A CRITICAL EVALUATION OF NON-EXECUTIVE DIRECTORS' LIABILITY FOR BREACH AND OVERREACH IN CORPORATE GOVERNANCE DUTIES IN STATE-OWNED COMPANIES IN SOUTH AFRICA

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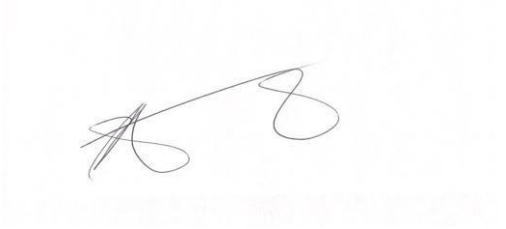

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SUMMARY

Section 77 of the Companies Act provides for the liability of directors and officers of a company in South Africa. The liability of directors must be understood in context, and as one which must be hinged on their conduct. The conduct of directors should be seen as aligning with or arising from other provisions in the Companies Act. In terms of section 66(1), a shift in corporate law in South Africa is evident. The shift is that directors have been given sweeping powers to use in controlling and managing a company. The powers directors have been given are admirable and significant in clarifying as to where directors stand in the corporate governance of the company. It is these powers and the duties contained in section 76(3) which point to the justification to hold directors of a company accountable for the way it is governed. For they are vested with the powers to govern the company.

The thesis focused on the liability of non-executive directors in state-owned companies (SOCs), for corporate governance breaches and overreach. SOCs are companies incorporated under the Companies Act. As such SOCs are subject to regulation by the Companies Act, unless expressly exempt from some provisions. In addition to the Companies Act, SOCs may come into being through an enabling law in which provision may be made that such institutions be incorporated under the Companies Act as a company whose shares would be held by the State. In other cases, SOCs can be directly brought into life by incorporation under the Companies Act without any exclusive enabling law. SOCs are further regulated under the Public Finance Management Act, though mainly from a financial perspective. The Public Finance Management Act contains schedules classifying SOCs into certain categories. In this regard, some SOCs are major public entities. The National State Enterprises Bill has recently been tabled in Parliament and if enacted into law will cause inroads in existing legislation applicable to SOCs. Amongst others, it will affect the composition of SOCs, as a holding company will be established, inevitably

implying subsidiaries below it. It will also affect the appointment and composition of boards of directors.

SOCs are organs of State which are placed within the overarching regulation and application of the Constitution. This is a significant placement especially when regard is paid to the Constitution as supreme law wherein which there is a Bill of Rights which determines its application to juristic persons as far as possible. Seen from this perspective, accountable governance provided for in the Constitution and which specifically applies to SOCs as it applies to other institutions, buttresses the duties of directors, especially non-executive directors.

Much has been said, and will still be said about SOCs, often in a negative light. There are many reasons for this. It is noteworthy that these are public entities. They play an important role in the improvement of public welfare. Many of these entities provide critical services that buttress massive industrial activities. If poorly governed, the brunt is excruciating on the public and private institutions, by extension, the South African economy. Non-executive directors play a significant role in mitigating this situation by ensuring effective corporate governance in SOCs. Serving on SOCs' boards is precisely to engender and entrench a sustained tone of good corporate governance. The reality, however, has been somewhat the opposite of the expected. Non-executive directors are pivotal to the success of SOCs they serve given the scope of powers at their disposal to ensure good corporate governance in SOCs. Thus, it is imperative that the law provides for clear guidelines as to how non-executive directors should fulfil their duties when serving on SOCs. It should also provide for liability against non-executive directors for breach and overreach in the performance of corporate governance duties in SOCs in South Africa.

It is in this context that the thesis examines the most pertinent legal instruments, including codes of corporate governance in South Africa. The thesis also includes a legal comparative study with a view to enhance the South African position. The underlying aim was to examine the spectre of liability against non-executive directors in SOCs. Recommendations for improvements are made at the end of the thesis.

KEY TERMS: State, Constitution, Non-executive directors, shareholder representatives, duties of directors, director liability and accountability, monitoring and supervision, performance evaluation, appointment of directors, organs of State, Companies Act, enabling laws, enforcement of liability.

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And, to God, many thanks for the nature of genes that run in my veins.

ABBREVIATIONS

ABC	Australian Broadcasting Corporation
BBC	British Broadcasting Corporation
CA	Companies Act
CBC	Canadian Broadcasting Corporation
CBCA	Canadian Business Corporation Act
CPCA	Canada Post Corporation Act
CPC	Canada Post Corporation
ESKOM	Electricity Supply Commission
FAA	Financial Administration Act
LCBO	Liquor Control Board of Ontario
PFMA	Public Finance Management Act
PGPA Act	Public Governance Accountability and Performance Act
PRASA	Passenger Rail Agency of South Africa
SAA	South African Airways
SABC	South African Broadcasting Corporation
SOC LTD	State-Owned Company Limited

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1.1 Introduction and background

The government of the Republic of South Africa is established in terms of the Constitution of the Republic of South Africa, 1996 (the Constitution).[1] Section 40(1) of the Constitution establishes the government by introducing spheres into which the government is classified, namely: national, provincial and local.[2] The three spheres of government are provided for under Chapter 3 of the Constitution. Chapter 3 of the Constitution provides co-operative governance.[3] Co-operative governance determines that all spheres of government co-operate in discharging their various responsibilities.[4]

To this end, it is understood that the three spheres of government are designed to work in co-operation in discharging government duties and principles, as outlined in section 41 of the Constitution. Furthermore, section 195(1) of the Constitution outlines basic principles that guide and underlie public administration[5] in South Africa. Public

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1 The Constitution of the Republic of South Africa, 1996.

2 The Constitution of the Republic of South Africa, 1996, s 40 determines the three spheres into which the South Africa government is classified, national, provincial and local spheres of government. The national sphere of government is charged with law and policy making functions which the executive arm of government implements from a national level (Duard Kleyn and Frans Viljoen, Beginner's Guide for Law Students (2nd edn Juta and Co. Ltd 1998) 3.3). Laws and policies enacted at the national sphere may apply in the whole of South Africa. The provincial level of government makes laws and policies at provincial level of government, which officials such as premiers of provinces implement. South Africa consists of nine provinces and each is clothed with provincial legislative powers (see the Constitution of the Republic of South Africa1996, s 103). For this reason, each provincial sphere accounts for its provincial affairs and may make laws and policies unique to the province. The local sphere of government consists of municipalities. There is a municipality in every province in South Africa, whose functions are numerous. Accordingly, local spheres through municipalities are designed to deliver basic services such as water, sewer and sanitation, electricity delivery, municipal roads and other critical infrastructure (The three spheres of Government (https://www.gov.za/about/-government/government-system/structure-and-functions-south-african-government) > accessed 03 August 2024).

3 John W Hendrikse and Leigh Hefer-Hendrikse, *Corporate Governance: Principles and Practice*, (2nd edn Juta 2012) at 109 have defined 'governance' as "the exercise of economic, political and administrative authority to manage business affairs at all levels."

4 Kleyn and Viljoen, *Beginner's Guide for Law Students* 3.2.

5 Public administration has been defined as: "the implementation of government policies". Today public administration is often regarded as also including some responsibility for determining the policies and programs of governments. Specifically, it is the planning, organizing, directing, coordinating, and controlling of government operations. Public administration is a feature of all nations, whatever their system of government. Within nations public administration is practiced at the central, intermediate, and local levels. Indeed, the relationships between different levels of government within a single nation constitute a growing problem of public administration (https://www.britannica.com/topic/public-administration) >accessed 03 August 2024.) Although courts in South Africa have not had occasion to define public administration, they have been able to link it to how the government should attend to the full spectrum of government activities. For instance, in the matter of *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006

enterprises are enjoined under section 195(2) of the Constitution, to observe and apply the basic principles of public administration stated in section 195(1) of the Constitution.[6] It is submitted that the basic principles of public administration act as an essential yard-stick in measuring how public enterprises work to fulfil their constitutional obligations.[7]

In South Africa, public enterprises are established for various purposes through their own legislation or directly under the Companies Act 71 of 2008 (the Companies Act).[8] Generally, all public enterprises are owned and controlled by the government.[9] It should be noted that public enterprises may go on to take other forms of establishment. Some public enterprises were incorporated as public companies through a provision in the establishing legislation.[10]

The nature of the establishment of public enterprises dictates whether they are regulatory, commercial, or non-commercial. To this end, some state-owned enterprises become companies owned by the state. They are aptly designated as state-owned companies (SOCs). Examples of SOCs include Denel, Transnet and South African Airways.[11] Although generally established by specific legislation, SOCs are subject to incorporation as companies under the Companies Act.[12] Accordingly, an SOC would initially come into being through an Act of Parliament.[13] Where an SOC is to be created through a statute, a provision in a SOC's

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(2) SA 311 (CC), [589] the court clarified how public administration should be carried out in South Africa. To the extent of the clarification the court determined that public administration should be carried out in regard to the values and principles laid out in the Constitution and should be accountable to the broader public. In view of the above, public administration can be defined as the mechanism in the public sector through which the discharge of public power and authority in carrying out government functions in fulfilment of constitutional values and principles takes place. See also Public Administration Management Act 2014 (PFMA), s 1 where 'public administration' was defined as "the public service, municipalities and their employees."

6 The Constitution of the Republic of South Africa, 1996, s 195(2).

7. The Constitution of the Republic of South Africa, 1996, s 195.

8 Companies Act 2008, s 8(2)(a).

9 Public Finance Management Act 1999, Schedule 2 and 3; South African Airways Act 2007, s 3(3)(a)(b).

10 E.g. Eskom through the Eskom Conversion Act 2001, s 3(1) and the South African Broadcasting Corporation which was incorporated as a public company under the Broadcasting Corporation Act 1999, s 8A.

11 South African Airways Act, 2007, s 4(1); Eskom Conversion Act 2001, s 3(1).

12 Companies Act 2008.

13 E.g. South African Airways through the South African Airways Act 2007.

own legislation would subject it to being incorporated as a company.[14]

When a state-owned enterprise[15] is required by its enabling legislation to be incorporated as a company, it becomes a SOC regulated by the Companies Act and other relevant laws.[16] Although it is not the focus of the research, it is submitted that the provision of the definition of a public enterprise and a SOC, as well as the distinction between the two concepts, are important and will accordingly be made in this research. The distinction provides a broad and clear understanding of public enterprises and SOCs. The thesis is explicitly concerned with non-executive directors in SOCs. The distinction, in so far as it may inform and jettison the widely held view that public enterprises are just one class, helps to focus the objective of the thesis on a species of public enterprises, the SOCs.

Thus, it is hereby established that various legal instruments regulate SOCs.[17] The regulation of SOCs through various laws may pose challenges to non-executive directors, shareholders and management of the SOCs. Essentially, the research needs to focus on the relevant laws regulating the various organs[18] and stakeholder relations involved in the governance of SOCs in South Africa. Stakeholders have been defined as parties such as individuals and organisations that have an interest in an undertaking.[19]

1.2. Problem Statement

For years, corporate governance[20] of SOCs in South Africa has been considered ineffective.[21] However, in reality, most citizens who expect good corporate governance and

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14 See the Eskom Conversion Act 2001, s 3(1) and the Companies Act 2008, s 1.

15 In this study, where reference is made to a state-owned enterprise or public entity the same will refer to a state-owned company, unless the context indicates otherwise.

16 E.g. the Public Finance Management Act 1999.

17 For example, SOCs are regulated through empowering legislation, the Companies Act 2008 and the Public Finance and Management Act.

18 The board of directors and shareholders.

19 Archie B Carroll and Ann K Buchholtz, *Business and Society: Ethics, Sustainability, and Stakeholder Management*, (9th edn Cengage Learning 2008) 208.

20 Corporate governance has been defined as the way in which companies are managed and controlled – see Committee on the Financial Aspects of Corporate Governance, Report of the Committee on the Financial Aspects of Corporate Governance (Sir Adrian Cadbury, Chair) (1992) para 2.5. See also: The Cadbury Report (Financial Aspects of Corporate Governance) <https://www.ecgi.global/publications.codes/cadbury-report-the-financial-aspects-of-corporate-governance > accessed 03 August 2024.

21 Tebello Thabane and Elizabeth Snyman van Deventer, 'Pathological Corporate Deficiencies in South

service delivery from the SOCs bear the brunt of ineffective corporate governance. The role of SOCs cannot be overstated in that they provide some of the most critical goods and services that, if left to the private sector, would arguably become unaffordable for the majority of South Africans.[22] This still requires that a balance be struck between profit-making[23] and the efficient provision of goods and services to the general public including local communities.[24] SOCs may be in a tricky situation as they may be expected to meet various goals rather than just realise profits. The expectation for commercial and social objectives is ever present even if a public enterprise is an SOC. That is precisely because government is not about profit for its own sake.[25] SOCs generating substantial revenue would be assured that such revenue would be used in governmental programmes such as infrastructure development, health and education.[26]

Therefore, the establishment of SOCs is seen as a way for the government to involve itself in business and to use the returns to improve social welfare. The corollary may be that if the government being in business is not correctly done, SOCs become an albatross around the government's neck. Thus, effective corporate governance of SOCs is a massive responsibility for those charged with this duty, namely the board of directors.

Company law provides two broad categories of companies: profit and non-profit companies.[27] SOCs,[28] undoubtedly fall under profit companies. It is important to distinguish SOCs from any other form of public enterprise. The ownership structure of SOCs is public in nature and prevents them from focusing merely on profits as they should meet other objectives of public welfare.[29] Others have suggested that the expectations of SOCs to

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Africa's State-Owned Companies: A Reflection' (2018) PER/PELJ 4-5.

22 Examples would be water, electricity, oil, gas, health care, transport, to name just a few.

23 Simon C Y Wong, 'The State of Governance at State-Owned Enterprises' (2018), International Finance Corporation, World Bank Group, 1, 3.

24 Thabane and van Deventer, 'Pathological Corporate Governance Deficiencies in South Africa's State-Owned Companies' 4.

25 The Constitution of the Republic of South Africa, 1996, s 195(1)(a)-(i).

26 Received in the form of dividends declared by SOCs to the State.

27 Companies Act 2008, s 8.

28 Companies Act 2008, s 8(2)(a) see also; the South African Airways Act 2007, s 4(1).

29 Companies Act 2008, s 1 – defining a State-Owned Company; Public Finance Management Act 1999, s 1 with respect to the definition of entity and ownership; section 49 and 50 with respect to the composition of accounting authorities and their functions to public entities.

provide non-commercial objectives have been used to justify their poor performances.[30]

Although the above appears to fall outside the scope of this research, it may be necessary to investigate it to establish whether breaches and overreach of governance functions occur due to compounding expectations on SOCs. Even though SOCs should make a profit to sustain operations and achieve their mandate, quite a number of them have been observed to struggle in sustaining their operations, for example, ESKOM SOC Ltd, South African Airways (SAA) SOC Ltd and Denel SOC Limited. It is unclear at this stage why SOCs make losses taking them to the brink of liquidation while many of them enjoy continuous government financial bail outs.

Notwithstanding the failure to pinpoint the causes of poor governance, many revelations in the State of Capture report suggest that part of the problem is wide scale corruption and the appointment of unsuitable persons in critical governance positions in SOCs.[31] Thus, there is a governance issue associated with leadership in the SOCs. Armstrong states that SOCs are beholden and account to the political party in power.[32] He adds that SOCs have lost the quest to provide efficient and affordable services to the citizens.[33] The reflected observation suggests that SOCs that are being governed poorly have deviated from what their foundational governance instruments provide.

The thesis is proceeding from a premise that instruments in the regulation of SOCs in South Africa even if found to be lacking in some respects, are good instruments for the success of SOCs. For instance, and as stated above, the Constitution sets the tone for public administration and provides for values and principles of accountability. Therefore, it may be argued that those charged with the affairs of SOCs must account to the citizens

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30 Kiarie Mwaura, 'The Failure of Corporate Governance in State Owned Enterprises and the Need for Restructured Governance in Fully and Partially Privatized Enterprises: The Case for Kenya', (2007), Fordham International Law Journal, 34

31 See also section 8 of the State Capture Report 19 < https://www,saflii.org/images/329756472-State-of-Capture.pdf >accessed 03 August 2024.

32 Ethical Boardroom, Corporate Governance and SOEs <https://ethicalboardroom.com/corporate-governance-andsoes/ - >accessed 08 May 2021.

33 Ethical Boardroom, Corporate Governance and SOEs <https://ethicalboardroom.com/corporate-governance-andsoes/ - >accessed 08 May 2021.

of South Africa in the manner in which they govern the SOCs. Wherefore as initially hypothesised, the governance of SOCs in South Africa is a failure, those in charge of their governance should account for the failures.

This thesis focuses on non-executive directors who are critical organs and catalysts in the governance of SOCs. The success of SOCs in South Africa will depend on the calibre of non-executive directors on the board of directors. Non-executive directors are company directors who are not involved in the day-to-day management affairs of the company. They are distinguished from executive directors who are involved in the day-to-day management of a company.[34]

Crucially, non-executive directors in SOCs are in the same position as independent directors as they are independent of the SOC in that besides serving on the board of a SOC, they have no further association with the SOC. The other side of the distinction is that non-executive directors could be associated with the SOC in some other capacity, but independent directors are wholly independent of the SOC.

The foregoing discussion suggests that the role of some SOCs' boards has been compromised and rendered unable to respond to the mandatory purposes of the SOCs. This thesis investigates the liability of non-executive board members who breach and overreach their governance duties in SOCs in South Africa, irrespective of the rationale for the poor governance being occasioned. It is argued that the poor performance of SOCs in South Africa is tied to the conduct of board members *per se* and non-executive directors when serving as such on boards of SOCs. This assertion is significant because boards of SOCs have wide powers, which, if exercised properly, may result in the good corporate governance of SOCs.[35]

Put simply, directors are in charge of the governance of SOCs. Based on their enormous duties and powers, they must be held accountable if they fail to perform these duties.[36] Exacerbating the widely reported poor performance of SOCs is the lack of accountability

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34 P Delport *Henocsberg on the Companies Act 2008*, Volume 11, Issue 35, 2024.

35 Companies Act 2008, 66(1).

36 Companies Act 2008, s 66(1), s 76(3).

for apparent breaches characteristic of board members.[37] To date, far too few cases of directors who have been held accountable for the overreach of governance duties exist. This is a grave concern if adequate attention and corrective action are not taken against the rampant occurrences of poor governance in SOCs.

1.3. Literature Review

The research investigates the legal instruments available which provide for the consequences for breach and overreaching in SOCs. The research is cognisant that provisions may already exist in some legislation that apply to SOCs, but they are poorly enforced.[38] The research will examine any hindrances in applying relevant provisions in known cases of poor performances at the hands of non-executive directors' governance breaches or overreach.

The legal framework applicable to SOCs is circumscribed in that it is known. These include the primary legislation of a specific SOC, the Companies Act, the Public Finance Management Act (PFMA) and codes of good corporate governance.

A subset of the problem is the calibre of those appointed to boards of SOCs in South Africa, who may be unfit for the positions.[39] This warrants an investigation as to whether board appointments should not include a fit and proper test for potential candidates to minimise likely inadvertent breaches and overreaching of governance functions.[40] The argument is that appointment to a board of directors should not be an experiment or some form of gamble or based on patronage. It should already be known and proven that those appointed have been so appointed on merit and should be able to discharge their duties efficiently.

It is believed that the problem of breaches and overreaching on governance duties by

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37 See the State of Capture report: Report No. 6 of 2016/17.

38 The Public Finance Management Act 1999, ss 38, 39, 50 and 86; Companies Act 2008, s 162.

39 Thabane and Van Deventer, 'Pathological Corporate Governance Deficiencies in South Africa's State-Owned Companies' 5.

40 Thabane and Van Deventer, 'Pathological Corporate Governance Deficiencies in South Africa's State-Owned Companies' 14.

board members may be avoided on condition that a fit and proper test is administered as a requirement for board appointment. It is contended that breaches and overreaching may be an automatic consequence of questionable appointments at board level. Appointments of boards for SOCs, including those of non-executive directors, should be conducted in a manner that only the best directors are appointed. It calls for an investigation to check whether there is a relationship between the occurrence of governance breaches in a SOC and the executive and non-executive directors who govern it. Accordingly, a poorly constituted board inevitably results in a poorly governed SOC characterised by avoidable governance breaches. Persons without requisite skills should not be expected to perform roles without skills, knowledge, or experience. It should be noted that director liability is linked to governance duties in the Companies Act.[41] In other words, it does seem that the liability of directors has to be conditional upon breach of the governance duties of board directors. It is submitted that once the governance duties have been infringed, liability for breach should be meted out to directors of an SOC.

In its review on SOEs the Presidential Review Committee remarked as follows on the matter of SOCs:

> The legislative framework for SOEs was found to be inadequate, displaying evidence of conflict and duplication. The governance, ownership policy, and oversight systems were found to be inadequate. The quality of the board and executives' recruitment was found to be inadequate. There is no clarity on the role of the executive authority; boards; and the Chief Executive in the governance and operational management of SOEs.[42]

The Presidential Review Committee's view, which indicated that in some cases, there is a lack of clarity on the role of the executive authority, is a concern. While the view is fair, it is submitted that the proposed research on these aspects should include a discussion of governance duties of boards as provided for in the Companies Act[43] as SOCs are

41 The Companies Act 2008, s 77(2)(a)(b).

42 Presidential Review Committee on State Owned Enterprises (2013) Growing the Economy – Bridging the Gap, Volume 1 at 8.

43 The Companies Act 2008, 5(4).

subject to the same spectrum of board duties.[44] Some uncertainty exists as to how boards of SOCs are performing the required governance duties, and it is submitted that such an evaluation may lead to more insight. Equally, it is in this line that the thesis will discuss and suggest a formalised performance evaluation and enforcement of liability of board directors in SOCs.

To fully engage the topic of study, literature available on the topic will be considered. For instance, literature regarding duties of non-executive directors and broad literature on the governance of SOCs in particular. The study will also examine academic articles and textbooks on the subject of corporate governance, which are available in South Africa and beyond.[45] For instance, Naidoo has written on the governance of SOCs in South Africa. She points out several weaknesses in the governance affairs of SOCs in South Africa.[46] Other authors discuss the pathological deficiencies in the governance of SOCs in South Africa across sectors.[47]

1.4. Aim of the Study

The research focuses on examining the exact scope, nature and enforcement of director liability on the part of non-executive directors in SOCs in South Africa. The central

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44 S 76(3) of the Companies Act 2008 contains duties of directors and provides as follows: Subject to subsections (4) and (5), a director of a company, when acting in that capacity, must exercise the powers and perform the functions of director-

(a) in good faith and for a proper purpose
(b) in the best interests of the company; and
(c) with the degree of care, skill and diligence that may reasonably be expected of a person-
(i) carrying out the same functions in relation to the company as those carried out by that director; and
(ii) having the general knowledge, skill and experience of that director.

45 Delport, *Henocsberg on the Companies Act 2008*; Cassim and others, *Contemporary Company Law*, Ramani Naidoo, *Corporate Governance: An Essential Guide for South African Companies*, (3rd edition LexisNexis 2016); Felix I Lessambo, *The International Corporate Governance System: Audit and Board Oversight*, (Palgrave Macmillan 2014).

46 Naido, *Corporate Governance*, 354.

47 Thabane and Van Deventer, 'Pathological Corporate Governance Deficiencies in South Africa's State-Owned Companies 9-10.

argument that is further explored later is that when good corporate governance is properly applied at board level, breaches and overreaching in governance duties are likely to be eliminated. It may be fair to expect good corporate governance when appropriate systems ensure that it has been implemented. That a lack of good corporate governance poses a valid concern, may be deduced from the fact that the drafters of the National Development Plan (NDP) expressed concerns about the poor performance of SOCs, which pointed to those charged with the governance of the SOCs.[48]

In evaluating non-executive directors' liability for breach and overreach in corporate governance practice, the following sections of the Companies Act, namely sections 1, 5(4), 76(1)(2)(3)(4)(5) and 77(2)(3)(9), including other legislation,[49] will form part of this thesis. The fact that different statutes regulate SOCs may contribute to the problem when it comes to the handling of breaches related to governance functions assigned to them. The concern may relate to the need to harmonise applicable laws. It is evident that applying more than one law to SOCs may pose its own challenges regarding the applicable law in cases of corporate governance breaches. Whereas the Companies Act advances a harmonised application of laws where possible, the Public Finance Management Act (PFMA) provides that, during conflict, it takes precedence to any other law.[50] However, this should be understood to be consistent with the Constitution as it is the supreme law.

The concurrent application of various legislation,[51] may, in practice, present its own challenges as to which one to apply to a set of facts or as to which one will prevail over the other. This will also be investigated in light of the new Bill, the National State Enterprises Bill.[52] The harmonisation of applicable laws is compounded by the additional burden of justifying the use of one statute as opposed to another, which may occur in practice. This

48 National Planning Commission (2012) National Development Plan 2030: Our Future- make it work, Pretoria 72 <https://www.gov.za/documents/other/national-development-plan-2030-our-future-make-it-work-15-aug-2012 >accessed 30 May 2024.

49 Such as the Public Finance Management Act 1999.

50 Public Finance Management Act 1999, s 3(3).

51 Companies Act 2008, s 5(4).

52 National State Enterprises Bill, 2024.

thesis further examines the provisions of director liability relating to governance breaches, specifically that of non-executive directors, which may be scattered in various statutes and designed to apply to SOCs. If found appropriate, the thesis may also recommend possible amendments to the existing governance instruments for SOCs.

It has been observed that the PFMA,[53] provides for criminal sanctions such as fines and imprisonment to any accounting officer found guilty of financial misconduct. In comparison, the Companies Act[54] provides for a declaration of a director as a delinquent, as was the case in the matter of *Organisation Undoing Tax Abuse NPC v Duduzile Cynthia Myeni* (*OUTA v Myeni)*.[55] Ms Myeni was sued for her conduct as the former chairperson of SAA. It was argued that she facilitated a lot of governance breaches and contributed to the financial woes experienced by SAA. In the Myeni matter, the court declared her a delinquent director for life, relying on the provisions of section 162 of the Companies Act. Interestingly, the application was not based on any of the provisions of the South African Airways Act.[56]

A fastidious look at the South African Airways Act (SAA Act) reveals that it has no provisions relating to directors' duties or liability for breaches of governance duties by directors of SAA. This explains why the application could not be brought in terms of the SAA Act with regard to the breach of duties by Ms Myeni.

The foregoing determines that the Companies Act can be a reliable piece of legislation for holding non-executive directors in SOCs accountable.

In summary, the study will examine whether the legal framework for non-executive directors' liability and accountability in SOCs is adequate in so far as it can be utilised to respond to non-executive directors overreaching their governance duties. Regarding the critical question, the following aspects, among others, will be discussed in the South African context and other jurisdictions selected for comparative studies.

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53 Public Finance Management Act 1999.
54 The Companies Act 2008.
55 [2019] ZAGPPHC 957.
56 South African Airways Act, 2007: Long title and s 2.

i. An analysis of the relevant legislation available in the regulation of the liability and accountability for non-executive directors in SOCs.
ii. In terms of the critical question, an examination of the duties of non-executive directors, including the liability and accountability for breach of such duties as provided for in various legal instruments (where available).
iii. An analytical distinction between executive and non-executive directors, in the context of SOCs is undertaken.
iv. The current legal framework and procedures applicable to SOCs in relation to non-executive director liability arising out of breach and overreach of governance duties is evaluated.[57] In terms of the above, noted inadequacies are highlighted and analysed in accordance with whatever guidance is provided by foreign jurisdictions.
v. The study examines whether provisions in relevant legal and other instruments relating to breaches and overreach in relation to the governance of SOCs are being applied.[58] Thus, whether a deduction can be made that the available legislative instruments have been disregarded by the most critical organs of SOCs governance, the board of directors and shareholder representatives.
vi. An evaluation of the concurrent application of laws that apply to the same or similar matters of SOCs is conducted to determine how harmonisation of such laws concerning director liability arising out of governance breaches can be achieved. An examination is also conducted where several statutes apply to director liability and which statute would, in practice, enjoy preferential application.

The grounds for subordinating any of the legislations in founding and establishing liability

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57 State-owned companies in South Africa are regulated through, the Public Finance Management Act 1999, the Companies Act 2008, establishing legislation including other best practice codes such as the Institute of Directors in South Africa, *King III Report of Corporate Governance for South Africa* (2009) (King III Report) and the Institute of Directors in South Africa, *King IV Report of Corporate Governance for South Africa* (2016) (King IV Report).

58 Generally, the Companies Act 2008 provides for the appointment of directors at incorporation, and subsequently during a shareholders' meeting at an Annual General Meeting. A state-owned company would generally have one shareholder Minister. It is that Minister who would be obliged to appoint directors for a specific state-owned company. However, the Companies Act does not provide how such appointment should be done, although the Memorandum of Incorporation can provide otherwise.

for breaches of governance duties will also be examined. If a conflict arises in the provisions of various applicable laws, the research intends to ascertain how such conflict should be settled.[59] The legal interpretation or principles relied on in subordinating other legislations on director liability will form part of the discussion.

Related to the above aspects on which the research in this thesis focuses, the focal points of further examination are set out below. These aspects are paramount in understanding the non-executive director's liability in SOCs in South Africa. Notably, the thesis will suggest legal reform to the existing framework regulating SOCs to ensure proper good governance practices are implemented. This would result in changes to the legislative framework that require periodic monitoring and evaluation of governance in SOCs. One possible way to achieve this is to draft legislation regulating the robust and consistent application of SOCs. This requires examining the legislative framework to address weaknesses in critical governance systems and processes. This will include the following:

a. An investigation into non-executive directors, their status, and whether SOCs in South Africa has benefitted from the presence of non-executive directors will be undertaken. Recommendations will be formulated around whether non-executive directors in South African SOCs who fail to perform their duties by their designation are held accountable and by drawing from best practices in comparative jurisdictions such as Australia, Canada and the United Kingdom (UK).

b. An evaluation of the expected governance functions of non-executive directors in SOCs compared to executive directors and director liability for failure to fulfil their governance functions will be conducted.

c. Existing measures will be examined to evaluate whether directors are fit and

[59] For instance, should the Companies Act 2008 being the subordinate Act, on a topic of either the appointment or duties of the boards of SOCs; will the other principal Act properly ensure that the public interest is protected. 'Public interest' here refers to the services provided to improve public welfare.

proper professionals, able to discharge their duties efficiently and effectively. This entails evaluating whether these measures are objective and transparent to ensure that merit-based appointments for non-executive board members in SOCs occur.

1.5. Research objectives

This research aims to evaluate the role and responsibilities of non-executive directors in SOCs and their accountability for breaching their governance duties.

The research focuses on the liability of directors who overreach or breach their governance functions in SOCs and to ascertain the aspects relating to the enforcement of liability. The current legal framework pertaining to the nature and the regulation of SOCs will be investigated.[60] When non-executive directors are allowed to walk away with impunity in the wake of breaches in their governance duties, the question of whether non-executive directors are accounting officers,[61] or are *bona fide* accounting officers must be answered as this affects accountability.[62] Without accountability for non-executive directors of SOCs, good corporate governance in SOCs will not be realised. In terms of accountability, King IV[63] states the following:

> The governing body is the structure that has primary accountability for the governance and performance of the organisation. Depending on the context, it includes, among others, the board of directors of a company, the board of a retirement fund, the accounting authority of a state-owned company and a municipal council.
>
> "Members of the governing body" (also referred to "as those charged with the governance duties") are those who are duly appointed to serve on the governing body and or its committees.

1.6. Significance of the Study

In recent years, the governance of SOCs in South Africa has been a concern not only to

60 E.g. the Companies Act 2008 and the Public Finance Management Act 1999.
61 The Public Finance Management Act 1999, s 1.
62 Refer to Chapter 5, paras 5.5 and 5.6, for a discussion on this aspect.
63 King IV Report,12.

its citizens and investors, but also to the economy. SOCs in South Africa play an important role in growing the South African economy and improving the welfare of South African citizens.[64] The Constitution calls for accountable governance and is the bedrock of good corporate governance of SOCs in South Africa.[65] It is submitted that accountable governance which is core to this thesis, is buttressed from a constitutional perspective.

It means that the importance of good corporate governance of SOCs goes beyond the SOCs themselves to the government and the people (society as a whole). The Constitution puts it crisply when it refers to this as 'public administration must be accountable', a principle which applies to public enterprises, including those that are SOCs.[66] Clearly, the public administration in SOCs will in greater measure revolve around non-executive directors of the SOCs. The submission is based on the enormous powers and functions devolved on a board of directors in law. Boards of directors in SOCs have similarly situated powers and functions as those of privately owned companies. It is on this model that it is submitted that public administration required by the Constitution will be realised when boards of directors in SOCs perform their duties as provided for in law.

Failure to realise good corporate governance of SOCs will result in the South African government continuing to financially bail out poor or underperforming SOCs, which either end up under administration or business rescue or restructuring.[67] Poorly governed SOCs not only contribute to a shrinking economy, but they also add to the existing burdens which ordinary citizens bear the brunt of as a result of inefficient institutions where lack of service delivery or inadequate service delivery is the order of the day.[68]

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64 SOCs in DPE Portfolio< https://dpe.gov.za/state/-owned-companies/ > accessed 03 August 2024.

65 The Constitution of the Republic of South Africa, 1996, s 195(1)(f) read with s 2(c)

66 The Constitution of the Republic of South Africa, 1996, s 195(1)(f) read with s 2(c).

67 For example, SAA was under business rescue as provided for under section 129 of the Companies Act.

68 Rand Water established under Water Services Act, 1997, recently struggled to provide water to many residents of Johannesburg.

When SOCs collapse or show signs of mismanagement, fundamental questions on this situation should always include who the directors are and whether they exercised their governance duties diligently and in the best interest of the SOC. The occurrence of poor governance in SOCs leading to financial distress[69] and other management-related problems indicate that directors failed in their duties to govern the failing SOC.

The research conducted in this thesis also includes governance breaches and the resultant liability in SOCs in other jurisdictions.[70] In this regard, the jurisdictions of Australia, Canada and the United Kingdom have been chosen for a comparative analysis. It is submitted that as the economic position of the jurisdictions sampled are more advanced than that of South Africa and that the jurisdictions have taken specific steps to improve corporate governance over many years[71] lessons may be available for South African SOCs. The research gears towards examining corporate governance instruments in the selected jurisdictions to ascertain any lessons for South Africa.[72] There are strong indications that the research will benefit the legal framework for governance of SOCs in South Africa.

1.7. Framework of the Thesis and chapter overview

This thesis is divided into eight chapters. Chapter 1 presents the research questions and feasibility, the introduction to the study, the aims, importance, justification for the study, the problem statement, the research focus, the research methodology, assumptions and expected findings. Chapter 8 gives the conclusion and recommendations of the study.

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69 Defined in section 128(1)(f) of the Companies Act 2008: in reference to a particular company at any particular time, means that-
(i) it appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months; or
(ii) it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months.

70 Companies Act 2008, s 5(2); Constitution of the Republic of South Africa 1996, s 39.

71 Instruments such as the King IV Report have been introduced in South Africa to improve corporate governance. The non-binding nature of the King IV Report affects its application in practice.

72 Farouk H I Cassim, Maleka Femida Cassim, Rehana Cassim, and others, *Contemporary Company Law*, (3rd edn Juta 2021) 2; *Smuts v Booyens Markplaas (Edms) Bpk and Another* 2001 (4) SA 15 (SCA) [23].

Chapters 2, 3, 4, 5, 6 and 7 examine accountability for non-executive directors in SOCs, mainly in South Africa and thereafter, from a comparative perspective, exploring Australia, Canada and the United Kingdom. The delineation of the chapters is provided below.

1.7.1. Chapter 2: The Constitution and SOCs' Legal Framework

This thesis examines the applicability of the Constitution[73] as the supreme law[74] and its application to SOCs. This chapter explores whether the Constitution sets the tone for accountability in the management and administration of SOCs in South Africa.[75] The chapter also draws a distinction between a public enterprise and a SOC.[76] It clarifies that laws regulating SOCs should be aligned with the Constitution to remain valid. It also demonstrates that SOCs are of significant importance, symbolising a constitutional mandate linked to the welfare of citizens and South Africa's development and should, therefore, be governed efficiently.[77]

1.7.2. Chapter 3: History and Development of Corporate Governance

This chapter presents a historical overview of corporate governance jurisprudence in South Africa and elsewhere globally. Because there are various relevant role players in the governance of SOCs, the critical role such as the shareholder representatives and board of directors' discharge will be examined. Definitions and concepts such as who is a director,[78] and the differences between executive and non-executive as well as an independent director are discussed. Director liability of non-executive directors in SOCs are also discussed. Furthermore, the chapter contains a discussion on the implication of the proposed National State Enterprises Bill[79] and its effects on the current legal regulation of SOCs and the governance function of non-executive directors in South Africa.[80]

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73 The Constitution of the Republic of South Africa, 1996, ss2 and 8.
74 The Constitution of the Republic of South Africa, 1996, s 2.
75 The Constitution of the Republic of South Africa, 1996, s 195.
76 Companies Act 2008, s 1. See also the Public Finance Management Act, 1999, s1.
77 Thabane and Van Deventer, 'Pathological Corporate Governance Deficiencies in South Africa's State-Owned Companies, 2.
78 The Companies Act 2008, s 1 and s 66.
79 National State Enterprises Bill 2024.
80 National State Enterprises Bill 2024, s 2 and s 22.

1.7.3. Chapter 4: Non Executive Directors' duties

This chapter discusses directors' duties as drawn from various sources, specifically in the South African context, where they exist in two principal sources, the Companies Act and the common law. Furthermore, this chapter acknowledges the duties of directors that may be found in other laws, such as enabling statutes of various SOCs and the PFMA. In addition, the chapter will include a discussion on the National State Enterprises Bill in relation to the duties of directors.

1.7.4. Chapter 5: Liability and Enforcement for Non-Executive Directors in SOCs

Having discussed non-executive directors in SOCs in Chapter 3 and their duties in Chapter 4, this chapter provides an examination of what constitutes non-executive director liability. A discussion is made on the nature of liability that may result from governance breaches by non-executive directors in SOCs from the common law and statutory law points of view.[81] Furthermore, the research discusses and examines available legislative regimes providing for liability for non-executive directors in SOCs in South Africa which incorporates a thorough analysis of existing law relevant to the subject.
Furthermore, Chapter 5 analyses the enforcement of liability for breaches of governance duties by non-executive directors in SOCs in South Africa. This explores how the enforcement regime of the liability can contribute to improving corporate governance in SOCs in South Africa.[82]

1.7.5. Chapter 6: Non-Executive Directors' Liability in Australia, Canada and the United Kingdom in respect of SOCs

Chapter 6 examines non-executive directors' liability regimes in SOCs in Australia,

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81 The Companies Act 2008, s 77(2).
82 The Companies Act 2008, s 77.

Canada and the United Kingdom to ascertain whether best practices and standards exist which could be used to assist in the improvement of the current governance framework that applies to non-executive directors and liability for breaches of their duties in SOCs in South Africa.

1.7.6. Chapter 7: Conclusions and Recommendations

Chapter 7 proposes recommendations and draws conclusions from the study.

1.8. Research methodology

The research is conducted primarily through desktop literature, which relies on primary and secondary sources such as legislation, case law, journal articles, internet sources, magazines and newspapers.

Sections 5(4), 66(1), 76(3) and 77 of the Companies Act and similar provisions in enabling legislation related to SOCs are central to the study.[83] Part of the question is how the legislative framework can be applied consistently or reformed to ensure that appointments and the role of SOCs directors, especially non-executive directors in South Africa, produce the kind of governance required.

Whereas the roles of directors in SOCs are scattered across various legislative instruments, the need to compose legislation to regulate SOCs is now important.

Although the research is primarily on South African SOCs, a comparative study of selected jurisdictions has been proposed. Comparative studies may assist in unravelling many legal concerns and answer questions that South African SOCs may still be battling with. In the quest to ensure the research is a success, comparative methods would also be used to obtain as much relevant material relevant to the topic as possible. The thesis

[83] A discussion of other laws specific to state-owned companies and relevant provisions in the Public Finance Management Act 1999 will be discussed. The discussion would again include a limited comparison to the selected jurisdiction proposed for this research.

contains developments in corporate governance accountability for non-executive directors in SOCs in South Africa and the comparative jurisdictions up to May 2025.

CHAPTER 2

THE CONSTITUTION AND STATE-OWNED COMPANIES' LEGAL FRAMEWORK

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2.1. Introduction

South Africa is a democracy founded on the Constitution[84] which espouses the rule of law, justice and democracy. In terms of these founding principles, the Constitution is the supreme law of South Africa.[85] Therefore, entrenched within its provisions, is that all laws and conduct must remain consistent with the Constitution or fall to be declared invalid.[86] The Constitution consists of a Bill of Rights which enshrines fundamental rights for both people, the citizens and institutions in South Africa, including juristic persons.[87] The Bill of Rights is contained in Chapter 2 of the Constitution. Section 8(1) of the Constitution clarifies the wide application and binding effect of the Bill of Rights on the legislature, the executive, the judiciary and all organs of state. Section 239 of the Constitution provides for organs of state. It states the following:

> "organ of state" means—
>
> (a) any department of state or administration in the national, provincial or local sphere of government; or (b) any other functionary or institution -
>
> > (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or

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84 The Constitution of the Republic of South Africa, 1996.

85 The Constitution of the Republic of South Africa 1996, s 2.

86 The Constitution of the Republic of South Africa 1996, s 2. See also *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and Others* 2009 (4) SA 222 (CC) [33], where the court stated the following: The supremacy clause of the Constitution declares that the Constitution is the supreme law; any law or conduct that is inconsistent with it is invalid. Like other branches of government, the judiciary must uphold and protect the Constitution. And s 8(1) of the Constitution provides that the Bill of Rights is binding on the judiciary as well as on the legislature and the executive. In addition, s 39(2) provides that when interpreting any legislation, every court must promote the spirit, purport and objects of the Bill of Rights. In the light of these provisions of the Constitution, a court cannot enforce a law that is inconsistent with the Constitution. It follows that a court may raise, of its own accord, the unconstitutionality of a law that it is called upon to enforce. See also *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* 2018 (2) SA 23 (CC) [40]. Furthermore, see *Minister of Justice and Constitutional Development and Others v Prince; National Director of Public Prosecutions and Others v Rubin; National Director of Public Prosecutions and Others v Acton and Others* 2018 (6) SA 393 (CC).

87 A juristic person is usually assigned as such by an act of Parliament. For example, Eskom is a juristic person by virtue of the Eskom Act 2001, s 1. See also the Constitution of the Republic of South Africa 1996, s 8(2).

(ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer;

"provincial legislation" includes—

(a) subordinate legislation made in terms of a provincial Act; and

(b) legislation that was in force when the Constitution took effect and that is administered by a provincial government.

The definition of an organ of state is wide enough to encompass SOCs.[88] In light of the wide definition of an 'organ of state' it may be assumed that it includes any public institution. Clarity as to whether a state-owned company can be termed an organ of state was offered in *Hoffmann v South African Airways,*[89] where the court stated that:

> Transnet is a statutory body, under the control of the state, which has public powers and performs public functions in the public interest. It was common cause that SAA is a business unit of Transnet. As such, it is an organ of state and is bound by the provisions of the Bill of Rights in terms of section 8(1), read with section 239, of the Constitution.

With due reliance on the above court case, it is submitted that a SOC as an institution is an organ of state, founded by the government through legislation to perform certain activities which the Constitution may regard as critical to the welfare of the South African people. According to Currie and de Waal, the core of an organ of state is determined according to how it is controlled, funded and the nature of functions it engages in.[90] These authors highlight that an organ of state can be defined in terms of the fact that it performs a public function instead of a private one.[91]

A public function manifests in a manner that indicates that the functions are in the public interest, not private interest. The public function may arise from a statute empowering

88 Constitution of the Republic of South Africa 1996, s 239.
89 2001 (1) SA 1 (CC) [23].
90 Iain Currie and Johan de Waal, *The Bill of Rights Handbook* (6th edn Juta 2013) 43.
91 Currie and de Waal, *The Bill of Rights Handbook* 43.

the public functionary or institution to perform certain powers.[92] Furthermore, another feature confirming SOCs[93] as organs of state is that they are susceptible to receiving financial assistance from the government when needing a financial injection. That is precisely because the government requires them to fulfil certain constitutional activities in the public interest.[94] Additionally, SOCs are either wholly owned or majority owned by the State.[95]

Notwithstanding the above, a critical question in establishing what an organ of state is has been the test that is used in confirming what an organ of state is. In *Korf v Health Professions Council of South Africa,*[96] the court developed a so-called 'control test'. The control test entails an assessment of how an institution is controlled and by whom. This will then assist to ascertain whether the institution involved is an organ of state. That is, organs of state are controlled by the State or State functionaries. It should be noted that Currie and de Waal have warned that the control test presents certain limitations viewed from a constitutional perspective. In their view, a broader test would be greatly acceptable to situate the meaning of organ of state in a manner that fits the spirit and purpose of the Constitution.[97]

In *Inkatha Freedom Party v TRC*,[98] the court sought to broaden the control test to embrace institutions whose activities fell within the scope of the Constitution.[99] The court held that although the TRC was not under the direct control of the government, its objectives were to fulfil a constitutional duty. The broadening of the control test would imply that the

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92 Currie and de Waal, *The Bill of Rights Handbook* 43.

93 *Airports Company South Africa v Big Five Duty Free (Pty) Ltd and Others* 2019 (5) SA 1 (CC) [10].

94 Businesstech: Eskom Gets Record R69 Billion Bailout in Budget: <https://businesstech.co.za/news/budget-speech/300890/eskom-gets-r69-billion-bailout-in-budget/ > accessed 18 July 2021.

95 For example, the Mobile Telecommunications Company is a SOC which offered some shares to the public <https://investors.mtc.com.na/documents/company-profile/mtc-namibia-company-profile.pdf- >accessed 08 May 2025 ; Eskom Conversion Act 2001, s 2.

96 *Korf v Health Professions Council of South Africa* 2000 (1) SA 1171 (T).

97 Currie and de Waal, *The Bill of Rights Handbook* 43.

98 2000 (3) SA 119 (C), 133 D.

99 A commission of inquiry such as the Truth and Reconciliation Commission established under the Promotion of National Unity and Reconciliation Act 34 of 1995.

government could have powers to prescribe certain functions for a public body.[100] This can be understood in the context of the Constitution, which provides for cooperative government and public administration.[101] The thesis finds no rationale for broadening the control test with regard to SOCs as they are already within the primary definition of organs of State.

Accepting that SOCs are generally established through their own legislation or directly incorporated under the Companies Act, for this study, the definition afforded to an organ of state helps to situate and confine the application of the Constitution to SOCs, which are organs of state through national legislation. Furthermore, section 8(2) of the Constitution determines that a provision of the Bill of Rights binds juristic persons, to the extent applicable. It is also noted that section 8(4) of the Constitution confirms that a juristic person is entitled to the rights enshrined in the Bill of Rights of the Constitution, provided such rights are practically possible.[102] It is accordingly assumed that the Constitution of South Africa includes within its application, companies, as they are generally established as juristic persons.[103] In *Weare and another v Ndebele,*[104] the Constitutional Court stated with reference to a juristic person that, 'the most relevant characteristics of a juristic person are its separate legal personality and the limited liability of the natural persons involved.' SOCs, as companies incorporated under the Companies Act, are separate from their named representative shareholders and can be sued in their own names.[105] This establishes that SOCs are juristic persons with separate legal personality.[106] It is an illustration that, depending on the nature of rights or duties in question, the Constitution will apply to SOCs, as they are juristic persons. Therefore, the Constitutional application is not limited only to natural persons, but to juristic persons of various formations.[107]

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100 *Esack NO v Commission on Gender Equality* 2000 (7) BCLR 737 (W) [7441].

101 The Constitution of the Republic of South Africa 1996, s 40-41 and s 195.

102 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC) [19] and [57].

103 The Constitution of the Republic of South Africa 1996, s 8(2).

104 2009 (1) SA 600 (CC) [53].

105 Companies Act 8(2)(a); Broadcasting 1999, s 8A; Eskom Conversion Act 2001, s 3(1).

106 Piet Delport *Henochsberg on the Companies Act 71 of 2008*, (Issue 26 LexisNexis 2021) 82. See also J T Pretorius and others, *Hahlo's South African Company Law Through the Cases: A Source Book*, (6th edn Juta 1999) 11; *Salomon v Salomon and Co Ltd* (1897) AC 22 (HL) [30].

107 The Constitution of the Republic of South Africa, 1996, s 8(2)(4).

The submission is that the application of the Constitution to juristic persons implies that the juristic persons must fulfil the obligations set out in the Constitution.[108] It is evident from the wording of the pertinent part of section 2 of the Constitution, namely, that 'the obligations imposed by it must be fulfilled' that the fulfilment of the obligations imposed by the Constitution is not discretionary. The part is worded in peremptory terms with the use of the word 'must' demanding compliance.[109] It is submitted that the obligations that fall on natural persons in South Africa equally, to the extent possible, befall juristic persons.[110]

For this thesis study, interest is devoted to the obligations imposed by the Constitution on SOCs as juristic persons. The legal framework regulating non-executive directors' liability and accountability is of particular interest in cases where constitutional obligations have not been achieved. The above should be seen in the context of the Constitution as the supreme law, demanding that all law should be consistent with it. To clarify, where SOCs are required in terms of the Constitution to achieve certain constitutional imperatives, who should account for any failure to achieve the ideals. Here, the study determines that non-executive directors must be held accountable where they breach their duties and explore sources from various instruments, including the Constitution, which places great responsibility on non-executive directors to constitutionally account for their performance.[111]

2.2. Applicability of the Constitution to SOCs

It has been established earlier[112] that the Constitution applies to and binds SOCs.[113] This was also confirmed by the High Court in *Mpofu v South African Broadcasting Corporation (SABC) and Others.*[114] In this matter the court succinctly clarified the application of the

108 Tshepo Mongalo, *Corporate Law and Corporate Governance*, (Van Schaik Publishers 2003) 77, 83; Delport *Henochsberg on the Companies Act 71 of 2008*, 82.

109 Christo Botha, *Statutory Interpretation: An Introduction for Students* (5th edn Juta 2012) 175.

110 Except those obligations which juristic persons cannot perform.

111 The Constitution of the Republic of South Africa, 1996, s 195(1)(f), s 195(2(b(c).

112 See paragraph 2.1 hereof.

113 The Constitution of the Republic of South Africa, 1996, s 2.

114 [2008] ZAGPHC 413 [55].

Constitution to SOCs as follows:

> Our Constitution compels government in all of its forms, both through government departments and organs of state (including state-owned enterprises) to adhere to principles of good governance. State-owned enterprises such as the SABC are included in the definition of "*organ of state*". It is for this reason that the provisions of the Constitution as well as the legislation enacted in terms thereof are applicable to state-owned enterprises.[115]

It is submitted that the Bill of Rights and the Constitution apply to SOCs for two reasons: they are organs of state and juristic persons.[116] Apart from the fact that several SOCs are established by statute, which must be consistent with the Constitution the obligations which the Constitution prescribes for SOCs must be fulfilled.[117] In the First Certification judgment,[118] the Constitutional Court had the occasion to deal with an objection to extend the Bill of Rights to apply to juristic persons. The Constitutional Court confirmed that juristic persons were not to be denied the protection of the Bill of Rights.

The approach is that, on a case-by-case basis, some rights may not be fit to be availed to the benefit of juristic persons,[119] for example, the right to life. In cases where the nature of a right at stake is inapplicable to juristic persons, including SOCs, such a juristic person cannot then claim the right as it falls outside rights accorded to or capable of effect to juristic persons.

SOCs as juristic persons may have duties that are distinct from those that apply to natural persons.[120] This would accord with the limitations that are inherent in juristic persons as they can only act through human beings. The same may apply when it comes to obligations which the Constitution demands to be fulfilled from either natural persons or juristic

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115 *South African Broadcasting Corporation Ltd and Another v Mpofu* [2009] 4 All SA 169 (GSJ) [55]; G*oodman Brothers (Pty) Ltd v Transnet Ltd* 1998 (4) SA 989 (W) [8].

116 The Constitution of the Republic of South Africa, 1996, s 8(1).

117 The Constitution of the Republic of South Africa, 1996, s 2.

118 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC) [19] and [57].

119 Currie and de Waal *The Bill of Rights Handbook* 37.

120 See Companies Act 2008, s 1 which defines a 'company' as a juristic person.

persons.[121] One conundrum which can be reflected is that the right to life may appear unsuitable to be granted to a juristic person, but the healthy operation of a juristic person such as an SOC may be equated to the protection of their life.[122] That means SOCs created and placed into existence have legal personalities of their own. When an SOC is set in motion its healthy existence depends on those who govern it,[123] so that it does not find itself wound up and deregistered on the basis of poor governance. From this perspective, one may submit that the life accorded to natural persons can, where appropriate, be a basis to argue that SOCs, which are juristic persons, ought to be accorded a similar right so that more in terms of good governance is done to keep them in existence. Therefore, the analogy is that non-executive directors governing SOCs should be aware that the lives of SOCs are in their hands. They must therefore be clear and competent about how such life can be healthily maintained.

Apart from the peremptory application of the Bill of Rights to juristic persons, Chapter 10 of the Constitution specifically provides for 'Public Administration' and stipulates basic values and principles governing public administration.[124] In this regard, section195(2)(c) provides that, the principles listed under section 195(1) of the Constitution apply to public enterprises,[125] among other organs of state. These principles constitute a long list which includes:[126]

(a) 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

121 Constitution of the Republic of South Africa 1996, s 8(2) and (4).
122 *Dhlomo v Natal Newspapers (Pty) Ltd* 1989 (1) AS 945 (A) [462]

123 The Board of Directors and Officers.

124 The Constitution of the Republic of South Africa 1996, s 195.
125 *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) [590].
126 The Constitution of the Republic of South Africa 1996, s 195(1).

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.

Although a definition has been attempted below, the term 'public enterprise' has not been precisely defined in literature. It is also noted that the Constitution uses the term 'public enterprise' understandably in a wider sense to refer to all public entities.[127] The thesis seeks to extract the application of the Constitution to SOCs for its own purposes. In doing so, it is necessary to contextualise the various designations of various public entities. In practice, the terms state-owned enterprise, state-owned company, public enterprise, public entity or parastatal denote those institutions owned and controlled by the government which are operated and managed through their own statutes or other founding documents.[128] This thesis submits that the designations can, in some instances and where particularly illustrated, be used interchangeably.

Mehert,[129] states the following about a public enterprise:

> It is a borderline entity sharing the features of a public entity and business. A public enterprise aiming at profit while at the same time having public nature as a public entity.
>
> One manifestation of the public dimension of public enterprises is that they are owned by

127 The Constitution of the Republic of South Africa, 1996, s 195(2)(c).

128 Pwc, State-Owned Enterprises: A Catalysts for public value creation< https://pwc.com/gr/en/publications/assets/state-owned-enterprises-catalysts-forpublic-value-creation.pdf > 04 August 2024.

129 Tewodros Mehert, 'The Concept and Characteristics of Public Enterprises in Ethiopia: An Overview' (2014) MLR 333, 342-343.

the public. Sometimes distinction is made between ownership in the legal sense as a formal claim in the framework of the legal order and ownership in the economic sense which enquires into the actual beneficiary from the thing. The public is presumed to exercise the ownership through the state, the government, local authorities or municipalities. The word "public" is therefore used as "of or pertaining to the people", relating to or belonging to, or affecting a nation, state or community at large; as opposed to private.

In some instances, a public enterprise has been defined as:

> 'a business organization wholly or partly owned by the state and controlled through a public authority. Some public enterprises are placed under public ownership because, for social reasons, it is believed that the service or product should be provided by a state monopoly.[130] Utilities (gas, electricity, etc.), broadcasting, telecommunications, and certain forms of transport are examples of these kinds of public enterprises.'

The following reflections by Fourie may to an extent be true of many public enterprises:[131]

> There is no standard definition for an SOE. Some key characteristics include their status as established legal entities operating within a commercial environment, and the fact that a government is a shareholder.

The different perspective from Fourie's assertion is that not all state-owned enterprises operate in a commercial environment or are involved in commercial transactions. Some public entities are established to provide services to the public without being required to be commercial.[132] Other public enterprises are of a regulatory nature such as the Competition Commission which was established to regulate competition in South Africa[133] and the National Electricity Regulator (NERSA).[134]

Other examples include such public entities as the entities listed under Schedule 2 and

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130 Britannica Money: Public enterprise < https://www.britannica.com/money/public-enterprise > accessed 24 April 2021.

131 David Fourie, 'The Role of Public Sector Enterprises in the South African Economy' (2014) AJPA 30, 33.

132 For example, the South African Social Security Agency – established under the South African Social Security Act 2004, s 4.

133 The Competition Commission Act 1998, s 2.

134 The National Energy Regulator Act 2004, s 3.

3 of the PFMA.[135] It is recognised that the PFMA is a critical piece of legislation in relation to government-owned entities. However, it fails to define terms such as state-owned enterprise and public enterprise but defines what a public entity is.[136] It may be argued that in terms of the PFMA, a public entity includes all government-owned, commercial and non-commercial entities. The reason for this is that the PFMA includes schedules for major public entities and other national public entities, in addition to listing all other government-owned entities.[137]

It is clear from the provisions of the PFMA that it has taken the step of placing public entities into different categories.[138] The different listing of public entities indicates how they are designed to be different from each other in terms of either being commercial or otherwise.[139] This may also suggest that public entities attract different expectations depending on the way they have been scheduled. Others are listed as major public entities which should imply that they are nationally and economically pivotal to broader public welfare.[140]

The study found that the public entities listed in Schedule 2 of the PFMA are in existence and practice commercial operations and have been described as major public entities. It is, however, unclear whether the classification as 'major public entities' considers the size of the balance sheet, perceived public importance or the geographical reach of the public entities, as all of them are operating nationally. It is assumed that these public entities have been designed with higher expectations and as catalysts in the South African economy.[141]

It may be surmised that 'public administration' in Chapter 10 of the Constitution and its

135 Public Finance Management Act 1999.

136 Public Finance Management Act 1999, s 1 defines a public entity as a national or provincial public entity.

137 Public Finance Management Act, 1999, Schedule 2 and 3.

138 Schedule 1 consisting of Constitutional institutions, Schedule 2 – consisting of major public entities and Schedule 3 – consisting of other public entities.

139 Public Finance Management Act 1999, s 48.

140 Public Finance Management Act 1999, schedule 2.

141 Public Finance Management Act 1999, schedule 2 read together with s 48.

application to public enterprises under section 195(2) of the Constitution refer to institutions of government, but which belong to, and are for the benefit of the people of South Africa. The definition of 'public enterprise' discussed above indicates that a public enterprise can combine public interests and commercial interests. It can, therefore, be argued that when the Constitution provides that the values and principles under Chapter 10 apply to public enterprises, it should be taken to mean all forms of public enterprises, commercial, non-commercial or regulatory. This may be attributed to the fact that the Constitution does not make any distinction in this regard.

Notwithstanding, the study in this thesis is premised on SOCs and, for this reason, seeks to focus on this type of public entity to the exclusion of other public entities. Since an SOC can have features of public interest benefits and commercial orientation, it is only possible to argue that a public enterprise can be an SOC if it is involved in commercial operations. An SOC transitions from being formally called a public enterprise to an SOC when it has been incorporated as a company, under the Companies Act.[142]

A company is only properly referred to as such if incorporated.[143] Notwithstanding, a public enterprise being incorporated as a company, and therefore an SOC does not place it outside the reach of the Constitution and section 195 in particular. It has already been indicated above that the Constitution applies to juristic persons.[144] It should be noted that public enterprises or all government-owned entities in South Africa are established for different purposes.[145] Furthermore, the operation and management of SOCs, over and above an enabling legislation's prescriptions, are rooted and guided in accordance with the Companies Act. This is because apart from an SOC being created by a specific legislation, it is further registered as a company in terms of the Companies Act, which lends the SOC to being commercially oriented. It is thus argued that SOCs in South Africa, since incorporation, are companies for all purposes.[146] The most apparent distinction

142 Companies Act 2008, s 8(2)(a).

143 See the Companies Act 2008, s 1 for the definition of a company.

144 The Constitution of the Republic of South Africa 1996, s 8(2) and s 8(4). See also *South African Broadcasting Corporation Ltd and Another v Mpofu* [2009] 4 All SA 169 (GSJ). [55]; G*oodman Brothers (Pty) Ltd v Transnet Ltd* 1998 (4) SA 989 (W) [8].

145 Mandla Mfundo Masuku, 'Effective Governance in South Africa: reality of myth?' (2019) AJDG 117, 122.

146 Eskom Conversion Act 2001, s 3(1); South African Airways Act 2007, s 4(1).

between an SOC and any other company registered under the Companies Act is the ownership structure. SOCs are owned by the government of the Republic of South Africa[147] whilst other companies are generally owned by private individuals and operate as privately held and managed entities.

There is evidence that the interpretation of any laws, including laws that apply to SOCs, must be conducted in line with the promotion of the Constitution.[148] Therefore, this means that any law that applies to SOCs will have to be interpreted in a manner that advances the spirit and purport of the Constitution.[149]

2.2.1. Definition of a SOC

In practice, some confusion may exist regarding using the correct terminology when referencing government-owned or public entities. While SOCs are identified by the suffix SOC Limited, for instance, Telkom SA SOC Limited,[150] in practice, it may be difficult to distinguish an SOC from any other public entity just by relying on the ownership structure. To ascertain the true nature of a public entity one may have to give regard to the fact that it is registered as a company in terms of the Companies Act.[151] As seen elsewhere above, an SOC may be regarded as any other public entity in common parlance and for convenience. Accordingly, for a clear distinction of an SOC from any other public entity, it may be of value to appreciate its definition.

Section 1 of the Companies Act defines a SOC, as:[152]

> an enterprise that is registered in terms of this Act as a company, and either –
>
> (a) is listed as a public entity in Schedule 2 or 3 of the Public Finance Management

147 The sole ownership of state-owned companies may begin to change with the announcement that SAA will have its ownership diluted with private investors.

148 Specifically, the Bill of Rights which apply to SOCs in accordance with section 8 of the Constitution.

149 The Constitution of the Republic of South Africa, 1996, s 39(2).

150 *Telkom SA SOC Limited v City of Cape Town and Another* 2021 (1) SA 1 (CC) [1].

151 Companies Act 2008, s 8(2)(a).

152 Companies Act 2008, s 1.

Act, 1999 (Act 1 of 1999); or

(b) is owned by a municipality, as contemplated in the Local Government: Municipal Systems Act, 2000 (Act 32 of 2000), and is otherwise similar to an enterprise referred to in paragraph (a).

The definition of an SOC primarily determines that, an SOC is an enterprise that is registered under the Companies Act as a company.[153] In addition, such a company is either listed under the PFMA or is a company owned by a municipality. The main thrust of the definition is that an SOC is an enterprise registered as a company in terms of the Companies Act.[154]

To fully understand the definition, it may be of further value to establish what an 'enterprise' is. An enterprise has been defined as 'an organisational structure through which business is conducted.'[155] An enterprise is, therefore, a structure utilised to conduct business. For a SOC, an enterprise would be an organisational structure in one of the forms of companies provided for under the Companies Act.[156] Accordingly, whether an SOC is one listed under schedule 2 or 3 of the PFMA or owned by a municipality in terms of Act 32 of 2000, at its core is that it is a business enterprise registered as a company. Another feature of an enterprise is that it is a business, which, for the study in this thesis, means that SOCs are those established with a profit motive.

The study illustrates the pivotal nature of SOCs to improving citizenry welfare and to promote effective and accountable governance contemplated in the Constitution.[157] In any event, profits for SOCs are brought back into national development to improve public welfare and bolster the economy. This happens in the form of dividends declared to the government, depending on whether the SOC is making profits or not. The downside of

153 Companies Act 2008, s 1 and s (8)(2)(a).

154 Companies Act 2007, s (8)(2)(a).

155 Barney Erasmus, Johan Strydom, and Sharon Rudansky-Kloppers, *Introduction to Business Management* (10th edition Oxford University Press 2016) 3.2.1.

156 Companies Act 2008, s 8(2) provides for two forms of companies, a profit company and non-profit company. Companies Act 2008, s 8 (2) determines that a profit company takes a number of other forms, (a) a state-owned company, (b) a private company, (c) a personal liability company, (d) a public company.

157 Constitution of the Republic of South Africa, 1996, s 195(1)(f).

loss-making SOCs is that the tables are turned; instead of them paying dividends to the State, the State bails them out financially, which is costly for taxpayers.

The Auditor General reported that major SOCs are habitually late completing audits, in addition to being in a poor financial state.[158] These problems point to corporate governance concerns in these SOCs.[159] The situation may only improve if necessary reforms are engineered in the corporate governance of SOCs. The Auditor General indicated that one problem is the prevalence of a culture of no accountability and no consequences.[160] It is in this aspect that the thesis will recommend that corporate governance breaches in SOCs must be visited with accountability and tangible consequences.

The conclusion drawn from the above discussion is that SOCs being companies are registered companies in terms of the Companies Act. Furthermore, besides being owned by the government of the Republic of South Africa, they are required, unless another overriding law provides, to abide by the provisions of the Companies Act.[161] It is submitted that public entities that are not prescribed to be incorporated as companies under the Companies Act should not be regarded as SOCs and would as a result probably not be regulated by the Companies Act.

Despite the ownership structure earlier referred to, a subtle distinctive feature is that SOCs are profit oriented companies and should be conducted on sound business models. For instance, Eskom is involved in electricity generation, supply and distribution at a fee. As much as the provision of electricity is essential to the public, it comes at a cost, and arguably, many South Africans find electricity unaffordable. Even though electricity is expensive in South Africa, Eskom's commercial orientation may justify the high price although there may be affordability and electricity supply concerns from the public.[162]

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158 Auditor General – Consolidated Report <https://pfma-2023-24.agsareports.co.za/pages/state-owned-enterprises - > accessed 08 May 2025.

159 Auditor General – Consolidated Report <https://pfma-2023-24.agsareports.co.za/pages/state-owned-enterprises - > accessed 08 May 2025.

160 Auditor General– Consolidated Report <https://pfma-2023-24.agsareports.co.za/pages/recommendations-to-the-new-administration - >accessed 08 May 2025.

161 Companies Act 2008, s 5(4).

162 Media statement < https://www.eskom.co.za/eskom-will-implement-the-nersa-approved-average-electricity-price-increase-from-01-april-2024/ > accessed 26 May 2024; https://www.thesouthafrican.com/lifestyle/how-much-pay-april-2025-eskom-electricity-hike/ - accessed 08 May 2025.

Regardless of the latter orientation, they should still apply a socially blended approach by attempting to provide electricity in every household in South Africa. Eskom charges electricity in terms of tariffs approved by the National Electricity Regulator (NERSA) – which is in itself not a company in the sense of being registered under the Companies Act. Therefore, to a large extent, Eskom remains impacted by NERSA – whose mandate has been confirmed by the High Court in *Eskom Holdings SOC Ltd v National Energy Regulator of South Africa* as follows:[163]

> NERSA in terms of the National Electricity Regulatory Act ("NERA") has the mandate to *inter alia,* regulate the generation, transmission and distribution of electricity. NERSA's functions are set out in section 4 of the NERA and include the consideration of applications for licenses and issuing of licenses for the operation of generation, transmission or distribution facilities and the regulation of electricity prices and tariffs.

It was already established earlier,[164] that SOCs generally are established through their own legislation and incorporated under the Companies Act.[165] Furthermore, the PFMA applies to SOCs as they are prescribed to be public entities.

It can be confirmed that public entities listed as major entities,[166] are SOCs in a commercial sense. For instance, Eskom,[167] Transnet,[168] (SAA),[169] South African Broadcasting Corporation (SABC),[170] among others.[171] These entities are operating commercially and aim to be self-sustainable, whether this is in practice the case or not. The common expectation is that any entity incorporating itself into a company, unless it does so as a non-profit company,[172] should be commercially and profit-oriented to remain sustainable

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163 2020 (5) SA 151 (GP) at [7] and [8].

164 See para 1.1 and 2.1.

165 See s 1 of the Companies Act on the definition of a company read with the definition of a state-owned company.

166 The Public Finance Management Act 1999, Sch 2.

167 The Eskom Conversion Act 2001, s 3.

168 Transnet Overview< https://www.transnet/AboutUs/overview.aspx >accessed 25 April 2021. See also the Legal Succession to the South African Transport Services Act 1989, s 2; *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) [3].

169 The South African Airways Act 2007, s 4.

170 The Broadcasting Act 1999, s 8A (1)(2).

171 Department of Public Enterprises: State-Owned Companies <https://dpe.gov.za/state-owned-companies/ - >accessed 25 April 2021.

172 Section 1 of the Companies Act, read with item 1(1) of Schedule 1 indicates that even a non-profit

and avoid depending on government financial assistance. The ideals of sustaining commercial viability for any SOC revolve around the governance work its board of directors engender for the SOC. This is how the thesis is mindful that non-executive directors' duties to SOCs are pivotal to their overall success as profit companies.

In *Steenkamp v Central Energy Fund SOC Ltd*,[173] one of the issues under consideration was the importance of avoiding financial losses of an SOC at all costs. Two directors of PetroSA lodged an application to be reinstated as directors after they were removed[174] by the holding company (Central Energy Fund SOC Ltd),[175] for failing to implement an agreed turnaround strategy for PetroSA. This strategy, if implemented, would have improved its financial position. The directors were accused of failing to ensure that the Petroleum Oil and Gas Corporation SOC Ltd (PetroSA) remained financially profitable.[176]

The directors (applicants) lost the case. The board of directors of the holding company (Central Energy Fund SOC Ltd), of PetroSA, through the removal of the directors, demonstrated the importance of implementing financially viable strategies to ensure the financial prosperity of the SOC. The directors were held accountable for their failure, at least to the extent of being removed from the board of directors of PetroSA.[177] This case supports the notion that SOCs are profit-driven and should be successfully governed to be sustainably profitable for them to remain in existence. It is, however, clear from the Steenkamp case that a weak board of directors may have allowed the incompetent board of the subsidiary to continue raking in board fees at no value to the subsidiary and with impunity.

The above scenario can be compared to the position at SAA SOC Ltd, where seven chief executive officers were hired and fired in a space of four years.[178] Each of these chief executive officers, though introducing a turnaround strategy, was not afforded the opportunity to implement it. Remarkably and disturbingly, concerning the SAA SOC Ltd, the

company may make profits only that these are deployed to the objects of the company.

173 2018 (1) SA 311 (WCC) [5].

174 *Steenkamp v Central Energy Fund Soc Ltd* 2018 (1) SA 311 (WCC) [20].

175 *Steenkamp v Central Energy Fund Soc Ltd* 2018 (1) SA 311 (WCC) [2].

176 *Steenkamp v Central Energy Fund Soc Ltd* 2018 (1) SA 311 [9]-[12].

177 *Steenkamp v Central Energy Fund Soc Ltd* 2018 (1) SA 311 (WCC) [2].

178 Thabane and Van Deventer, 'Pathological Corporate Governance, 5.

boards of directors were not held accountable in any way for the high turnover of chief executive officers at SAA SOC Ltd, which arguably contributed to its downfall over an extended period.[179]

On top of the foregoing, SAA SOC Ltd enjoyed massive financial bailouts nearly every fiscal year for more than a decade.[180] The financial injections did not improve the welfare of the citizens, nor did they improve the SAA SOC Ltd's performance. It is submitted that SOCs should be profitably managed if they are to remain sustainable and meet their objectives of improving the welfare of the citizens and contributing positively to the economy.

It should be noted, though, that SOCs are not required to remain profitable for profit's sake. Nonetheless, it is argued that when SOCs are profitable, they are in a better position to provide goods and services in accordance with their legal and constitutional mandate to the public. For instance, financial losses by SAA SOC Ltd may prevent it from flying, leaving many South Africans stranded or having to resort to other airlines, including international ones, sometimes at an inflated cost.

It has been clearly illustrated that, government-owned entities established either through own legislation or directly under the Companies Act, are known by any of the following designations: state-owned enterprises, public entities, public enterprises, SOCs, or parastatals.[181] A SOC may or may not originally be established through its own legislation. In instances where an SOC is not established through an own enabling Act, it is directly incorporated in terms of the Companies Act. An example of the above scenario would be Denel SOC Ltd.[182] Denel SOC Ltd was incorporated directly under the Companies

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179 Independent Online: Focus on SAA: How much has the taxpayer spent on the struggling airline over the last five years? < https://.msn.com/en-za/news/other/focus-on-saa-how-much-has-the-taxpayer-spent-on-the-struggling-airline-over-the-last-five-years/arBB1mErhQ?ocid=BingNews Serp - > accessed 16 July 2021.

180 Independent Online: Focus on SAA: How much has the taxpayer spent on the struggling airline over the last five years? <https://.msn.com/en-za/news/other/focus-on-saa-how-much-has-the-taxpayer-spent-on-the-struggling-airline-over-the-last-five-years/ar-BB1mErhQ?ocid=BingNews Serp - > accessed 16 July 2021.

181 Tewodros Mehert, 'The Concept and Characteristics of Public Enterprises in Ethiopia 342-343; David Fourie, The Role of Public Sector Enterprises in the South African Economy, 2014, Volume 7, African Journal of Public affairs, 33.

182 Denel <www.denel.co.za/about-us/company-profile > accessed 04 August 2024.

Act and is also subject to regulation by other statutes such as the PFMA.[183]

2.3. The legal framework of SOCs

As already noted in Chapter 1 and in this chapter, SOCs in South Africa are regulated through several statutes and other authoritative codes. In a report by the Presidential Review Committee, the legislative framework of state-owned entities was highlighted as a concern.[184] Specifically, the legislative framework was found to be inadequate, fraught with traces of conflict and duplications.[185]

The following statutes and codes have been found to be at the core of regulating SOCs in South Africa: the Constitution, Companies Act, PFMA and the King Reports with their accompanying Code of Good Practice.[186] It is of interest to this study to examine the whole legal framework applicable to SOCs in order to establish how the legal framework provides for liability and accountability for governance breaches occasioned by non-executive directors in SOCs. The discussion below briefly outlines certain provisions in the various instruments relevant to the regulation of SOCs in South Africa.

2.3.1.. The Constitution

The Constitution as the supreme law applies to all law and binds both juristic and natural persons in South Africa. SOCs as juristic persons neatly fall within the overarching scope of the Constitution. In this regard, section 195(2) of the Constitution is noteworthy in that it directly applies to all SOCs. The values and principles to which the Constitution

183 Denel < www.denel.co.za/about-us/corporate-governance >accessed 04 August 2024.

184 Presidential Review Committee on State Owned Enterprises (2013) Growing the Economy – Bridging the Gap, Volume 1, 8.

185 Presidential Review Committee on State Owned Enterprises (2013) Growing the Economy – Bridging the Gap, Volume 1, 8.

186 Ramani Naidoo, *Corporate Governance: An Essential Guide for South African Companies* (3rd edn LexisNexis 2016) 355; Thabane and Van Deventer, 'Pathological Corporate Governance Deficiencies in South Africa's State-Owned Companies 9-10.

subjects all public administration in government and its organs are couched in peremptory terms in the said section. Section 195(1) of the Constitution which contains the list of values and principles through which institutions of government should be governed uses peremptory terms namely the word 'must'. This means all institutions to which the Constitution applies must incorporate the values and principles in the way the institutions are to be governed.[187]

To this end, it is argued that regardless of the exact nature of an SOC, the constitutional values and principles must be observed in its governance and operational set up. From the list of values and principles mentioned a sense of accountable governance can be gleaned from section 195(1)(f) of the Constitution.[188] Furthermore, the Constitution contemplates that national legislation should be enacted to enforce the values and governance principles provided in section 195(1).[189] Legislation such as the PFMA should be seen as flowing from or contemplated by the Constitution to fulfil such a purpose.

That the Constitution provides for governance and accountability at the highest-level means that SOCs, among other entities, which are affected by the provisions of the Constitution cannot escape the need for accountability and proper governance. The Constitution underpins accountable governance.[190] For good corporate governance in SOCs to be achieved and sustained, boards of directors and other executive officers charged with governance should be competent enough to discharge their respective board duties. In doing so, the provisions in the Constitution must be enforced by factoring them into the governance of SOCs, including other relevant legal requirements in various laws and codes impacting on the corporate governance of SOCs.

Furthermore, when boards of directors and other officers of SOCs fail to discharge their governance duties, some form of accountability for failure to comply with the Constitutional

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187 See *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) at [1] where the Chief Justice stated 'Accountability, equality before the law and transparency are some of the values on which our constitutional democracy was founded. It ought therefore never to matter who a person, natural or juristic, is whenever the need arises to breathe life into these values.'

188 The Constitution of the Republic of South Africa, 1996, s 195(1)(f).

189 The Constitution of the Republic of South Africa, 1996, s 195(3).

190 The Constitution of the Republic of South Africa, 1996, s 195(1)(f).

provisions should be exercised. In essence, boards of directors of SOCs must comply with the Constitution.[191] The Constitution provides for the overarching background for the accountability required in the governance of SOCs whilst contemplating the enactment of specific laws to provide for such best practices as accountability and good corporate governance of institutions of government, including SOCs. The recommendation is that non-executive directors of SOCs must try to understand how the Constitution applies to SOCs.

Thereafter, they must infuse the Constitution in the way they perform their duties to SOCs. From an accountability point of view, it was discussed that the Bill of Rights provides that what the Constitution directs must be realised. As such, non-executive directors must realise the importance of accountable governance in SOCs, and if they do not, they must be held accountable for the failure to do so.

2.3.2. Public Finance Management Act, 1999

The PFMA is one of the national legislations envisaged in section 216 of the Constitution, and seeks to give effect to, amongst others, the values underpinning sections 195 and 217 of the Constitution.[192] The PFMA applies to SOCs and regulates the financial management and duties of directors towards SOCs. The preamble of the PFMA states as follows:

> To regulate financial management in the national government and provincial governments; to ensure that all revenue, expenditure, assets and liabilities of those governments are managed efficiently and effectively; to provide for the responsibilities of persons entrusted with financial management in those governments; and to provide for matters connected therewith.

Furthermore, the PFMA provides for its object under section 2 as follows:

> The object of this Act is to secure transparency, accountability, and sound management

191 The Constitution of the Republic of South Africa, 1996, s 195(1)(2).
192 *Road Traffic Management Corporation v Waymark (Pty) Ltd* 2019 (5) SA 29 (CC) [6].

of the revenue, expenditure, assets and liabilities of the institutions to which this Act applies.

Section 2 of the PFMA is consistent with section 195(1) of the Constitution with regards to the objects, values and principles listed under section 195(1) of the Constitution. To an extent, it may be concluded that section 195(3) of the Constitution has been partly addressed by provisions such as section 2 of the PFMA. Section 3 of the PFMA determines the nature of institutions to which the PFMA applies. Of interest is that the provision clarifies that the PFMA applies to among other institutions, to public entities listed in schedule 2 and 3 of the PFMA. As already confirmed, public entities listed in schedule 2[193] are primarily SOCs. SOCs are, therefore, public entities in line with the PFMA.[194] The listing of SOCs under Schedule 2 of the PFMA confirms that the PFMA applies to them.[195] It is submitted that the PFMA remains one of the most important pieces of legislation in South Africa in relation to public entities and SOCs. The above argument follows the premise that the PFMA homogenises the operations and management philosophies of public entities in South Africa – regardless of what any other legislation may provide, save for the Constitution.

Section 50 of the PFMA provides for the fiduciary duties of accounting authorities for public entities, and which duties apply to SOCs. Whereas section 1 of the PFMA defines an accounting authority, section 49(2)(a) of the PFMA determines that in relation to a public entity, an accounting authority is the board of the public entity if it has a board. It is notable that section 49 of the PFMA does not use terms such as board of directors; it instead uses the term 'body'. The term 'body' has not been defined in the PFMA.

However, the PFMA defines 'accounting authority' as a body or person mentioned in section 49 of the PFMA and clarifies what an accounting authority is.[196] Clearly, an

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193 Department of Public Enterprises< https://dpe.gov.za/state-owned-companies/ >accessed 16 July 2021.

194 *Mthimunye-Bakoro v Petroleum Oil and Gas Corporation of South Africa (SOC) Ltd* 2015 (6) SA 338 (WCC) [2].

195 Public Finance Management Act 1999, s 3(1)(b).

196 Public Finance Management Act 1999, s 1.

accounting authority is the equivalent of a board of directors in SOCs.[197] All SOCs in South Africa have boards of directors. For the above reason, an accounting authority would in the context of SOCs be the board of an SOC. It would therefore, follow that boards of SOCs are accountable in terms of the PFMA.[198]

In terms of section 50 of the PFMA the fiduciary duties of accounting authorities are as follows:

> The accounting authority for a public entity must:
>
> **(a)** exercise the duty of utmost care to ensure reasonable protection of the assets and records of the public entity;
>
> **(b)** act with fidelity, honesty, integrity and in the best interests of the public entity in managing the financial affairs of the public entity;
>
> **(c)** on request, disclose to the executive authority responsible for that public entity or the legislature to which the public entity is accountable, all material facts, including those reasonably discoverable, which in any way may influence the decisions or actions of the executive authority or that legislature; and
>
> **(d)** seek, within the sphere of influence of that accounting authority, to prevent any prejudice to the financial interests of the state.
>
> 3. A member of an accounting authority or, if the accounting authority is not a board or other body, the individual who is the accounting authority, may not:
>
> 3.3. act in a way that is inconsistent with the responsibilities assigned to an accounting authority in terms of this Act; or
>
> 3.4. use the position or privileges of, or confidential information obtained as, accounting authority or a member of an accounting authority for personal gain or to improperly benefit another person.
>
> 4. A member of an accounting authority must:

197 Public Finance Management Act 1999, s 49(1).

198 Public Finance Management Act 1999, s 2.

4.3. disclose to the accounting authority any direct or indirect personal or private business interest that that member or any spouse, partner or close family member may have in any matter before the accounting authority; and (b) withdraw from the proceedings of the accounting authority when that matter is considered, unless the accounting authority decides that the member's direct or indirect interest in the matter is trivial or irrelevant.

An evaluation of the fiduciary duties provided for in the PFMA reveals that they aim to bring about accountability and good corporate governance in public entities in South Africa. The liability for accounting authorities in public entities is provided for in section 83(2) and section 86(2) of the PFMA. Section 83(2) of the PFMA focuses on the financial misconduct of an accounting authority whereas section 86(2) of the PFMA establishes offences and penalties for breach of fiduciary duties by accounting authorities.

It should be noted that the accountability of an accounting authority for the mismanagement of duties in terms of section 86(2) of the PFMA is based on the grounds of willful or gross negligence. The establishment of the aforementioned liability will be examined later in this thesis and contrasted with that provided for in the Companies Act which also applies to SOCs.[199]

The PFMA does not draw a distinction on liability between fiduciary duties and the duty of care, skill and diligence. Another aspect of concern which warrants attention is the object of the PFMA as provided under section 2. In this regard, the PFMA directs its scope of application to corporate governance relating only to the financial aspects of public entities. Therefore, its scope and effect on SOCs is circumscribed. This suggests that the scope of directors' duties and the intended application of the PFMA are centred on the financial governance of public entities.

Notably, the accountability called for in the PFMA is directed at the financial governance aspects of public entities. Irrespective of the narrow application of the PFMA to public entities corporate governance on the part of non-executive directors is wide and goes beyond just financially related governance duties. The question may then be, how will

199 See Chapter 5 and 6 below.

total reliance on the PFMA assist in holding non-executive directors liable and accountable for governance breaches which are not of a financial nature? Though financial accounting is a critical aspect of corporate governance in SOCs, the corporate governance of SOCs should be analysed in a holistic way.

The fiduciary duties stated in section 50 of the PFMA should be examined in a much broader manner than in a financial accounting perspective only. Where the PFMA's scope to SOCs is limited because it only focuses on financial aspects, the submission is that the Companies Act will be complementary.[200]

It is apparent that the duties of directors in the Companies Act do widely impact every operational aspect of SOCs than the seemingly narrow duties provided for under section 50 read with section 2 of the PFMA.[201] The broader approach aligns with the values and principles provided for in section 195(1) of the Constitution. What remains to be determined is exactly how the PFMA seeks to achieve its object in the management, operations and governance of public entities.

Specifically, the focus of this thesis is how exactly the PFMA provides for liability and accountability on the part of non-executive directors of SOCs who breach and overreach their governance duties. Put simply, it would be ideal to ascertain how the financial health of SOCs is blended in with the broader scope of directors' duties to SOCs. Furthermore, past corporate scandals at SOCs while the PFMA is in operation are grounds for suggesting that the PFMA is not without its shortcomings or at least it has been ignored.[202] The shortcomings, though, appear to be more related to the incapacity of boards of directors to ensure financial prudence than the PFMA's inadequacy, which forms part of evaluations made in this thesis.

A preliminary evaluation of the provisions of the PFMA indicates that it does not contain a specific provision aimed at meting out liability and accountability for non-executive

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200 Public Finance Management Act 1999, s 50(1)(b; *Organisation Undoing Tax Abuse NPC v Duduzile Cynthia Myeni and others* [2019] ZAGPPHC 957 [253].

201 The PFMA board duties are adjudged to be narrow because they are financially inclined.

202 For example: irregular appointments and salary hike at the SABC involving a certain Hlaudi Moetsoeneng.

directors in SOCs who have overreached on their governance duties.[203] It only contains provisions concerning discipline and sanctions which apply to all accounting authorities in public entities.[204]

It is thus submitted that the PFMA treats all directors on a board similarly without differentiation between executive or non-executive directors. Section 2 of the PFMA further confirms the limited scope of liability and accountability provisions for those charged with corporate governance of public entities. In other words, section 2 of the PFMA situates liability and accountability on poor governance relating to the financial activities of public entities.

The deficiency in provisions for liability and accountability for non-executive directors in the PFMA is a concern given its central role in the regulation and governance of SOCs. The one way to cure the *lacuna* at the occasion of any governance breaches on the part of non-executive directors in SOCs may be to turn to the Companies Act or other enabling legislation as long as it provides for the establishment of liability against non-executive directors for breach of governance duties.

In its current form the PFMA does not serve the purpose of establishing specific liability against board members who breach or overreach their governance duties. In light of the incompleteness in the PFMA, it is proposed that to establish liability for board members who breach or overreach their governance duties, the responsibility should be handed to either the establishing legislation or the Companies Act. The provisions regulating liability and accountability in the PFMA are unclear in relation to how they apply to executive and non-executive directors in SOCs. It is accordingly important to ascertain how other statutes applicable to SOCs provide for this aspect of this study.

2.3.3. The Companies Act 71 of 2008

The Companies Act is the primary source of statutory company law in South Africa and

203 Public Finance Management Act 1999, s 84.
204 Public Finance Management Act 1999, s 50.

all companies incorporated under it are subject to its provisions.[205] As indicated above,[206] some SOCs are created through own legislation which would provide for the incorporation of such SOCs, as a company under the Companies Act. For example, the Broadcasting Act 1999 which establishes the SABC provides that the SABC must be incorporated as a public company with a share capital, under the Companies Act.[207]

Section 5 of the Companies Act determines that the Companies Act must be interpreted and applied in a manner that gives effect to the purposes set out in section 7.[208] Section 7 of the Companies Act sets out the purposes of the Companies Act which includes the promotion of compliance with the Bill of Rights. It is therefore important to point out that the values and principles of governance set out in the Constitution, which apply to juristic persons, find application in the Companies Act. This further strengthens the accountability and governance of SOCs.

Thus, where the Companies Act provides for liability against non-executive directors for breach or overreach on governance duties in SOCs, such provisions should, by extension, be implemented to realise the accountability advocated for in the Constitution.

Applying the provisions of the Companies Act to SOCs ensures that critical provisions which establish liability and accountability for non-executive directors equally apply to directors in SOCs.[209] This is important as SOCs' establishing legislation may lack any legal provisions establishing director liability and accountability. The Companies Act offers a comprehensive gamut of director liability,[210] which aids the PFMA and enabling legislation where no provisions are made for such mechanisms. It should also be

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205 Companies Act 2008, s 7.

206 See paragraph 1.1.

207 Broadcasting Act 1999, s 8A (1)(2).

208 Companies Act 2008, s 7(a)(b) provides the following:(a) promote compliance with the Bill of Rights as provided for in the Constitution, in the application of company law; (b) promote the development of the South African economy by- (i) encouraging entrepreneurship and enterprise efficiency; (ii) creating flexibility and simplicity in the formation and maintenance of companies; and (iii) encouraging transparency and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation.

209 Companies Act 2008, s 77 and s 162.

210 Companies Act 71 2008, s 77 and s 162.

recognised that the Companies Act contemplates that a conflict of laws may arise.[211]

This is a proven reality as a multiplicity of regulatory instruments apply to SOCs in South Africa. In this instance, the Companies Act seeks a concurrent application of pertinent laws relevant in a particular matter for which it also regulates.[212] To this extent, cognisance should be taken of the fact that the PFMA finds application in the event of a conflict of interest between statutes,[213] apart from the Constitution.[214] However, as indicated on matters such as director liability, the PFMA still leaves some unanswered questions. For instance, how the critical provisions apply to executive directors and non-executive directors who breach the duties provided for in the PFMA. As it stands, and apart from the foundational values and principles laid out in the Constitution, the Companies Act appears to provide for much more on liability and accountability for directors in companies in South Africa.[215]

What appears to be missing are provisions that clarify how to treat director liability for non-executive directors of SOCs. It is acknowledged that directors in privately held companies can be remarkably distinguished from directors in SOCs. Nonetheless, the Companies Act provides for director liability without distinguishing between executive and non-executive directors in SOCs or any other company.[216] It is a fair approach to the extent that they are board members. However, in practice, there may be distinctions in some of the duties as will be seen in Chapters 3 and 4 below.

2.3.4. Enabling Statutes of SOCs

Although SOCs are registered as companies in terms of the Companies Act, they are primarily established through their own legislation. However, there are a few exceptions

211 Companies Act 2008, s 5(4).
212 Companies Act 2008, s 5(4).
213 Public Finance Management Act 1999, s 3(3).
214 Section 2 of the Constitution determines that it is the supreme law with which all laws must be consistent.
215 Companies Act 2008, s 77(1), (2) and (3).
216 Companies Act 2008, s 77(1), (2) and (3).

in which some SOCs are directly incorporated in terms of the Companies Act.[217] It is exactly the concurrent application of various pieces of legislation to SOCs that may render them to appear overregulated.[218]

Despite the presumed duplication[219] of provisions applicable to SOCs which in itself is fraught with risks and confusion as to which statute supersedes all others, SOCs have been reported to underperform in regard to their various mandates.[220] Part of the problem is that liability and accountability in the governance of SOCs have been weak and largely unenforced. Though the above may be a good observation, there appears to have been reluctance on the part of the government to hold board members of SOCs accountable for breach of their governance duties.

OUTA v Myeni[221] is the only case brought in recent times against a non-executive director of an SOC. *OUTA v Myeni* was not brought by the Department of Public Enterprises responsible for SOCs, but by a non-governmental organisation. The application was brought in terms of the Companies Act rather than the primary statute. This is understandable because the Companies Act applies to SOCs. Furthermore, the South African Airways Act[222] which OUTA relied on does not have liability provisions. However, the Department of Public Enterprises could have relied on similar provisions to bring the application themselves.[223] Its reluctance to do so would mean that corporate governance

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217 Denel SOC Ltd is an example of a state-owned company directly established out of the Companies Act.

218 Pwc: State-owned enterprises: Governance responsibility and accountability <https://cdn.ymaws.com/www.iodsa.co.za/resource/collection.879CAE6C-7B90-49F5-A983-28AECBCE196F/PSWG_Position_Paper_3_Governance_in_SOEs.pdf - > accessed 04 May 2021. See also page 2 of the Protocol on Corporate Governance in the Public Sector available at: https://www.gov.za/sites/default/files/gcis_document/201409/corpgov0.pdf >accessed 05 May 2021.

219 Presidential Review Committee on State Owned Enterprises (2013) Growing the Economy – Bridging the Gap, Volume 2, 76

220 Businesswire: South Africa State-Owned Enterprises Report 2021 with Profiles of 24 Public Entities Including Transnet, Eskom, South African Airways and Denel-ResearchAndMarkets.com:https://www.businesswire.com/news/home/20210715005768/en/South-Africa-State-Owned-Enterprises-Report-2021-with-Profiles-of-24-Public-Entities-Including-Transnet-Eskom-South-African-Airways-and-Denel---ResearchAndMarkets.com. >accessed 29 October 2021.

221 *Myeni v Organisation Undoing Tax Abuse* [2021] ZAGPPHC 56.

222 South African Airways Act 5 of 2007.

223 Companies Act, 2008, s 162(4).

breaches in SOCs have enjoyed condonation from the Department itself.

The delinquency provisions provided for by the Companies Act are a good step in ridding companies,[224] including SOCs, of incompetent directors. However, the precondition remains that relevant provisions must be applied without fail. The Companies Act further provides for a declaration of delinquency against directors of companies.[225] Where the breach of a director's duties of an SOC is grave, the Companies Act[226] provides for a declaration as a delinquent director for life.[227] Declaring directors as delinquents whenever the requirements have been met sends a clear warning to directors, both executive and non-executive, that they can be held to account for how they manage an SOC.

2.3.4.1. South African Airways Act 2007

SAA SOC Ltd, which was initially a subsidiary of Transnet is, amongst other laws, regulated and enabled by the South African Airways Act. To unbundle it from its subsidiary relationship with Transnet,[228] its shares were sold to the government through the SAA Act, paving the way for the establishment of SAA SOC Ltd.

Thus, SAA SOC Ltd is regulated through its empowering legislation, the SAA Act, the PFMA, the Companies Act, the Constitution and other relevant laws. The text of the SAA Act is silent on provisions relating to the board of directors of SAA. For instance, section 6(3) of the SAA Act provides for the powers of the SAA to be contained in Schedule 2[229] of the Companies Act 61 of 1973 (the Companies Act of 1973). Schedule 2 of the Companies Act of 1973 related to the day-to-day operations of the SAA as a company. No provisions relating to directors' duties or the liability of directors are included. However,

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224 Companies Act, 2008, s 162.

225 Companies Act 2008, s 162.

226 Companies Act 2008, s 162(5)(a)(b) read with subsection 6(a).

227 Emily Makuta, 'Towards Good Corporate Governance in State-Owned Industries: The Accountability of Directors', (2009), MLJ 55, 69.

228 The South Africa Airways Act 2007, s 2 and the Preamble which provide: "To provide for the transfer of the shares of Transnet Limited in South African Airways (Proprietary) Limited to the State; to provide for the conversion of South African Airways (Proprietary) Limited into a public company having a share capital incorporated in terms of the Companies Act 1973; and to provide for matters connected therewith."

229 Companies Act 61 of 1973, replaced by the Companies Act 2008.

the SAA Act places the SAA under the direct regulation of the Companies Act[230] and the PFMA since it falls under Schedule 2 of major public entities. Although the SAA Act refers to the Companies Act of 1973, this Act has since been partially superseded by the Companies Act of 2008.[231] In essence, therefore, the SAA Act, by implication, provides for director liability by way of its reference to the PFMA and the Companies Act.

SAA has been hit with a number of spectacular governance scandals over a period extending beyond a decade.[232] It had also become the subject of business rescue, and liquidation has not yet been ruled out.[233] Recently, SAA was reported to be going through a new ownership structure in terms of which the South African government would end up with 49 percent shareholding and the private sector 51 percent shareholding.[234] With the dilution of ownership, it was hoped that SAA could begin to experience good corporate governance positively influenced by its envisaged new ownership structure.

Notwithstanding the optimism to reform and reposition the SAA, the hyped Takatso deal has been reported to have failed.[235] This leaves the SAA as a SOC to its own devices to revive its business or perish. Arguably, the mammoth task of revitalising the SAA stands on the shoulders of the executive and non-executive directors.[236] It is not an impossible task, provided the best corporate governance approaches can take root in its control and management. The SAA resumed its operations with the assistance of the government. It is hoped that the plan now in place will be viable to turn the SAA into a profit-making and efficient SOC. There has also been noticeable leadership at the SAA which may be

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230 Companies Act 2008.

231 Section 424 of the Companies Act 61 of 1973 remains operational.

232 AeroTime Hub: Prosecutors warn of rampant corruption in South African Airways <https://www.aerotime.aero/articles/27397-south-african--airways-corruption-investigation >accessed 29 April 2021.

233 News24: SAA Creditors approve extension for submission of rescue plan <https://www.news24.com/fin24/companies/just-in-unions-ask-for-more-delay--to-saa-business-rescue-plan-to-give-more-input-20200608 > accessed 29 April 2021.

234 Simple Flying: South African Airways To Relaunch With 51% Private Ownership <http://simpleflying.com/saa-relaunch-private-ownership/ > 18 July 2021.

235 South African Airways to Remain State-Owned as Takatso Deal Collapses -< https://www.bizcommunity.com/article/south-african-airways-to-remain-state-owned-as-takatso-deal-collapses-905134a#:~:text=14%20Mar%20204 > accessed 23 April 2024.

236 Companies Act 2008, s 66(1).

credited for its stability over the past three years.[237]

A dilution in ownership with an accompanying good governance structure by the SAA was a welcome move as it has been perpetually hit with a high turnover of chief executive officers in just a few years.[238] In addition, two of its board members appeared on the Zondo Commission for poor governance at the SAA. OUTA accused Dudu Myeni who served as a non-executive director and chairperson at SAA of collapsing the airline.[239] OUTA successfully brought a lawsuit against Ms Myeni in which she was declared a delinquent.[240] She unsuccessfully appealed this decision, and her declaration of delinquency remains.[241]

Ms Myeni's declaration of delinquency is welcomed because it acts as a form of accountability to a non-executive director of a prominent SOC. As already indicated, the lawsuit was not brought by an organ of state but by OUTA, a non-profit organisation. This raises serious questions about the role of the State in enforcing liability and accountability against non-executive directors of SOCs who have breached their duties. It communicates a message that there is an absence of an accountability framework in relation to SOCs or a lack of organs to drive accountability. One would have expected that the meeting of accountability in SOCs and other similar actions would be spearheaded by the Department of Public Enterprises itself to set the correct tone of intolerance towards governance breaches and overreach on the part of non-executive directors in SOCs.

The suggested approach would be ideal where non-executive directors are evidently unable to self-correct or are hopelessly compromised. It is submitted that the

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237 SAA Reports Strong Growth, Expansion Three Years after return to skies <https://www.news24.com/citypress/business/saa-reports-strong-growth-expansion-three-years-after-return-to-skies-20240912 - > accessed 08 May 2025.

238 Dianna Games, 'Up in the air: African airlines; the good and bad' (2019) 108, 113 The Journal of Good Governance Africa.

239 Organisation Undoing Tax Abuse: Delinquency order against Dudu Myeni is upheld<https://www.outa-co-za/blog/newsroom-1/post/delinquency-order-against-dud-myeni-is-upheld-1013 >accessed 09 May 2021.

240 *Organisation Undoing Tax Abuse NPC v Duduzile Cynthia Myeni* [2019] ZAGPPHC 957 [285(a)(b)].

241 *Myeni v Organisation Undoing Tax Abuse* [2021] ZAGPPHC 56.

Department of Public Enterprises' inaction and lack of apparent involvement in holding directors in SOCs liable and accountable for governance breaches are a violation of its constitutional duty. The Department of Public Enterprises must ensure that SOCs adhere to competent public administration provided for under section 195 of the Constitution.[242] Furthermore, the duty extends to ensuring that state-owned companies practice accountable governance.

2.3.4.2 Denel SOC Limited

Denel SOC Ltd was incorporated as a company in 1992 in terms of the Companies Act of 1973.[243] As an SOC, the South African government is the only shareholder in Denel SOC Ltd's various businesses. Denel SOC Ltd was directly incorporated as a company in terms of the Companies Act of 1973[244] and unlike other SOCs, it does not have an enabling Act that establishes it. Its governance is thus primarily regulated by the Constitution, the Companies Act, the PFMA, the common law and corporate governance codes.

On its website,[245] Denel SOC Ltd says that it is bound by the common governance instruments, and that its board of directors is required to conduct itself in accordance therewith. In March of 2021,[246] Denel SOC Ltd was already looking for a bailout from government amidst frequent resignations of senior staff members in its employment structure. Concerns on Denel SOC Ltd's irregular spending were also raised.[247] Recently, however, credit goes to the new leadership. Denel SOC Ltd has started showing signs of improvements.[248] Questions may accordingly be raised as to possible breaches of prudent

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242 The Constitution of the Republic of South Africa 1996, s 92(1), (2) and (3)(a)(b).

243 Denel SOC Ltd: Company Profile < www.denel.co.za >accessed 29 April 2021.

244 Companies Act 2008, s 8(1)(2).

245 Denel SOC Ltd: Corporate Governance <www.denel.co.za/about-us/corporate-governance >accessed 29 April 2021.

246 Bloomberg: South African Arms Maker Hunts for Cash With Debts Falling Due <https://www.bloomberg.com/news/articles/2021-03-11/south-african-arms-maker-hunts-for-cash-with-debts-falling-due >accessed 29 April 2021.

247 < https://.news24.com/Fin24/denel-hunts-for-cash-as-nearly-r3bn-debt-looms-large-20210311 > accessed 26 July 2024.

248 City Press, Dimakatso Leshoro, Denel Posts Profit for the first time in five years after state capture headache< https://www.news24.com/citypress/business/denel-posts-a-profit-for-the-first-time-in-five-years-after-state-capture-headache-20230614 > accessed 26 July 2024.

financial accountability by the management of the SOC in prior years.

Financial mismanagement by any standard should be seen as a consequence of poor corporate governance prevalent in a SOC. That would then call for accountability. The call falls squarely on a board of directors in charge of the SOC.[249] In Denel SOC Ltd's case, the inference is not any different. The financial disrepute which prevailed at Denel SOC Ltd suggests poor governance at the SOC.[250] This is in contravention of section 53 of the PFMA which provides for the responsibilities of accounting officers and requires financial prudence.

What is of concern is that, despite the company being incorporated in terms of the Companies Act, no non-executive board members have to date been held liable for any of the known breaches of governance duties, such as the irregular spending.[251] Irregular spending supposes that a company is spending its financial resources recklessly on things it does not need and which do not contribute to its sustainability.[252]

There are provisions in both the Companies Act and the partially repealed Companies Act of 1973 which establish liability and accountability for non-executive directors who breach or overreach their governance duties.[253] It does appear that, when it comes to SOCs even when they are originally incorporated under the Companies Act, enforcement of the critical provisions relating to liability and accountability for directors is yet to be taken seriously in South Africa.

2.3.4.3 Legal Succession to South African Transport Services Act

The Legal Succession to South African Transport Services Act establishes Transnet

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249 Companies Act 2008, s 66(1).

250 Denel SOC Ltd: Corporate Governance< www.denel.co.za/about-us/corporate-governance > accessed 17 July 2021.

251 See the Public Finance Management Act 1999, s 53 and 54.

252 Irregular spending equated to irregular expenditure which is defined in section 1 of the Public Finance Management Act 1999 as "expenditure, other than unauthorised expenditure, incurred in contravention of or that is not in accordance with a requirement of any applicable legislation".

253 Companies Act 2008, s 77(2)(3). See also Companies Act 2008, s 162(2). See also Public Finance Management Act 1999, s 83(2) and 86(2).

SOC Ltd.[254] Section 2(1) of the Legal Succession to the South African Transport Services Act determined the incorporation of a state-owned company, which became known as Transnet. The said incorporation ensued in terms of Legal Succession to the South African Transport Services Act of 1989.[255] Accordingly, and apart from its enabling Act, Transnet SOC Ltd is regulated in terms of the Constitution, the PFMA, the Companies Act and codes of good corporate governance.

It is important to briefly look at Transnet's conduct over the years to establish whether some of its affairs were conducted in breach of the laws that govern it. In *Transnet SOC Limited v IGS Consulting Engineers CC and Others,*[256] the court evaluated claims of irregular expenditure and illegal awarding of contracts in contravention of section 217 of the Constitution. The Court found that various contracts awarded and concluded by Transnet were unlawful.[257] This shows that wide governance breaches have marred Transnet's business conduct over the years.[258] This again raises the question of how all the irregularities involving breaches of relevant laws could have been going on under the watch and approval of the board of directors.

More important, however, is the determination of whether the legal framework for non-executive director liability and its response to breaches of directors' duties in SOCs is to be blamed or not. It seems not to be the case. The failure to hold non-executive directors of SOCs liable and accountable, despite laws that provide for it, points to a severe lack of enforcement.

The functionaries that need to take action to defend the good governance of SOCs have seemingly been lacking. Importantly, the shareholder representatives should be

254 Transnet Overview < https://www.transnet/AboutUs/overview.aspx >accessed 25 April 2021. See also the Legal Succession to the South African Transport Services Act 1989, s 2(1).

255 Legal Succession to the South African Transport Services Act 1989, s 2(1). See also *Chirwa v Transnet Limited and Others* 2008 (4) SA 367 (CC) [4].

256 ZAGPJHC 527 [2] and [22].

257 *Transnet SOC Limited v IGS Consulting Engineers CC and Others* ZAGPJHC 527 [40].

258 Andisiwe Makinana, Sowetan Live: Transnet wants court to set aside R54 bn contract for 1,064 locomotives <https://sowetanlive.co.za/news/south-africa/2021-03-09-transnet-wants-court-to-set-aside--r54bn-contract-for-1064-locomotives >accessed 11 May 2021.

instrumental in serving on SOC boards where directors are at the centre of corporate governance breaches.

Although there is room for improvement in the legal framework targeted at SOCs,[259] the corporate failures they have been facing are not directly attributable to an insufficient legal framework. It stems from optimal enforcement of existing legal instruments and other best practices in corporate governance. Instances where some SOCs or parties involved in corporate breaches challenged the use of the Companies Act indicate a level of backlash in SOCs using the Companies Act, where an enabling legislation provides for a procedure. For instance, in *SOS Support Public Broadcasting Coalition v South African Broadcasting Corporation Soc Limited*,[260] in which a question of which law to use on the removal of directors the Court favoured the use of the primary legislation on this point.

It is suspected that the insistence by the Respondent to use any other laws than the Companies Act may have been motivated by the absence of liability provisions compared to the Companies Act in any other law. This thesis explores whether the current legal framework is sufficient in holding non-executive directors accountable for breaches of their duties in SOCs. It also investigates whether lack of political will in ensuring good corporate governance in SOCs is a contributing factor to lack of accountability and liability of non-executive directors in SOCs.[261]

In one matter, the board of directors of the SABC found itself caught up in ministerial problems which the Court summed up as follows:[262]

> The two applications are instituted in the background of systematic and repeated failures

259 An example of improvement in the governance of SOCs is evident in the introduction of the National State Enterprises Bill, 2024.

260 *SOS Support Public Broadcasting Coalition v South African Broadcasting Corporation Soc Limited* 2017 JDR 1686 (GJ) para 146.

261 *SOS Support Public Broadcasting Coalition v South African Broadcasting Corporation Soc Limited* 2017 JDR 1686 (GJ) [1].

262 *SOS Support Public Broadcasting Coalition v South African Broadcasting Corporation Soc Limited* 2017 JDR 1686 (GJ) [1].

> in the governance and management of the SABC. This has presented itself in the continuous turn-over of Directors of the Board with resultant financial mismanagement. The critical systemic causes of governance failures and mismanagement were found to have been caused by Ministerial interference in the governance and operations of the SABC.

The Court indicated how ministerial interference was causing havoc in the affairs of the SABC. It coincided with the Public Protector's Report indicated in the judgment and titled 'When Governance and Ethics Fail.'[263] This is one example of how corporate governance in SOCs has been failing in South Africa, at the hands of those charged with ensuring it is well applied.

2.3.4.4. Eskom Conversion Act

The Eskom Conversion Act establishes Eskom SOC Ltd which remains South Africa's dominant and biggest generator, supplier and distributor of electricity in South Africa and beyond.[264] Eskom's establishment dates back many years and has seen changes to its name and ownership structure over the years culminating into Eskom SOC Ltd. At present, Eskom SOC Ltd is wholly owned by government and is a fully state-owned company.[265] Eskom SOC Ltd is registered as a company through a prescription in the Eskom Conversion Act 13 of 2001(the Eskom Conversion Act).[266] Primarily, the Eskom Conversion Act provides for foundational matters of transitioning Eskom SOC Ltd from its previous organisational structure to a public company and does not contain provisions in terms of how Eskom SOC Ltd must be governed.

In practice, Eskom SOC Ltd has had its share of poor governance such that, at the time of writing, it had been in the red for several years. Businesstech[267] quoting the South

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263 *SOS Support Public Broadcasting Coalition v South African Broadcasting Corporation Soc Limited* 2017 JDR 1686 (GJ) [3].

264 Andreas Klees *Electricity Law in South Africa* (Juta 2014) 44-45.

265 Eskom Conversion Act 2001, s 2 and s 4(2).

266 Eskom Conversion Act 2001, s 4(1) and the Companies Act 2008, s 8(1)(2).

267 Businesstech: The one thing Eskom's new boss needs to tackle urgently<https://businesstech.co.za/news/energy/356139/the-one-thing-eskoms-new-boss-needs-to-

African Chamber of Commerce and Industry (SACCI), reported that Eskom SOC Ltd had amassed a huge debt of over R450 billion as at 2019, although the situation has been improving as discussed below. SACCI was further quoted by Businesstech as having said the following:

> We hope that corporate governance will prevail at Eskom to allow an independent non-executive board, operating with the highest level of integrity, to execute its mandate through competent, and experienced executive management, to turn Eskom around.

The statement assigns Eskom SOC Ltd's problem as a failure in corporate governance. Importantly, a turnaround strategy would depend on its implementation by non-executive directors operating with the highest level of integrity and competence. Seemingly, the statement was made with the awareness that, being non-executive on its own would not serve as a panacea for Eskom SOC Ltd's problems. This has to be coupled with integrity and competence. Thus, pertinent questions about Eskom remain unanswered.

For instance, why have the non-executive directors on Eskom's board never been held to account for breaches of governance duties?[268] Furthermore, the PFMA[269] should have been applied to the way Eskom accumulated massive debts, which indicate wasteful expenditure. It was within the province of the Minister of Public Enterprises to have acted against wasteful expenditure. Furthermore, those involved in causing the wasteful expenditure including the board of directors should have been held to account. The State of Capture report[270] which became the subject of the State Capture Inquiry revealed profound corporate governance breaches at Eskom SOC Ltd. Several grave findings were made against Eskom's board in relation to its conduct. In parts, the report states the following in relation to Eskom SOC Ltd:

> (d) This may amount to a possible contravention of section 38 and 51 of the PFMA which states that a Board needs to prevent fruitless and wasteful expenditure, which in turn is an act of financial misconduct under section 83(1)(a) of the PFMA and subject to the

tackle-urgently >accessed 09 May 2021).

268 This is with reference to previous boards of directors during the State of Capture years.

269 Public Finance Management Act 1999, s 2, 51 and 83(2).

270 The State of Capture: Report No. 6 of 2016/17 20 <www.saflii.org/images/329756472-State-of-Capture.pdf >accessed 09 May 2021.

penalties under section 86(2) of the PFMA.

(e) It appears that the Eskom Board did not exercise a duty of care, which may constitute a violation of section 50 of the PFMA.

Despite the serious findings in the State of Capture report, not a single director, executive or non-executive of Eskom SOC Ltd has been held accountable to date for the governance breaches directors committed at Eskom SOC Ltd. From the report, most governance breaches at Eskom SOC Ltd ranged from various conflicts of interests to directors' failure to uphold their fiduciary duties. Had the executive and non-executive directors at Eskom SOC Ltd exercised their fiduciary duties and the duty of care and skill properly, as they were required to, Eskom SOC Ltd would not have spent billions in irregular expenditures. That today Eskom SOC Ltd is a commercially insolvent SOCs is a direct result of all the governance breaches and various overreaches that the executive and non-executive directors on Eskom SOC Ltd's board either occasioned or oversaw and refrained from acting upon.

In a recent matter of *Eskom Holdings SOC Limited v McKinsey and Company Africa (Pty) Ltd and Others,*[271] it was established that Eskom had recklessly paid money for work that was not carried out. The court stated that:

> Although the 2015 McKinsey contract was envisaged to be from the effective date on 1 October 2015, for a period of six months, it endured only for a period of three months until January 2016. In spite of its short-duration McKinsey were remunerated by Eskom as if the contract was for the entire period of six months. The conclusion of this contract was entered into without any tender process. In terms of this particular contract, McKinsey had to have a Supply Development & Localization (SD&L) partner. But no partner was named in the contract. Neither were the terms specified in the said contract. What is clear from the contract, however, is that Trillian was not a party to the contract. In the three months until January 2016 inexplicably, McKinsey was paid over R70 million while Trillian was paid R30,6 million. The latter was paid notwithstanding its CEO's evidence that at that time Trillian had only two employees who had done no billable work for Eskom

271 [2019] ZAGPPHC 185 [23].

at all let alone work worth this amount of money.[272]

It is evident from the extract that events and irregular transactions at Eskom SOC Ltd over the past years reveal a spectacular governance failure. The fact that Eskom SOC Ltd found itself saddled with a lot of financial debts was indicative of how irregularly it spent its financial resources whilst in debt. All the irregular expenditure happened under the control of the board of directors then in charge. Eskom SOC Ltd has made several headlines in the past few years. In fact, it has been blamed for negatively affecting the economy, nearly grounding all industries in South Africa, big and small alike. This is even more reason why this study argues that SOCs failing to achieve their legal mandate has a direct negative impact on both the economy of the country and the welfare of the citizens. It is an appreciation that, it is submitted, should be internalised by all directors including non-executive as they accept to serve on a board of an SOC. Behind SOCs are human beings whom the directors should have in mind as they oversee the corporate governance of the SOCs.

It is important to note that Eskom SOC Ltd, a duly incorporated company, finds its regulation under the Companies Act. As a public entity, it is still subject to the PFMA, the Constitution and best practice codes. It is unclear why the above legal instruments have not been instrumental in holding the board of directors and others at Eskom SOC Ltd liable and accountable for the way it traded recklessly and against well-established good corporate governance frameworks. Equally, the same legal instruments could have been relied upon to strengthen corporate governance at Eskom.

Recently, some indications have started to emerge that Eskom SOC Ltd is no longer indebted to the same levels as before.[273] This is a welcome improvement and an assurance that the appointments made post the various State Capture scandals may have been of competent individuals who can bring good corporate governance to Eskom.[274]

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272 *Eskom Holdings SOC Limited v McKinsey and Company Africa (Pty) Ltd and Others* [2019] ZAGPPHC 185 [13].

273 Eskom Debt Relief Amendment Bill, 2025, s 1(c); Swisher Post – What you must know about the new Eskom Debt Relief Amendment Act Bill <-https://www.swisherpost.co.za/news/taxpayers/set-to-carry-burden-of-eskom-debt-with-tariff-hikes-and-new-bill/ - >accessed 09 May 2025.

274 Admire Moyo – itweb – Tech personality Mteto Nyati 'ideal choice' to lead troubled Eskom: <https://www.itweb'co.za/article/tech-personality-mteto-nyati-ideal-choice-to-lead-troubled-

2.3.4.5. Broadcasting Act

The Broadcasting Act is the law that establishes the South Africa Broadcasting Corporation (SABC).[275] In terms thereof, SABC is incorporated as a company under the Companies Act.[276] Section 8A(5) of the Broadcasting Act makes it clear that the Companies Act applies to the SABC. The Broadcasting Act on its own does not contain provisions establishing liability and accountability for both executive and non-executive directors due to breach or overreach of their governance duties. Since the Broadcasting Act subjects the SABC expressly to regulation by the Companies Act, the establishment of liability for directors in the Companies Act applies to the non-executive directors of the SABC. There is therefore no shortage of mechanisms through which to bring the much-needed accountability to the SABC board of directors.

Another important aspect of the Broadcasting Act is that it clearly stipulates the nature of directors that should constitute its board.[277] The Board of the SABC is an amalgamation of executive and non-executive directors. The executive directors of the SABC are drawn and appointed from specific positions within the SABC by a stipulation in the Broadcasting Act.[278] Section 13 of the Broadcasting Act provides for twelve non-executive directors to be appointed by the President on the advice of the National Assembly.

It does seem that the composition of the SABC board meets international standards when it comes to a board's composition, as the Broadcasting Act provides for a mixture of both executive and non-executive directors for the SABC.[279] However, the provision may fall short of providing for gender and diversity in terms of expertise and educational

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eskom/KBpdg7pmRgZMLEew-> accessed 09 May 2025.

275 Broadcasting Corporation Act 1999, s 8A(1).

276 Broadcasting Corporation Act 1999, s 8A(1) ;Companies Act 2008, s 8.

277 Broadcasting Corporation Act 1999, s 12(a) and s 13(1).

278 Broadcasting Corporation Act 1999, s 12(b) provides that the Group Chief Executive Officer, Chief Operations Officer and Chief Financial Officer or their equivalent are the executive members on the Board of Directors. See also*: Democratic Alliance v South African Broadcasting Corporation SOC Ltd (SABC); Democratic Alliance v Motsoeneng* [2017] 1 All SA 530 (WCC) [3].

279 Broadcasting Act 1999, s 12(a)(b) and s 13(4).

qualifications. Of importance for the study is the ascertainment whether such composition has been of benefit to the SABC. If the board composition has not been of benefit, it may call for an examination of whether there has been some form of liability and accountability for how non-executive board members of the SABC breached their governance duties. In principle, the composition of the board of directors of the SABC ticks most boxes. Given the good-looking composition on paper in the Broadcasting Act, one expects that governance at the SABC would be in good shape.

Events at the SABC, such as poor executive appointments of the Chief Operations Officer at the hands of a board of directors and poor financial management, indicated that despite a board composition that met international standards, governance breaches at the SABC continued to prevail.[280] In this regard, Beecher-Monas questioning the well-supported rationale for the appointment of more independent (non-executive) directors stated that:[281]

> The premise underlying this push for independence is that independent directors are supposed to be better monitors because, in theory at least, they will be less willing to rubber stamp management policies and more willing to consider alternative courses of action.

What is of grave concern is the fact that despite the SABC board of directors comprising several non-executive directors', clear findings by the Public Protector of rampant mismanagement and other governance breaches were found to exist at the SABC.[282] Of further concern is that no liability was placed on any non-executive directors at the SABC. The lack of liability and accountability on non-executive directors in SOCs contributes excessively to the downfall of the public entities. Makuta maintains that 'unless directors can be held accountable, there would be nothing to compel them to perform their duties well and diligently.[283]

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280 *Democratic Alliance v South African Broadcasting Corporation SOC Ltd (SABC); Democratic Alliance v Motsoeneng* 2016 (2) SA 522 (SCA) [9], [10] and [197].

281 Erica Beecher-Monas, 'Marrying Diversity and Independence in the Boardroom: Just How Far Have You Come Baby?' (2007) OLR 373, 375.

282 The Public Protector Report titled "When Governance Ethics Fail" February 2014 10: <https://www.pprotect.org/sites/default/files/Legislation_report/SABC%20FINAL%20REPORT%2017%20FEBRUARY%202014.pdf > accessed 08 May 2021.

283 Emily Makuta, 'Towards Good Corporate Governance in State-Owned Industries 69.

Without consistent steps designed to hold non-executive directors of SOCs liable and accountable, there remains no basis to expect good corporate governance. The accountability advocated for is one where non-executive directors of SOCs are personally held liable for the governance breaches they cause. For instance, if because of poor handling of governance duties by a board of directors an SOC loses money or becomes a loss-making company, the board of directors presiding over such a poor state of governance should be made to account for the losses. In the case of the SABC, even though the provisions in the Broadcasting Act may be lacking in providing director accountability, it is not the end of the matter because the SABC is subject to the PFMA, and the Companies Act provisions. Both these Acts provide for liability and accountability. It is accordingly irregular that non-executive directors at the SABC have gone unpunished for governance breaches caused to the SABC.

2.3.5. Protocol on corporate governance in the Public Sector

A non-binding protocol on corporate governance for application in the public sector exists in South Africa.[284] The Protocol was introduced to fill the existing corporate governance requirements gap after South Africa's transition to democracy in 1994.[285] The Protocol states that it applies to, among other entities, all public entities listed under Schedules 2 and 3 of the PFMA.

In practice, the Protocol's actual enforcement, application, and effect on SOCs have proven difficult to ascertain.[286] Furthermore, the Protocol contains no provisions aimed at holding those charged with the governance of public entities liable and accountable.

In essence, the Protocol contains no provisions to establish liability and accountability for directors who may be found to have breached their governance duties. Instead, the

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284 The Protocol on Corporate Governance in the Public Sector (the Protocol) <https://www.gov.za/sites/default/files/gcis_document/201409/corpgov0.pdf > accessed 05 May 2021.

285 See The Protocol on Corporate Governance in the Public Sector 2 <https://www.gov.za/sites/default/files/gcis_document/201409/corpgov0.pdf >accessed 05 May 2021.

286 Despite numerous diligent searches no evidence of enforcement action could be obtained.

Protocol refers to section 83(2) of the PFMA[287] and section 424 of the Companies Act of 1973, which are still in existence.[288] Director liability of the nature stated under section 83(2) of the PFMA is very limited and relates to financial breach and does not cover a full spectrum of a director's governance duties. This limits the application of the Protocol. In any event, the Protocol is a non-binding document whose force and effect are in doubt.

Despite the fact that the Protocol outlines the distinction between executive and non-executive directors,[289] it is not a useful tool in terms of the overall governance of SOCs in South Africa. The Protocol recites provisions of director liability contained in the PFMA and the Companies Act; on its own it goes no further than that.[290] For the above reason, the Protocol offers less authority and should be seen as an insignificant attempt towards furthering a sound legal framework for director liability. In addition to the foregoing, the enforcement of the Protocol in the affairs of SOCs is in practice less visible and largely absent. Compounding the above is the lack of any enforcement of breaches of the Protocol's provisions. It is submitted that no significant expectation that the Protocol, a non-binding document, can bring about improved corporate conduct of SOCs in South Africa currently exists.

2.3.6. Codes of Corporate Governance

The use of corporate governance codes has become common across many jurisdictions.[291] The application of these codes to mainly listed companies or SOCs, however, varies due to the following:

Corporate governance codes function within a given legal environment. The interaction

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287 Public Finance Management Act 1999.

288 Companies Act 1973.

289 The Protocol on Corporate Governance in the Public Sector 17 < https://www.gov.za/sites/default/files/gcis_document/201409/corpgov0.pdf >accessed 05 May 2021.

290 The Protocol on Corporate Governance in the Public Sector, 5.2.4: https://www.gov.za/documents/other/protocol-corporate-governance-public-sector-01-jan-2002 > accessed 04 August 2024; Public Finance Management Act 1999, s 83 and the Companies Act 2008, s 77(2) and s (3).

291 Such as the Canada, United Kingdom, the Netherlands amongst others; <https://www.scribd.com/document/134903803/Codes-of-Corporate-Governance-Yale-053112 > accessed 17 July 2021.

> with the legal system is a complex matter that differs considerably from state to state, due to differences in the legal status of the codes, but also due to differences in the relevant legal systems. Enforcement techniques and efficiency will be directly dependent on the legal nature of the codes.[292]

South Africa is home to the famous King Reports on good corporate governance.[293] The King Codes as they are sometimes referred to, have been published since 1994 beginning with King Report I, the King Report II in 2002, and the King Report III in 2009, with the King Report IV being the most recent.[294] Important features of the King Reports is how they apply to companies including other entities that may choose to adopt them. King IV avails itself to be of application to SOCs.[295] It is notable that, King IV proposes a regime based on *'apply and explain'* as opposed to *'apply or explain'* which was the regime of the King Report III.[296] Since King III the Johannesburg Stock Exchange (JSE) has required of companies listing on the exchange to indicate how they had factored into their operations the principles of the relevant King Report.[297] Commencing with King II the Johannesburg Stock Exchange required some form of compliance or explanation of the companies listed as follows:

> Following King II, the Johannesburg Stock Exchange Limited (JSE) required listed companies to include in their annual report a narrative statement as to how they had complied with the principles set out in King II, providing explanations that would enable stakeholders to evaluate the extent of the company's compliance and stating whether the reasons for non-compliance were justified. There are indeed examples in South Africa of companies listed on the JSE that have not followed practices recommended but have explained the practice adopted and have prospered. In these examples, the board ensured that acting in the best interests of the company was the overriding factor, subject always to

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292 Eddy Wymeersch, 'The enforcement of Corporate Governance Codes' (2005) ECGI Working Paper Series in Law, European Corporate Governance Institute, 113, 114.

293 Institute of Directors in South Africa, King Reports: https://www.iodsa.co.za/page/king_reports > accessed 04 August 2024.

294 King IV Report.

295 King IV Report principle 2, 112.

296 King III Report (2009), 7; King IV Report, 37. Own emphasis added.

297 Monray Marsellus Botha, 'The Role of Directors in the Promotion of Corporate Governance: A South African Perspective' (2009) OBITER 702, 709.

> proper consideration of the legitimate interests and expectations of all the company's stakeholders.[298]

The JSE subscribes to certain principles espoused in King IV.[299] It has been observed that certain governance principles mentioned in the King Codes are also included in the Companies Act.[300] The commonality in provisions, even to a lesser extent, may bolster adherence to the King Codes as being contemporary and of assistance to companies. The King Codes are recommended for application in the governance of companies of all forms, including SOCs and other government-owned public enterprises. The codes apply on a voluntary basis.[301]

Despite the codes being voluntary for public sector companies, they nonetheless offer good corporate governance principles to SOCs.[302] The courts have also referred to the King Reports[303] which is testimony that the codes can fill up gaps that may exist in legislation or other laws on good governance practices. For example, in *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd,* the court stated that:[304]

> 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. To this end the corporate community within South Africa has widely and almost uniformly accepted the findings and recommendations of the King Committee on Corporate Governance.[305]

It is evident that the codes can play a complementary role in legislation and other laws where legislation is silent on a matter. Furthermore, the King Reports generally deal with

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298 King III Report, 6.

299 JSE: Ensuring Sound Corporate Governance< https://group.jse.co.za/governance > accessed 04 August 2024.

300 King III Report, principle 3.1. See also the Companies Act 2008, s 94.

301 The King IV Report 35.See also section 6.1.10 of the State Capture Report <https://www.saflii.org/images/329756472-State-of-Capture.pdf > accessed 06 May 2021.

302 King Report IV 112.

303 For example *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd* 2006 (5) SA 333(W) [16.7]; *Mpofu v South African Broadcasting Corporation ("SABC") [*2009] (4) SA 169 (GSJ) [29].

304 *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd* 2006 (5) SA 333 (W) [16.7].

305 *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd* 2006 (5) SA 333 (W) [16.7].

a wide spectrum of director conduct and organisation which make them a good resource for companies that want to align their operational philosophies on modern governance approaches.[306]

The King IV Report contains several general provisions relating to the accountability of those charged with governance duties.[307] No specific provision relating to the establishment of liability for non-executive directors who breach their governance duties in SOCs exists. King IV does, however, provide for the evaluation and monitoring of performance in SOEs in the following terms:

> The accounting authority should ensure that the evaluation of its own performance and that of its committees, its chair and its individual members, support continued improvement in its performance and effectiveness.[308]

The principle gives credence to the fact that accountability of directors is recognised in King IV in that they should give account of their performance. This provides confirmation that, the accountability of directors regardless of whether they are executive, non-executive or independent, is important.[309] King IV has been understood as geared to strike a balance between conformance and performance.[310] Critical to the foregoing is that a director is taken to have duties to fulfil and the designation of executive or non-executive does not absolve him or her from the duties of a director.[311] Although it is noted that the King Reports are best practice codes, it is submitted they are insufficient to project a good repository of authoritative material relating to non-executive directors' liability and accountability for governance breaches in SOCs.

The main weakness of King IV in respect to its application to SOCs is that they are not

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306 King Report IV 40-41.

307 King IV Report 6.6.

308 King IV Report 6.6, principle 9.

309 King IV Report principles 6, 7, 8 and 9.

310 Public Finance Management Act 1999, s51 <https://www.deloitte.com/za/en/services/audit/ analysis/kingiv-indenpendent-directors.html > accessed 18 July 2021.

311 Companies Act 2008, s76(2)(3): King Report IV; *Fisheries Development Corporation of SA Ltd v Jorgensen; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd* 1980 (4) SA 156 (W) [165].

regarded as binding.[312] Although the non-binding nature of King IV is acknowledged, it is applied to public companies that list on the JSE. Furthermore, it is good that King IV contains an elaborate section that is specific to state-owned companies.[313] It is accordingly suggested that codes on corporate governance such as King IV should receive legal recognition especially where relevant legislation does not regulate certain matters of SOCs. Draft King V has provisions that indicate some approaches which are suggested in this thesis. This includes the aspect of monitoring and evaluating performance and ensuring accountability.[314]

2.3.7. Conclusion

Section 2 of the Constitution establishes the Constitution as the supreme law of South Africa. The supreme law sets the tone with which all laws must be consistent or stand the risk of being declared invalid. The Constitution establishes organs of State including SOCs.[315] SOCs governance principles are set out in the Constitution,[316] in an enabling Act, the PFMA and the Companies Act. Clearly, a raft of laws applies to the operations and management of SOCs. Specific legislation providing a comprehensive regulatory framework for SOCs do not currently exist.

The Companies Act, and to an extent the PFMA,[317] provides for the liability and accountability for directors who breach or overreach their governance duties in SOCs. Despite the availability of accountability provisions in the respective Acts in practice many SOCs have been tainted with corporate governance scandals without decisive action being taken against those charged with their governance. The lack of enforcement of the clear

312 The weakness stems from the fact that King IV Report as a code is not law. Notwithstanding, the courts do refer to the principles in the King Codes from time to time. For example in: *Mthimunye-Bakoro v Petroleum Oil and Gas Corporation of South Africa* (SOC) Ltd 7 [2015] ZAWCHC 113;2015 6 SA 338.

313 King IV part 6.6.

314 King V, 2025: Governance and leadership role and responsibilities.

315 Constitution of the Republic of South Africa, 1996, s 239.

316 Constitution of the Republic of South Africa, 1996, s 195(1)(2)(3).

317 Companies Act 2008, s 77(1)(2)(3); Public Finance Management Act 1999, s 83, s 83 and s 84.

and commendable legal provisions in the Companies Act[318] to non-executive directors, who flippantly and frivolously breach and overreach their governance duties in SOCs, is highly regrettable.

The failure to invoke and apply available legal provisions to errant non-executive directors negatively affects the very public administration that the Constitution provides for – which public administration must be accountable to the public.[319] Therefore, it is submitted that failure of SOCs in South Africa is a total disregard of the Constitution, specifically its values and principles which call for accountability in State organs.[320]

Accountability has been held by the Constitutional Court as a central value, yet it remains elusive in a number of SOCs.[321] In the setting of SOCs, the High Court has stated that executive directors and non-executive directors are ultimately accountable for the performance and business affairs of the company.[322] It is important to underscore the critical tone that the Constitution sets as the way SOCs should be managed. Being the supreme law, if enforcement of accountability can be taken at a constitutional level in SOCS in South Africa, a glimmer of hope may soon emerge.

318 Companies Act 2008, s 77(2)(3) and the Public Finance Management Act 1999, s 83 and s 84.
319 The Constitution of the Republic of South Africa, 1996, s195.
320 *Black Sash Trust v Minister of Social Development and Others* 2017 (3) SA 335 (CC)[14].
321 *Black Sash Trust v Minister of Social Development and Others* 2017 (3) SA 335 (CC)[14].
322 *South African Broadcasting Corporation Ltd v Mpofu* [2009] (4) SA 169 (GSJ) [30].

CHAPTER 3

CORPORATE GOVERNANCE DEVELOPMENTS AND ORGANS OF CORPORATE GOVERNANCE IN SOCs

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3.1 Introduction and Historical development of corporate governance

Corporate governance and its development have been widely written about.[323] This indicates that it is critical to the success of companies and institutions.[324] It is important to have a clear understanding of what the concept of corporate governance means. When considering the origin of corporate governance, Gower[325] maintains that *'*one could say that corporate governance, whether recognised under that name or not, is a topic which is as old as the large company.*'*

A study involving corporate governance may not be complete without looking into the historical origins of this important subject. It is important for this research to establish how corporate governance evolved in South Africa. From such an examination, it should be established how various instruments provide and regulate the liability and accountability of non-executive directors in SOCs. For example, would it be that when the concept was being received and nationalised, the understanding was that it would go a long way in bringing about sustainable companies? Part of the promise in accepting corporate governance was to deliver sustainable results for companies, if well implemented.

The importance of the examination is to situate the thesis in a proper context of how liability for non-executive directors is provided for in the governance of SOCs in South Africa. Although corporate governance has become important worldwide, its origins are difficult to trace with certainty. It is reasonable to argue that corporate governance, in whatever form it may have been, began with the first companies that were established.[326] The argument is made because it is common cause to submit that such pioneering

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323 Mervin King and Fabian Ajogwu, *Outcomes-Based Governance: A Modern Approach to Corporate Governance,* (Juta 2020) 1.

324 FS Bryan 'Corporate Governance: A Director' View' (1983) University of Miami Law Review 273; LM Small 'The Evolving Role of the Director in Corporate Governance' (1979) The Hastings Law Journal 1353-1355; Botha, 'The Role and Duties of Directors in the Promotion of Corporate Governance, 702.

325 Paul L. Davies and Sarah Worthington, *Gower's Principles of Modern Company Law* (10th edn Sweet and Maxewell 2016) 349.

326 JN Price titled 'What Is the History of Corporate Governance and How Has It Changed?' <https://www.diligent.com/insights/corporate-governance/what-is-the-history-of-corporate-governance-and-how-has-it-changed/ > accessed 16 January 2022.

companies were managed and controlled in a certain way. The way in which control and management of such companies were conducted is what has become corporate governance today. For instance, as far back as 1651, the existence of the Dutch East India Company has been noted.[327] At that point not much was known in the way of corporate governance as it is known worldwide today. The Dutch East India Company was an outfit seemingly established in the Netherlands. It was involved in doing business by ships and ended up establishing its presence in the Cape, South Africa. For the purposes of this study, the following has been noted about the Dutch East India Company:

> The outpost was a foundation of the Company, which was a largely autonomous commercial body, acting independently of the Dutch state. It was subordinate to the Company's board of directors.[328]

Of significance here is that companies have been in existence since the sixteenth century and were managed and controlled in ways that were possible at that time. Cheffins[329] posits that the revolution in corporate governance in the USA took effect between 1880 and 1930, and family enterprises were common. Around that time, family-run businesses were prevalent. They had to transition to an era where the involvement of other parties such as managers or directors who were not family members, was a turning point in the governance of enterprises. The argument is that, at least two features became critical; first, it was the existence of companies before corporate governance fell into vogue. Second, it was the beginning of a different corporate structure which transitioned companies into the corporate governance known today.[330]

Wells[331] points out that the modern form of corporate governance began in 1932 with the publication of the famous book, *The Modern Corporation and Private Property,* by Adolf

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327 David Fourie, The Role of Public Sector Enterprises in the South African Economy 32; <https://www.sahistory.org.za/article/dutch-east-india-company-deicvoc > accessed 04 August 2024.

328 K Schoeman, *Early Slavery at the Cape of Hood Hope 1652-1717* (Protea Book House Pretoria 2007) 11.

329 B R Cheffins 'History and the Global Corporate Governance Revolution: The UK Perspective' (2001 University of Cambridge) 1, 4.

330 Robert C Bird and Stephen Kim Park, 'Organic Corporate Governance' (2018) Boston College Law Review 21, 28-29.

331 H Wells 'The Birth of Corporate Governance' (2010) Seattle University Law Review 1247.

A Berle and Gardiner Means.[332] Wells is careful in situating the origin of corporate governance only in *The Modern Corporation and Private Property,* as he notes that others wrote on the subject before Berle and Means.[333] It is submitted that the title *The Modern Corporation and Private Property* is indicative of a transition from an old form of corporations to a new one. This is a plausible argument because of the word 'modern' found in the title of the book. The Google dictionary defines the word *'*modern' as 'relating to the present or recent times as opposed to the remote past.'[334] That means some form of corporate governance existed before the modern one emerged.

The discussion of managing and controlling companies did not begin with Berle and Means, as there were companies in existence before their project was completed. Berle and Means admit to this fact and at no stage in their project did they wish to claim the status of being the first to talk about corporate structure.[335] What separates Berle and Means's project of *The Modern Corporation and Private Property* from the rest of the authors at the same time is that it was well documented and well organised. Critical to *The Modern Corporation and Private Property* is the discussion of various parties who come into play in controlling and managing of a company.[336] Berle and Means point out that, the problems of the corporation were exacerbated with the separation of control and ownership of corporations. Their stance in this analysis is that those who manage the corporation on behalf of others advance their own interests and forget the interests of shareholders, who are generally dispersed. Therefore, and importantly to Berle and Means' project, is their discussion of various organs which in a modern company plays a part in its control, ownership, and management. Their discussion is important because the concept of 'corporate governance' is only complete when one discusses the organs that are responsible for it in companies. These are the most important organs of corporate governance in a company, including in SOCs.

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332 Adolf A Berle and Gardiner C Means *The Modern Corporation and Private Property* (Hancourt, Brace and World Incorporated 1932).

333 Berle and Means, *The Modern Corporation and Private Property*.

334 Oxford Advanced Learner's Dictionary (7th Edition Oxford University Press London 2010) 946.

335 Berle and Means, *The Modern Corporation and Private Property,* 11*.* – where they state the following: 'Corporate enterprise is no new institution. From the days of the joint stock trading companies which built up the merchant empires of England and Holland in the Seventeenth Century, the quasi-public corporation has been well-known.'

336 Berle and Means, *The Modern Corporation and Private Property*, 66 and 112

Accordingly, Berle and Means discuss these three organs and how they affect the business of the corporation and the powers that each may likely wield.[337] It is for this reason that it may be said that Berle and Means begun the discussion of corporate governance in its modern facets. The argument is that since the publication of *The Modern Corporation and Private Property,* a level of awareness of corporate governance in its modern format has been received across the world. From that early stage of corporate reforms, 'corporate governance' as a term did not trend under this name as it is known today.

However, the management of a corporation and the appreciation of the organs involved in it were crystalised and formalised. It is evident that despite the circulation of modern corporate governance principles such as separation of organs and powers in a company, good governance remains elusive. Questions may be raised as to why corporate governance has not improved the state of companies even in its modern format. This may hold true for SOCs which have subscribed to the concept of corporate governance, almost unprepared for what it takes.

One widely circulated definition is credited to the late Sir Cadbury, who stated that corporate governance is the practice of how companies are managed and controlled.[338] This definition has become insufficient to address and fit the description of changing governance structures and the ever-increasing paradigm shifts and scandals which continue to manifest in various spheres of company activities.[339] The definition is insufficient because modern corporate governance needs to account for more than merely how corporations are managed and controlled.[340] The continuous innovation in various sectors of the economy may trigger the need to revisit the foundational definition of corporate governance. With a broader definition, the scope of operation may also be widened. The argument, therefore, is that for corporate governance to reign in all forms of

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337 Berle and Means, *The Modern Corporation and Private Property*, 129 and 196-199.

338 Cadbury Report, 1992, 2.5; The European Corporate Governance Institute: Cadbury Report (The Financial Aspects of Corporate Governance), para 2.5; < https://www.ecgi.global/publications/codes/cadbury-report-the-financial-aspects-of-corporate-governance > accessed 04 August 2024.

339 Botha 'The Role and Duties of Directors in the Promotion of Corporate Governance 703; Robert B Thompson 'Corporate Governance after Enron' (2003) Houston Law Review 99-102.

340 Botha 'The Role and Duties of Directors in the Promotion of Corporate Governance 703; David A Detomasi 'International Regimes: The Case of Western Corporate Governance (2006) International Studies Review 227.

management, operations, and leadership paradigm shifts, it should be defined correctly. In this regard Cassim expresses that corporate governance comes down to effective leadership which mirrors responsibility, accountability, fairness and transparency.[341]

Naidoo states that corporate governance should now be defined with the inclusion of such tenets as risk management, compliance, performance and sustainability and the payment of due regard to stakeholders.[342] Yet again, others such as Sale assert that the 'term corporate governance is widely used to refer to the balance of power between officers, directors, and shareholders.'[343] In this regard, Naidoo explores the importance of corporate governance and highlights the following factors as of importance:[344]

> Corporate governance regulates the exercise of power (that is, authority, direction and control) within a company in order to ensure that the company's purpose is achieved (namely the creation of sustainable shareholder value, the raison d'etre of most for-profit companies). It encompasses:
>
> - The creation and ongoing monitoring of an appropriate and dynamic system of checks and balances to ensure the balanced exercise of power within a company;
> - The implementation of a process whereby risks to the sustainability of the company's business are identified and managed within acceptable parameters; and
> - The development of practices which make and keep the company accountable to the company's identified stakeholders and the broader society in which it operates.

In their report, 'Who's running the Company: A guide to reporting on corporate governance?' the International Finance Corporation reflected on corporate governance by stating as follows:

> Corporate governance describes the structures and procedures to direct and control companies, and the processes used by the board of directors to monitor and supervise management in discharging the board's accountability to shareholders for the running of the

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341 *South African Broadcasting Corporation Ltd v Mpofu* [2009] 4 All SA 169 (GSJ) [64]; Farouk H I Cassim, Maleka Cassim, Rehana Cassim and others *Contemporary Company Law* (2nd edition Cape Town Juta 2012) (473).

342 Naidoo, *Corporate Governance: An Essential Guide for South African Companies* (3rd end LexisNexis Johannesburg 2016) 3.

343 Hillary A. Sale, 'Delaware's Good Faith' (2004) Cornell Law Review 460.

344 Naidoo, *Corporate Governance*, 4.

company and the performance of its operations.[345]

From these definitions, corporate governance can, therefore, be understood to be about managing and controlling companies with the objective of bringing about their efficiency and sustainability.

Whereas the previous discussion is important, it does not clearly set out how South Africa embraced corporate governance in modern times. The legal framework of South Africa's corporate governance regime appears to have come via the United Kingdom.[346] South Africa has since been able to develop various instruments to regulate wide aspects of corporate governance in companies and in SOCs.[347]

3.2. Corporate governance implementation in SOCs

3.2.1. General discussion

Good corporate governance is important for the reason that it brings benefits not only to companies and their shareholders, but to the overall economy of a country.[348] Well-managed companies will pay healthy taxes to the State and be the means to achieve economic and social benefits.[349] The taxes are used for welfare, roads and other economic infrastructure. Increasingly, it has been noticed that capital investors think carefully about which country or institutions to invest their capital in. One consideration is the state of governance in a target country or company before investment can be made therein.[350] In a speech by Arthur Levitt, the former Chairman of the USA Securities Exchange Commission, he alluded to the importance of good corporate governance for a country's prosperity by stating as follows:

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345 Who's Running the Company: A guide to reporting on corporate governance <https://www.ifc.org > accessed 23 May 2021.

346 Botha, 'The Role and Duties of Directors in the Promotion of Corporate Governance, 70; Richard Croucher and Lilian Miles, 'Corporate Governance and Employees in South Africa', (2010) Journal of Corporate Law, 368.

347 Examples include the Companies Act, 2008, the Public Finance Management Act 1999, King Report IV and several enabling statutes.

348 Thabane and Van Deventer, 'Pathological Corporate Governance Deficiencies' 2.

349 Companies Act 2008, s 7(d).

350 Thabane and Van Deventer, 'Pathological Corporate Governance Deficiencies', 2: Makuta 'Towards Good Corporate Governance in State-Owned Industries' 227.

> Today, the effects of a company's behaviour not only resonate nationally, but more likely, globally. If a country does not have a reputation for strong corporate governance practices, capital will flow elsewhere. If investors are not confident with the level of disclosure, capital will flow elsewhere. If a country opts for lax accounting and reporting standards, capital will flow elsewhere. All companies in that country – regardless of how steadfast a particular company's practices may be – suffer the consequences.[351]

Understandably, corporate governance at company level can contribute to how investors may view a stability for potential investment in a specific country. In *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd*,[352] it was stated that the practice of sound corporate governance is not only good for the company practising good corporate governance, but it remains to be in the best interest of the growth of South Africa's economy.

Generally, companies that are well-governed are likely to be sustainable and profitable. Applied to SOCs, it can mean improved welfare and well-functioning SOCs and other government institutions. When companies are well-governed, it will likely be good for the country as it can potentially attract good investments with significant spin-offs to the economy's growth, job creation and improved welfare to citizens. The submission is that corporate governance, however it may be defined, is a critical element to the success of SOCs in South Africa.

The rationale of establishing SOCs is a matter that has not been expressly explained in a piece of legislation.[353] What complicates matters in the context of South Africa is the lack of distinction between commercial and non-commercial SOCs. The submission is that state-owned enterprises (SOEs) that have been incorporated as companies should pursue a profit motive[354] for the benefit of the government and by extension the public who hold a beneficial interest. The other complication to the submission is to ascertain exactly why governments set up SOCs.

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351 Speech by Arthur Levitt, former Chairman of US SEC – <https://www.sec.gov/news/speech/speecharchive/1999/spch302.htm >accessed 23 May 2021.

352 2006 (5) SA 333 (W) [16.7].

353 Refer to Chapter 2, 2.2.1.

354 The Companies Act, 2008 s 8 (2) (a) confirms that a state-owned company is a profit company.

In South Africa there is no law that specifically classifies SOCs as separate from other public entities. The only distinction can be found in the PFMA that categorises public entities into major public entities and others.[355] The lack of classification is not seen as problematic as each established public entity's characteristics can be deduced from its founding documents. However, in comparison, Namibia for example, has introduced a classification of public enterprises through its Public Enterprises Governance Act 2019.[356] The advantage with such a classification is that a clear delineation from ordinary state-owned enterprises to SOCs is established.

Once it has been established, each state-owned entity's objective can be ascertained without confusion. For instance, the classification would establish that SOCs are incorporated for profit whereas other state-owned entities are established to fulfil certain public functions that, if left to the private sector, would be expensive for the majority of citizens. In this regard, Mehert argues that:

> The state has a public purpose in the exercise of its sovereign power. Such power is inherent in statehood and justifies the existence of a government. That is primarily manifested in the specific function of governments in discharging their traditional role of ensuring peace and security. But any modern state assumes responsibility beyond its traditional function of maintaining peace and order and protecting the country from external aggression, and it engages in economic activities. To accomplish this, one of the options is setting up an entity that undertakes commercial activities.[357]

Notwithstanding the above, what can be concluded is that once a government incorporates a company and proceeds to own most of its shares, that government has a commercial motive in mind for that incorporated SOC. The conclusion is drawn from the nature of the public entity incorporated as it inherently comes with its unique personality and legal characteristics. After incorporation, an SOC should operate like a privately held company. In other words, the differences should be concentrated in the ownership and governance structure, and in the prescriptions of the Companies Act or an enabling Act.

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355 The Public Finance Management Act 1999, Schedule 2 and 3.

356 See Public Enterprises Governance Act 2019, s 2.

357 Tewodros Mehert, 'The Concept and Characteristics of Public Enterprises in Ethiopia: An Overview' (2014) Mizan Law Review 333.

That SOCs are known to make losses is in part because of the way they are managed and controlled. This is a governance issue.[358] Mwaura[359] points out that '[p]arastatals are deeply implicated in most fiscal problems of African governments because of their inefficiency, losses, budgetary burdens, and provision of poor products and services.'

PricewaterhouseCoopers (PWC)[360] have stated that for state-owned enterprises (SOE's) to succeed, the board of directors and executive management will have to meet the following tests:

(a) Clarity - clear understanding of the purpose and objective of the SOE and their role in delivering this.
(b) Capacity – Time and resources to conduct their role well.
(c) Capability – Required and relevant expertise and experience to steer and manage the SOE.
(d) Commitment to integrity – Serving the citizen for the purpose of societal value creation.

An understanding of the specific purpose and objectives of the role of SOE's in delivering is thus of significant importance. In South Africa, SOCs exist because government took a decisive step to establish them for various economic purposes. The exact rationale for the creation of SOCs is for the companies to provide certain products and services to improve the economic welfare of the people.[361] For instance, Eskom has the mandate to undertake the provision of electricity in South Africa. Section 3 of the Eskom Conversion Act provides for the incorporation of Eskom as a company. The incorporation implies that Eskom should be managed as a profit company involved in the business of electricity.

The rationale for the creation of SOCs which have not been incorporated as companies may be gleaned from their establishing Acts. It may be argued that regardless of whether a SOC is a company in terms of the Companies Act, or merely exists out of its enabling legislation, its creation should remain corresponding to the values and principles outlined

358 Sunita Kikeri, 'Corporate Governance in South African State-Owned Enterprises' (2018) World Bank 1,4 < https://openknowledge.worldbank.org/handle/10986/30029 > accessed 12 June 2021.
359 Mwaura, 'The Failure of Corporate Governance in State Owned Enterprises, 34.
360 Jan Sturesson and others, 'State-Owned Enterprises: Catalysts for Public Value Creation? < https://www.pwc.com/gx/en/psrc/publications/assets/ > accessed 12 June 2021.
361 The Constitution of the Republic of South Africa, s 1996, section 195.

under Chapter 10 of the Constitution.

It is submitted that from a holistic government point of view, SOCs fulfil various purposes which complement the government's various efforts to achieve improved public welfare. This does not lend itself to suggesting that government provides for all products and services that the public needs to the exclusion of the private sector. The private sector complements government's efforts in the provision of necessary products and services such as health care, water and other related services. For example, the South African government has opened doors to private investors in the electricity generation sector. In terms of this initiative, independent power producers could generate electricity of up to 100 megawatts without requiring a license.[362] Furthermore, it should be noted that '[u]ltimately, public enterprises are established to fulfil public functions, and it follows that the public have interest in the efficient administration of public enterprises.'[363]

Poor corporate governance of SOCs erodes any expected benefits to the public. In other words, when governance is poor, an SOC cannot achieve its purpose. Any allocation of financial assistance to an SOC which is not geared for tangible expansion, but to fix debts, attracts the public' condemnation. Financially struggling SOCs have no financial resources to bankroll their core business and suddenly become a huge burden on taxpayers. SOCs that perform poorly financially seek government bail outs to expand business lines for projected maximum returns.[364] It is the submission that financial assistance by government may always mean that the government would have to divert money normally channeled to other government programmes just to serve a poorly governed SOC. Importantly, the State Capture Inquiry placed scandals regarding mismanagement, corruption, and lack of implementation of corporate governance principles in government departments and SOCs such as the SAA under the spotlight.[365] This lack of good

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362 Financial Post: Ramaphosa Cuts Red Tape to Ease Blackouts Hobbling South Africa <https://financialpost.com/pmn/business-pmn/south-africa-allows-more-private-power-generation-to-ease-crisis > accessed 16 October 2021.

363 Ntelamo Ntelamo, *A Manual on the Public Enterprises Governance Act in Namibia* (Juta 2021) 121.

364 The South African: South African government to spend R59 billion on bailouts for struggling SOEs: <https://www.thesouthafrican.com/news/south-african-government-r59-billion-bailouts-for-soe/ > accessed 16 September 2021.

365 Judicial Commission of Inquiry into State Capture Report: Part 1 (2022) Vol. 1 South African Airways and its Associated Companies, 8 and 9: '(8). The investigation revealed that there was a

governance implementation and accountability resulted in a robust and effective turnaround strategy combined with effective corporate governance to get the SAA back on sound footing and turn it around from permanent ruin. It is clear that poor governance of SOCs affects not only SOCs, but also the citizens who remain without beneficial interests.[366] In this regard, the Judicial Commission of Inquiry into State Capture summed it up as follows:

> State capture thrived in these entities because they were eventually being run, not in the interests of the people of South Africa for whom they were established, but in the interests of a select few who wielded power inside and outside of the entities.[367]

Several SOCs in South Africa have reported high dismissal performance results for years[368] due to how they are governed.[369] Concerns have also been raised against the calibre of those entrusted and charged with their governance and what the consequences that befall them are when they breach and overreach their governance duties. Directors and officers charged with the governance of SOCs ought to appreciate the mammoth task of effective corporate governance of the SOC which they have accepted to ensure that SOCs are managed efficiently and sustainably.[370]

The occurrences of poorly performing SOCs raise questions of the state of governance,[371] which should be remedied. SOCs that collapse should be met with the chagrin of the ordinary citizens as they are the direct recipients of the collapsing SOCs. It is

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steady decline in the quality and effectiveness of the governance of SAA from 2012 onwards. This poor quality and ineffectiveness developed over the period that Ms Duduzile Myeni was the Chairperson of SAA and her co-Board member, Ms Yakhe Kwinana, was Chairperson of SAAT.
(9). During both their tenures, acts of corruption and fraud took place at SAA and SAAT. Committed managers, who tried to stand up to the increasingly unreasonable and unlawful demands of these Board members, were slowly but surely removed from their positions.'

366 Section 1 of the Companies Act 2008, defines beneficial interest:
'when used in relation to a company's securities, means the right or entitlement of a person, through ownership, agreement, relationship or otherwise, alone or together with another person to-
(a) receive or participate in any distribution in respect of the company's securities;
(b) exercise or cause to be exercised, in the ordinary course, any or all of the rights attaching to the company's securities.'

367 Judicial Commission of Inquiry into State Capture Report: Part 1, (2022), Vol. 1 South African Airways and its Associated Companies, 1, 8-9.

368 Examples include Eskom SOC Ltd, SABC Ltd and Denel SOC Ltd.

369 Mandla Mfundo Masuku, 'Effective Governance in South Africa: Reality or Myth? (2019) African Journal of Democracy and Governance 118.

370 *Organisation Undoing Tax Abuse v Myeni* [2020] 3 All SA 578 (GP) [18]-[19].

371 Thabane and Van Deventer, 'Pathological Corporate Governance Deficiencies 1, 5.

necessary for the general public to be concerned about how SOCs are managed and controlled. Section 38 of the Constitution permits various categories of persons with standing to approach courts of law when a right in the Bill of Rights has been infringed or threatened.[372] This action may also be brought on behalf of others such as members of the general public or groups within the public or NGOs may use it to demand good corporate governance in SOCs.[373] Such an action may also be looked at from the perspective of section 195 of the Constitution to demand accountable governance of SOCs.

The above factors illustrate the ideal of corporate governance practices to companies and how beneficial corporate governance is as a cornerstone to the realisation of any company's purpose and sustainable success. For SOCs, corporate governance is an essential element of its success and should be vigorously implemented if they are to achieve their objectives. The enforcement of corporate governance in a company, whatever the type of company it may be, remains critical to the success and sustainability of the company. Corporate governance enforcement is less likely to be achieved when mechanisms in place allow for weak enforcement. Weak enforcement would be where there are uncoordinated actions which are random or inconsistent. Apart from mere enforcement of corporate governance principles, liability and accountability should follow incidences of poor performance in SOCs.[374]

The potential that SOCs hold to contribute to the economy of a country justifies their existence.[375] Whereas that is the unpinning philosophy, the way they are managed may have been frustrating their potential.[376] To understand why SOCs perform the way they do, one needs to look at how they are governed and by extension, the calibre or competence of personalities involved in the governance organs.

Critical to the assessment of the performance of SOCs is to evaluate the role players involved in their governance. Performance of SOCs must be assessed in conjunction with

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372 Constitution of the Republic of South Africa, 1996, s 38.

373 *Organisation Undoing Tax Abuse v Myeni* [2020] 3 All SA (GP) [9].

374 Such as financial losses, failure to prepare annual financial statements in time and failure to have financial statements audited. Additionally, failure to present annual financial statements in Parliament.

375 Public Finance Management Act 1999, s 2 and 3; Naidoo, *Corporate Governance,* 353.

376 Mandla Mfundo Masuku, Effective Governance in South Africa: Reality or Myth, (2019) Volume 6 African Journal of Democracy & Governance 118.

agreed targets. This entails that a performance statement or corporate plan which evinces annual performance targets must be used at the point of assessing the performance of SOCs. Together with such an assessment is a holistic outlook of how non-executive directors discharged their governance duties towards the achievement or otherwise of the performance targets agreed upon. As an example, the State Owned Corporations Act and Government Owned Corporations Act[377] in Australia provide for the inclusion of a corporate plan with performance targets as the basis of evaluating board performance.[378]

3.2.2. Organs of corporate governance in SOCs

Company law establishes that there are two important organs of a company, being the shareholders, who generally act in general meeting,[379] and a board of directors.[380] For SOCs, a shareholder is generally a natural person employed in government, usually a Minister heading a department or government Ministry. Below is an overview of the two

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377 **21 Statement of corporate intent: timetable and procedure**
(1) The board of a State owned corporation must prepare and submit to the voting shareholders a draft written statement of corporate intent not later than one month after the commencement of each financial year of the corporation.
(2) The board must consider any comments on the draft statement of corporate intent that are made to it by the voting shareholders within 2 months after the commencement of the financial year of the corporation.
(3) The board must consult in good faith with the voting shareholders following communication to it of the comments, make such changes to the statement as are agreed between the voting shareholders and the board and deliver the completed written statement to the voting shareholders within 3 months after the commencement of the financial year.
(4) The statement may not, before it is laid before both Houses of Parliament, be published or made available to the public without the prior approval of the board and the voting shareholders.
(5) The statement may be modified at any time by the board with the agreement of the voting shareholders.
(6) If the board, by written notice to the voting shareholders, proposes a modification of the statement, the board may, within 14 days, make the modification unless the voting shareholders, by written notice to the board, direct the board not to make it.
(7) The voting shareholders may, from time to time, by written notice to the board, direct the board to include in, or omit from, a statement of corporate intent any specified matters.
(8) Before giving a direction under this section, the voting shareholders are to consult with the board as to the matters to be referred to in the notice.

378 State Owned Corporations Act 1989, s 21(1)-(7); State Owned Enterprises Act 1992, s 41-2.

379 Cassim and Others, *Contemporary Company Law,* 467.

380 Len Sealy and Sarah Worthington, *Sealy and Worthington's Cases and Materials in Company Law* (10th edn Oxford 2013) 179.

organs with nuanced comparisons between a privately held company and an SOC.

3.2.2.1. The essence of shareholding in SOCs

Generally, the sphere of company law reveals,[381] unless otherwise stated, that the incorporators of a company are the shareholders of that company. Essentially, shareholders are the people or entities that own shares in a company and expect to derive a profit from the investment made, unless a company is a non-profit one.

In SOCs, the State is a unique and complex shareholder. The State is the substantive shareholder which must be represented by a natural person. It is the natural person who acts as shareholder representative where poor governance may find a conduit as happened at the SABC.[382] It is argued that SOCs have the potential to acquire strong financial positions and command sustainability. In some jurisdictions such as South Africa, the governance of SOCs has largely affected their potential to be catalysts of a thriving economy.

The idea of governments owning stakes in public companies could give an indication that governments need revenue which public companies may generate. The revenue can go a long way in assisting governments with its many programmes for the welfare of the people. Notwithstanding, the State should be seen as a juristic person and for it to act a natural person or persons should be appointed to act in the State's place.

For example, section 1 of the South African Airways Act defines the 'State' as the Government of the Republic of South Africa, which acts through the Minister responsible for Public Enterprises. Also, the State's shareholding is symbolic or is of a nominee character. The actual shareholders are those who stand to benefit from the shareholding in a material sense – the beneficial shareholders. These are the public. Arguably, the true shareholders in SOCs are the public. The SOCs belong to them. The public holds a

381 Companies Act 2008, s 13(1).

382 Marian Pargendler, 'State Ownership and Corporate Governance' (2012), Ford Law Review, 2917; Curtis J. Milhaupt and Mariana Pargendler, 'Governance Challenges of Listed State-Owned Enterprises around the World: National Experiences and a Framework for Reform', (2017) Cornell Law International Law Journal, 473, 478, *SOS Support Public Broadcasting Coalition v South African Broadcasting Corporation SOC Limited* ZAGPJHC 289 [2017] JDR 1686 (GJ) [1]-]3].

beneficial interest.[383]

In companies privately held, a shareholder is defined as 'the holder of a share issued by a company and who is entered as such in the certificated or uncertificated securities register, as the case may be.'[384] A distinction exists between a company and the shares in the company which are owned by the shareholder.[385] This distinction helps explain the difference between the two, in that a shareholder does not own the company but the shares in that company. Without shares subscribed, a company is an empty vessel. Share ownership is what makes shareholders refer to themselves as the owners of a company in which they own shares. It can be said that a company is a means designed to organise a venture with the aim of creating wealth for those who incorporate it.

In incorporating companies, gain remains a primary interest of shareholders. In privately held companies, the gain is for the shareholders who purchase shares in the company.[386] This is so because shareholders acquire shares[387] which are the measure of how dividends are paid out. The word 'gain' refers to acquisition through commercial enterprise. In *South African Flour Miller's Association v Rutowitz Flour Mills Ltd,* the court stated the following with regards to the meaning of the word gain:[388]

> Now, if you come to the meaning of the word 'gain', it means acquisition. It has no other meaning that I am aware of. It distinguishes between commercial undertakings on the one hand and what we may call literary or charitable associations on the other hand, in which persons associate, not with a view to obtaining a personal advantage, but for the purpose of promoting literature, science, art, charity or something of that kind.[389]

Besides the objective of gain, SOCs have specific objectives justifying their existence.

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383 Companies Act 2008, s 1.

384 Companies Act 2008, s 1.

385 Rehana Cassim, *The Removal of Directors and Delinquency Orders under the South African Companies Act,* (Juta 2020) 25.

386 Companies Act, 2008, s 1; Sealy and Worthington, *'Sealy and Worthington's Cases and Materials in Company Law*, 1-2. Cassim and others, *Contemporary Company Law,* 38; Irene-Marie Esser, 'Corporate Social Responsibility: A Company Law Perspective, (2011) SA Merc LJ, 317, 322.

387 Companies Act 2008, s 1; *Standard Bank of SA Ltd and Another v Ocean Commodities Inc and Others* 1980 (2) SA 175 (T) [8].

388 *South African Flour Miller's Association v Rutowitz Flour Mills Ltd* 1938 CPD 199.

389 *South African Flour Miller's Association v Rutowitz Flour Mills Ltd* 1938 CPD 199; *Mitchell's Plain Town Centre Merchants Association v Mcleod* 1996 (4) SA 159 (A) 169J.

For an organ of State[390] the objective of forming an SOC has to be located in either a policy paper or enabling law, if there is one, or from the Memorandum of Incorporation (MOI) itself. For example, the SABC's (as established in terms of the Broadcasting Act) objects are stated in its MOI. The stated object would be achieved with the SABC having been incorporated as a company under the Companies Act.

Furthermore, the achievement of the objects, the research argues, should be made possible through the SABC's own profits realised through offering broadcasting services and products by charging a fee. Whatever the objects of an SOC may be, and as already indicated elsewhere,[391] such objects may be achieved when the SOC is sustainably operating and well-governed. Therefore, it can be said that SOCs, achieving their core mandate, is dependent on first securing a good financial position.

Although it is unclear what value may accrue to the governance of companies for minding other interests beyond those for which they were incorporated, it has become acceptable to look beyond the primary interests of forming a company and accommodate such other interests as growth of the economy, employees' welfare, and community.[392] Literature suggests that corporate governance may not be complete if it does not transcend an institution's primary objective.[393] It can be said that SOCs may be expected to fulfil more than a profit motive objective.[394] Notwithstanding the expectation, the achievement of the primary object of an SOC in a sustainable way remains important.

The fulfilment of social and public interests may find better accommodation in SOCs than for example in privately held companies. It can be argued that there are good reasons the State is in business. For instance, to achieve both social and commercial objectives. However, a condition precedent for an SOC to fulfil some social objective is to remain profitable to be able to subsidise its own social interventions. Social

390 Companies Act 2008, s 13(1).

391 Pargendler, 'Governance Challenges of Listed State-Owned Enterprises, 473.

392 J, T Pretorius and others, *Hahlo's South African Company through the Cases* (6th edn Juta 2014) 4; Cassim and others, '*Contemporary Company Law,* 8; The Companies Act 2008, s 7(d)(e); Richard Croucher and Lilian Miles, Corporate Governance and Employees in South Africa, (2010) Journal of Corporate Law 367.

393 David Dematosi, International Institutions and the Case for Corporate Governance: Toward a Distributive Governance Framework? (2006) International Studies Review 228.

394 Pargendler, State Ownership and Corporate Governance, 2922-2923.

interventions cost money and may not be realised without an SOC maintaining profitability. Consequently, gains realised out of the business of SOCs would be channeled into various government projects to improve the general welfare of the people.[395]

Accordingly, it is fair to point out that SOCs by their nature, which is rooted in their ownership, are generally expected to contribute to social programmes. The expectations are aligned to the concept of State ownership governed on behalf of the public. However, the actual provision of social programmes is dependent on how well the SOCs are governed.[396] If a SOC struggles in the delivery of its core business by not turning profits, it will find it difficult to contribute to social programmes. This argument is true even for privately held companies that are in modern times expected to consider other stakeholders.[397] Since social programmes require financial resources to execute, a financially strapped SOC would compound its woes by attempting to contribute to social programmes. Whereas the submission is true, governments may harbour the expectation of having SOCs increase their social programmes to support the government in delivering certain governmental programmes. To this extent, the object of establishing a SOC is only justified when it extends beyond profit making to making a significant contribution to various governmental programmes. The thinking is that, an SOC having realised profits in its core business sectors, deploys some of that profit to meet government objectives.

The deployment of profits may take various forms. For instance, a SOC may declare dividends to government. The dividends will then be used for various governmental programmes. An SOC may, in addition to paying dividends to the government, undertake various economic welfare programmes. It should be noted that SOCs are not established to merely make profits and have such profits lying idle.[398] The above view is sustained because the rationale for the State to be in business through SOCs is to ensure the financial resources generated from the SOCs are directed into public welfare programmes. The State is not complete without the people in it.[399] Arguably, whatever the

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395 Pargendler, 'Governance Challenges of Listed State-Owned Enterprises, 477.

396 Esser, 'The Stakeholder Debate and Directors' Fiduciary Duties' 354.

397 Esser, 'The Stakeholder Debate and Directors' Fiduciary Duties'350.

398 David Fourie, The Role of Public Sector Enterprises in the South African Economy, (2004), African Journal of Public Affairs, 32

399 John Dugard, Max Du Plessis, Tiyanjana Maluwa and Dire Tladi, *Dugard's International Law: A*

State owns, it does so for its own people through the government of the day.

This was pointed out by the World Bank Group stating that:

> SOEs play important and often dominant roles in economic development and people's lives across the ECA Region. SOEs deliver essential services in many sectors, such as utilities, health, transportation, finance, and natural resources. Given ECA countries' diverse historical and economic backgrounds, their support for and reliance on SOEs differ. At the same time, the expectations of SOEs are similar across most of the countries participating in this Survey: Governments expect SOEs to perform well and to contribute to the economy through taxes and dividends. The public expects SOEs to deliver reliable public services and quality goods.[400]

That SOCs have a critical role to play in improving the welfare of citizens is unquestionable. In conclusion, it can be said that shareholders in SOCs are representative in nature on behalf of the State. In actual fact, the State is the shareholder. The State, being a juristic person, holds shareholding in SOCs on behalf of the public. In order for the public to benefit from the shareholding held on their behalf, the governance of SOCs should be in good order. In terms of the above, it is submitted that the public are the actual 'shareholders'[401] of SOCs. The exception may be where some shareholding in an SOC has been taken up by private persons.[402]

3.2.2.2. The role of shareholders in SOCs

Shareholders have their powers in meetings, specifically the general meeting.[403] Their situation is such that they would have appointed a board of directors to manage the business on their behalf. The Companies Act has heaped wide powers on directors.[404]

South African Perspective, (5th edn Juta 2018) 128-129.

400 World Bank Group; Corporate Governance of State-Owned Enterprises in Europe and Central Asia, [2020] CFRR, 1, 7 < https://openknowledge.worldbank.org/handle/10986/35011 > accessed 17 September 2021.

401 Pargendler, 'Governance Challenges of Listed State-Owned Enterprises, 475.

402 Bloomberg: South Africa Sells State Airline to Private -Equity Venture: <https://www.bloomberg.com/news/articles/2021-06-11/south-africa-sells-majority-of-state-airline-to-private-entities > accessed 18 October 2021.

403 Companies Act 2008, s 61.

404 Companies Act 2008, s 66(1).

This brings the question of exactly what the role of shareholders of SOCs is. Shareholder representatives in SOCs may find their duties placed in more than one legal instrument. This is without doubt the result of application of more than one legislation to the affairs of SOCs. That means any duties in each of the legal instruments would be for the observance and discharge by the shareholders. The discussion below examines the duties of shareholder representatives in SOCs in the various legal instruments applicable.

3.2.2.2.1 The Constitution

The Constitution provides for the duties of many functionaries including Cabinet Ministers.[405] It contains values and principles of public administration which must apply to various institutions, including public enterprises.[406] From a Constitution's point of view, the role of ensuring that what the Constitution prescribes in as far as SOCs are concerned, may be that of a Minister under whose control such a SOC is placed.[407] For instance, section 92 of the Constitution places accountability and certain responsibilities on the Deputy President as well as the Ministers.[408]

The accountability and responsibilities include ensuring the enforcement of the Constitution and other responsibilities assigned to them. A Minister, who is a shareholder representative of the State in an SOC, has his/her role grounded and cut out for him/her in the Constitution. Though the duties of Ministers are spelt out in the Constitution, they are stipulated in broad terms and do not specifically indicate how they should be exercised with regards to state-owned entities. The accountability focused on in this study is primarily on directors who feed into the accountability of Ministers. Some form of synergy is expected to happen between boards of directors and Ministers responsible for SOCs with respect to the governance of the SOCs.

In comparison, the Constitution of Namibia provides another perspective when it states

405 The Constitution of the Republic of South Africa, 1996, s 92.

406 The Constitution of the Republic of South Africa, 1996, 195.

407 For instance, South African Airways Act 5, 2007, s 1 clarifies that the Minister responsible for South African Airways, is the Minister responsible for Public Enterprises.

408 The Constitution of the Republic of South Africa, 1996, s 92(1)(2)(3)(b).

the following in respect of state-owned enterprises:

> To direct, co-ordinate and supervise the activities of Ministries and government departments including parastatal enterprises, and to review and advise the President and the National Assembly on the desirability and wisdom of any prevailing subordinate legislation, regulations or orders pertaining to such parastatal enterprises, regard being had to the public interest.[409]

Clearly, shareholder Ministers of SOCs have a responsibility to ensure good governance. The Namibian Constitution regards it as of such importance that it includes this responsibility in its Constitution. It does appear from the Namibian Constitution's perspective that such responsibility is rooted in the public interest. In other words, when good governance is discharged to enable an SOC to operate efficiently and effectively, its sustainability would benefit the public. The same is said of SOCs in South Africa; they are to be governed properly for the citizens of South Africa's benefit. This is exactly why the Constitution places them under section 195 as it provides for public administration. The placement marks their importance to the overall functioning of government.

3.2.2.2.2. The Public Finance Management Act (PFMA)

The duties and responsibilities of shareholder Ministers as stated in the Constitution are not extensive and detailed. This means those duties contemplated in the Constitution will have to be fleshed out in detail in other laws. One such law is the PFMA. The PFMA regulates the activities of various institutions in South Africa, including SOCs. Section 1 of the PFMA defines 'executive authority' and states that 'in relation to a national public entity, [executive authority] means the Cabinet member who is accountable to Parliament for that public entity or in whose portfolio it falls.'[410] The words *'who is accountable to Parliament for that public entity'* are pivotal if only they can be appreciated by executive authorities concerned.[411] This provision entails that shareholder ministers have accounting roles to fulfil concerning SOCs to which they have been assigned.

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409 The Namibian Constitution, article 40(a); Ntelamo, *A Manual on the Public Enterprises Governance Act in Namibia*, 10.

410 The Public Finance Management Act 1999, s 1(c).

411 Own emphasis.

It should be noted that a Cabinet member[412] is a Minister under whose control an SOC is placed, and for which he or she is accountable to Parliament.[413] Furthermore, section 62(3) of the PFMA provides for certain powers allocated to a Minister who is the shareholder representative in a SOC.[414] It is evident from the section that shareholder Ministers in SOCs have certain powers that they must exercise to comply not only with the PFMA, but with the Constitution. It is without doubt that the shareholder Ministers as representatives of their respective portfolios have important roles to play in the overall governance of SOCs. However, what remains unclear from the PFMA is exactly how shareholder Ministers must execute their various roles. This complexity is created by the nature of their involvement which leaves them at a distance from the affairs of SOCs.

The situation of shareholder Ministers is such that they cannot be expected to attend to the day-to-day affairs of SOCs under their control. There are other organs that should attend to the normal functioning of SOCs.[415] Although this is the case, the shareholder Minister so assigned must ensure that SOCs under their watch are governed properly and achieve their objects. This entails requiring regular overall corporate governance reports of the SOC which covers financial and all other matters. This is in addition to annual reports which a shareholder Minister must table in Parliament.[416] It is from this perspective that a shareholder Minister should remain appropriately involved in the affairs of an SOC allocated to them to be able to account for its performance in Parliament. This allowance does not imply undue interference with the operations of SOCs. It is reminiscent of some form of second layer supervision above that of a board of directors; the objective of which is to continuously ensure the successful management of the SOC.

412 The Constitution of the Republic of South Africa, 1996, s 91.

413 The Constitution of the Republic of South Africa, 1996, s 92 (3)(b).

414 The Public Finance Management Act 1999, s 63(2) provides that: "The executive authority responsible for a public entity under the ownership control of the national or a provincial executive must exercise that executive's ownership control powers to ensure that that public entity complies with this Act and the financial policies of that executive."

415 For instance, the Broadcasting Corporation Act 1999, s 14, establishes that the executive committee of the SABC should consist of the Group Chief Executive Officer, Chief Operations Officer and Chief Financial Officer, amongst others.

416 Public Finance Management Act 1999, s 55(3).

3.2.2.2.3. The Companies Act 71 of 2008

The Companies Act is a law of general application which applies to all forms of companies in South Africa.[417] For this reason, it tends to provide for an all-inclusive approach in certain aspects of the governance of companies. Notwithstanding, the fact that SOCs are incorporated in terms of the Companies Act,[418] certain activities or duties of those responsible for the proper governance of SOCs are not provided for under the Companies Act.[419] These may be provided for in other laws such as the PFMA and empowering legislations of SOCs.[420] The definition of 'shareholder' in the Companies Act does not fit the context of an SOC. It is for the same reason that section 57 of the Companies Act clarifies the reference to shareholder as 'other than of an SOC'. Having noted the above distinction, it is important to ascertain what duties shareholders of SOCs have under the Companies Act.

Company law consistently states that shareholders exercise their powers in a general meeting.[421] This does not suggest they are barred from exercising powers other than in a general meeting. For instance, section 60 of the Companies Act provides for shareholders to act other than at a meeting. For the purposes of the study, it is accepted that SOCs have as their shareholder which is the State. Strictly speaking, the representative is a Minister who is generally a sole representative. Notwithstanding the singular nature of Ministers as State representatives in SOCs, Ministers as executive authorities[422] work with other functionaries in discharging their shareholder responsibilities in relation to SOCs.[423]

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417 The Companies Act 2008, s 8(1)(2).

418 The Companies Act 2008, s 1 and s 8(2)(a).

419 Examples would include how directors of SOCs are to be appointed in SOCs as this is different from how directors are appointed in privately held companies. Another example relates to financial management and expenditure.

420 Cassim and others, *Contemporary Company Law* 480.

421 Companies Act 2008, s 60 and s 61(1) – 61(14); *Mayor, Constables and Co of Merchants of the Staple of England v Governor and Co of Bank of England* (1888) 21 QBD 165 – where the following was said: The acts of a corporation are those of the major part of the corporators, corporately assembled….By 'corporately assembled' it is meant that the meeting shall be one held upon notice which gives every corporator the opportunity of being present. See also Pretorius and others, *South African Company Law*, 207.

422 Public Finance Management Act 1999, s 1(b) provides that an executive authority in relation to a national public entity, means the Cabinet member who is accountable to Parliament for that public entity or in whose portfolio it falls.

423 For instance, special advisers assist executive authorities in discharging their duties; see the

In terms of the foregoing, it is submitted that although Ministers account alone, they are assisted, at least in an advisory capacity, in discharging their duties with respect to SOCs. For very practical reasons, given the uniqueness of SOCs' ownership, a shareholders' meeting in SOCs may not transact in the same way as they do in privately-owned companies. How, then, do shareholder Ministers carry out their duties in relation to SOCs which are expressly allocated to them in law?[424]

Ministers as executive authorities would discharge their duties with the help of the various functionaries and account to Parliament on how they have discharged their duties in relation to SOCs.[425] What is evidently absent are mechanisms particularly suited to the nature of the shareholding structure in SOCs to exercise any shareholder roles. The lack of a bespoke mechanism for shareholder Ministers of SOCs may bring about inconsistencies in how Ministers get involved and the scope of duties they perform on behalf of SOCs under their control.

It is suggested that some form of procedure on how shareholder Ministers should be involved in performing any shareholder duties should be codified. The codification may bring some form of standard and uniformity. In practice, shareholder Ministers for SOCs work closely with boards of directors whom they appointed to the SOCs. The boards of directors' report on corporate governance to the shareholder Ministers who in turn need to report to Parliament.[426] If shareholder Ministers are to intervene in poor corporate governance or to support the SOCs, the intervention should be effected via its boards of directors.

Equally, when shareholder Ministers are to hold directors accountable, they will be informed by the performance reports received from the boards of directors under their command. If shareholder Ministers do not read the reports or request them to appreciate the performance of the SOCs, they will find it difficult to account to Parliament. Equally, they will find it difficult to hold directors accountable. Furthermore, as can be seen from

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Handbook on the Appointment for the Appointment of Persons to Boards and State Controlled Institutions, (2009) Department of Public Service, 1, 12.

424 In such instruments as the Constitution, the Public Finance Management Act and empowering statutes.

425 Public Finance Management Act 1999, s 1(c); Executive Members' Ethics Act 1998, s 2(a)(i)(ii) and 2(b).

426 The Constitution of the Republic of South Africa, 1996, s 92(3)(a)(b).

the Companies Act,[427] there is no distinction in terms of directors' duties and liability between executives and non-executive directors.[428] This means that non-executive directors will be held liable in terms of their duties as provided for in the relevant laws.

3.2.2.2.4. The National State Enterprises Bill

The National State Enterprises Bill has recently surfaced.[429] It is the new touted answer to the ills of SOCs in South Africa, should it become law. The preamble for the Bill reads as follows:

> To provide for the development of strategy for national state enterprises; to establish the State Asset Management SOC Ltd; to provide for the State as the sole shareholder of a holding company; to consolidate the State's shareholdings in national state enterprises; to provide for the powers of the shareholder on behalf of the State; to provide for the holding company's powers as shareholder of subsidiaries; to provide for appropriate and effective monitoring and reporting mechanisms over subsidiaries; and to provide for matters connected therewith.

The National State Enterprises Bill has serious ambitions.[430] It also recognises that there have been challenges in the current corporate governance of SOCs.[431] Whether the Bill will succeed or not depends on several factors, including what the final version of the law would look like and the calibre of those who will be involved in implementing its provisions to realise its purposes, as summed up in the preamble.

The Bill retains the known organs of corporate governance,[432] whilst introducing new role players. The Bill makes the President the shareholder representative on behalf of the State.[433] This marks a departure from the current arrangement where a Department of Public Enterprises and other ministers are accounting for shareholding in SOCs. Importantly, all SOCs will be pooled into a holding company, surprisingly in a staggered

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427 Companies Act 2008.

428 Companies Act 2008, s 76(3(a)(b)(c) and s 77(1)(a), (2)(a)(b), (3).

429 National State Enterprises Bill 2024 ('the Bill').

430 National State Enterprises Bill, 2024, s 2(b)(c)(d)(e).

431 National State Enterprises Bill, 2024, s 2(a): enhance the operational efficiency of the national commercial state-owned enterprises to achieve the State's developmental objectives through a National Strategy to be implemented by a holding company and national commercial state-owned enterprises.

432 Shareholder and board of directors provided under section 8 and 9 of the Bill.

433 National State Enterprises Bill 2024, s 6(3).

approach.[434] This will entail huge responsibilities. This will impact current Cabinet Ministers who have served as shareholder representatives to various SOCs. In some cases such as Eskom, there has been dual accountability.

The Department of Public Enterprises and the Ministry of Minerals have both had a part in Eskom's affairs. The President appointed a Minister of Electricity. With the Bill, the President alone will hold the shareholding unless such role is delegated to another public official.[435] The functions of the shareholder representative are clearly spelt out in section 8 of the National State Enterprises Bill. With powers vested in section 97 of the Constitution, it may be possible to change the current set up of shareholder representatives by amending any enabling legislation which may conflict with the provisions of the Bill.[436] It is further expected that the Bill will affect many provisions in enabling laws and the Companies Act, relating to shareholders and directors of SOCs.[437] This is expected given that the Bill provides for the duties of these organs, which should, once it becomes law, be harmonised with current provisions in any pertinent laws.[438]

3.2.2.2.5. Recognition of shareholders in SOCs through case law

Notwithstanding that the State is generally the true shareholder in SOCs, the ownership extends to the public on whose behalf the State rightly acts.[439] It should also be noted that even where an enabling law or a MOI names the State as shareholder, there is an accountable minister for the SOC. In these circumstances, and in practical terms, the public is likely to hold a certain minister accountable as the shareholder than seek to hold the State accountable as it dispenses no acts or decisions in relation to a SOC.[440] Again, it will be noted that most enabling statutes define at least one minister,[441] and such minister normally acts as shareholder on behalf of the State. For instance, the

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434 National State Enterprises Bill 2024, s 2(c) and 6(1)(2).

435 See discussion under para 3.4 below.

436 National State Enterprises Bill 2024, s 6(3).

437 National State Enterprises Bill 2024, s (8) and s (9); s 22(1) and (2).

438 National State Enterprises Bill 2024, s (8) and s (9).

439 Pargendler, 'Governance Challenges of Listed State-Owned Enterprises, 475.

440 The Public Finance Manage Act 1999, s 1(c) defines an executive authority as "in relation to a national public entity, means the Cabinet member who is accountable to Parliament for that public entity or in whose portfolio it falls."

441 Broadcasting Act 1999, s 1; Eskom Conversion Act 2001, s 1; Executive Members' Ethics Act 1998, s 2(a)(ii).

South African Airways Act[442] defines 'Minister' as the Minister responsible for Public Enterprises.

It will be noticed that in practice SAA falls under the Department of Public Enterprises,[443] and it can therefore be said, the Minister responsible for Public Enterprises is the shareholder of SAA on behalf of the State. In some cases, there may be more than one shareholder minister involved. Recently, the President of South Africa appointed the Minister of Electricity to oversee Eskom.[444] The appointment of the Minister of Electricity meant that realignment of functions had to happen to harmonise the working affairs of various ministries.[445]

A multiplicity of shareholder ministers, if not carefully planned and executed, may hamstring good governance in SOCs as ministers may have different views on matters relating to the SOC. Understandably, the President had to find a way to ensure that Eskom purposefully performed. The move may have been a great one as Eskom has begun to record improvements.

Commendably, the board of directors appointed at Eskom appeared to have been competent enough to hit the ground running and their impact has since been pervasive in an extended period without load shedding.[446] Added to this is the existence of the Bill which is aimed at revolutionising the ownership and management structure of SOCs in South Africa.[447] This may mean that the President has plans of robustly reforming SOCs to gear them for high performance and high levels of good corporate governance.[448]

The big question remains, what exactly is the role of shareholders of SOCs in South Africa? In other words, do shareholders of SOCs exercise similar powers comparable to shareholders in privately owned companies? To answer the question, it is necessary to evaluate the traditional role of shareholders of companies, and to also appreciate how

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442 South African Airways Act 2007, s 1.

443 Department of Public Enterprises< https://dpe.gov.za/ > accessed 15 June 2021.

444 The Presidency: The Republic of South Africa < https://www.thepresidency.gov.za/president-sets-out-roles-and-responsibilities-minister-electricity > accessed 04 August 2024.

445 The Presidency: The Republic of South Africa: https://www.thepresidency.gov.za/president-sets-out-roles-and-responsibilities-minister-electricity > accessed 04 August 2024; The Constitution of the Republic of South Africa 1996, s 97; Electricity Regulation 2003, s 34(1)(2).

446 IOL: Today Marks 10 Months without Load Shedding in SA: <www.iol.co.za > – accessed 30 January 2025.

447 National State Enterprises Bill 2023.

448 National State Enterprises Bill 2024, s 2(d) and (e).

the role has evolved. Furthermore, it may be necessary to contextualise how being a shareholder of an SOC reflects in practice. The concern is that, whereas ministers are executive authorities and have powers in relation to SOCs,[449] they exercise limited involvement in the actual operations of SOCs.

To some degree shareholder ministers find themselves in a position of inherent conflict. This arises because on the one hand they exercise shareholder powers; on the other hand, they exercise some powers akin to those of directors as they have to provide oversight on boards of the SOCs under their portfolio.[450]

Because Ministers are expected to account to Parliament, and by extension to the public, it is expected that Ministers demand the same level of accountability from other organs involved in the management of SOCs. Therefore, it can be said that Ministers may not be able to properly discharge their accountability duties if they do not use available instruments to ensure other organs below them properly manage SOCs at their own levels. What remains unclear may be instances where an accounting authority fails to properly discharge their duties and whether the executive authority can under these circumstances step in. In other words, do Ministers retain residual powers in relation to SOCs?

Two English authorities establish that shareholders can exercise residual powers in addition to any other powers that may have been allotted to a board of directors, but which, for any incapacity a board of directors is unable to exercise.[451] In *Barron v Potter,*[452] the court stated as follows:

> If directors having certain powers are unable or unwilling to exercise them – are in fact a non-existent body for the purpose -there must be some power in the company to do itself that which under other circumstances would be otherwise done. The directors in the present case being unwilling to appoint additional directors under the power conferred on them by the articles, in my opinion, the company in general meeting has power to make the appointment.

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449 Public Finance Management Act 1999, s 1.

450 Benjamin B Saunders, Ministers, Statutory Authorities and Government Corporations: The Agency Problem in Public Sector Governance, (2022), Melbourne Law Review, 698.

451 *Bamford v Bamford* [1970] Ch 212; [1969] 1 All ER 969 CA and *Barron v Potter* [1914] 1 Ch 895.

452 *Barron v Potte*r [1914] 1 Ch 895 [903].

The finding in *Barron v Potter* suggests that a company would not suffer because a board of directors is unable for any reason to take a resolution on a matter. What can be gathered here is that the common law and statutory law grant reserve powers to shareholders which they may exercise when there is a need. The reserve powers include the exercise of power expressly bestowed on a board of directors. It may be submitted that shareholders have a role to play in the affairs of a company over and above the role played by a board of directors it appointed. It has been suggested that a board of directors may resolve to defer a matter to shareholders in a general meeting for decision.[453]

The understanding is that a board should not be seen as delegating to shareholders. However, it may be that some matters may appear to be in the province of a board of directors, but which when decided upon might be irregular to be approved without prior approval of shareholders.[454] It is practice for shareholders' powers to be known as concentrated in a general meeting. A shareholders' meeting is either a general meeting or an annual general meeting.[455]

In the past, the execution of executive powers in respect of at least one SOC was challenged for having gone overboard and for being irregular. In *SOS Support Public Broadcasting Coalition v South African Broadcasting Corporation SOC Ltd*,[456] the court stated the following in its opening statement, to the disbelief or embarrassment of those interested in good corporate governance in South Africa:

> The two applications are instituted in the background of systematic and repeated governance failures and management of the SABC. This has presented itself in the continuous turn-over of Directors of the board with resultant financial mismanagement.
>
> The critical systematic causes of governance failures and mismanagement were found to have been caused by Ministerial interference in the governance and operations of the SABC.

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453 Davies and Worthington, *Gower's Principles of Modern Company Law* 14-14.

454 Public Finance Management Act 1999, s 66(3)(c)(d).

455 The Companies Act 2008, s 1 defines a shareholders' meeting as: "with respect to any particular matter concerning a company, means a meeting of those holders of that company's issued securities who are entitled to exercise voting rights in relation to that matter." An annual general meeting has been defined as; "means a meeting of a public company required by section 61(7) of the Companies Act."

456 [2017] ZAGPJHC 289.

The first application sought to challenge the lawfulness of the powers vested in the Minister through an amended MOI and the SABC Charter. In short, the powers were in respect of the appointment, discipline and suspension of the executive directors of the SABC. In the second application, the issue was about the Minister's powers to remove the board of directors of the SABC.

It is important to underscore that the applications were instituted in the context of what the court described as repeated failures in the governance and management of the SABC.[457] Whether a shareholder Minister purports to exercise reserve powers or not, the ultimate responsibility remains that of the Minister to ensure the reserve powers are exercised in the best interest of the SOC. Therefore, any exercise of reserve powers for an improper purpose may amount to an abuse of shareholders' powers for which the minister will account.[458]

According to the evaluation of the court, the alterations to the MOI of the SABC made by the Minister make it apparent that the Minister, as shareholder representative, assigned herself powers to abuse and negatively affect governance at the SABC.[459] It is crucial to underline that Ministerial interference referred to in the court case aforementioned is reference to the Minister of Communications, who was the representative of the State as shareholder of the SABC at the time.[460] The Minister's ill-advised involvement in the affairs of the SABC brings into sharp focus the question of the role of shareholders of SOCs and the boundaries of such roles.

The court gave an indication of the scope of a shareholder representative such as the Minister's powers, in relation to the powers of the board of directors.[461] The court referred to the powers of the board of directors of the SABC. Being itself a company, albeit an SOC, its business affairs resided in the hands of the board of directors. The court

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457 *SOS Support Public Broadcasting Coalition v South African Broadcasting Corporation SOC Ltd* [2017] ZAGP JHC 289 [1].

458 *SOS Support Public Broadcasting Coalition v South African Broadcasting Corporation SOC Ltd* [2017] ZAGP JHC 289 [87]-[93].

459 *SOS Support Public Broadcasting Coalition v South African Broadcasting Corporation SOC Ltd* [2017] ZAGP JHC 289 [87]-[93].

460 *SOS Support Public Broadcasting Coalition v South African Broadcasting Corporation SOC Ltd* [2017] ZAGP JHC 289 [87]-[93].

461 Broadcasting 1999, s 12(11).

explained with reference to section 66(1) of the Companies Act that it allowed the board of directors of the SABC more powers than the shareholder would have in the discharge of the SABC's affairs and business.[462]

Considering what the court found, it may be said that the Minister's alteration of the MOI to give herself powers that the law allocated to be performed by a board of directors would have been irregular. The court found that the powers granted to the Minister in the MOI to appoint, re-appoint and discipline executive directors had the effect of undermining the independence of the SABC. Furthermore, the court found that the powers were inconsistent with the specific independence and pluralism required of the public service broadcaster.[463]

Shareholder ministers do not have unlimited authority to do as they please in the sphere of corporate governance, especially if it is to the detriment of the company itself. Even legitimate residual powers of shareholders may be limited in the best interests of the company.[464] Thus, powers to advance or promote personal or other interests are not recognised. That remains the case even when a shareholder is merely the one who acts in a representative capacity such as the Minister of Communications in the case of the SABC scenario discussed above.[465]

The SABC discussion raises the question of liability and accountability of shareholders of SOCs, in so far as they interfere with governance in SOCs. In SOCs, can it be said that non-executive directors can decline an instruction of a shareholder legitimately and keep their positions on the board? Another related concern is exactly whether SOCs have legal mechanisms to hold shareholders accountable, and even liable when they usurp the powers of the directors or when they abuse their reserve powers.

In the sphere of SOCs, the question is more relevant because a shareholder representative can be equated to an agent, who may also like a director (who is not also a

462 *SOS Support Public Broadcasting Coalition v South African Broadcasting Corporation SOC Ltd* [2017] ZAGP JHC 289 [125]; *Ex Parte Russlyn Construction (Pty) Ltd* 1987 (1) SA 33 (D) [36H].

463 *SOS Support Public Broadcasting Coalition v South African Broadcasting Corporation SOC Ltd* [2017] ZAGP JHC 289 [87]-[93].

464 Public Finance Management Act 1999, s 63(2); the Constitution of the Republic of South Africa, 1996, s 85(2)(e) and s 92((2)(3)(a)(b).

465 *SOS Support Public Broadcasting Coalition v South African Broadcasting Corporation SOC Ltd* [2017] ZAGP JHC 289 [122].

shareholder) of an SOC company be susceptible to self-interest and other governance breaches at the expense of an SOC. Although the study examines the legal framework of director liability and accountability, it is also of importance to refer to situations where other organs such as shareholder ministers negatively interfere in the governance of SOCs. Since the non-executive directors would have their performance feeding into that of shareholder representatives, a discussion of shareholders remains relevant.

The problem, it is submitted, is that current corporate law is arguably premised on the assumption that a shareholder cannot destroy that which is their own as they established the company in order to gain from it.[466] What corporate law has forgotten is that when it extends its boundaries to regulate companies that belong not to the shareholder representative but to a State, such shareholders fulfil a role which is similar to a director who is not a shareholder akin to one in a privately held company. What the above suggests is that shareholder representatives in SOCs can act in their own interest and not in the interest of the SOC and the State they represent.[467] For this reason, it is suggested that the Companies Act should view State shareholder representatives in SOCs as different from shareholders in privately held companies and consider introducing specific tailored regulatory measures for their conduct.

It has also been expressed that a representative shareholder can act out of political interest which goes against the interest of an SOC and the public for whom it was established.[468]

It might not be helpful for the corporate governance of SOCs to only seek to reign in non-executive directors and forget the involvement of the shareholders' representative, who in some notable cases makes decisions that detrimentally affect SOCs.[469] It is suggested that the Companies Act should provide for adequate regulation of SOCs with respect to

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466 Companies Act 2008, s 7(d); Gower's Principles of Modern Company Law 3-4.

467 *SOS Support Public Broadcasting Coalition v South African Broadcasting Corporation SOC Ltd* [2017] ZAGP JHC 289 [1].

468 Simon C Y Young, 'The State of Governance at State-Owned Enterprises', Public Sector Opinion, International Finance Corporation, Washington DC World Bank, 1, 3.

469 The scope of the study does not extend to the liability and accountability of shareholder representatives in state-owned companies.

confining shareholder representatives' powers. The National State Enterprises Bill[470] places the shareholding in SOCs in the State and makes the President of the Republic the representative of the shareholder. For as long as the tone of good corporate governance of SOCs is set from the top and effectively enforced downwards, there is no reason why SOCs' performances in South Africa should not improve. The National State Enterprises Bill reflects as one of its objects: 'to ensure the proper governance of the holding company and its subsidiaries; and promote the commercial sustainability of the holding company and its subsidiaries.'[471]

Regarding the President as the shareholder representative of the State in SOCs through the envisaged holding company, the position does not end there. This is because the National State Enterprises Bill makes allowance for the President to transfer the administration of the National State Enterprises Act (once it has become an Act), to a member of Cabinet in line with section 97 of the Constitution.[472] Should the Bill become law, it is hoped that the President will carefully transfer the administrative powers of the law.[473] The holding company to be formed under the proposed law will have significant powers and will preside over massive financial and other resources which should not be allowed to fall into the wrong hands. This means that the transfer of administrative powers should be carefully conducted to ensure that the powers are devolved in good hands, given what would be at stake.

Whilst over or undue involvement of shareholders may prove to be problematic, the opposite position may also have its ramifications. Ramalho, former IoDSA CEO, warned against not involving shareholders, stating that '[w]hen shareholders aren't active in exercising their powers, a misalignment in the balance of power can occur where the board is not held accountable'.[474] Accordingly, shareholders or other interested parties should, on behalf of an SOC, be able to initiate a case against miscreant directors.[475]

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470 National State Enterprises Bill 2024, s 1 and s 6(3).

471 National State Enterprises Bill 2024, s 2(d) and (e).

472 National State Enterprises Bill 2024, s 6(3).

473 National State Enterprises Bill 2024, s 6(1) and (2).

474 Institute of Directors in Southern Africa: Directorship (2014) 15.

475 For instance, approaching a court of law under section 38 of the Constitution of the Republic of South Africa,1996.

Whereas it appears to be a fair allocation of duties to shareholder representatives in SOCs, enforcing accountability may not be achieved when they themselves initiate or contribute to the breaches of duties by directors in SOCs. An example of such conduct came to the fore in *South African Broadcasting Corporation SOC Ltd and Others v Democratic Alliance and Others,*[476] in which the SABC appealed the finding of the High Court. This matter concerned an executive director of the SABC who was irregularly appointed amidst governance failures at the SABC.[477] The matter in reference reported more than just the irregular appointment of an executive director to the position of Chief Operating Officer of the SABC. The court concurred with the Public Protector's report, which indicated that governance and ethics had failed at the SABC.[478]

Although the foregoing was the case, no non-executive director has yet been held to account for such failed ethics and governance at the SABC. It explains why SOCs keep failing when non-executive directors and shareholder representatives can be instrumental in appointing incompetent executives. This may be a reflection on the calibre of the two organs.

3.2.3. Board of Directors

A board of directors is a critical organ in a company's governance, only second to the shareholders.[479] Evidence of this statement can be found in the significant powers entrusted to boards of directors.[480] Directors of a company account and report to the shareholder regarding how they control and manage the company's business affairs on behalf of the shareholder. Section 66(1) of the Companies Act signifies that the powers of directors are bestowed on them by law. They do not derive powers from the shareholders. This is applicable to board of directors in SOCs, subject to what the PFMA and empowering laws of SOCs may provide.

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476 2016 (2) SA 522 [5], [8] and [13].

477 *Democratic Alliance v South African Broadcasting Corporation Ltd and Others* 2015 (1) SA 551 (WCC).

478 *South African Broadcasting Corporation SOC Ltd and Others v Democratic Alliance and Others* 2016 (2) SA 522 (SCA) [5].

479 *Pretorius v PB Meat (Pty) Ltd,* [2013] ZAWCHC 89, [25]; *Navigator Property Investments (Pty) Ltd v Silver Lakes Crossing Shopping Centre (Pty) Ltd* [2014] 3 All SA 591 [31].

480 Companies Act 2008, s 66(1).

The Companies Act defines a board as 'the board of directors of a company.[481]' It is invaluable for the discussion to define what a director is, given the enormous powers bestowed on this critical organ.[482] Section 1 of the Companies Act defines a director as 'a member of the board of a company, as contemplated in section 66, or an alternate director of a company and includes any person occupying the position of a director or alternate director, by whatever name designated.'

It is evident from the words 'by whatever name designated' that a director may be assigned or be known by a different name other than 'director' whilst still acting as a director. An example of the above may be found in the PFMA, where 'accounting authority' is defined with reference to a board of a directors.[483] In practice issues that present problems do not generally revolve around what is meant by a board or director of a company. The critical issues generally revolve on the powers exercised and discharged by a board of directors. It may also be said that a board of directors is better understood in the context of exactly what function it plays in a company. The existence of a board appears to be justified when regard is paid to its powers and duties to the company.[484]

The duties and powers remain central to the success or failure of a company. Seen from the wording of section 66(1), the powers extend to all business affairs of a company. Therefore, it is justified to require that directors of a board account for how they exercise the lofty powers. This applies equally to boards of directors in SOCs where failure of corporate governance may mean untold hardship on the populace. A board of directors is one way to ensure that members of the executive management do not run the affairs of a company in their own interest. This does not in a way suggest that the installation of a board of directors means that they become an insulation of corporate governance failures.

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481 The Companies Act 2008, s (1).

482 Companies Act 66(1).

483 Public Finance Management Act 1999, s 1, states that "accounting authority means a body or person mentioned in section 49." Section 49(1) states that; "Every public entity must have an authority which must be accountable for the purposes of this Act." Whereas section 49(2)(a) states; "(a) has a board or other controlling body, that board or controlling body is the accounting authority for that entity."

484 Companies Act 2008, s 66(1).

It is well known that a juristic person[485] such as a company cannot act on its own.[486] For the limitation on a company being a juristic person, it needs natural persons to act on its behalf. The natural persons who act as a board of directors of SOCs form the focus of the present discussion. Company law determines that various companies would at least have basic structures such as a board of directors.[487] The Companies Act provides for at least two forms of companies, a profit company and a non-profit company.[488] Accordingly, the Companies Act further provides for the number of directors each of these companies may have to comply with the requirements of incorporation and subsequent operation.[489] It is noted that the situation is remarkedly different when it comes to SOCs.

In SOCs, the number of directors that need to be appointed is not addressed by the Companies Act itself, but is left to the enabling legislation, if any. For instance, the Broadcasting Act provides for the number of directors that must constitute the SABC board of directors.[490] Furthermore, the provision stipulates how the board of directors of the SABC should be constituted.[491] However, determining the number of directors in SOCs that are directly incorporated under the Companies Act without own legislation may prove problematic. Under these circumstances the assumption is that the number will be determined in the MOI of the SOC in question. In some cases, SOCs' own legislation is so incomplete, as to not even provide for the appointment of directors, let alone the number.[492]

It is submitted that where an SOC is one directly incorporated in terms of the Companies Act as a public company, the minimum number of three directors provided for should at least be appointed.[493] The Companies Act applies to SOCs unless a modification has occurred.[494] This means that SOCs are subject to the provisions on director composition to the extent possible in that the appointing authority adheres to the provisions. Beyond

485 Companies Act 2008, s 19(1)(a)(b).
486 *Ferguson v Wilson* [1866] 2 Ch App 77; 15 LT 230 [89].
487 Companies Act 2008, s 13(1).
488 Companies Act 2008, s 8 2(a)(b)(d).
489 Companies Act 2008, s 66 (2)(a)(b).
490 Broadcasting Act 1999, s 12(a) provides for twelve directors of the SABC, and (b) determines the number and designations of executive board members to constitute the SABC board of directors. Altogether the SABC board of directors could be constituted of 15 board members.
491 Broadcasting Act 1999, s 12(a)(b) and s 13.
492 See for example, the South African Airways Act 2007 and the Eskom Conversion Act 2001.
493 Companies Act 2008, s 66(2)(b).
494 Companies Act 2008, s 9(1)(2)(a).

the minimum three directors the Companies Act provides for, it is unclear how a shareholder representative would decide on a higher number to appoint.[495] It may in practice appear impractical to appoint a minimum or maximum number of directors for a SOC, as provided for in the Companies Act.[496]

However, the appointment by a shareholder Minister of more directors or the same number of directors as required for public companies in terms of the Companies Act cannot be justified simply based on practicality or impracticality. A clear regulation of how many directors should be appointed for a particular SOC is required. The number should either be stipulated in an MOI by a stipulation in the Companies Act or be placed in the overarching enabling legislation such as the PFMA. In this instance, it will be seen that the National State Enterprises Bill has commendably provided for the appointment and composition of boards of directors for SOCs.[497]

A board of directors too large or too small may not meet the needs of a SOC concerned. A board of directors 'effectiveness will depend very much on the people involved.'[498] A poorly composed board of directors may attract ineffectiveness. Generally, the composition of boards should be tailored to the company's needs. This means that the board of directors should, in some way, be representative of the expertise required by the company to be successful in its business operations.[499] Only through this can SOCs' value be driven by those who serve on boards. Without the consideration of expertise those appointed have no value to add to the board and the business of the SOC.

The National State Enterprises Bill provides for a maximum of nine board members of the holding company envisaged to be formed.[500] The composition would be an assortment of skills, experience and integrity.[501] It is interesting that integrity is finding its way into law when the appointment of directors is an issue. Notable is that once the National Enterprises Bill becomes law, the composition of the board of directors for the holding

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495 The Companies Act 2008, s 66(2)(a)(b).

496 Companies Act 2008, s 66(2(a) and (b).

497 National State Enterprises Bill 2024, s 10(1) and (3).

498 Tom Wixley and Geoff Everingham, *Corporate Governance,* (4th edn SiberInk 2015) 39.

499 National State Enterprises Bill 2024, s 10(1).

500 National State Enterprises Bill 2024, s 10(3).

501 National State Enterprises Bill 2024, s 10(1).

company will be in terms of this law.[502] The improvement here is that, for the first time, there will be a law that calls for a minimum standard for director's appointments.

Legal precedence expresses the view that the board directors of a company are not agents of the shareholders of the company but act independently and only account to the company.[503] In *Cohen v Segal* the court indicated that directors are creatures of statute and occupy a position peculiar to themselves and do not fit several designations that are from time to time ascribed to them such as agents, trustees or managing partners of a company.[504]

The foregoing position poses some challenges concerning SOCs as board members account to shareholder Ministers on how they manage SOCs.[505] The particular Minister, in turn, accounts to Parliament and, ultimately, the general public.[506] This will mean that directors in SOCs may not be able to insist that they are a creation of a statute to the extent of absolving themselves of any accountability and liability. Regardless of the peculiar nature of directors of a company contrasted with that of a shareholder, directors owe their fiduciary duties to the company.[507]

It is trite that directors are legally obliged to act in the best interests[508] of a company which arguably includes interests of those who are part of the company. It has been expressed, that the definition of a company under the Companies Act,[509] is insufficient to assist in addressing the question in whose interest directors of a company act. In other words, directors do not only act in the interests of the company as a juristic person.[510] They act also in the interests of those who formed it and those in some way important to it, whom it is argued should be seen as being part of the company.[511] With specific

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502 National State Enterprises Bill 2024, s 10(1), (3).

503 *Cohen v Segal* [1970] (3) SA 702 (W) [706].

504 Cohen v Segal [1970] (3) SA 702 (W) [706].

505 Naidoo, *Corporate Governance*, 164.

506 Public Finance Management Act 1999, s 55(3).

507 *Re Smith & Fawcett Ltd* [1942] Ch 304 at 306 (CA).

508 Companies Act 71 of 2008, s 76(3)(b).

509 Cassim and others, *Contemporary Company Law* 2012, 515; Companies Act 2008, s 1: a company means "a juristic person incorporated in terms of this Act."

510 Companies Act 2008, 76(3)(a); *Percival v Wright* [1902] 2 Ch. 421; Paul L. Davies and Sarah Worthington, *Gower's Principles of Modern Company Law*, (10th edition Sweet & Maxwell, 2016) 468.

511 I Esser, The Stakeholder Debate and Directors' Fiduciary Duties, (2007) Volume 19, South African

reference to SOCs, it can be said that directors act in the best interests of the company and of the State, and by extension the public.[512]

Regrettably, the legislative framework does not include or prescribe minimum guiding requirements for the suitability of a candidate for appointment to a board of directors in SOCs. None has been found in both the PFMA[513] and the Companies Act.[514] However, codes of good corporate governance, such as King IV, do make recommendations of certain requirements to consider when appointing board members.[515] The absence of standard requirements may lead to the appointment of incompetent non-executive directors in SOCs in South Africa. This practice is against contemporary approaches as would be advocated for in codes of good practice such as the King Reports.[516] Pertinently, King IV recommends that:[517]

> The governing body should comprise the appropriate balance of *knowledge, skills, experience, diversity and independence* for it to discharge its governance role and responsibilities objectively and effectively.

Best practice appears to dictate that competent individuals should be appointed to the boards of SOCs.[518] It is recommended that, given the absence of provisions in the PFMA and Companies Act with respect to the appointment of board members, the recommendations in King IV[519] should be utilised. In *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd*,[520] the court gave weight to the King Code on corporate governance. This would be a confirmation that codes of good governance practices can complete the law.

Mercantile Law Journal, 346, 350.

512 Constitution of the Republic of South Africa 1996, s 195(1)(e)(f) and (2)(c).

513 The PFMA provides for an accounting authority without providing how such authority should be appointed.

514 The Companies Act is silent when it comes to the appointment of directors in SOCs. Section 66(2)(a)(b) under the Companies Act as it applies to the composition of a board of directors in private and public companies is somewhat impractical in the sphere of SOCs.

515 King IV Report, Principle 7.

516 King IV Report, Principle 7.

517 King IV Report, Principle 7; own emphasis added.

518 King IV Report, Principle 7.

519 King IV Report, Principle 7.

520 *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd* 2006 (5) SA 333 [16.7].

3.2.3.1. Distinction between executive, non-executive directors and independent directors

The Companies Act does not define executive director, non-executive director and independent director nor does it distinguish the terms. In practice, it may be important to distinguish these designations as the various directors fulfil different roles on a board of directors. In practice, the roles fulfilled by executive directors are not the same as those of non-executive directors. Their respective duties may accordingly also differ.[521] It is crucial for this study to distinguish between executive director, non-executive director, and independent non-executive directors to determine the varied responsibilities, if any, that befall the different types of directors. Furthermore, some distinction between the non-executive directors which forms the central theme for the study, against other types of directors, is necessary.[522]

An executive director is generally associated with the class of directors that are employed by a company and involved in the management of the company on a day-to-day basis. In other words, executive directors are contractually employed by the company and earn a monthly salary.[523] This means the bulk of the duties of executive directors are specified in the employment contract and any accompanying job description. Being directors,[524] executive directors are further subject to the spectrum of directors' duties which are provided in law.[525]

Executive directors by implication of their employment contracts, answer to non-executive directors. In a sense, unconfirmed by any law but apparent in practice, non-executive directors act in an elevated position to that of executive directors.[526] Executive management members some of whom are board members do report to the board of directors

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521 Tom Wixley and Geoff Everingham, *Corporate Governance,* 44; Cassim and Others, *Contemporary Company Law*, 551.

522 See Chapter 1; 1.

523 Mongalo, *Corporate Law and Corporate Governance,* 156; Naidoo, *Corporate Governance,* 139-140.

524 Companies Act 2008, s 1 read with section 66.

525 Companies Act 2008, s 76(3)(i)(ii).

526 Franklin A. Gevurtz, The Historical and Political Origins of the Corporate Board of Directors, (2004) Volume 33, Hofstra Law Review, 1, 13.

in that role of management.[527] It is precisely why non-executive directors can monitor executive management.[528] That is because as employees, executive managers are subject to the board of directors' supervision and monitoring. It is from this elevation of non-executive directors that calls for them to monitor executive directors are made.[529] This aspect is further discussed below.

A non-executive director is a director who is not employed by the company and does not attend to the day-to-day management of the company.[530] The non-executive director does not have an employment contract with the company and is only involved on a part-time basis with the company.[531] It is common to find that non-executive directors earn a fee known as a sitting allowance for attending board meetings. In addition, non-executive directors can earn a retainer fee for being engaged to offer director services to the company on an ad hoc basis.[532]

It should be noted that non-executive directors, although not employed by the company, may have some other association with the company. For example, a non-executive director can be a shareholder of a company which may compromise their independence to the company.[533] An independent director enjoys the attributes of a non-executive director and more.[534] An independent director not only is not an employee of the company, but in addition does not own any shares in the company.[535] Such a director is independent of the company in that the director is neither employed nor has shareholding or any other relationship with the company other than being a board member.[536]

Most SOCs' board of directors only consist of non-executive directors who are generally

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527 Executive directors on the SABC's board of directors are a perfect example.

528 Gevurtz, The Historical and Political Origins of the Corporate Board of Directors, 13-14.

529 Finch, Company Directors, 197.

530 Cassim and Others, *Contemporary Company Law*, 652-653.

531 Mongalo, *Corporate Law and Corporate Governance,* 156; Naidoo, *Corporate Governance,* 139-140; *Fisheries Development Corporation of SA Ltd v Jorgensen; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd* 1980 (4) SA 156 (W) [165].

532 King IV Report 65; King III Report Principle 2, 25 and 153.

533 King III Report principle 2.18, 67.

534 Baltic Institute of Corporate Governance: Handbook for State-owned Enterprises <https://www.ecgi.global/publications/codes/guidance-on-board-effectiveness-handbook-for-state-owned-enterprises-eelvlt > accessed 06 August 2024: where 'independence' was defined 'as economic independence from the company and an absence of political connections'.

535 Cassim and Others, *Contemporary Company Law,* 652-653.

536 Cassim and Others, *Contemporary Company Law*, 551-552.

independent of the SOCs.[537] There are a few examples of SOCs where a board of directors consists of a combination of executive and non-executive directors. For example, the SABC board of directors is in terms of the Broadcasting Act required to have a combination of executive and non-executive directors.[538] The Companies Act does not prescribe whether a company's board of directors should consist of executive, non-executive or independent directors.[539] Notwithstanding, the Companies Act sets some requirement for the composition of audit committees. For example, section 94(4)(a) of the Companies Act disqualifies persons involved in the day-to-day management of the company from being members of the audit committee. The Companies Act determines that the composition of boards of directors for companies would be left in the hands of the incorporators to arrange in the MOI.[540]

The distinction between executive, non-executive and independent directors is an important discussion in company law. There has been growing calls for non-executive directors to constitute the majority of board members on company boards.[541] The calls are accompanied by a belief that non-executive directors and independent directors would provide better monitoring and independence on a board, thereby improving the corporate governance of a company.[542] In this regard, King Report III states that 'the board should comprise a balance of power with a majority of non-executive directors. The majority of non-executive directors should be independent.[543]

The rationale for supporting non-executive directors to constitute the majority of members on a board includes independence and neutrality in terms of being able to offer good judgment, monitoring and supervising executive management.[544] Though non-executive

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537 For example, see the Broadcasting Act 1999, s 12(a). King IV also recommends a majority non-executive on boards of directors of companies.

538 The Broadcasting Act 1999, s 12 (a)(b) clearly indicates that twelve non-executive directors must be appointed to the SABC board of directors, and three executive directors comprising, the Group Chief Executive Officer, the Chief Operations Officer and the Chief Financial Officer or their equivalents.

539 Companies Act 2008, s 66(2).

540 Companies Act 2008, s 66(4)(a)(ii), s 72(2) and s 94(2)(4)(a).

541 Maria Guterrez and Maribel Saez, 'Deconstructing Independent Directors' (2013), Journal of Corporate Law Studies, 63.

542 Mongalo, *Corporate Law and Corporate Governance,* 156.

543 King III Report principle 2.18, 38.

544 Cassim and Others, *Contemporary Company Law*, 652.

directors may be preferred as capable of bringing about good corporate governance in companies, little evidence exists in practice to support the preference.[545]

The notion of independent non-executive directors monitoring executive directors appears to be a duty that is outside the scope of directors' legally recognised duties.[546] However, it may be of great value to suggest that executive directors are monitored given that they are under an employment contract. After all, the call for non-executive directors to supervise executive management is not ill-advised. It is to these that non-executive directors would delegate many of the functions which would be capable of performance by those in full-time employment with the SOC.

Notwithstanding the lack of evidence to support improvement in a company's performance, if its board of directors is composed of a majority of non-executive directors and independent directors, it has been suggested that they can go a long way in the monitoring[547] and management of executive directors who are susceptible to acting in their own interests, instead of the company's interests.[548] In the State Capture Inquiry, several executive directors were implicated in corruption scandals at Eskom.[549] This begs the question of whether the position would have been different if the board had been composed largely of non-executive and independent directors. However, it may be problematic to assume that a board of directors comprising non-executive and independent directors would absolutely be above self-interested actions.[550]

It is a positive step that the National State Enterprise Bill factors in integrity in the appointment of directors. The point is that composition alone, even if meeting recommended templates, does not go far enough if those appointed are unscrupulous individuals. Executive directors are an extension of a board of directors, but they are involved in the

545 Beecher-Monas, 'Marrying Diversity and Independence in the Boardroom' 373, 375.

546 Companies Act 2008, s 76(3).

547 SABC News: Former Eskom CFO Anoj Singh stripped of his SAICA membership: <https://www.sabcnews.com/sabcnews/former-eskom-cfo-anoj-singh-stripped-of-his-saica-membership/ > accessed 24 June 2021.

548 Smith, Corporate Governance, 273, 278.

549 Daily Maverick: Eskom: Zuma, Molefe, Koko and Singh key players in State Capture <https://ww.dailymaverick.co.za/article/2022-04-29-eskom-zuma-molefe-koko-and-singh-branded-key-players-in-state-capture/ > accessed 23 October 2021.

550 Maria Vagliasindi, 'The Effectiveness of Boards of Directors of State-Owned Enterprises in Developing Countries' (2004) The World Bank, 2,3

day-to-day management of a company.

The traditional argument may be that all directors on a board are required to execute the same governance duties as a collective.[551] However, a deeper look would reveal that a blanket approach to board duties is becoming superfluous and unsupported by the reality and dynamics emerging in most modern boards of directors. Clearly, executive directors and non-executive directors by their respective designations are subjected to differentiated duties.[552] Indeed, there may be duties that will remain the same.[553] However, discharging them may occur differently. For instance, the duties in section 76 of the Companies Act such as the duty of care, skill and diligence may be carried out differently by executive and non-executive directors precisely because of their situations. For example, executive directors blend their day-to-day discharge of board duties in their daily jobs. They do not have to step outside their full-time jobs to perform their board duties and then step back into the day-to-day affairs to perform their full-time jobs. In effect, during their full-time duties it is within this scope that they perform board duties arguably those delegated to them by non-executive directors.

Naidoo asserts that the powers conferred on a board are collectively conferred on all of them.[554] Dalley asserts that '[t]he ultimate managerial authority in a corporation lies with the board as a whole.' The officers are appointed to carry out the directions of the board.'[555] The above clarifies the role of directors as opposed to that of officers in a company. While the above views are accepted and find accommodation in the law, the reality indicates that executive and non-executive directors may take additional duties tailored to their varied designations.[556]

Non-executive directors are credited for bringing objectivity to a board of directors.[557] That is only because they are not employees of the company and some of them do not own

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551 Gevurtz, The Political and Historical Origins of the Corporate Board of Directors, 6; Naidoo, *Corporate Governance,* 164.

552 Cassim and Others, *Contemporary Company Law,* 652-653.

553 Companies Act 2008, s 76(3).

554 Naidoo, *Corporate Governance,* 164.

555 Dalley, Paula J Dalley, 'Public Company Corporate Governance under the Sarbanes-Oxley Act of 8 2002' (2003) Oklahoma City University Review, 203.

556 *Organisation Undoing Tax Abuse v Myeni* [2020] 3 All SA 578 (GP) [16].

557 Cassim and Others, *Contemporary Company Law,* 652.

any shares in the company. Less has been written about how not being part of the company may mean a non-executive director's knowledge of the business is limited. Furthermore, a non-executive director may possibly not deploy as much commitment to the success of the company as one who either works for it or owns shares in it. Mouton refers to this lack of commitment stating as follows:

> Board members must be heavily invested to really care. An independent, non-executive director only comes to board meetings to drink tea and eat your cookies. You need some independents, but the independent director doesn't look at the wellbeing of the company. He doesn't lie awake at night thinking, 'will it survive?[558]

The sentiments may have some relevance to non-executive directors in SOCs who may convene meetings after meeting without improved governance of an SOC, while continuously drawing board fees. In fact, it may not be farfetched to speculate that some board meetings decide nothing. Furthermore, the excerpt demonstrates the conundrum of the effectiveness of non-executive directors on a board. It seems that although their effectiveness cannot be denied, it depends on certain factors such as their own commitment, competence and professionalism to really contribute meaningfully to the work of a board.

The acceptance of a monitoring role on non-executive directors to execute against executive directors is a complex ideal that is recommended for deployment in SOCs. Its success, however, will depend on many factors. Non-executive directors should themselves be skilled to be able to provide leadership, supervision and monitoring of executive directors. Without a level of skills, non-executive directors will be bound to settle for what they are told by executive directors. It is here where it is relevant to insist that those without minimal skills such as of reading the SOCs' financial accounts and evaluating the financial position, should not accept an appointment to the board of directors.[559] They may become a conduit of poor approvals for unnecessary expenditure.

It may also go a long way to expressly provide for the monitoring and supervisory roles

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558 Chris Barron, King got it wrong – Mouton Sunday Times (19 October 2014) <https://www.timeslive.co.za/sunday-times/business/2014-10-19-king-code-got-it-wrong--mouton/ > accessed 15 November 2021

559 Joanna Bird and Jennifer Hill, 'Regulatory Rooms in Australian Corporate Law' (1999), Brooklyn Journal of International Law, 571.

that non-executive directors are required to discharge in existing legal instruments. The inclusion of the additional roles will obviate the probable backlash and defence that executive directors may seek to rely on to challenge the authority of non-executive directors. It may happen that ill-advised executive directors may resist any supervision by expressing that they are equals. Of course, the argument will be short-sighted and oblivious of the fact that as executive directors, they are employees of an SOC. In so far as they are employees and within that scope, the executive directors will account to non-executive directors. The SABC has some commendable provision which states that executive directors account to the board of directors, meaning to the non-executive directors, other than to themselves.[560]

From practice, a board of directors monitoring performance of another board works well in situations where there is a holding and subsidiary company relationship. In this situation, the board of the holding company is in a supervisory capacity and monitors the performance of a subsidiary board, the executive board so called, which in turn monitors management's performance.[561] For instance, the board of directors of the Central Energy Fund SOC Ltd (CEF) is supervisory to the board of the subsidiary company, the Petroleum Oil and Gas Corporation SOC (PetroSA).[562] On each of these SOCs there is a board of directors. As it appeared in the matter of *Steenkamp v Central Energy Fund Soc Ltd*,[563] the board of the CEF was instrumental in dismissing the directors of PetroSA for poor performance, having failed to turn around the financial position of PetroSA. The illustrated scenario appears much more credible as a monitoring mechanism than non-executive directors monitoring executive directors on the same board of directors.

However, with the suggested reforms for formalising such additional roles of monitoring and supervising executive directors, things can be easier for non-executive directors.

It may also go a long way to expressly provide for the monitoring and supervisory roles that non-executive directors are required to discharge in existing legal instruments.

560 Broadcasting Act 1999, s 14(2).

561 Sofie Cools, 'The Dividing Line Between Shareholder Democracy and Board Autonomy: Inherent Conflicts of Interest as Normative Criterion' (2014) ECFR 276 footnote 91.

562 *Steenkamp v Central Energy Fund Soc Ltd* 2018 (1) SA 311 (WC) [44].

563 2018 (1) SA 311 (WC) [10] and [11].

Cognisance must be taken of the fact that when it is suggested that non-executive directors should monitor the conduct and performance of executive directors, what is proposed is the monitoring of the performance of the executive directors in their capacity as managers,[564] and not the monitoring of their performance as directors on the board of directors. It may appear unimaginable that a peer should monitor another peer and still maintain a healthy and balanced work relationship on a board of directors. Notwithstanding the rarity that directors hardly monitor each on how they perform on a board of directors, corporate governance should require that directors first check themselves before or if they are to check executive management better. Some laws of public enterprises have provided for situations where a board member missing three consecutive meetings without leave of the board of directors can be removed.[565] If other directors on a board are not paying attention to the conduct of one of their own, be it in terms of participation or discharge of board duties or mere attendance of board meetings, the board may become dysfunctional.

It is here where through the leadership of the chairperson of a board that monitoring is made part of the board's culture aimed at improving the governance of the SOC. In *Organisation Undoing Tax Abuse v Myeni*,[566] the Court indicated that a chairperson has a role to play in ensuring the effectiveness of a board. Equally, it is submitted that all other directors on a board must ensure that they monitor each other's performance and not leave everything to the chairperson. This further suggests that, even the chairperson cannot be left to lead the board of directors astray and unopposed. All this can happen when all directors are alert and objectively monitoring their own conduct in pursuit of an effective board and good governance of the SOC.

Section 13(1)(c) of the National State Enterprises Bill provides for a detailed performance evaluation against targets set.[567] This implies that the performance of directors will be monitored against targets. It is submitted that directors should find it acceptable to

564 Katherine M Brown, 'New Demands, Better Boards: Rethinking Director Compensation in an Era of Heightened Corporate Governance' (2007) New York University Law Review, 1102, 1106.

565 Competition Commission Act 2003, s 8(1)(c); Namibia National Reinsurance Corporation 1998, s 8(1)(c).

566 *Organisation Undoing Tax Abuse v Myeni* [2020] 3 All SA 578 (GP) [36]-[37].

567 National State Enterprises Bill, 2024, s 13(1)(c).

develop a mechanism of monitoring each other's performance against not only targets, but in line with their duties.

The scenario implies that nothing should hinder a board to monitor itself or to go on with its work unchecked. For instance, literature on evaluation of board performance has suggested that directors can evaluate each other and can also conduct self-evaluation. Therefore, while there may be fears of causing disharmony through a backlash by a director who may feel he or she is being monitored, the essence of doing so is geared to support good corporate governance by directors performing their duties effectively. It may further enhance feedback on performance if it is taken positively, and if monitoring is not used to settle scores. It is submitted that directors on a board are equal. Thus, monitoring by a board of directors is not limited to non-executive directors monitoring the work of executive management. It is submitted that monitoring begins with non-executive directors themselves.

The justification for monitoring and supervising would lie in the difference between executive and non-executive. Equally, it is within board meetings where the board, collectively will make decisions which executive directors should implement in their management operations of the SOC.[568] It is on these decisions that they will be required to provide feedback on implementation and on what the achieved outcomes have been. Supervision and monitoring will therefore happen in the context of their executive roles. It is also to the board of directors' meetings where executive management (some of whom may be executive directors) will provide information on the overall corporate governance of the SOC. Indeed, executive management would bring the day-to-day performance of the SOC to the board of directors in a meeting. This is practical accounting for the performance of their duties as executives.

The above reality should be seen in context as certain factors such as the calibre of the shareholder representative of the SOC may influence performance.[569] Furthermore, the ownership and governance structure of SOCs pose a challenge to all directors on a board. Essentially, even if non-executive directors would be better placed as against

568 Companies Act 2008, s 66(1) and s 73.

569 Vagliasindi, 'The Effectiveness of Boards of Directors' 3.

executive directors, they have no measure of clout to insulate poor governance directives and any toxic influence, flowing from a shareholder representative, for instance.[570] Non-executive directors may be required to supervise and monitor executive directors. In such a case, shareholder Ministers should not be seen to interfere with the lines of communication and established practice.

Another aspect to be added to the conundrum of executive directors is that, even though they are employed by the company, when serving on a board they are expected to discharge their board duties. Equally, when executive directors are performing their contractual employment duties, they should discharge them as per the contract of employment.[571] Non-executive directors and independent directors do not have to appear to abdicate their duties on a board to the executive directors. In practice, it may be difficult to delineate between an executive director as a member of senior management and a member of senior management as an executive director. These roles, although fulfilled by one and the same person, are in practice varied and should not be mixed. It is submitted that if not carefully managed, there may be a conflict of roles in respect of executive directors in SOCs.

For SOCs, monitoring management performance is for the board of directors as a collective.[572] Furthermore, monitoring of the board of directors' performance is left to the shareholder representative.[573] The study submits that should it be necessary for non-executive directors to monitor the performance of their fellow executive directors in that capacity, certain mechanisms of how that would work should be provided for in legal instruments such as the PFMA and the Companies Act. As the shareholder and the board of directors are the most important organs in SOCs, their duties should be properly defined. Whereas there is a strong argument about a board composition that leans more to non-executive directors, the influence of the ownership and management of SOCs should be assessed for how they can be detrimental to corporate governance at SOCs.

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570 W Richard Frederick, 'Enhancing the Role of the Boards of Directors of State-Owned Enterprises' (2011) OECD Corporate Governance Working Papers, 1,9-10 <www.oecd.org/daf/corporateaffairs/wp >accessed 13 November 2021.

571 Cassim and Others, *Contemporary Company Law,* 652-653.

572 Smith, 'Corporate Governance'277-278 and 288.

573 Public Finance Management Act 1999, s 51(2).

Non-executive directors are generally regarded as independent unless they are in some way associated with the SOC.[574] The question that is for discussion is the rationale for preferring more non-executives than executives on a board of directors. Modern trends do not support a majority executive directors' board.[575] The preference for more non-executive directors ought to be quantified as it is not known to be a panacea for board ills. These mechanisms will be discussed in more detail below.[576] It is submitted that, though the composition of the board may play an important role, aspects such as the integrity and competence of the directors count profoundly towards good corporate governance.

In practice little evidence exists that non-executive directors and independent directors are more efficient and less compromised. On the contrary, there is evidence that in some corporate scandals the boards of the companies involved were composed of a mixture of executive and non-executive directors.[577] For instance, it was established that when Enron collapsed, its board comprised independent directors.

These directors failed to stop the collapse of Enron.[578] It has even been accepted that legislation such as the Sarbanes-Oxley Act 2002 was enacted to respond to several scandals of world-famous companies.[579] The Sarbanes-Oxley Act was an answer to many corporate scandals. It introduced best practices to enhance corporate governance in public companies. Its preamble sums up the intent behind enacting the law: 'To protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes.' The Sarbanes-Oxley Act introduced the public accounting board to regulate public accounting firms that audit public companies.[580]

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574 Cassim and Others, *Contemporary Company Law*, 652-653.

575 Cassim and Others, *Contemporary Company Law,* 652-653.

576 At 3.7.3 under the discussion of the Role of Non-Executive Directors in SOCs.

577 Dalley, 'Public Company Corporate Governance under the Sarbanes-Oxley Act', 185, 187.

578 Beecher-Monas, 'Marrying Diversity and Independence in the Boardroom' 373, 376.

579 Peter V. Letsou, the Changing Face of Corporate Governance Regulation in the United States: The Evolving Roles of the Federal and State Governments, (2009) Volume 46 Williamette Law Review, 149, 185.

580 Sarbanes -Oxley Act of 2002, Title II, 116.

Beecha-Monas[581] argues that independence alone is not helpful. She proposes that it would be a good idea to combine director independence and diversity.[582] It does appear that apart from different ideas, perspectives, and experience, support for diversity embraces having women on boards. This conclusion follows the findings of Beecha-Monas's thesis. She points out that Enron had one woman, in addition to majority non-executive directors.[583] On this account, Beecha-Monas seeks to conclude that boards of directors should have independent non-executive directors diluted with diversity. It is understood that diversity is not to be limited to gender but to such ideals as independent thinking and originality.

Chia[584] appears to support the call for diversity and independence of directors. Chia advocates for diverse and independent boards for Singaporean companies stating that:

> In sum, having a culture of diversity creates a culture of dissent as diverse board members provide diverse perspectives and improve critical thinking. With such culture of scrutiny, the "strong" form of the monitoring board can then be achieved in Singapore. With such a culture of scrutiny and dissent, creativity and innovation can also be fostered.

The foregoing thesis brings an important underlying aspect of who should get appointed to a board. The composition of a board in terms of the qualities may be more important than the quantity. SOCs' boards in South Africa have largely been found wanting in relation to their performance. SAA and Eskom may serve as examples. Despite a mixed composition of several SOCs' boards, corporate scandals have continued to occur.

If 'diversity' is to be understood as consisting of differences in ideas, experience and related factors, it can be argued that all board members would have one or two of the elements constituting diversity in the sense explained. To that extent, diversity alone offers very limited benefits. Independence, generally, is defined as when a director has no shareholding interest in the ownership of the company.[585] This definition is also limited

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581 Beecher-Monas, 'Marrying Diversity and Independence in the Boardroom' 373, 386.

582 Beecher-Monas, 'Marrying Diversity and Independence in the Boardroom' 373, 376 – defines 'Diversity' as diversity in perspectives, ideas, and experience.

583 Beecher-Monas, 'Marrying Diversity and Independence in the Boardroom' 373, 376.

584 Yaru Chia, 'Board Diversity in Singapore' (2015) Singapore Academy of Law Journal 304, 311.

585 Cassim and Others, *Contemporary Company Law,* 653.

because independence should include an element of being able to insulate influence or pressure to carry out instructions from the appointing authority detrimental to the SOC.

It should align with the courage to dissent within reason than to flow with the majority. Additional suggestions would include independence of mind and thought and of undue influence from the appointing authority. It is argued that politically exposed persons should not be appointed to boards of SOCs as they may already be compromised. Through them, improper instructions unrelated to the best interests of the SOC may find accommodation and move to infiltrate whole organisations.

The assumption is that, where a person is competent but fails to discharge his or her duties to the board because of any compromise, such person should at least be honest enough to resign. If a person knows that due to a possible appointment he or she will not be able to maintain independence without undue influence, such appointment should be declined forthwith. These reflections can be a reality in SOCs where political influence comes into play and where, because of its ramifications, persons are appointed with ulterior instructions. SOCs will not survive corporate governance failures if they are turned into vehicles to achieve political goals divorced from the purposes these entities were formed for.

It is exactly the glaring evidence of the corporate scandals that enforces a call away from the common calls of artificial diversity and independence. A new way of looking at how boards of directors can be efficient and highly accountable is advocated for. This includes a thorough examination of certain qualities of how boards are composed. Certainly, a composition that only seeks to look at diversity and independence by paying little attention to other problems SOCs experience will still fall short of addressing inherent poor corporate governance.

The proper composition of a board of directors is critical in answering the questions of liability and accountability in SOCs in South Africa. In the final analysis, non-executive directors if suitably qualified, can perform their duties efficiently and improve SOCs' performance. It is, however, respectfully submitted that shareholder representatives in SOCs should interact with the SOCs in a professional manner and solely in the best interests of the SOCs' good governance. The hope that a large number of non-executives

on a board of directors of SOCs alone, will bring results, loses sight of the intricate dynamics on SOCs' boards. The suggestion is that, and this may assist non-executive directors to perform well, the appointing authorities should eliminate any personal expectations and only appoint directors that will promote the objects of the SOCs and ensure that their actions are aligned to the Constitution.

3.2.3.1.1. The Distinct Role of Non-Executive Directors in SOCs

The call for and preference of non-executive directors on boards, as well as the focus of this thesis, warrant an examination of the role of non-executive directors in SOCs. The growing calls and preferences of non-executive directors are rooted in the belief that, being independent and part-time from the company, they usher in external and unfettered perspectives to the management of the company.[586]

These directors are believed to be capable of exercising uncompromised and independent thinking in the best interests of the company. It has been said that the fundamental role of the non-executive directors is to ensure that the company is run properly, but not to run the company. It is this arm's-length involvement with the company by non-executive directors which it is believed can bring much value to the company.[587]

In this regard, the role of non-executive directors can be summarised as follows:[588]

- To set and ensure strategy implementation, setting goals and objectives and accounting for performance reporting.
- To monitor and evaluate management performance of the day-to-day management of the company.
- To be involved in ensuring that the financials and risk management profiles of the company reflect a good picture of corporate governance.

It is submitted that non-executive directors who have no knowledge of the business of the company on which they serve will find it difficult to contribute value to the company.

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586 Cassim and Others, *Contemporary Company Law,* 652.

587 Mervyn King and Fabian Ajogwu, *Outcomes-Based Governance; An Approach to Corporate Governance,* (1st edn 2020, Juta) 70-71.

588 Murray Steele, 'The Role of the Non-Executive Director' <https://doi./10.1017/CBO9780511494819.004 > accessed 22 March 2024.

This is discouraged and one way to make certain is to emphasise competence at appointments. Furthermore, non-executive directors who lack sufficient information and are inadequately involved are less likely to add any value to the company. It is contended that to ensure that directors with the necessary level of expertise and independence sit on a board; non-executive directors should constitute many boards for SOCs. However, this contention is not lightly made. It is made on condition that, firstly, the appointing authority understands that the SOC is a public entity formed for the public good. Secondly, those who are appointed are competent and have proven to be independent in their thinking, deeds and are of high integrity. They are trusted to act on irregular instructions from anyone.

3.2.3.3. Appointment and composition of boards in SOCs

An evaluation of the legislative framework regulating director liability, conduct and accountability reveals that no clear regulations and / or guidelines exist on the appointment of directors in most SOCs. The SABC is an exception because the Broadcasting Act determines how the board of directors of the SABC is to be appointed[589] and constituted.[590] In South African SOCs the common board composition is one that reflects a unitary board of directors.[591] This is a board of directors which comprises both executive and non-executive directors.[592]

A unitary board of directors differs from one where a two-tier board structure exists.[593] A two-tier structure board implies a management board and a supervisory board.[594] This is common in holding companies.[595] By implication, the board of directors of the holding company becomes supervisory to the management board.[596] The management board

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589 Broadcasting Act 1999, s 13(1)(2)(a)(b)(c).

590 Broadcasting Act 1999, s 12(a)(b).

591 Examples include the Eskom board and the SABC board.

592 King IV principle 7(7)(b);.

593 German Stock Corporation Act 1965, s 30(1) and (4); Cassim and Others, *Contemporary Company Law*, 655-656; David Block and Anne-Marie Gerstner, One-Tier vs Two-Tier Board Structure: A Comparison between the United States and Germany (2016), Comparative Corporate Governance and Financial Regulation 1, 22-23

594 Cassim and Others, *Contemporary Company Law,* 655-656.

595 Central Energy Fund <https://cefgroup.co.za/integrated-group-structure/ >accessed 08 August 2024.

596 National State Enterprises Bill 2024, s 1; Cassim and Others, *Contemporary Company Law,* 655-656.

would then ordinarily consist of mainly executive directors while the supervisory board of directors would consist of mainly non-executive directors.

Directors appointed to SOCs are generally independent and non-executive directors are not the incorporators of the companies. SOCs in South Africa do not generally list on the stock exchange or get diluted in terms of ownership, and for that reason remain state-owned. Accordingly, directors of SOCs do not as of practice own[597] any stakes in the companies[598] and are appointed by the shareholder representative, generally the Minister heading the Department of Public Enterprises or another relevant Minister.[599] The following extract is poignant to the critical issue of director appointment in SOCs:

> In the private sector, a nominations committee – or failing that the board themselves – would typically be responsible for conducting due diligence on prospective non-executive directors and making recommendations to the shareholders for the appointment. Appointment of executives, on the other hand, would be the responsibility of the board alone.
>
> By contrast, director appointments in the public sector are largely led or solely influenced by one single individual – the relevant Minister – especially in the case of non-executive directors. Whilst executives like the CEO are interviewed and shortlisted by the board, there is often still interference with this process during the initial recruitment process.
>
> In this regard Natesan points out that it is critical that the Ministers ensure that thorough due diligence is performed and that existing boards are consulted to determine the skills and experience needed before making any non-executive director appointments. It is equally critical that Ministers allow the board to appoint executives without undue influence. In addition, Ministers should consider a staggered rotation process to provide continuity and institutional memory within boards.

Natesan further highlights that according to the King IV report on corporate governance,

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597 It remains to be seen as the situation may change with the ongoing talks to have private equity in South African Airways. See the report at:< https://liveandletsfly.com/south-african-airways-sold/ > accessed 15 November 2021.

598 Companies Act 2008, 57(2), (3) and (4).

599 Accountancy SA: SOE Boards: It matters Who Gets Appointed and How they are Appointed < https://www.accountancysa.org.za/soe-boards-it-matters-who-gets-appointed-and-how-they-get-appointed/ >accessed 11 November 2021.

'the board should consider the collective knowledge, skills and experience required by the board as well as the diversity of the board'.[600] Given the importance of the role of directors on a board of an SOC, it is advisable to ensure only fit and proper persons are appointed. A thorough consideration is sometimes lacking in the sphere of SOCs, in favour of political pressure.[601] In the same vein, the former Chief Justice of the Constitutional Court of South Africa expressed that some kind of tests to determine whether a person is fit and proper should be conducted before people are assigned to positions of high responsibility.[602]

As indicated, the Companies Act does not provide for requirements that must be met for persons to be appointed as directors to SOCs. Section 9(1) of the Companies Act has been noted as providing that all provisions in it apply to SOCs unless exempted in terms of subsection 3. With respect to the appointment and composition of boards of SOCs, enabling laws or best practices are generally followed. Although it has been noted that section 66(2) of the Companies Act provides for the composition of a board of directors of up to three directors. This is insufficient for the board of a SOC. Generally, the composition of boards in SOCs is preferred to have a diverse range of expertise to assist the SOC perform its objective for the benefit of the public. Furthermore, section 66(2) of the Companies Act has been noted to allow for the number of three directors to be changed in line with the Memorandum of Incorporation. In other words, the composition of three directors can be amended in the MOI to a higher number. It is submitted that this provision can serve as a gateway to boards of SOCs having more than three directors.

The PFMA also lacks similar provisions on the issue. What then would guide a shareholder representative to appoint not only executive and non-executive directors, who are diverse, but who also meet proper competency requirements? The Broadcasting Act comes close as it provides some requirements for those who must be appointed to the

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600 Accountancy SA: 'SOE Boards: It matters Who Gets Appointed and How they are Appointed' <https://www.accountancysa.org.za/soe-boards-it-matters-who-gets-appointed-and-how-they-get-appointed/ >accessed 11 November 2021.

601 Thabane and van Deventer, Pathological Corporate Governance Deficiencies, 4.

602 Accountancy SA: 'SOE Boards: It matters Who Gets Appointed and How they are Appointed' <https://www.accountancysa.org.za/soe-boards-it-matters-who-gets-appointed-and-how-they-get-appointed/ > accessed 22 June 2021.

board of directors of the SABC. Section 13 of the Broadcasting Act states that:

4. The members of the Board must, when viewed collectively –

    a. be persons who are suited to serve on the Board by virtue of their qualifications,expertise and experience in the fields of broadcasting policy and technology, broadcasting regulation, media law, frequency planning, business practice and finance, marketing, journalism, entertainment and education, social and labour issues;

    b. be persons who are committed to fairness, freedom of expression, the right of the public to be informed, and openness and accountability on the part of those holding public office.

Currently no approved standard for appointing board members for SOCs, in South Africa, save where an empowering legislation provides for this exists.[603] Generally, the legislative framework governing SOCs is inadequate and should be strengthened especially in respect of ensuring that appointments meet all desired competencies, such as diversity, independence, competence, experience and integrity.[604] The King Report IV provides guidance in relation to the appointment process of directors in SOCs.[605] It is therefore suggested that the principles provided in the King IV Report on the appointment of directors should be considered to develop a competent procedure for appointing directors in SOCs in South Africa.[606]

The Institute of Directors in South Africa has expressed its concern on the appointment of directors as follows:

> Directors need to have the requisite knowledge, skills, experience and personal qualities, and should be appointed through a formal, independent process. This is critical in any organisation, but particularly for SOEs because of their influence on the rest of the

603 An example is the Broadcasting Act 1999.

604 Tom Wixley and Geoff Everingham, *Corporate Governance,* 39.

605 King IV Report Principle 7, 115.

606 The recommendations in King IV if applied appropriately could go a long way in ensuring not only the best appointments to SOCs boards but also ensure the best composition.

economy, and the difficulty of keeping political and economic goals separate.[607]

It is accordingly argued that different statutes used in company law to address corporate scandals is not the only answer. Part of the solution lies in a formal appointment process. It is submitted that although some value lies in having directors appointed possessing varied expertise, perspectives, experience or a certain gender on a board of directors, attention should also be paid to the character, skills, education, integrity, good judgment and competence of those considered for appointment.

The system for appointing non-executive directors should at least be able to disqualify directors known for being dishonest and self-interested. Furthermore, it is suggested that a proper balance of critical factors should be considered in appointing board directors. The fame and/or personal status of a potential director unhinged from competence at board level should not play a determining role to ensure an appointment in an SOC.

One can agree with the then Chief Justice of the Constitutional Court arguing that it is clear what will happen to an organisation if rotten apples are appointed.[608] Essentially, the appointment of board members for SOCs in South Africa has to date disregarded the recommendations in the King III Report.[609] Furthermore, it seems that appointment of board members of SOCs is sometimes done on political grounds,[610] resulting in questionable appointments.[611] The relevant Minister who represents the State as shareholder in an SOC is a political appointee and observes the political party's interests if left unguided. The Minister must take serious precautions to ensure that independent directors are appointed to the board of an SOC and that instructions are not taken from the governing party/parties.[612] A situation to the contrary would fall in the category of undue meddling with the control, ownership and management of SOCs.

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607 IoDSA 'IoDSA hails Government plan to improve board appointments on state-owned entities' <https://www.iodsa.co.za/news/355434/IoDSA-hails-Government-plan-to-improve-board-appointments-on-state-owned-entities.htm > accessed 22 June 2021.

608 Accountancy South Africa: It Matters Who Gets Appointed and How they Get Appointed: <https://www.accountancysa.co.za/soe-boards-it-matters-who-gets-appointed-and-how-they-are-appointed/ >accessed 08 August 2024.

609 King III Report Principle 2.18.

610 Vagliasindi, 'The Effectiveness of Boards of Directors' 1, 3.

611 Vagliasindi, 'The Effectiveness of Boards of Directors' 1, 3.

612 IOL 'ANC welcomes appointment of new Eskom CEO, board chair' <https://www.iol.co.za/news/politics/anc-welcomes-appointment-of-new-eskom-ceo-board-chair-12824735 >accessed 23 June 2021.

Political party interference in the appointment of directors tends to undermine the independence of directors in SOCs. This presupposes that when directors are appointed to boards of SOCs as such, they arrive with a measure of compromise and their independence is somewhat diluted. Ultimately, any political interference in director appointments and compositions of boards have a resultant effect on poor corporate governance:[613]

> Political influence in the nomination process is still strong in developing countries. The key challenge is to prevent the process to degenerate into a situation characterised as "political interference". The political interference goes either through the nomination process itself, involving a complex political negotiation among different government organs, or through direct nomination of political appointees. This is often identified as a main weakness of SOE corporate governance, as too often Boards are populated with people chosen for their political allegiance rather than business acumen.[614]

Where questionable appointments at board level in SOCs have been made, the performance of such SOCs' results have been catastrophically poor.[615] To address the problem, appointments must in future be guided by an independent and transparent appointment process based on merit and one which can be audited.[616] The suggestion is in addition to the basic but critical requirements of competency that all board members must exhibit. The National State Enterprises Bill contains provisions which will apply to the appointment of directors for the holding company and its subsidiaries.[617] In its current form, it appears to create confusion about how directors will be appointed. For example, section 10(1) provides as follows:

> The Board must, after implementing the prescribed transparent process, recommend the appointment by the shareholder of persons as directors on grounds of their skill, knowledge, experience and integrity, which, when considered collectively, will enable them to fulfil the objectives of the holding company.

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613 Anna Menozzi and others, 'Board Composition, Political Connections and Performance in State-Owned Enterprises' (2010) Collegio Carlo Alberto 1, 2.

614 Vagliasindi, 'The Effectiveness of Boards of Directors' 1, 8.

615 Thabane and Snyman van Deventer, Pathological Corporate Deficiencies, 2-4.

616 Vagliasindi, 'The Effectiveness of Boards of Directors' 1, 8; the submission by the Dullar Omar Institute to the Zondo Commission on the appointment of board directors to state-owned companies (2019]) The Dullar Omar Institute 1, 13.

617 The Companies Amendment Act, 2024, provides for the exclusion subsidiary company from the requirements on financial assistance.

The submission on this provision is that it is understood to refer to an outgoing board of directors engaging itself in the recruitment and appointment of an incoming board of directors.[618] There is also a reference to prescribed procedures which must be followed.[619] The expectation is that those prescribed procedures, wherever they will be contained, will be objective and applied consistently every time an appointment is required. Another concern may be that using an outgoing board of directors to attend to the initial processes of appointing a new board may be seen as allowing an outgoing board to recommend stooges, who may cover up fraud or other misappropriations of a past board. On the good side, the innovation of having a transparent and prescribed process for appointing directors may improve the calibre of board members appointed in SOCs in South Africa. If the process is flawed, any interested party could challenge it in open court.[620]

Of particular importance is section 10(3), which provides that the board is again required to recommend an alternative person where the shareholder declines to appoint directors based on the recommendation made. The understanding is that if the recommended appointment of one or more directors is questionable or undesirable, the board must provide credible names.[621]

There is no scope in the Bill for the shareholder to appoint directors based on personal choice or without guidance. This differs from what can be found in the Public Enterprises Governance Act, where a minister can substitute the names of recommended persons with those of his or her own and proceed to make an appointment.[622] The problem with this scenario is that the minister substitutes names unguided. There is clear room to appoint a person who did not go through a prescribed process. This situation has been avoided with the Bill and it is a commendable step in the right direction depending on how implementation will be carried out.

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618 Section 1 of the National State Enterprises Bill defines “Board” as the board of directors of the holding company.

619 National State Enterprises Bill 2024, s 10(1).

620 The Constitution of the Republic of South Africa, 1996, s 38.

621 National State Enterprises Bill 2024, s 10(2): it is noted that the section does not require the shareholder to explain why he or she declines to appoint based on the initial recommendation.

622 Public Enterprises Governance Act 2019, s 8(4) and s 9(4).

3.3. Conclusion

SOCs are critical organs of corporate governance in South Africa in the provision of quality public welfare. The shareholder representative, usually a Minister, the board of directors, mainly, non-executive and the executive management play significant roles in an attempt to ensure good governance of SOCs. In some SOCs there is a blend of both executive and non-executive directors, with the majority being non-executive directors. This is the situation at Eskom and the SABC respectively.[623] This mixture is not by coincidence; it is a creation of enabling laws adapted even in SOCs without own legislation.[624]

The difference between a shareholder Minister in an SOC and a shareholder in any other company is that, in SOCs, the shareholder Minister represents the State.[625] This places the shareholder Minister as a critical contributor to either the bad or good corporate governance of SOCs. This is because the designation comes with responsibilities.[626] Other shareholders' powers are those known in company law as reflected in the Companies Act and few other sources such as codes of corporate governance.[627] For shareholder Ministers, their powers go beyond those contained in the Companies Act, to those in the PFMA and other instruments,[628] including an enabling law if the SOC has one.[629] These instruments will contain the powers and functions of shareholder Ministers in the SOCs in which they represent the State as shareholders.[630]

Since the State is juristic in nature, the shareholder Minister or another functionary appoints the board of directors of an SOC. Thus, the composition of a board of directors of an SOC is not entirely the same as that of a company privately managed. Some SOCs legislation provide for a board of directors' composition, others do not. There are other SOCs without own primary laws. Even in these cases, the board of directors' composition will not be as would be constituted in privately managed companies. The composition

623 Broadcasting Act 1999, s 12(a) and (b).
624 Broadcasting Corporation Act 1999, s 12(a) and (b).
625 Eskom Conversion Act 2001, s 1 read with s 2; South African Airways Act 2007, s 1 and s 2(a).
626 South African Airways Act 2007, s 3(3)(a)(b); Eskom Conversion Act 2001, s 6(4).
627 Companies Act 2008, s 59, 60 and 65.
628 Public Finance Management Act 1999, s 63(2).
629 Constitution of the Republic of South Africa 1996, s 92(2), s 92 (3)(b); South African Airways Act 2007, s 3(3)(a)(b); Eskom Conversion Act 2001, s 6(4); Companies Act 2008, 65(1).
630 South African Airways 2007, s 3(3)(a)(b); Eskom Conversion Act 2001, s 6(4); Broadcasting Act 1999, s 1.

usually reflects a blend of expertise believed to be catalysts in governing the SOCs successfully. It is also accepted that the Companies Act does not venture to dictate the composition of boards as to executive or non-executive, both directors are bound by the provisions of the Companies Act.[631]

The Composition of boards of directors in SOCs is high on non-executive directors than on executive directors.[632] Recent literature indicates that non-executive directors have some monitoring role over executive directors to discharge.[633] This observation is not disputed. However, the thesis submits that non-executive directors too must be in a position to monitor themselves. The suggestion stems from experience in SOCs in South Africa where non-executive directors have themselves caused governance problems than executive management who had to be monitored.[634] To put it simply, someone must be checking the checker. In the SAA case, the Chairperson of the Board was complicit in poor corporate governance.[635]

Evidence indicated further that at least one of the directors on the board aligned with the Chairperson's poor corporate governance practices.[636] Under normal circumstances, the shareholder Minister ought to be monitoring the non-executive directors he or she appointed to the board of the SOC to which he or she is the shareholder representative. However, this is rare as corporate scandals have occurred while shareholder Ministers were around and could not stop them[637] or the shareholder Minister removed the board of directors, instead as happened in this case. In the case of the SABC, a shareholder Minister was herself complicit in corporate governance failures at the institution.[638]

If non-executive directors can monitor themselves and make this part of their ongoing performance evaluation and conducted in a spirit of objectivity aimed at improving

631 *Organisation Undoing Tax Abuse v Myeni* [2020] 3 All SA 578 (GP) [32]; *Howard v Herrigel and Another NNO* 1991 (2) SA 660 (A) [678].

632 For example, section 12 of the Broadcasting Act 1999, indicates twelve non-executive directors to three executive directors of the SABC board of directors.

633 Block and Gerstner, One-Tier vs Two-Tier Board Structure, 10-11.

634 *Organisation Undoing Tax Abuse v Myeni* [2020] 3 All 578 (GP) para [264].

635 *Organisation Undoing Tax Abuse v Myeni [*2020] 3 All 578 (GP) para 264.

636 *Organisation Undoing Tax Abuse v Myeni* [2020] 3 All 578 (GP) para 148-149, 161]

637 *Organisation Undoing Tax Abuse v Myeni* [2020] 3 All 578 (GP) para 264-

638 *SOS Support Public Broadcasting Coalition v South African Broadcasting Corporation SOC Ltd* [2017] ZAGPJHC 289 JDR 1686 (GJ) [1]-[3].

corporate governance, it may be a good thing. It would mean that the work of self-correcting starts with the directors themselves before it is suggested by other parties, such as the public or other non-governmental institutions. The advantage of a board which monitors its own performance is the assurance it gives that it is serious about good corporate governance of the SOC. This suggestion further solidifies the governance outlook of SOCs as board members themselves will be at the forefront to align their conduct with the law.

The chapter succeeded in situating the evolution, management and management structure of SOCs beginning with the Constitution.[639] As they are, SOCs are generally to be seen as organs of State[640] and should be managed in an accountable way as provided for in the Constitution. The Constitution is to be given prominence in the affairs of SOCs since its obligations must be fulfilled and all laws must remain consistent with what it provides.

The role of SOCs' shareholders in South Africa was discussed in the context of the Constitution and the PFMA. Shareholders, most of whom are Cabinet Ministers, must, in terms of the Constitution, account on how they discharge their duties. Their duties are not limited to their departmental affairs. They would stretch to their role in SOCs under their portfolio.[641]

The chapter also discussed the two main distinctions of directors on boards of directors. These being the executive directors and non-executive directors.[642] It was established clearly that executive directors are salaried employees of an SOC while non-executive directors are outsiders and not employed by the SOC.[643] Non-executive directors were singled out as being in a critical and catalytic position to the success of the SOCs. This is because they should oversee and monitor the performance of the executive management. Executive management, in some SOCs, may include board members.[644] In this connection, it was found that non-executive directors stand in a supervisory role against

639 The Constitution of the Republic of South Africa, 1996, s 195(f), (2)(c).
640 The Constitution of the Republic of South Africa, 1996, s 239.
641 The Constitution of the Republic of South Africa, 1996, s 92(3)(a)(b).
642 Cassim and Others, *Contemporary Company Law*, 653-656.
643 Cassim and Others, *Contemporary Company Law*, 652-657.
644 Broadcasting Act, 1999, s 12(a)(b).

executive directors.[645] Although they may serve on the same board, executive directors answer to non-executive directors about how they are discharging their roles in the day-to-day management of the SOC.[646]

The chapter further discussed the board of directors in the context of how they are appointed in SOCs. The recommendations in King IV relating to the composition of boards of directors were suggested for use in the appointment of directors or SOCs' boards.[647] Another aspect discussed was the differentiation of a two-level board system where there is a management board and a supervisory board of directors.[648] This set up implicates a holding company and subsidiary relationship. In terms of this arrangement, the supervisory board would include non-executive directors whereas the management board would mostly constitute executive directors.[649]

It is evident that once the National State Enterprises Bill becomes law, SOCs will be regulated from a central law.[650] This may not stop the application of other laws, but it will create some uniformity on many fronts relating to the improvement of corporate governance of these entities.[651] It is evident that the National State Enterprises Bill departs from the premise that corporate governance of SOCs has to be improved.[652] This recognition of the current problems admits to the inadequacy of a more harmonised legal instrument on the organs in charge of SOCs. The National State Enterprises Bill will place responsibility for the governance of SOCs in identified functionaries. This may mean that accountability will be demanded from the same functionaries.[653]

645 Broadcasting Act 1999, s 14(1)(2).
646 Broadcasting Act, 1999, s 14(1)(2).
647 King IV, principle 7(7)(f).
648 Cassim and Others, *Contemporary Company Law*, 655.
649 Cassim and Others, *Contemporary Company Law,* 655.
650 National State Enterprises Bill 2024, s 2(a) –(e).
651 National State Enterprises Bill 2024, s 22(1), s 22(2)(a)(b), s 22(3).
652 National State Enterprises Bill 2024, s 2(a).
653 National State Enterprises Bill 2024, s 8 and s 9.

CHAPTER 4

DUTIES OF NON-EXECUTIVE DIRECTORS OF SOCs

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4.1. Introduction

It has already been confirmed[654] that the Companies Act and other relevant laws involved in the corporate governance of SOCs contain provisions regarding the role and responsibilities of the board of directors.[655] The board of directors as an institution has duties allocated to it for its sole performance.[656] This chapter discusses the directors' duties, accessible in different legal instruments premised on the understanding that directors work collectively as the board of directors[657] (even though individual directors may perform some board duties).

This thesis appreciates that there may be different types of directors;[658] however, it does not attempt to justify a distinction between directors' duties and board duties. Instead, it submits to a conflation of these duties, treats them as the same, and aligns with the

654 See Chapter 1:1.1; Chapter 2:2.1, 2.2; Chapter 3: 3.2.1

655 Companies Act 2008, s 1; Public Finance Management Act 1999, s 1; Broadcasting Act 1999, s 12.

656 Companies Act 2008, s 66(1); Public Finance Management Act 1999, s 50 and s 51; National State Enterprises Bill 2024, s 9.

657 Companies Act 2008, s 1.

658 Companies Act 2008, s 1; Cassim and Others, *Contemporary Company Law*, 541-543.

director who serves on a board of directors as defined in mainstream instruments applicable to the regulation of SOCs.[659] Besides the mainstream definition of what a director is, the ramifications of what the concept means have enjoyed quite some debate which has situated boards at the centre of corporate governance.[660] The healthy debate could be forgiven and understood, first in the pioneering role allocated to those who occupy the seat of director.[661] Secondly, the success or failure of the company rests on them.[662]

A company, being a juristic person, inevitably depends on human organs in it to control and manage it.[663] Therefore, it can be said that directors of a company direct the company's behaviour.[664] It is within this sphere that directors assume their duties to the company. The duties have been in place from the common law and have also been circumscribed by legislation[665] recently in statutes that resulted in a codification or semi-codification of these duties.

Historically, and from a common law perspective, directors were seen as capable of wearing many labels. For instance, they have been seen as agents and trustees.[666] That is precisely because they are placed in a position of trust over other people's money and are thus stewards of company funds.[667] Furthermore, directors have been seen as placed in a unique position, almost seen as answering to no other but the law and the company.[668] It is through this that shareholders have been held not to be in a position to control directors nor themselves exercise the powers conferred on the directors, unless

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659 Companies Act 2008, s 1: means a member of the board of a company, as contemplated in section 66, or an alternate director of a company and includes any person occupying the position of a director or alternate director, by whatever name designated.

660 Gevurtz, The Historical and Political Origins of the Corporate Board of Directors, (2004), Volume 33, Hofstra Law Review, 1, 91-95; Joanna Bird and Jeniffer Hill, Regulatory Rooms in Australian Corporate Law, (1999), Brooklyn Journal of International Law, 555, 560.

661 Companies Act 66(1); *Commonwealth Bank v Friedrich* (1191) 5 A C S R, 115; *Statewide Tobacco Services Ltd v Morley* (1990) 2 A C S R,115.

662 Companies Act 2008, s 66(1); Companies Act 2006, s 172; Rosemary Teele Langford, The Duty of Directors to act Bona Fide in the Interests of the Company: A Positive Fiduciary Duty? Australia and the UK Compared, (2011), Journal of Corporate Law Studies, 215, 221.

663 Piet Delport, *New Entrepreneurial Law*, (LexisNexis 2014), 12-15; *Salomon v Salomon and Co Ltd* [1897] AC 22 (HL).

664 Companies Act 2008, s 66(1); C. Graham W. King, Extending Fiduciary Principles to the Director-Creditor Relationship: A Canadian Perspective, (2002),Volume 29, Manitoba Law Journal, 244.

665 Companies Act 2008, s 66(1), s 76(3); *Re City Equitable Fire Insurance Co*., [1925] Ch 407.

666 *Mulkana Corp NL (in Liq) v Bank of New South Wales* (1938) 8 ACLR 278 SC (NSW) [78].

667 Cassim and Others, *Contemporary Company Law,* 552-553; *Re Air Canada and M & L Travel Ltd. et al.* (1993), 108 D L R (4th) 592 (S.C.C).

668 *Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 378; [1967] 2 AC 134 (HL) [395].

legally sanctioned.[669] There is, however, an appreciation that shareholders have powers, usually in a general meeting or shareholders' meeting,[670] being the platform where company-affecting resolutions are taken.

In *Automatic Self-Cleansing Filter Syndicate Company Limited v Cuninghame*,[671] the question was whether shareholders in a general meeting could compel directors as to which course of action in a given transaction should be taken, and whether the directors could decline the direction of the shareholders. The direction would seem to fly in the face of the powers of directors laid out in the constitution of the company. In their minds, the directors felt that the direction was not of benefit to the company. The court stood with the directors by determining that directors were not merely agents to feed on shareholders' decisions even when going against the company's constitution and not neatly in the best interests of the company.[672]

Similarly, directors in SOCs should have an appreciation for the enormous powers, duties and functions allocated to them.[673] With these powers, directors in SOCs do not have to look at the appointing authority as legally permitted to issue them with instructions they must follow without demur. Thus, the powers that directors have may appear quite wide and not susceptible to shareholders' influence or control and serve within the bounds of applicable law.[674] These include where directors appear to be reluctant in the taking of necessary resolutions or performing certain acts important to the company.[675] The unique position of directors is enabled by law, especially statutory law,[676] as discussed below. Notwithstanding the unique position in which directors find themselves, there are legal duties they must perform, as discussed below. It is through their duties that their involvement with SOCs is called to scrutiny.

Directors' duties have been described as one of the most problematic areas in company

669 *Barron v Potter* [1914] 1 Ch 895 [901] – [903].
670 Companies Act 2008, s 60, s 61(1).
671 *Automatic Self-Cleaning Syndicate Company Limited v Cuninghame* [1906] 2 Ch 34 (CA) [42-3].
672 *Auto Self-Cleaning Filter Syndicate Company Limited v Cuninghame* [1906] 2 Ch 34 (CA) [42-3].
673 Companies Act 2008, s 66(1); Public Finance management Act 1999, s 50 and s 51; National State Enterprises Bill 2024, s 9.
674 Companies Act 66(1); *Mayor, Constables & Co of Merchants of the Staple of England v Governor and Co of Bank of England* (1888) 21 QBD 160 [165].
675 *Barron v Potter* (1914) 1 Ch 895 [903].
676 Companies Act s 66(1).

law due to their previously informal nature.[677] It is submitted that when they are reduced to writing any person of average intelligence should be able to grasp them. The problem, however, is how to apply the duties in various company transactions in practice. It is this aspect that has made others raise the question as to exactly what directors have to do when performing their duties.[678]

Breaches of directors' duties point to a failure to successfully comply with the duties in practice. In South Africa these duties have been codified into the Companies Act.[679] Notwithstanding the semi-codification of the duties of directors, such codification is merely partial with the rest of the duties still scattered in the common law.[680] Therefore, it is accepted that the codification of directors' duties has not replaced the operation of the common law in this area of company law. Rather, the codified directors' duties complement the common law directors' duties.[681] Since the common law has not been abolished, directors need to comply with the statutory and common law duties. Notwithstanding, the partly codified duties should be seen as offering a commendable shift in terms of access and certainty to directors' duties in South Africa.[682]

Having discussed the existence and legal placement of a board of directors' duties, the focus moves to establishing what duties directors of an SOC must discharge. In other words, what are the duties of directors on a board of an SOC. Are the directors' duties in SOCs different from those of any company incorporated under the Companies Act? Since SOCs are regulated through a multiplicity of statutes, it is expected that the duties of directors may be scattered in the various relevant legal instruments.

In practice, it raises the question whether the placement of SOCs' directors' duties in various legal instruments may complicate access and application. Since directors of

677 Delport, *Henochsberg on the Companies Act 71 of 2008*, 295; Mongalo, *Corporate Law and Corporate Governance,* 158.

678 C. A Riley, The Company Directors Duty of Care and Skill: The Care for an Onerous but Subjective Standard, [1999] Volume 62, The Modern Law Review, 697, 708.

679 Companies Act 76(3)(a)(b)(c)(i)(ii).

680 Companies Act 2008, s 76(3); *Organisation Undoing Tax Abuse v Myeni* [2020] 3 All SA 578 (GP) [243].

681 Cassim and Others, *Contemporary Company Law*, 683-684; Delport, *Henochsberg on the Companies Act 71 of 2008,* 296-297.

682 Companies Act 2008, s 76(3); Cassim and Others, *Contemporary Company Law,* 684.

SOCs may have their duties in various legal instruments, the question is whether their duties sharply equate to directors' duties in privately owned companies or not. Notwithstanding the above-mentioned concerns, it is important to situate known powers of directors from which they derive most of their duties. Section 66(1) of the Companies Act provides the following:

> The business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise.

The section discusses how directors must exercise their authority in relation to a company. A board of directors can do so itself or some of its authority can be delegated and exercised under its direction.[683] Of significant relevance to the discussion are the duties assigned to executive and non-executive directors which are discussed in detail below. It is worth mentioning that the enormous powers accorded to directors in section 66(1) of the Companies Act embed directors' duties under section 76(3). As previously reflected, and generally, the duties of directors' stem from two sources, namely, legislation and the common law while the King IV Report also plays an important role.[684] The relevant enabling Acts and the King Reports will accordingly be evaluated below. For instance, King IV devotes a part to provisions specific to public entities.[685] In this section, the Report discusses various obligations of accounting authorities.

Directors have duties to perform, and they do so on behalf of the company they serve.[686] For non-executive directors, the duties are performed intermittently.[687] This is plainly because they are not employees of a company.[688] However, intermittence, does not equate to being ignorant or disengaged. In *Francis v United Jersey Bank,*[689] it was expressed

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683 Companies Act 2008, s 66(1).

684 Cassim and others, *Contemporary Company Law*, 507; Companies Act 2008, s 76(2)(a)(b) and (3)(a)(b)(c).

685 King IV, 2016, Part 6.6.

686 Companies Act 2008, s 76(3).

687 Cassim and others, *Contemporary Company Law*, 551.

688 *Fisheries Development Corporation of SA Ltd v Jorgensen; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd* 1980 (4) SA 156 (W) [166].

689 432 A. 2nd 814 (N J S C. 1981).

that directors should acquire a rudimentary conception of the company's business. It is the one way in which they would be able to see how their own duties would align to the business needs of the company. To ascertain breach, one needs to have knowledge of what was to be performed and the foundational principles of that performance.[690]

It is submitted that, in practice, establishing governance breaches attributed to non-executive directors may be a complex exercise. The incidence that a breach should have a trail of either cost, loss or damage to the company may complicate the examination of a breach's consequence.[691] As such, the manifestations of breaches may be varied and complex to discern for those whose interest it might be to hold non-executive directors accountable. This has led the media to nearly do the work that the corporate governors should have been doing by lifting the lid on occurrences of poor corporate governance in SOCs. To hold non-executive directors of SOCs accountable to their duties should be clear and known even to those who should hold them accountable. Furthermore, they should be conversant with exactly what may in each instance of breach would have been the required standard of conduct which was not met. This accountability is provided for in both the PFMA and the Companies Act. The submission is that implementation of the provisions is what should be stepped up when governance beaches have been reported.

4.2. The Common Law duties of directors

Prior to the codification of directors' duties, they were exclusively located in the common law. Under common law, directors' duties have been traced back to a long line of very long-respected court cases. In these cases, the constant theme has been that directors duties include fiduciary duties of loyalty, good faith and the avoidance of a conflict of interests. The duty of care has not been placed in the same bag as the fiduciary duties, but has been paralleled with the fiduciary duties and is equally acknowledged in many court cases. The codification of directors' duties is a contribution to the common law duties of directors. Under the umbrella of fiduciary duties, sub-duties of good faith, honesty and loyalty can be filtered out separately. Fiduciary duties cannot be contracted out of. This explains that the duties apply from the date of appointment to the board of directors. It was long determined that the scope

690 Companies Act s 66(1) read with s 76(3)(a)(b)(c)(ii).
691 Companies Act 2008, s 9(a)(b).

of duties of directors would be as may have been contained in the Memorandum of Incorporation.[692] This authority determines that directors' duties and powers have been circumscribed for a very long time.

From a common law perspective, non-executive directors' duties have not posed known difficulties in ascertaining them. The earliest cases have provided that a director's duties to the company consisted of fiduciary duties and the duty of care and skill.[693] With fiduciary duties, one would come across the duty to avoid conflict of interest, the duty to act in good faith and to be loyal to the company. For instance, in *re Brazilian Rubber Plantations and Estates Ltd* it was stated that:

> I have to consider what is the extent of the duty and obligation of directors towards their company. It has been laid down that so long as they act honestly they cannot be made responsible in damages unless guilty of gross negligence.[694]

4.2.1. Fiduciary duties

Directors' duties may broadly be divided into fiduciary duties[695] and the duty of care, skill and diligence.[696] Fiduciary duties in turn are generally divided into two broad categories, the duty to act in good faith and the duty to avoid a conflict of interest.[697] An inquiry into a breach of fiduciary duties is conducted in line with the two broad categories. It is submitted that it is important to contextualise the breaches of directors' duties in accordance with the specific duties for non-executive directors.

4.2.1.1. Conflict of interest

Non-executive directors stand in a fiduciary relationship with the SOC to which they are appointed. Firstly, it is established law that directors owe their fiduciary duties to the

692 *Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame* [1906] 2 Ch 34.
693 In re *Brazilian Rubber Plantations and Estates Ltd* [1911] 1 Ch 425.
694 In re *Brazilian Rubber Plantations and Estates* [1911] 1 Ch 426.
695 Companies Act 2008, s 76(a) and (b).
696 Companies Act 2008, s 76(3)(c)(i)(ii).
697 Wixley and Everingham, *Corporate Governance*, 59.

company.[698] They are required by law to observe the duty of avoiding a conflict of interest between their own interests and those of the SOC they serve.[699] In terms of this duty, non-executive directors of SOCs must forsake their own self-interest for the interest of the SOCs.[700] This entails avoiding a conflict of interests and remaining loyal and faithful to the SOC. The SOCs' interests should be placed first.[701]

For non-executive directors to be found liable for breach of a fiduciary duty relating to conflict of interest, the breach in question should reveal the existence of conflicting interests. For instance, if a non-executive director of an SOC such as Eskom and a non-executive director who privately and independently produces power, sells it to Eskom at a higher cost than other independent power producers, whom Eskom declined to source from on account of such non-executive director's influence, this would amount to a conflict of interests. In the example given, the non-executive director places his or her interests above that of the SOC in that Eskom purchases power generated by the non-executive director's own company at a higher price at the non-executive directors' insistence. Eskom would be paying far less if it was buying from other independent power producers. In the scenario given, the non-executive director who influenced Eskom's decision must be held liable for Eskom buying power at an inflated cost and for suffering a potential loss.

To avoid potential conflicts of interest it is submitted that non-executive directors serving on a board of a SOC should, as a rule, not be appointed to such a board of an SOC on the strength of any known compromise or conflict of interest. Generally, the duty to avoid a conflict of interest is discussed alongside two rules, namely, the no-profit rule and the corporate opportunity rule.[702] The two rules if observed may ensure that a non-executive director is adhering to the duty to avoid a conflict of interest between himself and the company.

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698 Cassim and Others, *Contemporary company law*, 687.

699 Companies Act 2008, 76(3)(a)(b)(c).

700 Randall Morck and Bernard Yeung, Some Obstacles to Corporate Governance in Canada and How to Overcome Them, (2006), Canada Steps Up, 281, 324.

701 In *Bristol and West Building Society v Mothew* [1998] Ch 1 [18], the court held that a fiduciary is someone who undertakes to act for or on behalf of another in circumstances that give rise to a relationship of trust and confidence between parties.

702 Delport, *The New Companies Act Manual,* 91.

4.2.1.2. No-profit rule

The no-profit rule is a subsidiary fiduciary duty in terms of which a director is prohibited from making secret profits to the detriment of the company. It is observed that what is prohibited is secret profits.[703] This per implication means that some profits may be acceptable provided certain requirements are met. The common law has established that secret profits can be allowed if there is prior, frank and open disclosure by a director to the company followed by its free consent.[704] Where the profits fall in the category of being secret the law indicates that the profits are the property of the company to whom the director in question owes or owed a fiduciary duty.[705] To qualify as secret profit, a certain test must be complied with namely, whether such profit was made by the director by virtue of his office of directorship.[706]

Given the findings of pervasive poor corporate governance in several SOCs in the Judicial Commission of Inquiry into State Capture Report, it may be argued that the non-executive directors of the SOCs mentioned in the reports, profiting from secret corrupt deals, could be charged with a breach of the secret profit rule. This includes transactions resulting in an SOC being overcharged on a procurement contract and according to which the non-executive director receives a secret profit or bribe at the very expense of an SOC.[707] Regrettably, no prosecution of non-executive directors with regards to the making of a secret profit has yet transpired in terms of the State Capture findings. It is hoped that steps will be taken to ensure non-executive directors in the various SOCs[708] which were involved in governance breaches are held accountable.

4.2.1.3. Corporate opportunity rule

Part of the duty of avoiding a conflict of interest is the duty to avoid usurping a corporate opportunity. It may happen that a director, while discharging his board duties to a

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703 Delport, *Entrepreneurial Law*, 142; *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168

704 *Phillips v Fieldstone* [2004] 1 All SA 150 (SCA).

705 *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168.

706 *Phillips v Fieldstone* [2004] 1 All SA 150 (SCA).

707 Judicial Commission of Inquiry into State Capture; Volume 3, the Capture of Eskom, 840.

708 Judicial Commission of Inquiry into State Capture Report: Part IV, Volume 1 (2021); Judicial Commission of Inquiry into State of Capture: Part 1, Volume 1, (2021).

company, comes across a corporate opportunity. If the director exploits the opportunity for himself by virtue of having encountered it as a director, he may be acting against the duty to avoid a conflict of interest.[709] The questions that may be raised are: what would be the position if the company was not itself pursuing such an opportunity?

Would a director be found to have breached his duties to a company if he took up an opportunity which the company was not at all pursuing or not interested in pursuing? An example of a conflict of interests arising due to a corporate opportunity may be found in *Da Silva v CH Chemicals (Pty) Ltd.*[710] In the said case the managing director of a company was assigned to negotiate a deal with a rival company. After the deal failed the managing director tendered his resignation and joined the rival company. The court in evaluating the question of corporate opportunity defined it as follows:

> one that the company was actively pursuing or one that can be said to fall within the company's existing or prospective business activities, or that is related to the operations of the company within the scope of its business or that falls within its line of business.

The definition for corporate opportunity is broadly defined and includes several possible scenarios. It includes both the company's assets and its confidential information. On the strength of the definition, a director is prohibited from using confidential information of the company for personal profit, or for the profit of others.[711] A non-executive director of an SOC must ensure that an opportunity rightly belonging to the company is preserved and secured for the SOC. According to the Judicial Commission of Inquiry into State Capture Report, external parties seeking to capture or usurp benefits from ESKOM SOC Ltd for themselves had much information at their disposal to plot the capture successfully.[712] This information was obtained from members on the board of the SOC.[713] Hence, this clearly illustrates a contravention of the corporate opportunity rule and have resulted in the near collapse of some SOCs in South Africa.[714]

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709 *Dorbyl Ltd v Vorster* 2011 (5) SA 575 (GSJ) [25].

710 2008 (6) SA 620 (SCA) 627 [18] - [19].

711 Cassim and others, *Contemporary Company Law*, 539.

712 Judicial Commission of Inquiry into State Capture, Volume 4, 880-882.

713 Judicial Commission of Inquiry State Capture, Volume 4 880-881.

714 The Judicial Commission of Inquiry State Capture Reports feature a lot of governance failures of mostly SOCs.

4.2.1.4. Good faith

The duty to act in good faith is well established in the common law and has now been codified in the Companies Act.[715] The duty may be broadly defined to include all actions other than personally profiting at the corporation's expense (classic duty of loyalty) and ignoring known misfeasance by company officers and is basically synonymous with the absence of a duty of loyalty.[716] Acting in good faith translates into acting with loyalty to a company. Non-executive directors are obligated to act in good faith on behalf of a SOC.[717] Acting in good faith appears to be related to acting in the best interests of a company.[718]

The duty to act in good faith being a fiduciary duty permeates other fiduciary duties.[719] Acting in good faith extends to acting in the interests of the company, within powers allocated, and using the powers for the purpose for which they were given and to the exercise of independent and unfettered discretion.[720] It is associated with the fact that fiduciary duties are generally divided into two broad categories, the duty to act in good faith and the duty to avoid a conflict of interest. Generally, the test may be subjective. Notwithstanding, the absence of reasonable grounds for the failure to observe the standard of good faith may lead to the finding of breach of the duty of good faith.[721] This would be taken to mean that a director breached his or her fiduciary duties to the company.

Clearly, where a non-executive director would be said to be acting in bad faith it is when such conduct appears to be injurious to the company.[722] Accordingly, any act that is calculated to cause a loss, damage or cost to the company may be classified as conduct in bad faith, for it is an overarching duty.[723] It is therefore argued that an act of bad faith should be made to induce liability against a non-executive director when in its wake it brings loss, damage or costs to a company. Since this is a fiduciary duty, its breach

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715 Companies Act 2008, s 76(3)(a); *Modise and Another v Tladi Holdings (Pty) Ltd* [2020] 4 All SA 670 (SCA) para 35.

716 Brian Cheffins et al, Outside Director Liability, (2004) No 11, American Law & Economics Association Annual Meetings, 1, 13.

717 Companies Act 2008, s 76(3)(a).

718 Companies Act 2008, s 76(3)(b); *Treasure Trove Diamonds Ltd Hyman* 1928 AD 464 [479].

719 Delport, *the New Companies Manual*, 90.

720 Companies Act 2008, s 76(3)(a).

721 Cassim and others, *Contemporary Company Law,* 707.

722 Companies Act 2008, s 76(2)(a)(ii); Cassim and others, *Contemporary Company Law*, 707.

723 Delport, *Entrepreneurial Law*, 141.

should without doubt result in consequences for any director in breach. There may be instances when a board of directors acts informed and relies on information it should rely on. For instance, in the case of the SABC, a board of directors may rely on information supplied by its chief financial officer. In terms of the Broadcasting Act,[724] a chief financial officer of the SABC is an executive director.[725] Under circumstances when a board acts based on information supplied by an executive director, if such an act goes wrong by costing the company, the board is assigned a recourse in the business judgment rule.[726] The board would be afforded the defence of business judgment rule if it did not blindly rely on the information supplied.

4.2.1.5. Improper purpose

Non-executive directors of SOCs like all other directors are required to act for a proper purpose.[727] Generally, the purpose of the powers placed in directors of all kinds is that such powers are deployed for proper purposes for the single benefit to the company.[728] In other words, powers should be exercised to significantly achieve the objectives of the SOC.[729] Where the powers given to the directors are used to achieve results which are meaningless to the company, such deployment of the allocated powers is for an improper purpose. Any use of board powers unaligned to the purposes of the SOC should be deemed to be a breach of the duty to use powers for a proper purpose. The use of directors' powers for an improper purpose will attract liability if such misuse results into loss, damage or costs to the company.[730]

Section 76(3)(a) of the Companies Act expressly provides for the duty to act for a proper purpose. Therefore, a non-executive director should only use the powers they have by virtue of the position of director for a proper purpose. The powers are allocated for use to the benefit and advantage of the company not any other person or party.[731] The power

724 Broadcasting Act 1999.

725 Broadcasting Act 1999, s 12(b).

726 Companies Act 2008, s 5(a).

727 Companies Act 2008, s 76(3)(a).

728 Companies Act 2008, s 76(3)(a).

729 Companies Act 2008, s 76(3)(a).

730 Companies Act 77(2)(a).

731 Companies Act 2008, s 76(2)(a)(i)(ii).

is acquired and required to be deployed for a proper purpose.[732] It is regrettable if conduct classified as improper would not translate into liability absent loss, damage or cost to the company. It is submitted that acting for a proper purpose is aligned with an objective test applicable to boards of directors.[733] Any person in the position of the director required to act for a proper purpose should act as such, under the same circumstances. It is the case that a non-executive director should deploy the powers only for the purpose conferred.[734] It is therefore an appropriate assessment of an objective standard as any director in that position would be required to act in accordance therewith.[735]

4.2.1.6. Best interest of the SOC

In terms of the Companies Act one of the directors' duties is to act in the best interests of the company.[736] The duty to act in the best interests of the company presupposes that there may be other or ordinary interests and best interests. The duty is only concerned with the best interests of the company. In an inquiry in whose or which interests a non-executive director may have acted it should be examined whether under the circumstances it can be said that the conduct under scrutiny served to advance the best interests of the SOC.

That is, did the SOC have something to gain and did it actually gain the interest? The best interests may arguably represent SOCs' cumulative interests connected to its success and good corporate performance. It has been said that conducts likely to infringe on the duty to act in the best interests of a company would be those where self-dealing is involved.[737] As has been indicated in the preceding chapters of this thesis, a breach of the duty to act in the best interest of an SOC may possibly not attract any reaction unless it has manifested in loss, damages or costs to the SOC.

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732 Companies Act 2008, s76(3)(a).

733 *Organisation Undoing Tax Abuse v Myeni* [2020] 3 All SA 578 (GP) paras 1[6 and 273]; Cassim and Others *Contemporary Company Law,* 708.

734 Delport, *Entrepreneurial Law,* 142.

735 Cassim and Others, *Contemporary Company Law,* 708.

736 Companies Act 2008, s 76(3)(b); Farouk H I Cassim and Others, *Contemporary Company Law,* 708.

737 Brian R Cheffins and Bernard S Black, Outside Director Liability Across Countries, (2006), Volume 84, Texas Law Review, 1385, 1400.

It is submitted that directors of an SOC should be subjected to higher standards that are not dependent on a finding of loss, cost, or damage to the SOC. Breach of corporate governance duties in SOCs should be a cause for concern even if it did not cause loss, costs or damages to the SOC. That is because non-executive directors are required to act in the SOC's best interests and by necessary extension in the public interest.[738] Furthermore, it may defeat the purpose if a breach is only so regarded if it has resulted in loss, costs or damages to the SOC.[739] That is because non-executive directors are duty bound to act in good faith and in the best interest of the SOC.[740]

4.2.2. Skill, care and diligence

Section 76(3)(c) of the Companies act plainly states that a director, while acting in that capacity, must exercise the powers and functions relating thereto:

(i) carrying out the same functions in relation to the company as those carried out by that director; and

(ii) having the general knowledge, skill and experience of that director.

It can be observed that although directors are given substantial powers to control and direct the business affairs of an SOC,[741] such powers come with conditions and standards to be considered while discharging the broad powers. It is within this context that the duty of care, skill and diligence should be appreciated. From the onset the submission is that this duty as all other duties behooves directors to act with their eyes and minds open.[742] If discharged properly, the outcome should reveal that a director did not act or make a decision headlong. In practice, the duty should be reflected in the decisions directors make in the boardroom. Non-executive directors, not being full-time employees of SOCs have their involvement through board meetings. Alternatively, in the actions they take in furthering the business interests of the SOC.

The duty of care, skill and diligence proceeds from a perspective that a director would

738 The Republic of South Africa Constitution, 1996, s 195(1)(c).
739 Companies Act 2008, s 76(3)(a)(b);
740 Companies Act 2008, s 76(a)(b).
741 Companies Act 2008, s 66(1).
742 Companies Act 2008, s 66(1), and s 76(3)(c).

act informed.[743] To exercise care would mean that a non-executive director is aware of the transaction he or she is engaging in on behalf of the company. That is, the director has all the requisite information about the transaction on which he can buttress his decision. The scope of care and diligence in deploying the powers and functions of a director include reliance on information supplied by designated officers.[744] A non-executive director is entitled to rely on such appropriately supplied information to make a decision. It may then be said that non-executive directors would exercise care in the source and quality of the information on which they base their decisions.

An interesting feature about this duty in the Companies Act is that it floats between subjective and objective indices. On the one hand a director is expected to deploy the skills he or she has,[745] possibly to the best of their abilities – denoting a subjective test. On the one hand a director is expected to discharge the duties as any other person in his or her position would, and possibly to the best of their abilities – denoting an objective test.[746] The assessment of a breach of this duty may prove challenging.[747] When a non-executive director is known to have certain skills, qualifications and knowledge it may be a simple matter to expect from him or her to be able to produce a certain level or kind of performance in accordance thereof. The objective test, namely, that a non-executive director is expected to discharge his or her duties as any other person in his or her position would, may alleviate this difficulty.[748] In terms of modern-day practice, directors are no longer able to blindly rely on a lack of skill, care and diligence to justify breach of duty as it has been accepted that directors are fit and proper persons who are able to appreciate the demands of the office.[749] It should not save a non-executive director to argue that he or she did not have this or that level of skill. This will imply recklessness and negligence.

The law does not compel a non-executive director to perform that which they do not know.

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743 Companies Act 2008, s 76(4)(a)-(b).

744 Companies Act 2008, s 76(5)(a)-(c).

745 Companies Act 2008, s 76(3)(c)(ii).

746 Companies Act 2008, s 76(3)(c)(i).

747 Section 77(2) and (3) of the Companies Act establish that delict would be used to examine occurrences of negligent conduct.

748 Companies Act 2008, s 76(3)(c)(i).

749 Cassim and Others, *Contemporary Company Law,* 751.

It would be a corporate blunder to proceed and act or decide on a matter without any level of skill, only because a person is a director. The above suggests that being unskilled or poorly skilled would not suffice as a defense if a person without care, skill and diligence ventures into performing board duties knowing they do not have what it takes to perform such duties. This alone amounts to not being reasonable in terms of which any reasonable person would not act. It may be likened to a situation in which a non-executive director performs duties knowing that he or she lacks the requisite skills to discharge them properly.

It is submitted that, especially in the sphere of SOCs that deal with public interest, a qualification threshold should be set for directors serving on SOC boards. To date, the tendency has been to appoint along political lines.[750] Best practice, however, leans towards the appointment of directors based on merit and in a transparent manner.[751]

The National State Enterprises Bill has a provision concerning the yardstick on the appointment of directors.[752] The appointment of competent persons ensures that those appointed can discharge their governance duties skillfully, carefully and diligently. Furthermore, a reasonable non-executive director would be required to discharge their board duties in a reasonable manner.[753] Competent discharge of board duties would be beneficial to SOCs in terms of good governance and overall sustainability.

The Zondo Judicial Commission of Inquiry into State Capture,[754] has enlightened researchers and the public about the dire consequences when directors, including non-executive directors of SOCs, conduct their affairs without the necessary care, skill and diligence and instead act with ulterior motives, including that of personal and political expediency.[755] The unintended consequences include the unfortunate insolvency of the SOCs.[756] When the SOCs

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750 Judicial Commission of Inquiry into State Capture Report: Part 1, Volume 1, (2021), 9.

751 King IV Report, Part 6.6 Principle 7.

752 National State Enterprises Bill 2024, s 10(1).

753 Companies Act 2008, s 76(3)(c)(i).

754 Judicial Commission of Inquiry into State Capture < https://www.sastatecapture.org.za > accessed on 01 June 2022.

755 Judicial Commission of Inquiry into State Capture Report: Part 1, Volume 1 (2021), 35.

756 Several SOCs have been reported to be insolvent, ESKOM, SAA and DENEL SOCs Ltd are

are insolvent, it is difficult for them to function properly, and they may be unable to fulfil their mandates. The effect of this is that the public, who are the only and primary beneficiaries in a material way, stand to suffer the consequences of poor corporate governance. The following excerpt best explains a non-executive director's conduct out of line with the law as follows:

> The Board members concluded that Ms Myeni appeared to be trying to secure her own funding for the acquisition of the 10 Airbus A320s, without involving the executive, resulting in the attempted change in the Board's funding resolution. Ms Myeni's conduct in the Pembroke transaction resulted in delays in the delivery of the aircraft that cost SAA approximately R800m in pre-delivery payments. This led to a further cash shortfall and SAA having to increase its borrowing limits, which negatively impacted SAA for a long time.[757]

Carefully examined, the excerpt provides a glimpse of multiple breaches the former board chairperson of SAA committed. It is clear the SAA was even made to foot higher bills than it would have had, had the chairperson and the board acted with care, diligence and with the best interests of SAA.

Poor performance arising from breach of board duties is costly to SOCs, and the economy, as financial resources are wastefully spent. Wasteful expenditure is a breach of duty on the part of a board of directors of SOCs.[758] SOCs which poorly perform harm the economy as they cause negative ripple effects in various economic industries, and to the citizens of the country. For instance, when electricity shortages are perpetual, industries that depend on Eskom are unable to operate optimally.

Any losses incurred in various industries will mean such industries pay less tax thereby affecting government revenue and may even lay off workers, thereby contributing to poverty creation in South Africa. This serves to impress upon those charged with governance of SOCs to be appreciative of the critical role the SOCs were established to fulfil in the public's interest. Hence, it is critical that non-executive directors of SOCs act with the necessary skill, care and diligence.[759]

Where SOCs incur losses because of directors acting outside the realms of the

examples.

757 Judicial Commission of Inquiry into State Capture Report: Part 1, Volume 1 (2021), 35, at 89.
758 Public Finance Management Act 1999, s 50(1)(b)(ii).
759 Companies Act 2008, s 76(3)(c).

'reasonable director' or are directly involved in the losses, relevant laws should be used to hold them to account. One such relevant law is the Companies Act itself.[760] It is appreciated that the provisions that are in existence in the Companies Act can go a long way in assisting to put an end to poor governance in SOCs, provided it is properly applied.

In *re City Equitable Fire Insurance*,[761] the stance of the Court was that it was impossible to describe the duty of directors in general terms when one had regard to the companies operating in different industries. Notwithstanding, the Court still held that a director was not required to exhibit performance of duties beyond his or her skill.[762] Thereby approving of the subjective test. The Court further went on to hold that directors were not liable for mere errors of judgment. This would indicate a low threshold for directors to avoid liability to the company.

There has been a departure from some cherished principles in the common law, in that the threshold for finding a director liable has been tightened. For instance, in *Daniels v Anderson*, it was held that it was no longer appropriate to judge directors' conduct by the subjective tests applied in older cases. This authority should be seen as a turning point for directors who were given greater latitude before they could be held liable for misconduct by the company. From this shift, one can link the instance of partial codification that has been carried out in the directors' duties in the Companies Act.[763]

4.3. Statutory Duties of Directors

SOCs are regulated by several statutes.[764] When in a quest to find the duties of directors in SOCs, the primary sources are the laws that apply to SOCs. The laws may provide differently and may apply concurrently,[765] unless a conflict renders one of them inapplicable to the elevation of another. It has been noticed that the National State Enterprises Bill once it becomes law, will limit the application of the PFMA to the Holding company and its subsidiaries.[766] Below is the examination of the various laws that are applicable

760 Companies Act 2008, s 77(2)(a)(b) and (3).
761 *In re City Equitable Fire Insurance Co Ltd* [1925] 1 Ch 426-428.
762 *In re City Equitable Fire Insurance Co Ltd* [1925] 428.
763 Companies Act 2008, s 76(3)(c)(i)(ii).
764 For example, enabling statutes, the Companies Act and the Public Finance Management Act.
765 Companies Act 2008, s 5(4)(a)(b) and s 9(1)(3); Public Finance Management Act 1999, s 3(3).
766 National State Enterprise Bill, 2024, s 22(3).

to directors in so far as providing for their duties is concerned.

4.3.1. The Public Finance Management Act

The PFMA provides for what it terms the 'fiduciary duties of accounting authorities' under section 50 thereof. When evaluating the section, it can be noted that the section points to how the various duties should be deployed or what should be achieved when such duties are exercised. For instance, section 50(1) directs accounting authorities to exercise utmost care to ensure reasonable protection of assets and records of the public entity. In this regard, attention is drawn to the fact that the PFMA is enacted 'to secure transparency, accountability, and sound management of the revenue, expenditure, assets and liabilities of the institutions to which this Act applies.'[767]

The discharge and performance of the fiduciary duties in terms of the PFMA should be seen in the context of the purpose of the PFMA. It may therefore be argued that directors' duties should be exercised in accordance with the object that must be achieved by the entity in question. The reasoning is that powers are only exercised for a purpose for which they were conferred.

It is therefore submitted that SOCs directors should exercise a duty of the utmost care to ensure that SOCs' assets and records are properly protected. Apart from section 50, section 51 of the PFMA provides for the general responsibilities of accounting authorities. It is unclear what the difference is between the fiduciary duties under section 50 of the PFMA and the general responsibilities under section 51 of the PFMA. It, however, appears that both the provisions spell out duties of directors which are steeped in financial transactions of a public entity.

The duties provided for under the two sections could be seen as complementary to other duties of directors which may be in other legal instruments. For instance, some resemblance may be found in the said duties[768] and those provided for under the Companies

767 Public Finance Management Act 1999, s 2.

768 Public Finance Management Act 1999, s 50(1)(a)(b) and s 2(b).

Act.[769] Overall, it appears that the duties of accounting authorities in the PFMA are much wider and financially inclined. For instance, section 50(1)(a) of the PFMA transcends the duty of care[770] to include protection of assets.

Furthermore, notable is section 50(2) of the PFMA which includes such duties as fidelity and integrity in addition to the known company law directors' duties of honesty and acting in the best interest of the public entity.[771] This may be attributed to the fact that the duties set out in the PFMA have been tailored to fit the objective of the PFMA.[772] It is nonetheless submitted that as section 51 of the PFMA relates to operational aspects of a public entity (day-to-day operations of a public entity which is generally a management responsibility) it is more suited to management than to an accounting authority such as a board of directors. Regard will accordingly have to be made to the general duties of directors in the Companies Act to address any deficits.

4.3.2. The Companies Act 71 of 2008

Section 66(1) of the Companies Act determines that the business affairs of a company must be managed under the direction of a board of directors. Clearly, the Companies Act allocates significant powers to boards of directors. The question may be posed as to how exactly a board of directors must manage the business affairs of a company. Consequently, the board of directors' duty is to manage the affairs of a company either itself or by management under the board's direction.

Non-executive directors are required in terms of section 75 of the Companies Act to disclose personal financial interests. This caveat helps non-executive directors guard against conflicts of interest with the SOC. The beauty of the provision is that it is required of non-executive directors to disclose personal financial interests that have a bearing on a matter in the purview of the SOC, in advance. Compliance with section 75 of the Companies Act may help non-executive directors maintain good standing in fulfilling their duty to avoid conflicts of interest.

769 Companies Act 2008, s 76(2)(a) and (3)(a)(b)(c).
770 Companies Act 2008, s76(3)(c).
771 Companies Act 2008, s 76(3)(b).
772 Public Finance Management Act 1999, s 2.

To manage the affairs of a company, a board of directors is obliged to act in accordance with the standards set out in section 76 of the Companies Act. Although section 76 of the Companies Act refers to them as 'standards of directors conduct', they are essentially what constitutes directors' duties.[773] Notably, it is clear from section 76 of the Companies Act that directors are peremptorily required to act in a certain way. The above is deduced from the word 'must', which is used to remove discretion and institutionalise compliance with the duties.[774]

Section 76(2)(a)(i) provides the following:

> A director of a company must:
>
> (a) Not use the position of director, or any information obtained while acting in the capacity of a director-
>
> (i) to gain an advantage for the director, or for another person other than the company or a wholly-owned subsidiary of the company; or.
>
> (ii) to knowingly cause harm to the company or a subsidiary of the company.

The duties of directors appear to fall into the scope of the duty which prohibits directors to not use company information in their possession to access secret profits or not to usurp a corporate opportunity that belongs to a company for themselves.[775] Furthermore, directors are required not to cause harm to the company or its subsidiary knowingly. The use of the word 'knowingly' suggests intention or negligence on the part of a director rendering any harm caused in a knowingly manner not excusable. However, the reverse is that, if a director causes harm to a company without knowing their action or decision may cause harm, then they escape liability for that harm. This resembles the principle of the business judgment rule which is premised on absolving directors when they act having relied on information on which they should rely.[776] In other words, directors should be informed about the action or decision they are taking or making while remaining unaware

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773 Richard Croucher and Lilian Miles, Corporate Governance and Employees in South Africa, (2010) Journal of Corporate Law Studies 367, 371.

774 Companies Act 2008, s 76(2) and s76(3).

775 *Dorbyl Ltd v Vorster 2011* (5) SA 575 (GSJ) [28]; *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 [177]; *Phillips v Fieldstone Africa (Pty) Ltd and Another* 2004 (3) SA 465 (SCA) [31].

776 Companies Act 2008, s 76(4)(b)(i).

of its potential harm to the company.

While making the decision, they do so in good faith and in the best interest of the company and they themselves remain unconflicted in any way.[777] Accordingly, directors may not offend the provision in section 76(2)(ii)(a) if they did not know or did know, but relied on credible information which they rationally believed it would be in the best interest of the company, although in the end harm was caused to the company or its subsidiary.

Apart from the duties set out in section 76(2) of the Companies Act section 76(3) of the Companies Act provides for the following duties:

> Subject to subsections (4) and (5), a director of a company when acting in that capacity, must exercise the powers and perform the functions of director-
>
> (a) In good faith and for a proper purpose;
> (b) In the best interests of the company; and
> (c) With the degree of care, skill and diligence that may reasonably be expected of a person-
> (i) carrying out the same functions in relation to the company as those carried out by that director; and
> (ii) having the general knowledge, skill and experience of that director."

The Companies Act, through its partial codification, ushers in fiduciary duties of good faith, honesty and loyalty and the duty to exercise reasonable care and skill, which is not a fiduciary duty.[778] Importantly, the common law permeates the entire spectrum of all the duties of directors. That is, not only do the codified duties of directors arise from the common law, but the establishment of liability is also buttressed by the common law. It is evident from subsection 2 that the principles of the common law are used to establish liability.[779] As is discussed below and reflected in Henochsberg,[780] codified company law owes its existence to the common law.[781] As such, the codification of company law in the form of statutes such as the Companies Act does not render the common law extinct.

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777 Havenga, 'The Business Judgment Rule, 28.

778 Cassim and Others*, Contemporary Company Law*, 706.
779 Companies Act 2008, s 77(2)(a) and (b).
780 Delport, *Henochsberg on the Companies Act 71 of 2008* 296.
781 Cassim and Others, Contemporary Company Law, 507.

The common law, therefore, remains in operation side by side with the statutory law and may fill gaps that exist in the statutory law.

In practice, when directors embark on the discharge of their actual duties of managing and directing the business affairs of a company, their conduct must meet the standards set out in the aforementioned statute and the common law.[782] For instance, when directors approve of financials of SOCs, they should in accordance with section 76(3)(b) of the Companies Act place the interest of the company first and act in good faith. Directors will also be expected when for example approving a company resolution to do so with care, skill and diligence in line with section 76(3)(c) of the Companies Act. In *re Brazilian Rubber Plantations and Estate Ltd*, the court had to consider exactly the extent of what constituted directors' duties towards a company. As may be deduced, the court stated the following in regard to a director's duty:

> It has been laid down that so long as they act honestly they cannot be made responsible in damages unless guilty of gross negligence. There is admittedly a want of precision in this statement of a director's liability. In truth, one cannot say whether a man has been guilty of negligence, gross or otherwise, unless one can determine what is the extent of the duty which he is alleged to have neglected. A director's duty has been laid down as requiring him to act with such care as is reasonably expected from him, having regard to his knowledge and experience.[783]

Accordingly, when a director has a certain level of skill, he or she ought to use it to the benefit of the company. Nowadays every director is believed to have some skill to be appointed to a board.[784] It would be irregular for a director to fail to deploy his or her skills to the benefit and in the best interest of a company. In other words, directors have to be alert while executing their duties to invoke their skills and care to ensure that the company benefits from their expertise, knowledge and experience. Where directors fail to comply with these duties and become disloyal to the company, act in their own interest and in bad faith which translates into a breach of directors' duties, it should lead to

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782 Being the standard of care, skill and diligence and the observance of fiduciary duties of good faith and loyalty to the company.

783 In *re Brazilian Rubber Plantations and Estate Ltd* [1911] 1 Ch 425 [436]-[437]; *In re City Equitable Fire Insurance Co Ltd* [1925] 1 Ch 407 [428] and [459].

784 Bird and Hill, *Regulatory Rooms in Australian Corporate Law,* 571.

adverse consequences.[785]

Apart from the statutory duties, Naidoo suggests that a board of directors also has a duty to monitor management and to strategically plan the success of the company.[786] Naidoo expresses that developing and executing a strategy is a pivotal function of the board of directors.[787] These complimentary duties or objectives though important more clearly resemble the provisions set out in codes of conduct such as the King Reports discussed below.

4.3.3. Duties of Directors in enabling legislation

In this part of the study an attempt is made to ascertain whether selected enabling laws of SOCs provide for board of directors' duties.[788]

4.3.3.1. SAA Act

The SAA Act does not provide for the board of directors of the SAA SOC Ltd.[789] It consequently does not provide for duties of directors. It however provides for the objects of the SAA SOC Ltd which would arguably be a pre-occupation of the directors of the SAA SOC Ltd.[790] There is a determination of the SAA SOC Ltd to be registered as a company under the Companies Act.[791] This should be seen as a way to subject the SAA SOC Ltd to a plethora of provisions of the Companies Act, unless exempted.

Therefore, for the duties of directors of SAA SOC Ltd their primary reference point would remain the Companies Act and the PFMA.

4.3.3.2. Broadcasting Act

The Broadcasting Act is the statute that establishes the corporation known as the

785 Companies Act 2008, s 77(2)(3).

786 Companies Act 2008, s 77(2)(a)(b) and (3).
787 Refer also to Chapters 1:1.1, Chapter 2:2.3, Chapter 3:3.2.2.1, 3.2.2.2, 3.2.2.3, 3.2.2.4.
788 Refer also to Chapters 1:1.1, Chapter 2:2.3, Chapter 3:3.2.2.1, 3.2.2.2, 3.2.2.3, 3.2.2.4.
789 Listed as a major public entity under Schedule 2 of the PFMA.
790 South African Airways Act 2007, s 6(1).
791 South African Airways Act 2007, s 4(1), 2(a)(b).

SABC.[792] The Broadcasting Act is one enabling statute that provides for a board of the SABC and further provides for the appointment and composition.[793] The Broadcasting Act places the affairs of the SABC in the hands of the board of directors.[794] In a way, from a practical perspective, the duties of directors of the SABC are circumscribed in the Broadcasting Act.[795] Quite commendably, the Broadcasting Act specifies that executive management accounts to the board of directors.[796] The submission is that, the accountability has to do with the duties executive management would have performed as assigned and delegated to them by the board of directors.[797]

4.3.3.3. Eskom Conversion Act

Eskom SOC Ltd is a major public entity listed under the PFMA and is established by conversion into a public company through the Eskom Conversion Act.[798] The Eskom conversion Act does not contain duties of directors. It is, however, to be accepted that since it is a public company, and incorporated under the Companies Act, directors will find the duties under the Companies Act applicable to them.[799] In addition, the duties that are provided for under the PFMA are also part of the extent of directors' duties they must exercise and discharge.[800]

4.3.3.4. National State Enterprises Bill

The National State Enterprises Bill contains a range of directors' duties.[801] The duties will be applicable to the holding company and its subsidiaries to be established once the Bill becomes law. The National State Enterprises Bill contains powers, functions and duties of board,[802] as well as standards of director conduct.[803] The Bill basically determines that

792 Broadcasting Act 1999, s 1 and s 8A. The SABC is listed as a major public entity under schedule 2 of the PFMA.
793 Broadcasting Act 1999, s 1 and s 12(a)(b).
794 Broadcasting Act 1999, s 8, s 10(4)(a) and s 12(11).
795 Broadcasting Act 1999, s 12(11).
796 Broadcasting Act 1999, s 14(2).
797 Broadcasting Act 1999, s 13(11) and (13).
798 Eskom Conversion Act 2001, s 3(1), read with s 4(1).
799 Companies Act 2008, s 76(3)(a)(b)(c)(i)(ii).
800 Public Finance Management Act 1999, s 50 and s 51.
801 National State Enterprises Bill 2024, s 9 and s 11.
802 National State Enterprises Bill 2024, s 9.
803 National State Enterprises Bill 2024, s 11.

standards of directors conduct under section 76 of the Companies Act and in the common law apply.[804] In addition, directors of the holding company, and arguably those of the subsidiary companies, will act in the best interest of the company by taking cognisance that it is a catalyst to development and should be sustainable while being managed in the public interest.[805] The Bill confirms the application of a multiplicity of statutes and other documents, in the control and management of the holding company to be formed, and its subsidiaries.[806] Perhaps surprisingly, the Bill excludes the PFMA from applying to the holding company and its subsidiaries, except for a few sections.[807]

4.3.4 King Reports: I, II, III, IV

The Institute of Directors in South Africa (previously, the Institute of Directors in Southern Africa) has published a number of the King Reports on corporate governance beginning with the King Report I in 1994 followed by the King Report II in 2002. In 2009 King III was published in line with the enactment of the Companies Act 2008. This study only includes the King III Report and IV Report as they are most relevant to the topic and aligned to the Companies Act. The King Reports are important in that they contain contemporary principles on the directors' duties. As will be indicated below, the principles contained in the reports can be applied to the governance of SOCs.

4.3.4.1. King Report I

King I was published in 1994 during the era of the Companies Act, 1973.[808] As the foreword indicates, the Code was written to promote the highest levels of corporate governance in corporate South Africa.[809] King Code I raised the concern that it had become important for directors to account to the shareholders how they were managing the affairs of the corporation.[810] Thus, it can be seen that the concern about directors' crucial role to

804 National State Enterprises Bill 2024, s 11.
805 National State Enterprises Bill 2024, s 11.
806 National State Enterprises Bill 2024, s 9(2) read with s 22(1).
807 Section 22(3) of the Bill provides that only sections 47 and 48 of the PFMA will be applicable to the holding company and its subsidiaries. This would mean that all other sections including sections 50 and 51 will be unapplicable.
808 Companies Act 1973.
809 See Foreword of King Report I, 1994.
810 King Report I, Chapter 1:1, 1994.

the success of the corporation have been debated in South Africa for many years. Accepting that at the time there was a dearth of statutory legislation providing for codified directors' duties, King Code I made an attempt to list some of the duties board directors could carry out in a corporation.[811] King Report I indicated that directors, divided up into executive and non-executives were accountable to the shareholders.[812]

An important caveat to be drawn from King Code I is that non-executive directors need to insist on accurate reporting by executive management, as it is on the information they are given decisions about the corporation are made.[813] In the context of SOCs, the caveat is equally true and important to the present day. It is on this realisation that non-executive directors will act informed with accurate information and to make decisions based on reliable information about the SOC. It is suggested that non-executive directors carefully consider information provided to them in evaluating and assessing the day-to-day management of the SOC, and its financial sustainability.

4.3.4.2. King Report II

King Report II was produced in 2002; it is still within the dispensation of the Companies Act 1973. The King Report II opens up with an elaborate introduction reflecting on the inclusive shareholder approach and contextualises the corporate governance of corporations in that approach. This would mean that the King report sought to elevate the need to recognise other stakeholders to a corporation. This would further mean that directors of corporations had to be aware that besides the shareholders, that there were other stakeholders of importance to the corporation. For the purposes of the provisions of critical importance to the thesis, King Report II indicates an improvement on the provision of directors' duties and accountability functions. King report II places the board of directors at the centre of corporate governance of a corporation, and it states that:[814]

> The board is the focal point of the corporate governance system. It is ultimately accountable and responsible for the performance and affairs of the company. Delegating authority

811 King Report I, Chapter 4 and 5, 1994.
812 King Report I, Chapter 5, 1994.
813 King Report I, Chapter 6, 1994.
814 King Report II, Principle 2.1:2.1.1, 2002.

> to board committees or management does not in any way mitigate or dissipate the discharge by the board and its directors of their duties and responsibilities.

It would be apparent that King II was express in requiring of the board of directors to take charge, oversee strategy and to monitor management performance.[815] From this perspective, these would be good ideals to improve corporate governance in SOCs which may not have been taken advantage of by SOCs. King Report II brought out the distinction between executive and non-executive directors to the fore. Furthermore, the Report distinguished the different designations. Importantly is that the Report provided in a distinguished way how non-executive directors were critical to the success of the corporation. A foremost important provision indicating how involved the directors' duties are reflected in the following terms:

> Non-executive directors should be individuals of calibre and credibility, and have the necessary skill and experience to bring judgment to bear independence of management, on issues of strategy, performance, resources, transformation, diversity and employment equity, standards of conduct and evaluation of performance.[816]

It is apparent from the excerpt that directors' duties that non-executive directors must be of a certain calibre of competence. The recommendation is poignant and welcomed. To benefit from a recommendation of this nature would entail that those who appoint non-executive directors ensure that they appoint individuals who are fit to serve on a SOC's board of directors. It is submitted that the National State Enterprises Bill is moving towards the direction where competent non-executive directors are appointed to SOCs boards.[817]

4.3.4.3. King Report III

The King Report III on corporate governance was necessitated by the enactment of the Companies Act, and changes in corporate governance on the international stage.[818] The King III Report is premised on the principle of 'apply or explain' basis. The King III Report is a voluntary code and does not earn the status of law although it generally applied to

815 King Report II, Principle 2.1: 2.1.4, 2002.
816 King Report II, Principle 2.4:2.4.2, 2002.
817 National State Enterprises Bill 2024, s 10(1).
818 King III Report, Principle 2.17.

companies listed on the Johannesburg Securities Exchange (JSE).[819]

In relation to the activities of the board of directors, King III provides as follows:

> The board should act as the focal point for and custodian of corporate governance.
> (1) Companies should be headed by a board that directs, governs and is in effective control of the company. Every board should have a charter setting out its responsibilities and it should meet as often as is required to fulfil its duties, preferably at least four times a year.
> (2) The board should collectively provide effective corporate governance that involves monitoring the relationships between the board and management of the company, and between the company and its stakeholders.
> (3) The board's paramount responsibility is the positive performance of the company in creating value. In doing so, it should appropriately consider the legitimate interests and expectations of all its stakeholders.
> (4) The board should exercise leadership, enterprise, integrity and judgment in directing the business of the company so that it can survive and thrive.

4.3.4.4. King Report IV

In 2016 the King IV Report was published which is also premised on voluntary application by any organisation subscribing to its principles. The King IV Report is based on the notion of 'apply and explain' which marks a departure from the King III Report which was based on 'apply or explain'.[820] Remarkedly, the King IV Report contains a large section dedicated to the governance of public entities.[821] Although the King IV Report provides an elaborate section applicable to SOCs, the provisions remain voluntary. As such, SOCs may arguably benefit from applying them to their various contexts although they are not obliged to do so. It is suggested that to the extent that laws regulating SOCs are silent on a matter, reliance can be placed on provisions in the King IV Report if it provides principles on the matter.

Part 6.6 of the King IV Report contains specific provisions applicable to SOCs.[822] This includes the duties of accounting authorities. As indicated above, accounting authority

819 King III Report, Principle 2.17.

820 King IV Report, Principle 35.

821 King IV Report, Part 6.6.

822 Institute of Directors in South Africa: King IV, Principle 1 to Principle 16, 112-117.

when used in the context of a public entity is an equivalent to a board of directors.[823] The duties of accounting authorities set out in the King IV Report provide for practical duties which directors should carry out if they are to effectively manage the business affairs of a SOC.[824] The King IV Report provides for at least sixteen principles which it proposes for application to SOEs.[825] Some of the principles are the following:

> Principle 1: The accounting authority should lead ethically and effectively.
>
> Principle 2: The accounting authority should govern the ethics of the SOE in a way that supports the establishment of an ethical culture.
>
> Principle 3: The accounting authority should ensure that the SOE is and is seen to be a responsible corporate citizen.
>
> Principle 4: The accounting authority should serve as the focal point and custodian of corporate governance in the SOE.

It is evident from the various principles indicated in King IV that directors of SOCs have demanding responsibilities which they should consider discharging appropriately. If applied properly, it is submitted that the principles can go a long way in improving the corporate governance of SOCs. The principles are clear that they devolve on a board of directors of an SOC. It is the board of directors that remains the focal point and custodian of corporate governance in SOCs. Therefore, if the principles, in addition to other standards are applied appropriately by a board of directors, corporate governance should ultimately improve in SOCs. Whereas the King IV respects other SOCs' stakeholders, it is clear that the governing body should act in the best interests of the SOC.[826] This is clearly not different from how directors are required to act in the best interest of the company under the Companies Act.

The successful management and control of SOCs in a profitable and sustainable manner has remained a challenge in South Africa. Broadly speaking, the sustainable management of SOCs would adhere to the United Nations Sustainable Global Goals (UN

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823 The Public Finance Management Act 1999, s 1 and s 49(2)(a).
824 The Companies Act 2008, s 66(1).
825 Institute of Directors in South Africa: King Report IV, Principle 1 – Principle 16, 112-117.
826 King IV, part 6.6, principle 16.

SDGs).[827] The UN SDGs are a call to member states of the United Nations to take steps to ensure a sustainable ecosystem on the planet which supports social, economic and environmental responsive actions.[828] In line herewith, King IV recommends that accounting authorities should appreciate the inseparability of good performance and sustainable development of SOCs in the value creation process.[829] Whereas the challenges of SOCs have been noted, what is still lacking is the enforcement of accountability against those charged with the governance of the SOCs. Besides the noted challenges of SOCs, some poor governance results from the breaches of governance duties allocated to non-executive directors for how they discharge their duties.[830]

It is argued that accountability in SOCs will encourage better governance and improved performance as only those committed and competent will accept appointments given the possibility of being held to account for negligent failure. The study recognises that SOCs do not fail inherently. They fail because of how they are managed and controlled. Essentially, the poor governance in SOCs may be the direct cause of their failure to be profitable and sustainable. Naturally, non-executive directors who serve on SOCs contribute to the problem of poor governance of SOCs. For contributing to its failure, it is only fair that consequences are designed to meet such poor contribution. It is here where liability is advocated for to ensure necessary accountability in SOCs.

4.3.5. Conclusion

The duties of directors were discussed in this chapter. The discussion maintained the context of non-executive directors in SOCs. Whereas the Companies Act has tended to make no distinction between executive and non-executive directors in terms of its applicability, a shift has been noticed to the extent of indicating the two types of directors which can obtain on a board of directors.[831] The Companies Amendment Act is

827 The United Nations: 17 Sustainable Development Goals< https://sdgs.un.org/goals >accessed 31 March 2023.

828 The United Nations: 17 Sustainable Development Goals < https://sdgs.un.org/goals >accessed 31 March 2023.

829 King IV Report Part 6.6 Principle 4.

830 Companies Amendment Act 2024, s 13(7A).

831 Companies Amendment Act 2024, s 13(7A).

introducing various directors on board committees.[832] This is a step in the right direction. The codified directors' duties which apply to all types of directors, including non-executives are contained in section 76(3) of the Companies Act. There are other duties in the PFMA which are strictly for accounting authorities[833] which is an equivalent body of a board of directors of a public entity.[834] It was indicated that the duties of directors can be traced to two broad sources, namely, the common law and statutory law.

The discussion reserved the common law as the originating source of directors' duties and is still in force only where expressly excluded by statutory law.[835] The codified duties of directors were found to flow from or to be predicated on directors' enormous powers under the Companies Act.[836] The Companies Act has broadened the powers of directors by allocating them the powers to control, manage and direct the company's business affairs. Section 66(1) of the Companies Act appears to buttress the directors' duties under section 76(3). For SOCs, being companies, the directors serving in these entities must perform the same duties as those directors in privately managed companies. At the same time, it is the provisions which make it necessary for directors to be required to account for how they have managed the affairs of the SOCs.

In the chapter other sources of directors' duties which are codified and available in other statutes were also discussed. It was found that the PFMA also provides for directors' duties.[837] The duties may be similar to the ones provided for under the Companies Act. Enabling laws of certain SOCs were surveyed with a view to ascertain whether they contain any directors' duties. Of those surveyed, it is only the Broadcasting Act that was found to be elaborate by providing for not only the appointment and composition of directors[838] but, also provides for the fact that the SABC is managed under the control of the board of directors.[839]

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832 Companies Amendment Act 2024, s 13(7A).

833 Public Finance Management Act 1999, s 1 and s 49.

834 Public Finance Management Act 1999, s 50 and 51.

835 Henocsberg on the Companies Act 2008,298(9); *Mthimunye-Bakoro v Petroleum Oil and Gas Corporation of South Africa* (*SOC*) *Limited and Another* 2015 (6) SA 338 (WCC).

836 Companies Act 2008, s 66(1).

837 Public Finance Management Act 1999, s 50 and s 51.

838 Broadcasting Act 1999, s 12(a)(b) and s 13(1).

839 Broadcasting Act 1999, s 13(11) and (13).

The National State Enterprises Bill was also discussed and it was found that it contains a long list of directors' duties.[840] These will become applicable to the holding company to be formed once the Bill becomes law. The holding company will have subsidiaries which will also be affected by law. Note is taken that the National State Enterprises Bill asserts its supremacy on other laws. To this end it may affect the applicability of other pertinent laws currently applied to SOCs.[841]

The chapter discussed the applicability of King Reports to SOCs and how they can complement existing legislation. The King reports, specifically III and IV have provisions concerning directors' duties. King IV has a section dedicated to public entities and provides for directors' duties which can be applied to SOCs. Evidently, there is no shortage of sources for directors' duties. This means that non-executive directors serving on SOCs' boards of directors have various sources to which to turn to access their duties. These duties must be discharged for corporate governance to be achieved in SOCs.

The failure of directors to discharge their duties or failure to discharge them competently and in accordance with the law is indicative of poor corporate governance. SOCs' non-executive directors shoulder responsibilities to ensure that executive management is not only implementing decisions being made but also the duty to ensure the non-executive directors themselves are making the right decisions for the SOC. The submission is that poor decisions cannot yield good results even if implemented properly. The law has designed mechanisms to ensure that non-executive directors can account for the duties they have assumed to the SOC.[842] In the next chapter the liability and enforcement of liability for non-executive directors who have breached or overreached their duties are discussed.

840 National State Enterprises Bill 2024, s 9.

841 National State Enterprises Bill 2024, s 22.

842 Companies Act 2008, s 77(1), (2) and (3).

CHAPTER 5

LIABILITY AND ENFORCEMENT FOR NON-EXECUTIVE DIRECTORS IN SOCS

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5.1. Introduction

In Chapter 3 the definitions of non-executive and independent directors were discussed.[843] It was further indicated that SOCs' boards are generally composed of a majority of non-executives who are independent directors.[844] Examples of SOCs where boards of directors are composed of executive and non-executive directors include Eskom[845] and the SABC.[846] Importantly, the authority to have a mixture of executive, non-executive and

843 See paragraph 3.4.2.1 in Chapter 3.

844 See paragraph 3.5 in Chapter 3.

845 See Eskom's leadership website <https://www.eskom.co.za/about-eskom/leadership/ >accessed 17 January 2022.

846 Broadcasting Act 1999, s 12(b); see also the SABC website containing the composition of the Executive Team <https://www.sabc.co.za/sabc/sabc-board > accessed 13 November 2021.

independent directors on a board generally flows from an enabling law or may be informed by best practice.[847] As seen from the discussion in Chapter 3, the designations and differential composition of board members on an SOC's board do not necessarily translate into a well governed SOC.[848] A properly composed board of directors is not a guarantee that good corporate governance will prevail in an SOC. A properly constituted board of directors still has to competently discharge its corporate governance duties beyond mere composition.

The board of directors' good discharge of its duties must endure and be manifest in its management, operation and leadership of the SOC. Ultimately, achieving the specific SOC's mandate in a sustainable manner is what may be attributed to good corporate governance. An additional factor to measure board of directors' performance in SOCs is how the SOC impacts on public welfare as they remain the beneficiaries of SOCs. As was indicated in Chapter 4, the Companies Act, the PFMA and the King III Report and the King IV Report clearly point out that the boards of directors must act within the boundaries of their prescribed duties whilst taking charge of the ethical leadership of the companies in which they serve.[849] In this regard, it is of value to highlight that the King III Report[850] provides the following principles pertaining to a board's responsibilities:

> The board is responsible for corporate governance and has two main functions; first, it is responsible for determining the company's strategic direction (and, consequently its ultimate performance); and second, it is responsible for the control of the company. The board requires management to execute strategic decisions effectively and according to laws and the legitimate interests and expectations of stakeholders.

It can be gathered from the extract from the King III Report that directors of a company have a pioneering role to discharge in ensuring that a company is strategically driven to achieve great performance.[851] High performance for companies manifests itself in the achievement of a company's core objectives while it remains sustainable into the future.

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847 King IV Report Principle 7, 7(b).

848 See paragraph 3.4.2.1 in Chapter 3.

849 Refer to paragraph 3.9.3 in Chapter 3.

850 The King III Report Principle 1.1.

851 The King III Report 1.1.

It is submitted that when companies perform financially well and in terms of their line of business, directors and all others charged with their governance justify appointment to their positions. If results are poor, it may be taken to mean corporate governance is also poor. A correlation in performance results and the actual roles discharged by non-executive directors on a board are vouched for.

Directors of public and private companies including SOCs generally stand at the forefront of being held liable and accountable for the way a company is controlled and managed.[852] As Bekink asserts:

> Significant discretionary powers are conferred upon directors and as such, they have a fundamental influence on the success or failure of a company. This is particularly true of the modern corporate environment, where directors play an active role in the management of a company.
>
> Directors, therefore, are required, by law, to discharge their powers lawfully and honestly in both their personal and official capacities. Failure to do so may lead to extensive liability for any loss the company suffers.[853]

With the significant powers conferred upon directors, it is fair to expect directors to account and even be liable to the company should the powers entrusted to them be misused. It is essential to contextualise the rationale and justification for directors to face liability and accountability for the management of companies. Section 66(1) of the Companies Act provides the following:

> The business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise.

It is evident from the section[854] that it seeks to limit the authority of a board and only allow it to be exercised to the extent provided by law and the MOI. Such limitation ensures that

852 Companies Act 2008, s 66(1).

853 Bekink, 'Indemnification and Aspects of Directors' and Officers' Liability Insurance', 88.

854 Companies Act 2008, s 66(1).

a board performs its duties within certain boundaries. In other words, boards are prevented from exercising powers ultra vires. From this point of view, exercising powers in contravention of these boundaries as provided for in the law or MOI should be visited with liability.

Section 66 of the Companies Act establishes the board of directors as the single centre of power and control of a company. Consequently, a board of directors may be placed at the centre of liability and accountability if a company is governed unethically and corruptly. The board of any company, as a collective, should be the first in line to account for and assume any liability.

In *State v Kapia*,[855] Justice Liebenberg in an obiter statement stated that aspiring directors oversell themselves to be recruited to a board without ever minding that serving on a company board is an onerous responsibility for which one may be held liable. It is, therefore, imperative that non-executive and independent directors take cognisance of the liability that may be visited upon them for how they discharged their duties on the board of an SOC. Therefore, the motivation to serve on a board should be borne out of a genuine desire to contribute to the success of the SOC and to be bound by applicable laws. Any other motivation may result in non-executive directors being compromised and ready to engage in governance breaches.

This chapter focuses on discussing the liability and accountability of non-executive directors of SOCs. It is argued that for the board directors to discharge their duties with the utmost good faith, care, skill and diligence, some form of effective liability should apply to them for serving on SOCs boards. The Companies Act provides for directors' liability.[856] It is trite that directors may sometimes act beyond the scope of their duties negligently or recklessly, warranting the attraction of some form of condemnation. Furthermore, directors may breach their fiduciary duties to a company or act in contravention of the duty of care, skill and diligence. Due to the likelihood of these occurrences, shareholders should be mindful that management and non-executive directors could act in

855 *State v Kapia and Others* 2018 (3) NR 885 (HC) [2].

856 Companies Act 2008, s 77.

their own interests to the detriment of the company and the shareholders.[857] It is within this sphere that a breach of governance duties should be seen as acting contrary to the company's interest. Such breach should therefore be met with liability as the law may provide proportionate to the extent of the breach. The existence of effective liability and accountability mechanisms may go a long way in ensuring non-executive directors' adherence to their duties. The spin-offs for non-executive directors adhering to their duties will be improved corporate governance in SOCs. The further spin-offs are improved public welfare, good service delivery to the citizens and value addition to the economy.

To this day, laws have been developed to enable shareholders to act if the company invested in is mismanaged.[858] For SOCs, matters are complicated. This may be attributed to the fact that the mismanagement may arise from a shareholder representative having instructed a board of directors to act in a certain manner, which in turn may result in the chief executive officers flouting processes for the personal gain of the shareholder representative.[859] Wrong instructions, it is argued, can be cascaded down all the way from a representative shareholder to executive management. Even so, directors as fiduciaries to and of a company should not concede to any detrimental influence on the SOC but should be steadfast and adhere to their duties. Directors who may mismanage or mishandle the governance of SOCs, should thus be held accountable for any loss or damage to the SOCs which may result from their actions.

This chapter accordingly serves to discuss the scope of the regulation for the assignment of liability to non-executive directors in SOCs.[860] It is a well-known phenomenon that directors, while acting as such, may attract liability should they contravene their duties.[861] This phenomenon transcends privately held companies to SOCs.

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857 Berle and Means, *The Modern Corporation and Private Property,* 220.

858 Companies Act 2008, s 16(1), s 20(4)(5) and s 71(1).

859 Judicial Commission of Inquiry into State Capture Report: Part 1, (2022), Vol. 1 South African Airways and its Associated Companies, 1, 8-9.

860 The focus of the chapter is on how liability for breach of non-executive directors' duties is assigned from a legal point of view with respect to SOCs in South Africa. As such the chapter excludes an elaborate discussion of aspects dealt with in other chapters of the study. In that regard, non-executive directors are distinguished as they are directors who are not employees of a SOC. Thus, executive directors are those who work for a SOC based on an employment contract.

861 Companies Act 2008 s 77(2)(a)(b) and s 77(3).

In Chapter 4 directors' duties were discussed. The discussion of the duties culminated into an appreciation that such duties if not properly performed will attract consequences for directors on whom they fall.[862] Such liability equally falls on non-executive directors in SOCs who can be held liable for the breach of board duties,[863] which resulted in loss, damages or costs to the SOC to which they were appointed. This is the position in terms of the common law, Companies Act and the PFMA.[864] It means that non-executive directors must carry out their duties in a manner that conforms to the law.[865] Liability for non-compliance with the law accordingly attaches to non-executive directors by virtue of their serving in that capacity whilst not conforming to the law.[866] Such liability may rightly be the consequence of the acts or omissions of non-executive directors while serving on a board of directors of a SOC.[867]

Although there is no specific distinction in liability attaching to the different classes of directors, it should be noted that this study focuses on non-executive directors in SOCs. The aforementioned status quo should also not be conflated with the fact that executive directors may serve under a contract of employment with a SOC.[868]

To the extent that an executive director is an employee of a SOC,[869] liability in terms of such a contract may still be decided in terms of a SOC's internal policies and the contract of employment.[870] That is in addition to the consequences such executive directors may face under the Companies Act.[871]

It does appear that there is no shortage of legal instruments providing for accountability on the part of directors in SOCs. The implementation of the accountability provisions may be lacking. This accordingly begs the question of the role of non-executive directors in the

862 Chapter 4, para 4.3.5.
863 Companies Act 2008, s 76(3)(a)(b) read with s 77(2)(a)(b) and subs 3.
864 Companies Act 2008, s77 and Public Finance Management Act, 1999, s 82 and s 83.
865 Companies Act 2008, s 76(3)(a)(b)(c).
866 Tricker, *Corporate Governance,* 123.
867 Companies Act 2008, s 77(2)(a)(b)(i)(ii)(iii), s 77(3)(a)-(e).
868 Companies Act 2008, s 77(2)(a)(b)(i)(ii)(iii), s 77(3)(a)-(e).
869 For example, section 12(b) of the Broadcasting Act 1999 provides for executive directors who are employees of the SABC.
870 Public Finance Management Act 1999, s 84.
871 Companies Act 2008, s 77(2) and (3).

enforcement of accountability at SOCs. Non-executive directors are seen as a good fusion into any board of directors. It is believed that they bring much needed value, independence and can assist in monitoring executive directors to produce exceptional performance.[872] Non-executive directors may independently oversee company actions and act as a form of check and balance against the actions of executive directors of a SOC.[873] Conversely, the Companies Act itself does not include such an expectation of non-executive directors over executive directors but assigns liability for failure to comply with the law to executive and non-executive directors without differentiation.

Although it may be argued that non-executive directors of a SOC may independently oversee company actions and act as a form of check and balance against the actions of executive directors of a SOC, it is unclear how non-executive directors should monitor executive directors. In general, non-executive directors do not accept board appointment with the purpose of monitoring executive directors in their capacity as directors. Non-executive directors become members of a board of a SOC with the purpose of discharging their expressed duties as directors which remain tritely recognised in both the common law[874] and statutory law.[875] This does not include the duty to monitor executive directors.

It is suggested that contracts of employment of executive directors could be written to include the scope of board duties the executive directors should discharge.[876] That is in addition to other management duties from their employment with a SOC. The differentiation in duties in the contract of employment may be so worded as to make it easier for non-executive directors to conduct their oversight and monitoring function over the affairs of the SOC. The distinguished role by non-executive directors of supervising and monitoring executive management should not merely be assumed. It can be expressly provided for in contracts of employment entered into between executive directors and the

872 Cassim, Femida Maleka Cassim, Irene M Esser and Others, *South African Corporate Administration, (*Revision Service No 21 Juta, 2013), 15-3.

873 Naidoo, *Corporate Governance,* 139.

874 Fiduciary duties include the duty to act in good faith, the duty to act in the best interests of the company and the duty to avoid conflict of interests.

875 Companies Act 2008, s 76(3)(a)(b)(c)(i)(ii).

876 Broadcasting Act 1991, s 12(b).

company. Time may perhaps have come to incorporate the aspect of supervision and monitoring as part of the duties of non-executive directors in the Companies Act and the PFMA.

Conversely, it should be remembered that non-executive directors are themselves not immune from committing governance breaches. Should it be expected of executive directors to monitor non-executive directors and vice versa? Importantly, however, irrespective of where the monitoring responsibility lies non-executive directors will be held to account should they face any governance breaches. By placing a monitoring duty on non-executive directors, sight may be lost of the governance blunders and breaches that non-executive directors may cause or commit and for which, because they do not have anyone monitoring them may go unpunished.

Executive directors will have no authority to supervise and monitor non-executive directors. However, nothing should stop executive directors from refusing to perform unlawful instructions handed to them by non-executive directors. Doing so would render them in breach of governance duties alongside the non-executive directors on whose instructions they acted. The defence that they were instructed is not in law available as it does not exist. The submission is that although it is good practice to constitute a board with both executive and non-executive directors the composition alone may not insulate an SOC from corporate governance breaches and lead to the enforcement of accountability.

Whereas non-executive directors should assist by ensuring independence and effective governance in SOCs, experience sometimes indicates the contrary. For instance, the State of Capture Report has detailed governance breaches at the hands of non-executive directors in several SOCs.[877] In cases where not all non-executive directors partook in governance breaches those not involved should have acted in the best interest of the SOC by approaching courts of law. Their failure to speak out or take positive action is an omission which cuts the same way a commission of a corporate governance breach does.

With the evidence in the State Capture Report, it appears that non-executive directors who were not involved in any governance breaches either merely resigned quietly, were

[877] Judicial Commission of Inquiry into State Capture Report: Part 1 Volume 1, (2021), viii-ix.

kicked out[878] of a board of directors or were consumed in inertia and remained silent.[879] This silence or omission translating into failure to act in the best interest of a SOC could amount to willful negligence.[880] Incidences of omissions should furthermore be evaluated within the contexts of section 66(1) and section 165(2)(b) of the Companies Act. Both these sections enjoin non-executive directors to protect the interests and welfare of a SOC.[881]

Though secondary to the topic of the thesis, it is submitted that the legal framework has a *lacuna* with regards to shareholder representative accountability and/or its enforcement. Neither the Companies Act nor the PFMA provide for accountability by shareholder representatives or any other persons who may seek to influence both executive and non-executive directors in the due performance of their governance duties. In this regard Naidoo expresses her concern stating as follows:[882]

> Unlike shareholders of a private company, the nature of the shareholder rights exercised by the minister are not proprietary as they are exercised on behalf of the people of the Republic who are ultimately the owners of all state owned entities. 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 bound equally with the directors by the fiduciary duties set out in the 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 directors, must also apply to the shareholding Minister.

According to Naidoo, the shareholder Minister also acts as a fiduciary and should adhere to the principles of the Companies Act and the PFMA.[883] Conversely, this is not confirmed in the two Acts. A legal framework that focuses liability only on directors in SOCs may not achieve much as poor performance and poor governance of SOCs may be rooted beyond the role of directors. The need for holding shareholder representatives and others[884] to account for the poor governance at SOC's due to undue influence in SOCs is

878 Judicial Commission of Inquiry into State Capture Report: Part IV, Volume 3 (2021), 706.
879 Judicial Commission of Inquiry into State Capture Report: Part IV, Volume 3, (2021), 722.
880 Companies Act 2008, s 77(2) and (3).
881 See also s 165(5) of the Companies Act 2008.
882 Naidoo, *Corporate Governance,* 371.
883 Companies Act 2008, s 77(2)(3). See also Naidoo, *Corporate Governance,* 97.
884 Companies Act 2008, s 66(1) and s 76(3).

accordingly advocated.[885] It is submitted that non-executive directors should not allow themselves to be used as conduits for poor governance decisions, but should be able to use the law to protect the interest of an SOC and to ensure accountability for breaches of the law.[886]

Non-executive directors who are not prepared to challenge any undue influence regardless of its origin are not fit and proper to serve as directors of an SOC and may be in breach of their duties. Directors are required to withstand any undue influence, even that of shareholder representatives of SOCs. It is evident that SOCs are a unique type of company. The involvement of several layers in their governance structures with none of them constituting the owners of shares in the SOCs makes it intricate. This may call for an additional framework to regulate aspects that have appeared problematic in the governance of these institutions.

5.2. An overview of directors' statutory liability

Before embarking on director liability as laid out in various sections of the Companies Act and contextualising them to SOCs, an overview of the pertinent statutory liability is briefly discussed. The Companies Act provides for director liability in section 77 of the Act. Directors as a collective and grouped as executive and non-executive subscribe to generally the same duties under the Companies Act.[887] It however does not mean there is an absence of varied designations on a board.

In practice the distinction generally manifests by way of a contract of employment between the company and an executive director. In this connection an executive director doubles as a board member and an employee of the company, at the same time. It transpires through a contract of employment which necessarily brings duties slightly varied from those of non-executive directors on a board.[888] It is only fair to expect that an executive director has substantial accountability to give to the company on a day-to-day

885 Companies Act 2008, s 76(3)(a)(b)(c)(i)(ii).
886 Companies Act 2008, s 66(1), s 76(3) and s 77(2)(3).
887 Companies Act 2008, s 76(3).
888 Piet Delport, *Henochsberg Commentary on the Companies Act 71 of 2008* (Issue 1 Juta 2021) 303.

basis compared to that of a non-executive director. The thesis is inclined towards non-executive director liability but recognises the collective approach of boards of companies in relation to their governance duties. A brief account of statutory liability under the Companies Act is provided below.

5.2.1. The Companies Act: section 77

Section 77, although not exclusively, provides for a comprehensive scope of director liability under the Companies Act.[889] In terms of the section[890] liability is split into three spheres. The three spheres are: a director will be held liable for breach of fiduciary duties, for the duty of care, skill and diligence and for any of the transactions listed under section 77(3) of the Companies Act.

From a diligent search conducted during this research, no court cases to date have been found that implicated section 77 of the Companies Act.[891] Moreover, court cases involving director liability in SOCs in South Africa are uncommon. The scarcity of court cases implicating section 77 of the Companies Act while SOCs continue to be in a poor state of corporate governance reveals a lack of enforcement of accountability for non-executive directors serving on SOCs' boards. Non-executive directors may have to justify their being on boards by engendering tangible transformation in SOCs. When SOCs fail while non-executive directors are serving on boards, it raises questions about the contributions they should be making to the success and overall good corporate governance of SOCs.

More critical is that when they do not live up to their duties, they should answer for their governance failures. Due to its importance, section 77 of the Companies Act and how the section specifically relates to the liability of non-executive-directors is discussed further below. The operation of section 77 is not put to good use in SOCs and goes largely unnoticed. Employing section 77 of the Companies Act could mean that non-executive directors in SOCs who are failing in their governance duties are held liable.

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889 Companies Act 2008, s 77(2)(a)(b)(i)(ii)(iii), s 77(3)(a)-(e).

890 Companies Act 2008, s 77.

891 Apart from the well-known case of Myeni and Hlaudi Motsoeneng discussed in this chapter.

5.2.1.1. Section 22 of the Companies Act

Section 77 of the Companies Act is supplemented by sections 22 and 218 of the Act. Section 22 of the Companies Act prohibits reckless and insolvent trading,[892] and the consequences that flow from such conduct. Section 22 determines as follows:

> (1) A company must not:
>
> > (a) carry on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose; or (b) trade under insolvent circumstances.
>
> (2) If the Commission has reasonable grounds to believe that a company is engaging in conduct prohibited by subsection (1), the Commission may issue a notice to the company to show cause why the company should be permitted to continue carrying on its business, or to trade, as the case may be.
>
> (3) If a company to whom a notice has been issued in terms of subsection (2) fails within 20 business days to satisfy the Commission that it is not engaging in conduct prohibited by subsection (1), the Commission may issue a compliance notice to the company requiring it to cease carrying on its business or trading, as the case may be.

The indication from section 22 of the Companies Act is that it is unlawful for a company to trade under circumstances where it is reckless to do so.[893] Exactly what constitutes reckless trading should be determined. The determination would assist those charged with the governance of companies to be aware of reckless trading so that they may, if advised, take steps to remedy such precarious trading. It appears that reckless trading refers to trading that is unlawful in terms of the Companies Act or the MOI.[894] Furthermore, it has to be remembered that, under the Companies Act, significant powers have been allocated to directors.[895] So, reference to a company which is a juristic person would mean that the board of directors would be accountable for a company trading recklessly

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892 *Lobelo and Others v Kukama and Others* [2013] ZAGPJHC 72 [4].

893 Companies Act 2008, s 22(1): *Lobelo and Others v Kukama and Others* [2013] ZAGPJHC 72 [4] and [44]; Delport, *Henocsberg Commentary on the Companies* Act 2008, 117.

894 Companies Act 2008, s 20(2).

895 Companies Act 2008, s 66(1).

and for all its other conducts contemplated in the Companies Act.

It is submitted that reckless trading manifests as a lack of due care and in failure to act in the best interest of the company by those charged with the governance of a company. Importantly, the section determines that reckless trading obtains where the company is trading in circumstances involving gross negligence, with intent to defraud any person or for any fraudulent purpose. It is further submitted that reckless trading would encompass trading under insolvent circumstances while the company continues to take on more debt when it is clear that it would not be able to service such debts.[896] A link is evident between a company trading recklessly and the conduct of directors of such company.[897]

The submission is made in line with the wide scope of directors' overall powers with respect to a company. In terms of section 66 of the Companies Act the business and affairs of a company must be managed under the direction of the board of directors.[898] It accordingly follows that where SOCs as companies are involved in reckless trading, directors, executive and non-executive, will have to account for their actions, and where justified will be liable for such reckless trading. Given a board's central powers in controlling and managing the affairs of a company it follows that it should be aware of its reckless trading, and generally the health and governance of the company. Non-executive directors of SOCs should not easily escape accountability when it comes to reckless trading. In South Africa several SOCs have been noted to have been unable to turn profits while they continued to pay salaries and board fees to persons not bringing any value to them.[899] It can be argued that SOCs can, if care is not taken, be used as vehicles to merely pay salaries without actually having them achieve their purpose.

5.2.1.2. Section 218 – Companies Act

Section 77 of the Companies Act is apart from section 22, further supplemented by section 218 in its regulation of director liability. Section 218(2) of the Companies Act provides

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896 Cassim and others *Contemporary Company Law,* 789.

897 *Rabinowitz v Graan and Others* 2013 (5) SA 315 (GSJ) [22].

898 Companies Act 2008, s 66(1).

899 At different times, examples included the SAA SOC Ltd, DENEL SOC Ltd and SABC SOC Ltd.

for civil actions. Subsection 2 should be read to implicate the ascertainment as to whom or against whom the said civil actions apply. The subsection provides that '[a]ny person who contravenes any provision of this Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention.'

The provision is wide and in line with the theme of the thesis. It is opportune to point out that it includes directors. As indicated with respect to section 66(1) of the Companies Act, directors have wide powers and control over a company and in essence a company is managed and controlled under their direction. For this entrenched position, it may not be far-fetched to submit that any contravention contemplated under this section may affect directors of a company. Notable is the fact that such contravention is not one to be sustained by the company, but by the person who occasioned it. Importantly, the person, director or any other officer of the company will shoulder the liability they have occasioned. The question may however be posed whether directors who face liability but otherwise acted honestly would face liability from the civil actions brought. Section 77(9) of the Companies Act offers a form of defence where a director acted within his or her limits. It provides as follows:

> In any proceedings against a director, other than for willful misconduct or willful breach of trust, the court may relieve the director, either wholly or partly, from any liability set out in this section, on any terms the court considers just if it appears to the court that—
>
> (a) the director is or may be liable, but has acted honestly and reasonably; or
>
> (b) having regard to all the circumstances of the case, including those connected with the appointment of the director, it would be fair to excuse the director.

It does appear that section 77(9) offers some defense to a director who would otherwise have been liable but because they acted honestly and reasonably, in furthering the business of the company will be relieved. This subsection is seen to cushion the exposure of directors who would otherwise be caught under section 218(2).[900] What is clear is that willful misconduct and willful breach of duty is left without any defence, and a director will be held liable for acting under such circumstances. The trier of facts would have to

[900] Companies Act 2008, s 77(9)(a)(b).

ascertain the scope and nature of conduct and find whether it deviated from the protected conduct, or it remained within. Any conduct of a non-executive director falling outside the parameters would be punishable.

5.3. Liability applicable to non-executive directors of SOCs

The liability of directors (albeit the common law) has been described by Finch as follows:

> The common law operates to give directors remarkable freedom to run companies incompetently. Provided that their behaviour falls short of the grossest negligence they are unlikely to be held to account.[901]

The language in the above text is not marginally different from the language employed in the pertinent provisions in the Companies Act.[902] The lack of a substantial difference in the language is evident in the lack of a strict approach[903] to hold directors accountable. Gross negligence is still a determinant in proving liability against a director.[904] There are indications beginning to emerge that gross negligence would soon be jettisoned for a stricter approach.[905] A stricter approach would be associated with permitting liability for negligence without requiring that the negligence complained of be gross. The development is welcomed as it may bring a change in the boardroom of SOCs, provided there is proper monitoring of governance breaches, and implementation of any such strict measures of liability. It is hoped that with the looming paradigm shift on the horizon with respect to holding directors accountable strictly, that courts will equally take action. Courts have been known to be lenient in adjudicating on internal company matters.[906] For instance, the stance that shareholders who appoint foolish directors would only have themselves to blame when such directors run the company into the ground does not augur well for application in SOCs.[907]

The reason is that these institutions should perform in the public interest and if few

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901 Finch, 'Company Directors: Who Cares About Skill and Care?' 179.
902 Companies Act 2008, s77(9)(a)(b).
903 Companies Act 2008, s 77(10).
904 Companies Act 2008, s 77(2)(a) and (b).
905 Cassim and Others, *Contemporary Company Law,* 747.
906 Cassim and Others, *Contemporary Company Law,* 747.
907 *Daniels (formerly practicing as Deloitte Haskins & Sells) v Anderson* (1995) 16 ACSR 607 (NSW); (1995) 37 NSWLR) 438; *Turquand v Marshall* (1869) LR 4 Ch App 376.

persons, such as directors in charge of them are allowed to run them into the ground without adverse consequence, the public and the economy of the country may suffer untold hardship. Shareholder representatives, being politicians, are not famed for appointing competent and unblemished directors to SOCs boards.[908] To avoid shareholders appointing incompetent directors, shareholders should be aware of what it takes to manage SOCs properly. The public, who remain the beneficial shareholders, may suffer if the attitude of the courts were that those who appointed non-executive directors should deal with the consequences. In this connection, the recommendation is that courts should be willing to deal with directors of SOCs whenever a matter before them requires a finding of accountability against directors.

Furthermore, holding directors in SOCs accountable has appeared to be beyond the capability of any mechanisms set up for this purpose.[909] It leaves such enforcement of accountability in the capable hands of the courts. In the absence of an express mechanism or avenues to decide on director liability, the best-known avenue available to prosecute any actual, suspected or perceived breaches of directors' duties, are the courts of law.[910] Whereas there is nothing wrong with the courts being approached to enforce accountability, the availability of internal mechanisms[911] could serve as a much needed intervention to hold errant directors to account. The advantage being that internal mechanisms may be cheaper and time-saving, whereas litigation is expensive and may be time consuming.

The arrival of additional codes such as the Code for Responsible Investing in South Africa (CRISA) in the corporate governance space though welcomed, has regrettably not improved matters in SOCs.[912] This may be exacerbated by the fact that CRISA's application is on apply or explain basis. It encourages transparency, governance amongst

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908 South African Institute of International Affairs: Terence Corringan, Corporate Governance in Africa's State-owned Enterprises: Perspectives on an Evolving System, (2014), Policy Briefing 102, 3: <https://saiia.org/za/research/corporate-governance-in-africa-state-owned-enterprises-perspectives-on-evolving-system > accessed 10 August 2024.

909 Public Finance Management Act, 1999, s84.

910 Companies Act 2008, s77(3)(8)(9)(10).

911 For example, a tribunal set up specifically to deal with directors accused of breach of their governance duties.

912 CRISA, Code for Responsible Investing in South Africa <https://www.crisa2.co.za/crisa2code > accessed 01 April 2023.

other principles but contains no legally binding provisions for not complying with such principles. It therefore does not serve as an enhancement to the Companies Act[913] or the PFMA. In governing SOCs how directors discharge their governance duties is important. It is how the board duties are discharged that will result in a certain outcome for the SOCs. There is, therefore, a link between how directors discharge their duties and the ultimate performance of SOCs.[914]

When directors fall below the standards of conduct prescribed by law,[915] it may follow that they have breached their governance duties to SOCs. The law, common and statutory, provide for director liability where directors have breached their standards of duty. Essentially, director liability is the consequence of a breach of directors' duties to an SOC which is encapsulated in various legal instruments regulating SOCs.[916]

To enhance accountability in the affairs and management of SOCs, those charged with governance, such as board directors, should be visited with some form of liability when they breach their governance duties. Without the spectrum of accountability hanging over the heads of non-executive directors, it may be difficult to expect that they will on their own ensure good corporate governance in SOCs. It may not be impossible for non-executive directors to conduct their duties well even in the absence of accountability mechanisms.[917] However, since the law provides duties, it equally provides for sanctions for breach of the duties.

Whereas director liability in general is an old aspect of company law and available at common law, the specific liability of directors in the sphere of SOCs is a relatively novel concept. Hence, it follows that specific provisions should be made for the duties to be performed on behalf of or in the furtherance of the business of an SOC, as well as the enforceable consequences for the breach of such duties. It is also imperative that clear guidelines are available as to who the responsibility rests to ensure that directors who breach their duties are held accountable in SOCs. This is suggested, given the unique

913 Companies Act 2008, s 77 and Public Finance Management Act 1999, s 50 and 51.

914 Cassim and others *Contemporary Company Law,* 664; Mervyn King and Fabian, *Outcomes-Based Governance*, 3.

915 Companies Act 2008, s 76(2)(3).

916 Companies Act 2008, s 77(2). See also the Public Finance Management Act 1999, s 82(3)(1)(2).

917 Companies Act 2008, s 77(2) and (3).

nature of SOCs, where there may be a lack of personalities to take non-executive directors on for their governance breaches in SOCs. This complexity is caused by the agency nature of all those involved in the governance of SOCs.

5.4. Sources of liability for non-executive directors in SOCs

Directors' duties have, before codification, been primarily and exclusively located in the common law.[918] It has recently been partially codified under the Companies Act.[919] This follows that the breach of directors' duties was, until such codification, dealt with in terms of the common law. Today, however, both the common law and statutory law apply.[920] It is further noteworthy to keep in mind that although partial codification of directors' duties has taken place, it does not replace the common law duties.[921] Courts have consistently held that statutory provisions are not intended to change or jettison the common law unless expressly stated or by positive implication.[922]

In this section of the thesis, the liability of directors is discussed alongside directors' duties. As indicated above, liability for non-executive directors in SOCs flows from a breach of the directors' duties.[923] As such, director liability is not without a basis. The Companies Act does not define the term 'liability' in relation to directors' breach of their duties but, provides for provisions that establish liability on the part of a director.[924] The Oxford dictionary defines 'liability' as 'the state of being legally responsible for something.'[925] In the context of the study, liability, is understood as being legal responsibility for loss or damage caused by a director who has breached his or her duties as a director against the company.

Before presenting a discussion of the pertinent provisions of the Companies Act on liability for directors in breach of their duties, it is of value to indicate what actions trigger

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918 Cassim and Others, *Contemporary Company Law,* 507.

919 Date of commencement: 01 May 2011.

920 Companies Act 2008, s 72(2).

921 Cassim and others, *Contemporary Company Law,* 684.

922 *Attorney-General, Transvaal v Botha* 1994 (1) SA 306 (A) [330I-J]; *Hlumisa Investment Holdings (RF) Ltd and Another v Kirkinis and Others* 2020 (5) 419 (SCA) [44].

923 Companies Act 2008, s 76(3), s 77(2) and s 77(3).

924 Companies Act 2008, s77 (1)-(10).

925 A S Hornby Oxford Advanced Learner's Dictionary: International Student's Version (7th edn Oxford University Press 2005) 849; Companies Act 2008, s 77.

director liability against a company. As explained in Chapter 4, directors are fiduciaries,[926] and in addition they have the duty to exercise reasonable care, skill and diligence which is not a fiduciary duty.[927] When it comes to accounting for the performance of their duties both sets of duties should be accounted for. It has long been established in *Percival v Wright* that directors owe their fiduciary duties[928] to the company and arguably to a whole body of shareholders, and not to an individual shareholder.[929] The whole body of shareholders may thus be regarded as the embodiment and reflection of what makes up a company. In other words, a company may not be complete without some form of shareholders. With respect to SOCs, behind the shareholder is arguably the public whose interest the shareholder represents in the SOC. Directors being fiduciaries, and acting in that capacity, place themselves in a position of trust toward the shareholders, and the public in the case of SOCs.[930] This requires of them to always act in the best interest[931] of the SOCs and in good faith.[932] The load of duties that directors accept to perform on behalf of the company should be seen as a legal commitment that they take upon themselves, and for which they will account. Cassim and others sum it up as follows:

> The new approach to directors' duties is that persons who accept office as directors of a company undertake legal responsibility for ensuring that they know and understand the nature of the duties that they are required to comply with.[933]

Therefore, directors should not take up positions on a board unknowing of the full scope of their onerous duties. Equally, no director should be on a board oblivious to the legal consequences that flow from breach of duties they have assumed. To ensure that such legal responsibilities are consummated, a breach of the duties of directors should warrant some form of recourse to the company on behalf of which a director accepts to act

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926 In *Bristol and West Building Society Building v Mothew* [1998] Ch 1 [18] the court expresses that "a fiduciary is someone who undertakes to act for or on behalf of another in circumstances that give rise to a relationship of trust and confidence between the parties."

927 Companies Act 2008, s 76(3)(c).

928 Fiduciary duties are broadly summed up as good faith, honesty, loyalty and avoidance of conflicts of duty and interests. All owed to a company by its directors.

929 [1902] 2 Ch 421.

930 *Cohen v Segal* 1970 (1) SA702 (W) 706.

931 Companies Act 2008, s 76(3)(a)(b).

932 *Howard v Herrigel* 1991 (2) SA 660 (A) [678A].

933 Cassim and Others, *Contemporary Company Law,* 509 [2021].

in the company's best interest and with the necessary degree of care and skill. The provisions of director liability in the Companies Act apply to executive and non-executive directors of SOCs without exception.[934] This may be attributed to the fact that they are fundamentally directors of companies, regardless of who the owner is. The operation of director liability is arguably such that the liability applies on the merits of a case without regard to how a company in question is owned.

The ownership of an SOC should not be used to influence how director liability is applied upon breach of governance duties. Weight should be attached to the breach itself, provided that the breach has resulted in loss, damage or costs to a SOC. Non-executive director on SOCs boards are for all purposes comparable to directors of other forms of companies. The scope of duties of directors in the Companies Act and the liability of directors which relate to the duties of directors apply to non-executive directors of SOCs.[935] Hereunder, the provisions of statutory liability under the Companies Act are explored.

5.4.1. Section 77 of the Companies Act 71 of 2008 in context

As indicated above, directors' liability is provided for under section 77 of the Companies Act and relates to executive, non-executive and independent directors.[936] Section 77(1) of the Companies Act also includes alternate directors, officers of the company as well as persons who are members of a committee of a board or the audit committee of a company. This implies that statutory liability for breach of directors' duties is applied uniformly to all directors of a company. The situation may be different under the common law. Notwithstanding the wide application of director liability, the focus of the thesis is concerned with non-executive director liability. This category of directors being from 'outside' a company or SOC is also expected to monitor and supervise executive directors.[937] The pertinent provisions of the Companies Act which are rendered as the source of director liability are section 77(2) and (3). In terms of section 77(2) and (3) a director and thus

934 Refer also to the wide definition of 'director' in section 1 of the Companies Act, 2008.
935 Companies Act 2008, s76(3) and s 77(2)(3).
936 Cassim and Others, *Contemporary Company Law*, 689 [2021].
937 Cassim and Others, *Contemporary Company Law,* 653-656 [2021].

also a non-executive director may be held liable in accordance with the principles of the common law relating to a breach of a fiduciary duty for any loss, damage or cost sustained by a company as a consequence of a breach by a director of a duty contemplated in sections 75, 76(2) and section 76(3)(a) or (b) of the Act.

Section 77(2)*(a)* links the common law fiduciary duties to the statutory duties. However, it should be noted that the common law duties remain of a sui generis nature.[938] On a proper reading of this subsection, it means that breach of a fiduciary duty which causes loss or damage to the company establishes liability on a director. In other words, a director must have committed a breach relating to his or her fiduciary duties and that breach should have caused the loss or damage to the company. The subsection uses the word 'may' to denote the yardstick to hold a director liable for breach. The section does not say a director 'shall' or 'must'[939] which would denote that upon breach a director would be held liable without need to exercise discretion. The word 'may'[940] denotes that discretion is allowed to the company as the trier of facts relating to a possible breach by a director. Another interpretation of the wording is that it may be understood to mean that a breach by a director can be established, but it may not necessarily follow that such director would be held liable. In other words, not all breach of fiduciary duty may result in liability for a director. Delport, for example, indicates that the conduct of the director has to amount to willful misconduct or willful breach of trust in order for it to result in liability against a non-executive director.[941] Willful misconduct and willful breach of trust has been held to mean that a director had not acted honestly in a given situation in relation to his duties as director.[942] This liability was succinctly summarised in *Breetzke*:[943]

> The fiduciary must place the interests of the other party to whom the duty is owed before their own. While many breaches of fiduciary duties involve dishonesty, that is not always the case. Nonetheless, any departure from the path of rectitude that such a duty imposes

938 *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 [199-242].

939 Botha, *Statutory Interpretation*,178. See also *Bezuidenhout v AA Mutual Insurance Association Ltd* 1978 (1) SA 703 (A) 709.

940 Botha, *Statutory Interpretation,* 178. See also *Amalgamated Packaging Industries v Hutt* 1975 (4) SA 943 (A) [950].

941 Delport, *Henochsberg on the Companies Act 71 of 2008*, 303.

942 *Ex parte Lebowa Development Corporation Ltd* 1989 (3) SA 71 (T)).

943 *Breetzke and Others NO v Alexander and Others* [2020] JOL 48345 (SCA) [36].

will be visited with personal liability. The importance of such duties is emphasised by the fact that several statutes concerned with financial issues impose duties of good faith.

Section 77(2)(b) of the Companies Act determines liability against directors based on common law principles of a delictual nature.[944] It would seem that the scope is wide in that the liability can be established based on breach of directors duties, on any other provision of the Companies Act or based on a breach of a provision in the MOI.[945] Clearly, statutory liability cannot be proven or established without resort to the principles of the common law.[946]

There is, however, some difference between section 77(2) and section 77(3) of the Companies Act. Subsection 3 does not appear to require the use of the principles of the common law to establish liability. It would merely require the conduct of a director to meet any of the conducts described in the subsection. It is submitted that the common law principles tend to permeate the entire sphere of corporate law, even when some portions of it are codified.[947] In fact, literature states that company law in its codified state evolves from the common law in that, it is not excluded in all instances and 'recourse may [still] be had to the common law which, save for the express legislative exclusions remains the structure of company law upon which the superstructure of the Act rests'.[948] The implication is therefore that even where the law is codified certain of its principles must be sourced from the common law. It is therefore the case even in holding directors liable for delictual liability. That is, whereas liability may be with reference to duties as codified, the liability will be in accordance with the common law. There is therefore a linkage or complementarity in application between statutory law and the common law.[949]

Section 77(3)(b) deserves special discussion because it may transpire in many SOCs without consequence to anyone who may have acquiesced in the carrying on of the company's business despite knowing that it was being conducted in a manner prohibited

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944 This relates to delictual liability for breach of duties under s 76(3)(c); refer also to Cassim and others *Contemporary Company Law*, 786.

945 Companies Act 2008, s 77(2)(b)(i)(ii)(iii)

946 Companies Act 2008, s 77(2)(a)(b)(i)(ii)(iii).

947 Companies Act 2008, s 76(3)(c).

948 *Mthimunye-Bakoro v Petroleum Oil and Gas Corporation of South Africa* (*SOC*) *Limited and Another* 2015 (6) SA 338 (WCC); see also Delport, *Henochsberg on the Companies Act 71 of 2008*, 296.

949 Cassim and Others, *Contemporary Company Law*, 785 [2021].

by section 22(1). When non-executive directors on a board of an SOC act knowing that their actions are in contravention of any of the listed acts in section 77(3) they may not escape liability. Delport asserts that the instance of knowing or knowingly excludes any reasonableness with respect to any decisions implicating section 77(3).[950] Thus explained, it entails that any director performing such actions, knowing or knowingly, gives rise to accountability.

Notably, subsection 3 does not employ discretionary words as 'may' as is the case with subsection 2. It determines that a director is liable for any loss, damages or costs sustained by the company owing to the director's action or omission falling in the categories outlined under the subsection. If a director caused loss, damages or costs to the other party that director is liable. It does not allow for a discretion with regards to its application. The subsection is underpinned by actions or decisions of directors which are carried out with the knowledge of their deleterious effect or implication on the company. The knowledge should be such that the decisions or actions are known as to what consequences they bring upon a company. The submission is, therefore, that such knowledge removes any instances of reasonableness and confirms liability on such directors. Equally, acting knowing the effect of the action wipes away any defences a non-executive director could raise. It will amount to negligent recklessness.

Section 77(3) may have found its way albeit indirectly into certain decisions on the actions of non-executive directors of SOCs.[951] In the matter of *South African Broadcasting Corporation SOC Ltd and Others v Democratic Alliance,*[952] the reports received and investigated by the Public Protector pertaining to the governance of the SABC were evaluated by the court. The Public Protector's report became known as 'When Governance and Ethics Fail'.[953] The pertinent issues before the court concerned the systematic maladministration at the SABC and the irregular appointment of Mr Hlaudi Motsoeneng,[954]

950 Delport, *Henocsberg on the Companies Act 71 of 2008*, 308.

951 *Organisation Undoing Tax Abuse and Another v Myeni and Others* [2020] 3 All SA 578 (GP) [18].

952 2016 (2) SA 522 (SCA).

953 *South African Broadcasting Corporation SOC Ltd and Others v Democratic Alliance and Others* 2016 (2) SA 522 (SCA) [5].

954 *South African Broadcasting Corporation SOC Ltd and Others v Democratic Alliance and Others* 2016 (2) SA 522 (SCA) [5].

who was found to be unqualified for the position of Chief Operating Officer, which he occupied.[955]

The Public Protector's report concluded that there were pathological corporate governance deficiencies at the SABC, and that 'Mr Motsoeneng had been allowed by successive boards to operate above the law'.[956] The matter was an appeal from the decision of the High Court where the court provided a summation of the poor state of corporate governance at the SABC.[957] The Public Protector's report on the various governance breaches at the SABC highlighted that governance and ethics had however, failed dismally at the SABC.[958]

The board of directors was at the centre of poor governance at the SABC.[959] Their conduct contributed to significant losses incurred by the SABC. The Supreme Court of Appeal, for example, pointed out that during the time of the poor governance at the SABC, it had to be rescued with a loan of R1 billion to prevent it from closing.[960] It is evident that the SABC had been subjected to extremely poor governance, at the hands of its own directors, largely non-executive. It is also known that several board replacements took place which contributed to the poor governance at the SABC. An evaluation of the findings in the Public Protector's Report highlighted that sufficient grounds in law and fact exist to hold successive boards of directors, including executive and non-executive directors liable and accountable for the poor governance at the SABC.[961]

The board of directors and the various ministers failed to take corrective steps to ensure that good corporate governance prevailed at the SABC.[962] The findings and the

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955 See the Broadcasting Act 1999, s 12 which provides that the Chief Operating Officer of the SABC is an executive director of the SABC.

956 *South African Broadcasting Corporation SOC Ltd and Others v Democratic Alliance and Others* 2016 (2) SA 522 (SCA) [6].

957 *Democratic Alliance v South African Broadcasting Corporation Ltd and Others* 2015 (1) SA 551 (WCC) [83].

958 Public Protector's Report: *When Governance Fails,* Report No 23 of 2013/2014. See also: *South African Broadcasting Corporation SOC Ltd and Others v Democratic Alliance and Others* 2016 (2) SA 522 (SCA) [5].

959 *South African Broadcasting Corporation SOC Ltd and Others v Democratic Alliance and Others* 2016 (2) SA 522 (SCA) [5] and [9].

960 *South African Broadcasting Corporation SOC Ltd and Others v Democratic Alliance and Others* 2016 (2) SA 522 (SCA) [49].

961 Public Protector Report, *When Governance Fails,* Report no 23 of 2013/2014, 131.

962 *South African Broadcasting Corporation SOC Ltd and Others v Democratic Alliance and Others*

recommendations of the Public Protector's Report should have been concurred with.[963] Accordingly, the directors at the SABC who caused or associated with the poor corporate governance and who acted to advance the worst interests of the SABC should have been held liable for the losses and damages caused to the SABC. Thus, it seemed typical of South Africa's SOCs that nobody is held liable for corporate governance breaches. Generally, boards of directors are central to poor corporate governance in SOCs. What is more disheartening is that shareholder representatives condone governance breaches by directors. Alternatively, directors align with or acquiesce governance breaches, as is evident in the SABC case.[964]

Recently, the SABC and SIU brought a lawsuit against a past executive director to claim money from his pension for his past conduct as an executive employee of the SABC. Despite their conduct, no past non-executive director of the SABC has been held to account.[965]

In *Steenkamp and Another v Central Energy Fund SOC Ltd and Others,*[966] the applicants unsuccessfully fought what they understood to be the unlawful removal from the board of directors of Petroleum Oil and Gas Corporation SOC Ltd (PetroSA) by the directors of PetroSA's holding company, Central Energy Fund SOC Ltd.[967] It should be noted that despite the financial losses reported and blamed on the board of PetroSA, no liability accrued to them save for removal from the board.[968] Despite this, it does appear that removal from a board of directors of an SOC is in practice regarded as a form of liability and accountability. However, removal is a demonstration that poor performance may not be tolerated.

In *Organisation Undoing Tax Abuse NPC v Duduzile Cynthia Myeni,*[969] the plaintiff

2016 (2) SA 522 (SCA) [48].

963 Public Protector Report, *When Governance Fails,* Report no 23 of 2013/2014, 131.

964 *South African Broadcasting Corporation SOC Ltd and Others v Democratic Alliance and Others* 2016 (2) SA 522 [20].

965 *South African Broadcasting Corporation SOC Ltd v South African Broadcasting Corporation Pension Fund* 2019 (4) SA 608 (GJ).

966 2018 (1) SA 311 (WCC) [23].

967 *Steenkamp and Another v Central Energy Fund SOC Ltd and Others* 2018 (1) SA 311 (WCC) [44].

968 *Steenkamp and Another v Central Energy Fund SOC Ltd and Others* 2018 (1) SA 311 (WCC) [44].

969 [2020] 3 All SA 565 (GP) [8].

brought a suit against the late Ms Dudu Myeni for her to be declared a delinquent director in terms of section 162(5) of the Companies Act.[970] Ms Myeni was the chairperson of the SAA board of directors at all material times relating to the suit.[971] SAA lost out on business opportunities at the hands of the board of directors led by Ms Myeni. In fact, the court stated that it was a sabotage.[972] The court's finding reveals that the duties of directors as embodied in the PFMA were evaluated and that the board of directors of SAA according to its findings either failed to carry them out or breached them.[973] While the board of directors of SAA governed the airline poorly, it also incurred great financial losses. Not surprisingly, the SAA faced business rescue a few years later.[974]

It is clear from the judgment that Ms Myeni failed to comply with instructions issued by the shareholder representative.[975] Most concerning, however, is the fact that the shareholder representative of the SAA was, despite the ignorance of the instructions, not prepared to hold the board of directors liable and accountable for the airline's poor governance and resultant financial losses. When non-executive directors carry out decisions or transactions contrary to their lawful duties, they in addition to any liability expose themselves to orders of delinquency.[976]

Directors on a board are known to act as a collective.[977] Although directors on a board serve as a collective, certain tasks may be carried out by a director on behalf of a board.[978] Equally, directors come to a board of directors differently skilled. When it comes to seeking a declaration for delinquency, courts appear to accept that an applicant or plaintiff can choose his or her target amongst the board members implicated.[979] In the Myeni matter, for instance, she was declared a delinquent for the manner in which she

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970 Organisation *Undoing Tax Abuse NPC v Duduzile Cynthia Myeni* [2020] 3 All SA 565 (GP) [8].

971 Organisation *Undoing Tax Abuse NPC v Duduzile Cynthia Myeni* [2020] 3 All SA 565 (GP) [4].

972 Organisation *Undoing Tax Abuse NPC v Duduzile Cynthia Myeni* [2020] 3 All SA 565 (GP) [253].

973 Organisation *Undoing Tax Abuse NPC v Duduzile Cynthia Myeni* [2020] 3 All SA 565 (GP) [253], [256] and [254].

974 *South African Airways SOC Ltd (In Business Rescue) v National Union of Metalworkers* 2021 (2) SA 260 (LAC) paras [5-7]; Matuso Associates: Business Rescue of South Africa Airways (SOC) Limited <https://matusonassociates.co.za/saa/ > accessed 28 November 2021.

975 Organisation *Undoing Tax Abuse NPC v Duduzile Cynthia Myeni* [2020] 3 All SA 565 (GP) [264].

976 Companies Act 2008, s 162(5)(c)(bb).

977 Delport, *Henocsberg on the Companies Act 71 of 2008*, 305.

978 *Organisation Undoing Tax Abuse and Another v Myeni and Others* [2020] 3 All SA 578 (GP) [21 and 23].

979 *Myeni v Organisation Undoing Tax Abuse NPC and Others* [2019] JOL 46379 (GP) [70].

conducted herself on the board of the SAA. The submission is that the case is supported for targeting Ms Myeni because she was the Chairperson, and she was implicated in various transactions that were deleterious to the SAA. It begs the question of how a chairperson of a board of directors could refuse to adhere to instructions intended to save an SOC, and no adverse consequence follows.

The Organisation for Undoing Tax Abuse, a non-profit organisation, had to require some form of accountability, although regrettably not the form provided for under section 77 of the Companies Act. Commendably, however, is that at least some accountability in the form of being declared delinquent followed.

Where governance breaches were caused by directors at the insistence of a shareholder representative, and the director merely carried it out, directors may possibly be exempt from liability for any resultant losses. However, a company may not indemnify a director in relation to breaches under section 77(3) of the Companies Act.[980] It is thus imperative that directors with the highest integrity are appointed to a board in SOCs.

In some instances, directors may breach their duties due to their own actions, without influence from executive authority. Under these circumstances, the expectation may be that the shareholder representative should take it upon themselves, and on behalf of an SOC to demand accountability. As alluded to, it is concerning to find that in past cases of breach of directors' duties in SOCs, the responsible shareholder failed to act in holding directors accountable. It should be noted that to date no non-executive directors of SOCs in South Africa have been subjected to liability within the scope of section 77 of the Companies Act and that which is provided for under section 83(1)(2)(3) of the PFMA. This is unbelievable when one takes appreciation of the state of corporate governance in SOCs.

Furthermore, section 77(3)(a) determines that a director will be held liable if that director acted beyond their authority in binding the company.[981] The section does not distinguish whether the act provided is one that was carried out in the best interests of the company,

980 Companies Act 2008, s 78(6).

981 *Organisation Undoing Tax Abuse and Another v Myeni and Others* [2020] 3 All SA 578 (GP) [33].

with the only concern being the lack of authority to act.[982] Under the mentioned circumstances, company law had long classified acts beyond the powers of the person acting to be *ultra vires*. The recognised principle of *ultra vires* refers to actions beyond the powers conferred on an individual official. In the context of non-executive directors, an MOI or law for instance regulating SOCs would provide for their powers.

In *Attorney-General v Mersey Railway Co*,[983] it was said that to examine whether an act is beyond the powers so conferred, one needs to understand a two-stage inquiry. The inquiry proceeds as follows. The purpose of the powers should firstly be ascertained, and then the powers which were exercised to achieve the purpose should be examined. If an act is not within the main purpose for which the powers were conferred, it must be checked whether the act is still incidental or consequential to the main purpose. From the section, it may seem that *ultra vires* acts do not necessarily attract liability save where the company suffered loss, damage or costs.[984] The situation implies that *ultra vires* acts by directors, even when they amount to or cause a breach of directors' duties do not result in liability in the absence of loss, damages or costs to the company arising out of such acts.

Section 20 of the Companies Act provides for the validity of company actions. The thrust of the section is that company actions are not merely rendered invalid for non-compliance with what an MOI may provide. Section 20(2) provides, among others that where an MOI limits the powers of directors to perform an act on behalf of the company, such act may be ratified by shareholders in writing.

It is important to note that subsection 3 is instructive and may render ratification of acts performed beyond conferred powers unlawful. It is clear from section 20(3) of the Companies Act that acts contravening the Companies Act cannot be ratified. Under such circumstances, directors will be held liable for any loss, damages or costs arising from such acts. It does appear from the literature that shareholders can ratify certain *ultra vires* acts of directors and hold directors liable for any loss arising from the ultra vires

982 Companies Act 2008, s 20(1)(a)(b).
983 [1907] 1 Ch 81 (HL) [99].
984 Cassim and Others, *Contemporary Company Law*, 720.

conduct.[985] The preceding should be understood in the context that certain *ultra vires* acts cannot be ratified. For example, acts that are irregular and unlawful cannot be ratified.[986]

It is clear from section 77(2) of the Companies Act that liability for a director under the Companies Act would be founded on the principles of the common law relating to breach of fiduciary duties or to delict. Director liability under the Companies Act is, thus, not rooted only in breach of the codified director duties,[987] but includes a breach of the director duties recognised in the common law and as stipulated in section 77(2). The section further signifies that liability is a common law-sponsored remedy for the loss or damages suffered by a company. By placing liability on the principles of the common law and delict, it follows that breach should be proven by the recognised principles of the common law and delict. It confirms the notion that the liability of directors has been recognised in the common law before the codification of such liability under the Companies Act. Furthermore, a link of complementarity is therefore established in examining statutory and common law liability.[988] Liability in terms of section 77(3) would be imposed on a director if that director acted in a manner as stipulated in the section.[989]

5.4.1.1. Supplementary provisions on directors' liability under the Companies Act

An evaluation of the Companies Act reveals that there are several provisions strewn in various sections which imply or impose liability on directors, amongst others. It has been noticed that some of the provisions, as will be indicated below, correspond to the liability they impose or imply to what is provided for in section 77 of the Companies Act. In some instances, the liability provided for in the various sections relates to the duties of directors under section 76(3) of the Companies Act. It is accordingly necessary to evaluate the sections.

(a) Section 20(6)

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985 Naidoo, *Corporate Governance,* 209.
986 Companies Act 2008, s 20(3). See also *Boschoek Pty Ltd v Fuke* [1906] 1 Ch 148.
987 Companies Act 2008, s 76(3).
988 Cassim and Others, *Contemporary Company Law,* 785.
989 Companies Act 2008, s 77(3).

Section 20 of the Companies Act provides for the validity of company actions. Company actions are carried out by human beings such as directors on behalf of the company.[990] Company directors have been given wide powers to manage and control the business affairs of the company.[991] There may also be instances where ostensible authority to act may attract liability against the company.[992] Accordingly, where liability relating to how an action of a company was carried out arises, questions would be raised as to who acted on behalf of the company. In this regard, section 20(6) provides as follows:

> Each shareholder of a company has a claim for damages against any person who intentionally, fraudulently or due to gross negligence causes the company to do anything inconsistent with-
>
> (a) this Act; or
> (b) a limitation, restriction or qualification contemplated in this section, unless that action has been ratified by the shareholders in terms of subsection (2).

The section is relevant to the sphere of SOCs. In SOCs, the shareholder is the State represented by a department head such as a Cabinet-Minister. Apart from the shareholder representative, there is usually a board of directors which also acts in terms of applicable legal instruments such as the Companies Act. In terms of section 20(6) of the Companies Act and with specific reference to SOCs, the State as a shareholder is the proper claimant or plaintiff.[993] However, given the reality of SOCs being juristic persons, and equally the State being a juristic person, it is hoped that a shareholder representative being a department's minister can bring such a claim against a director or board of directors.

The rule allows natural persons to act on behalf of the company. The question, however, may be who, on behalf of the State, may act in instances where the board of directors or the shareholder representative is the subject of such a loss or damage to the SOC. Clearly, the section refers to any person being the subject of the claim of damages in

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990 Delport, *Henocsberg Commentary on the Companies Act* 2008, 94-95.

991 Companies Act 2008, s 66(1); Delport, *Henocsberg Commentary on the Companies Act* 2008, 95.

992 Delport, *Henocsberg Commentary on the Companies Act* 2008, 95-96; *Wolpert v Uitzigt Properties (Pty) Ltd* 1961 (2) SA 257 (W) at 266–267.

993 Companies Act 2008, s 165(1).

question. Cassim points out that section 20(6) of the Companies Act imposes liability primarily on those who manage the company's business.[994] In this instance, it is understood that a shareholder minister acting *ex officio* would be best placed to claim on behalf of an SOC. There are instances where a director or just a few directors may have acted to the detriment of the SOC. On the authority established in the *Outa v Myeni* case,[995] it is submitted that in such instances, only those responsible for the loss or damage should be targeted with liability claims. The question that may be asked is whether the other directors, who have not acted to the detriment of an SOC, find standing in company law to claim on behalf of the SOC.

Section 20(4) and (5) provide for other parties who may seek recourse on behalf of a company.[996] For instance, subsection 4 provides for a trade union in addition to a director, shareholder or prescribed officer to bring an application to a High Court to restrain a company from doing anything inconsistent with the Companies Act. It is a welcome form of interdict to save a company from any imminent unlawful transactions. However, it is more cumbersome for any such party, especially a trade union, which do not have easy access to company information to ensure that any imminent yet harmful actions to the company do not transpire.

(b) Section 38(3)(d)

Section 38(3)(d) provides as follows:

> A director of the company is liable to the extent set out in section 77(3)(e)(i) if the director-
>
> (i) was present at a meeting when the board approved the issue of any unauthorised shares, or participated in the making of such a decision in terms of section 74; and
>
> (ii) failed to vote against the issue of those shares, despite knowing that the shares had not been authorised in accordance with section 36.

In terms of the section a director is liable upon breach of the duty required of such director

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994 Cassim and Others, *Contemporary Company Law*, 223.

995 *Myeni v Organisation Undoing Tax Abuse NPC and Others* [2019] JOL 46379 (GP) [70].

996 Companies Act 2008, s 20(4) and (5); Cassim and Others *Contemporary Company Law*, 223-224 [2021].

in terms of section 38 read together with section 36 of the Companies Act. Clearly, the liability under this section relates to issuing of unauthorised shares in breach of section 36 of the Companies Act. The liability provided for is correlated with section 77(3)(e) which imposes a duty on directors to act in a certain way during a meeting where the issue of shares is a subject matter for approval. The liability under this section viewed through SOCs may find limited application. It is because SOCs do not generally issue shares in the manner it happens in private or public companies. In SOCs the State holds all the shares and listing on a stock exchange is rare. The study could not establish from sources consulted that the MOI of SOCs allows directors or the shareholder representative powers to issue or alter the issue of shares in SOCs.

(c) Section 45(7)

The Companies Act provides for liability against a director or directors of a company for having voted for or failing to vote against a board resolution that was void in terms of section 45(6) of the Companies Act. Section 45 of the Companies Act provides for loans or other financial assistance to directors. Subsection 3 provides for the conditions or circumstances under which assistance may be given. If the assistance does not accord with the requirements determined in the subsection[997] they fall to infringe on the provision, and liability may arise against those who resolved or who should have voted against the assistance. It appears from subsection 7 that liability arising therefrom is harmonised with liability under section 77(3)(e)(v). In the sphere of SOCs, it is not practice for SOCs to financially assist directors or other parties. Liability under this section may thus remain fairly inapplicable for directors in SOCs.

(d) Section 104

This section concerns liability that may attach to a director of a company flowing from untrue statements made in a prospectus.[998] The section clarifies that the liability that attaches to directors and other persons is in addition to the liability that attaches to a director of a company in terms of section 77(3)(d)(ii) of the Companies Act. It should be

997 Companies Act, 2008 s 45(3).

998 Companies Act, 2008 s 104(1)(a)(b)(c)(d)(i)(ii).

distinguished that the section under discussion refers particularly to liability which does not necessarily cause loss or damage to a company to which a director serves. It is liability that may be caused to other persons, natural or otherwise[999] who may have relied on the untrue statements in the prospectus, to their own detriment. The provision may not easily find application to directors in SOCs. The reason is that SOCs, although not prohibited, do not practice issuing securities and are, therefore, unlikely to release a prospectus. Consequently, it can be said that liability against directors for breach of their governance duties may, in some cases, not be applicable to directors in SOCs.

(e) Section 137(2)(a)-(d)

Section 137 of the Companies Act concerns the effect of business rescue on shareholders and directors of a company. Section 137(2) imposes certain duties of directors during business rescue. Paragraph (d) exempts a director acting in furtherance of paragraphs (b) and (c) from the duties under section 76 and the liabilities set out under section 77 of the Companies Act. The exemption from certain duties and liability should be evaluated. Section 137 as part of Chapter 6 of the Companies Act effectively deals with business rescue. As is evident from section 140 of the Companies Act and paragraph (a) of section 137(2) directors lose their powers during a business rescue. During this period certain powers[1000] resort under a business rescue practitioner. However, directors are not relieved of all their statutory and fiduciary duties.[1001] They must still disclose any personal financial interest or those of a related person in the company.

In addition, directors do not escape liability provided for under section 77(3)(a), (b) and (c). It is, thus, submitted that absolving directors of all liability against the company during business rescue may be irregular given that directors may still act in the name of the company.[1002] In fact directors remain as such and commencement of business rescue proceedings does not render them dismissed from the board. They are required to

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999 This is because companies or other juristic persons can buy shares in a company that has issued a prospectus to this effect.

1000 Companies Act, 2008, s 140(1).

1001 Companies Act, 2008 s 137(2).

1002 Companies Act 2008, s 137(2)(a).

cooperate and provide company information to the business rescue practitioner.[1003] It is, therefore, fair to argue that directors may still be held liable for damages, losses or costs caused to the company for the way they conduct themselves contrary to sections 77(3)(a),(b) and (c) during business rescue.

(f). Section 218(2)

Liability under the Companies Act appears to go beyond liability for damages, loss or cost to the company to include liability suffered by other persons. The Companies Act provides for civil actions, and specifically provides as follows:

> Any person who contravenes any provision of this Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention.[1004]

It appears from the section that the use of the words, 'any other person' refers to other persons than the company itself. In other words, the words imply that, in addition to a company suffering damages, loss or costs through contravention of a provision in the Companies Act, any other person who may have suffered similarly situated loss may proceed with a civil action against the person who contravened a provision in the Companies Act thereby causing the loss, damage or cost.[1005] It does seem that section 218(2) of the Companies Act is limited in its application as regards personal loss, in that it may not be applied to assist in personal claims.[1006] In the sphere of SOCs no indication of liability against directors arising out of this section has been found to date.

5.5. Non-executive director liability under the PFMA

Apart from the Companies Act, the PFMA provides for some liability of directors in SOCs.[1007] Interestingly, the PFMA provides for a mechanism that should be used to determine liability. For instance, section 84 provides for 'applicable legal regime for disciplinary proceedings'. Pertinently, the section states as follows:

1003 Companies Acy 2008, s 142(1).
1004 Companies Act 2008, s 218(2).
1005 Companies Act 2008, s 218(2).
1006 *De Bruyn v Steinhoff International Holdings NV* [2020] ZAGPJHC 145.
1007 Public Finance Management Act 1999, s 83(1)(a)(b), s 83(2)(3).

> A charge of financial misconduct against an accounting officer or official referred to in section 81 or 83, or an accounting authority or a member of an accounting authority or an official referred to in section 82, must be investigated, heard and disposed of in terms of the statutory or other conditions of appointment or employment applicable to that accounting officer or authority, or member or official, and any regulations prescribed by the Minister in terms of section 85.

Financial misconduct referred to in section 84 of the PFMA is reminiscent of reckless trading when a company is insolvent.[1008] It is observed that section 84 of the PFMA providing for investigation of financial misconduct is silent on which functionary or administrative body should conduct the investigation. What can be gathered from the section is that the section defers to any other law relating to the appointment of those to be investigated, which include accounting authorities in SOCs. It is, therefore, unclear what should happen if the laws pertaining to the appointment of some accounting authorities do not make provision for who should investigate alleged misconduct. Gaps such as the one being discussed may result in some financial misconduct not being investigated precisely because there is no effective legal mechanism to conduct investigations.

It is unclear whether section 84 of the PFMA applies to matters involving the determination of liability for directors who may have breached their duties under the PFMA or only to disciplinary matters.[1009] The concern is raised because the provision refers to disciplinary proceedings[1010] other than determination of liability for financial misconduct. It is submitted that the disciplinary proceedings[1011] should result into the determination of liability for miscreant accounting authorities.[1012] Section 86 of the PFMA on the other hand provides for offences and penalties. Subsection 2 provides as follows:

> An accounting authority is guilty of an offence and liable on conviction to a fine, or to imprisonment for a period not exceeding five years, if that accounting authority wilfully or in a grossly negligent way fails to comply with a provision of section 50, 51 or 55.

1008 Companies Act 2008, s 22.

1009 Such as those under section 50 and 51 of the PFMA.

1010 Public Finance Management Act 1999, s 84 is titled “Applicable legal regime for disciplinary proceedings.”

1011 Public Finance Management Act 1999, s 84.

1012 Public Finance Management Act 1999, s 83(2).

It is evident from section 86 of the PFMA that the determination of liability on the part of a director which should result in an offence and penalty lies with the courts. Powers to impose jail time, for instance, have not been vested in any organ other than the courts. It is further notable that a finding of liability in terms of section 86 against a director depends on willful or gross negligence in carrying out duties assigned to them under the relevant sections.[1013]

Therefore, breach of duties on the part of a director which is not willful or grossly negligent will not result in a finding of guilt. To the extent of the foregoing, the PFMA clarifies the standard for a finding of guilt which would impute liability on a director. It is further evident that when a director is found guilty a fine or imprisonment or both can be handed down against such director. It is therefore submitted that section 84 does not have a bearing on section 86 and the provisions are entirely independent of each other.

It may be said that section 84 of the PFMA serves the purpose of determining how an accounting authority,[1014] the equivalent of a board of directors,[1015] should be dealt with on breach of their duties. It does appear that it may be incumbent upon the appointing authority to use the mechanism respectively laid down in sections 84 and 86 to occasion discipline and to approach the courts for the establishment of guilt on the part of directors of SOCs. What is evident from the PFMA point of view is that liability on the part of directors in SOCs may result in a fine or imprisonment. The determination of such fine or imprisonment is for the court to make. It is apparent that the PFMA does not provide for the recovery of loss, costs or damages which a SOC may have sustained as a result of directors' breach of their duties. It is however clear that resort can be had to the Companies Act, and nothing in the PFMA furthermore, bars an SOC from recovering loss, costs or damages through the common law principles.

It is necessary to discuss the wording of the section as to what constitutes negligence and gross or willful negligence. The distinction will assist in establishing which form of non-compliance would be rendered gross or willful to attract the sanction of a fine or

1013 Public Finance Management Act 1999, s 50, 51 and 55.
1014 Public Finance Management Act 1999, s 84.
1015 Public Finance Management Act 1999, s 1.

imprisonment. Negligence is understood as the failure to exercise due care when another person of comparable reason would have been able to exercise due care.[1016]

The test for negligence implies an objective standard. Neethling and others discuss negligence as 'attitude or conduct of carelessness or thoughtlessness.'[1017] It does seem that a finding of negligence implies that a person whose conduct complained of as being negligent should have fallen below what would have been expected of them under the circumstances. Moreover, the person under such circumstances should have acted in a certain way but failed. It is even more so when acting in a certain way is the only act which would bring good results or prevent certain harm setting in.[1018] Applied to a non-executive director, it would mean that he or she acted below the required standard.

The discussion contextually explains negligence. It does not explain or describe what would be considered as willful or gross negligence. This discussion is concerned with willful or gross negligence because that is the standard set for finding a non-executive director liable for breach of duties provided under sections 50, 51 and 55 of the PFMA. Accordingly, a further inquiry is necessary to establish exactly what degree of negligence would earn the ascription of 'willful' or 'gross'. It may be argued as Neethling and others do, that for *Acquilian* liability purposes, negligence of any degree should result in some form of liability.[1019] The common law position has been altered where a statute prescribes mechanisms on director liability and gross or willful negligence as the threshold for a finding of liability.

It is necessary to ascertain whether the negligence is gross or willful or merely just negligence. That is because for accountability purposes, the PFMA subscribes to the yardstick for non-executive directors, to gross or willful negligence.[1020] Authorities overwhelmingly indicate that for conduct to be said to be gross it must have departed extremely from the conduct that would ordinarily be negligent.[1021] In other words, gross negligence is more

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1016 *Kruger v Coetzee* 1966 2 SA 428 (A) 430 [E-G].

1017 Neethling and others, *Law of Delict*, 116.

1018 *Kruger v Coetzee* 1966 2 SA 428 (A) 431 [H].

1019 Neethling and Others, *Law of Delict*, 120.

1020 Public Finance Management Act 1999, s 86(2).

1021 *MV Stella Tingas Transnet Ltd t/a Portnet v Owners of the MV Stella Tingas* 2003 2 SA 473 (SCA) 480-481. See also; *Bickle v Joint Ministers of Law and Order* 1980 2 SA 764 (R) 770 [C].

than ordinary negligence. It is a matter of degree, with gross negligence indicating a larger degree of negligence that a person in that position would not have allowed to proceed knowing the consequent harm arising from their conduct. Applied to the context of the thesis, it would indicate that negligence which is not gross will not result into accountability even if there has been breach of duties or failure to comply with the provisions.[1022]

Furthermore, it is noticed that the standard of liability under section 86 of the PMA falls on willful or gross negligence. It therefore follows that 'willful negligence' should be ascertained as to its meaning. This suggests that section 86 of the PFMA determines that negligence that should be established hinges on it being either gross or willfulness to confirm non-compliance with the provisions in question. Thus, having established gross negligence it should now be established what constitutes willful negligence. In *Bickle v Joint Ministers of Law and Order*,[1023] the court defined gross negligence parallel to willfulness by stating that gross negligence does not include willfulness. Willfulness indicates intention on the part of the actor, in this case a non-executive director acting at will, knowingly undeterred of the probable consequences. Willfulness should be understood in the context of a deliberate step taken on the part of a non-executive director to act in a certain way contrary to what the relevant sections provide. Reasonably, such non-executive director would be acting knowing the consequences of his or her actions.

It does appear that it is fair and just to hold non-executive directors liable based on willful or gross negligence as these standards imply a serious departure from a reasonable person. Any non-executive director would be expected to know the required conduct on their part and take steps to confirm thereto. The stance is hinged on the realisation that a non-executive director who acts intentionally to cause harm or damage to a SOC should be accountable for such deeds. It must be stated that to prove willful or gross negligence in the terms of section 86 of the PFMA Act, a court would have to have sufficient evidence to indicate that a defendant was not only negligent but was either grossly or willfully negligent. The burden of proof would be with the plaintiff throughout the entire

1022 Public Finance Management Act 1999, s 50, 51 and 55; Delport, *Henocsberg Commentary on the Companies Act* 2008, 302(1).

1023 1980 2 SA 764 (R) 770 [C].

inquiry.[1024]

Accordingly, the only way to enforce section 86(2) of the PFMA against non-executive directors in SOCs is to prove that any non-compliance with the relevant provisions was willful or grossly negligent. What is however not stated is the kind of harm or prejudice an SOC should have suffered which would be restored by a fine or imprisonment. It is argued that if an SOC suffered financially, in that case it is probable to sue for specific loss and related costs. For the foregoing reason there may be justification to seek both civil and criminal liability against non-executive directors, depending on the offensive conduct proven.

5.6. Non- Executive director liability under enabling Acts

In Chapter 2 of this thesis, it was indicated that SOCs are created in either one of two ways, namely through their own enabling law or directly through the Companies Act.[1025] The effect of this is that an SOC created in terms of its own statute will be required to observe not only its statute but also the provisions of the Companies Act as well as the provisions of any other statute that applies to SOCs.[1026] Consequently, SOCs are regulated from a variety of legal instruments including codes of good practice.[1027]

Of importance for this thesis is to examine a sampled legal regime of enabling laws pertaining to SOCs with a view to analyse any applicable provisions relating to the enforcement of liability for governance breaches against non-executive directors. As a departure point, it should be noted that the enabling laws surveyed do not specifically provide for any form of enforcement of liability against non-executive directors. Essentially, the absence of an approach through which to effect liability and the mechanisms to enforce it in enabling statutes by implication defer such mechanisms to other relevant instruments.[1028] That means non-executive directors would be subject to the existing regime of holding all other directors accountable.

1024 *Ntsala v Mutual & Federal Insurance Co Ltd* 1996 2 SA 184 (T) 190.
1025 Companies Act 2008, s 8(1) (2)(a).
1026 For the example the Public Finance Management Act 1999, s 3.
1027 For example, the King Code Reports I, II, III and IV.
1028 Such as the Companies Act 2008 and the Public Finance Management Act 1999.

Notwithstanding, it is submitted that enabling statutes that do not provide for the appointment, composition, duties and powers of boards of directors should do so. That would serve to ensure that no uncertainty exists as to the duties of a board of directors of an SOC established in terms of the enabling Act. An enabling Act of an SOC should include sufficient information as to the board's duties to act as a comprehensive guide as to what is expected of the board and the consequences of noncompliance with its requirements. It is thus necessary and of value to investigate the enabling Acts of the SOCs. While the foregoing is in context, cognisance is taken that once the National State Enterprises Bill becomes law a measure of harmonisation and uniform approach will be achieved. That means the law will be the mainstay of the regulation of the holding company and its subsidiaries.

5.6.1. SABC – the Broadcasting Act

The SABC is established in terms of the Broadcasting Act 1999[1029] and is listed under schedule 2 of the PFMA as a major SOC. The SABC is incorporated as a company[1030] with the State being the sole shareholder.[1031] The Broadcasting Act provides for the composition of the board of the SABC. Notably, the majority of the members of the SABC board of directors are non-executive directors.[1032] Interestingly, the Broadcasting Act stipulates certain appointment criteria and includes certain qualities and standards that the members of the board of the SABC should meet to be suitably appointed to the board. These include qualifications, expertise and experience in the fields of the SOC.[1033] Section 13(4) of the Broadcasting Act in addition provides for good governance as follows:

> Members of the Board must, when viewed collectively… (b) be persons who are committed to fairness, freedom of expression, the right of the public to be informed, and openness and accountability on the part of those holding public office.

In terms of sanctions and accountability, it is notable that section 15 of the Broadcasting

1029 About the SABC < https://www.sabc.co.za/sabc/about-us/ > accessed 06 January 2022.
1030 Broadcasting Act 1999, s 7(1).
1031 Broadcasting Act 1999, s 7(2).
1032 Broadcasting Act 1999, s 12(a) and s 13(1).
1033 Broadcasting Act 1999, s 13(4)(a)(b)(c)(d).

Act provides for removal of board members from the board of directors of the SABC. It states the following:

> The appointing body may remove a member from the office on account of misconduct or inability to perform his or her duties efficiently after due inquiry and upon recommendation by the Board.

Although the Broadcasting Act does not contain any provisions as to how the members of the SABC would be subject to punitive accountability for the breach of the duties they must collectively fulfil, section 15 signifies a measure of accountability. Furthermore, the possibility of removal of the directors under section 15 of the Broadcasting Act should be viewed favourable. Applied properly and consistently, the section on removal can lead to some form of accountability. This is in the sense that those who do not perform or misconduct themselves with respect to their corporate governance will be removed from the board of the SABC. Removal from a board because of misconduct or failure to discharge duties is not praiseworthy. It brings some form of shame on those who are subjected to it, and that alone can go some way in influencing directors' conduct.

It is positively noted that section 17 of the Broadcasting Act determines that a person in conflict of interest may not be appointed to the board of the SABC. Ideally, the section should additionally provide for what would happen if a director were later discovered to have concealed a conflict of interest to secure an appointment. The section merely provides that a meeting in which a conflict of interest should have been disclosed but was not would be rendered null and void.[1034] It is also unclear at which stage the nullity would be pronounced and if an additional board meeting will have to be held for this purpose. The Broadcasting Act is also silent on the effect of the proceedings being declared null and void or on any liability being applied to the director in question. It is supposed that as the Broadcasting Act being the enabling Act of the SABC does not provide for director liability the Companies Act will have to be utilised for this purpose.

In conclusion, the Board of the SABC is not subject to a performance assessment in terms of the Broadcasting Act. Therefore, breaches of corporate governance duties

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1034 Broadcasting Act 1999, s 17(3).

would have to pop up randomly for example, if reported on by the media. Corporate governance breaches not reported on will go unnoticed and continue to harm the SABC. To prevent this from occurring the SABC's performance should be reported on which will in turn reflect the performance of the board of directors. Notwithstanding the absence of the usual provisions of strict accountability, there are provisions requiring the board of the SABC to perform in accordance with accepted trends.[1035] With respect to the provisions, if the board of the SABC fails to lay audited financials[1036] and to submit an annual report[1037] to the Minister, they would be taken to be in breach of their duties to the SABC.

5.6.2. Transnet – The Legal Succession to the South African Transport Services Act

Transnet is a SOC whose sole shareholder is the State.[1038] The sole shareholding of the State in Transnet perfectly places it in the domain of SOCs.[1039] The Legal Succession to the South African Transport Services Act provides for a 'board of control', what is known at Transnet as the board of directors. The 'board of control' derives its powers from the Legal Succession to the South African Transport Services Act under section 24. It is notable that the said Act does not provide for liability for members of the board. Accordingly, it is concluded that when it comes to assessment of liability for board members of the Transnet, resort will be to the Companies Act. Equally, the Transnet legislation does not subject the board of control to any periodic evaluation of their performance. As noted above, the failure to measure performance of the board regularly means the board's conduct even if in breach is not easily and timeously found out. When board conduct is in breach of their duties but has not been found out, the basis to hold any non-executive director liable for any breach of duty is severely compromised. The advantage of systematic performance monitoring and evaluation is also to document the performance of an SOC. This would assist non-executive directors to intervene and to restore the SOC to good performance when necessary.

1035 Broadcasting Act 1999, s 25 and s 28.
1036 Broadcasting Act 1999, s 25.
1037 Broadcasting Act 1999, s 28.
1038 About Us < https://www.transnet.net/AboutUs/Pages/Affiliates.aspx > accessed 06 January 2022. See also; Legal Succession to the South African Transport Services Act 1989, s 2(2).
1039 About Us < https://www.transnet.net/AboutUs/Pages/Shareholders.aspx > accessed 06 January 2022.

5.6.3. SAA - South African Airways Act

The SAA is regulated through the South African Airways Act.[1040] The said Act stipulates that the SAA shall incorporate as a company in terms of the Companies Act. Through incorporation as a company under the Companies Act, the SAA is subjected to the regime of the Companies Act. In terms of section 3(3)(a) the South African Airways Act the State is declared as the shareholder of SAA. There is a noticeable absence of a board of directors and its duties in the South African Airways Act. Equally, the South African Airways Act does not provide for director liability. It may perhaps be attributed to the fact that the SAA is incorporated in terms of the Companies Act which contains the relevant provisions.[1041] Evidence hereof can also be found in the fact that when one non-executive director of SAA was implicated in the failure of governance at SAA reliance was placed more on the Companies Act and the PFMA.[1042]

5.6.4. Eskom – Eskom Conversion Act

Eskom exists in terms of the Eskom Conversion Act[1043] which prescribes it to be incorporated as a company.[1044] The Eskom Conversion Act does not provide for a board of directors' duties and liability for breach of duties. Appreciating that Eskom is a public company incorporated in terms of the Companies Act,[1045] it finds application to provide for a board of directors' duties and liability for breach of duties. For the enforcement of director liability therefore, non-executive directors in Eskom would be subjected to the regime of the PFMA, Companies Act and the common law.

5.6.5. Denel SOC Limited

Denel SOC Ltd (Denel) is owned by the State in that the State is the only shareholder. It

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1040 South African Airways Act 2007.
1041 South African Airways Act 2007, s 4(1).
1042 Reference is made to the *OUTA v Myeni* matter.
1043 Eskom Conversion Act 2001, s 2.
1044 Eskom Conversion Act 2001, s 2.
1045 Eskom Conversion Act 2001, s 2.

also has several subsidiaries. It is however unclear how the shareholding in Denel's subsidiaries is held.[1046] Denel as an SOC is different in terms of its establishment in that it does not have its own enabling legislation. For the above reason, it is a company directly incorporated in terms of the Companies Act.[1047]

Denel as a company indicates that it is an SOC that subscribes to good corporate governance.[1048] In its statement on Good Corporate Governance it states as follows:

> The board is committed to applying and enforcing applicable corporate governance principles. It recognises that sound corporate governance enhances the long-term sustainability of the company and provides assurance to its stakeholders that the company is well managed. Risk management and internal control systems in place are designed in accordance with best practice in compliance with the King Code of Governance Principles; as well as the King Report on Governance (King IV report) recommendations, the Public Finance Management Act, no. 1 of 1999 (PFMA); and the governance requirements of the Companies Act, no. 71 of 2008 (Companies Act), as amended. Following the launch of King IV, the company is in the process of implementing the principles of King IV, although the Board charter and Terms of References of the Board committees already reflect the King IV principles.

From the excerpt, one gets a sense of Denel's resolve to be properly governed. Denel clearly states that it seeks to abide by various corporate governance instruments and to have its performance evaluated. Despite Denel's apparent resolve to be bound by various governance instruments, its performance over the years has revealed a contrary picture.[1049] Significantly, for enforcement of directors' liability in respect of breach of duties the Companies Act and the PFMA remain the primary sources for provisions relating thereto. Denel's struggles could have been linked to its leadership, which ought to have ensured it was governed as planned.

1046 Company Profile< www.denel.co.za/our-business/associated-companies > accessed 17 May 2023.

1047 Corporate Governance < www.denei.co.za/about-us/company-profile >accessed 18 May 2023.

1048 About us < http://www.denel.co.za/about-us/corporate-governance > accessed 07 January 2022.

1049 Denel Posts a Profit for the first time in five years after state capture headache: <https://www.news24.com/citypress/business/denel/-posts-a-profit-for-for-the-first-time-in-five-years-after-state-capture-headache-20230614 > accessed 09 May 2024.

5.7. Test for statutory liability in laws applicable to SOCs

In terms of the Companies Act, loss, costs and damages would be determined in terms of the common law principles relating to breach of fiduciary duties.[1050] Furthermore, a determination of liability is premised in the principles of the common law relating to delict for any loss, damages or costs. What the Companies Act does not say is the threshold of fault regarding delict. The Companies Act defers to the principles of the common law relating to fiduciary duties as the yardstick to be used to establish *culpa or dolus.*[1051] It is unclear whether in instances where negligence should be proven as it should in cases of fiduciary duties whether it should be ordinary or gross negligence as these two forms are available in common law.

It appears from section 77(9) of the Companies Act that a court may exercise some form of discretion to relieve a director partly or wholly, of liability on account of breach of trust if the breach is not one for willful misconduct, or willful breach. Notwithstanding that the above concerns breach of trust, it may provide an indication that a non-executive director may be partly or wholly relieved of liability where willful breach of duties is absent. Furthermore, it is unclear how the common law principles to which the Companies Act defers should be balanced with the statutory provisions that determine willful or gross negligence under the PFMA. Since the Companies Act defers the finding of liability to the common law and delictual principles, it is argued that the stipulations in the PFMA may override the said principles.[1052] The Companies Act does not insist on gross or willful negligence. With ongoing reforms to the common law, strict liability regarding directors' duties is becoming the standard.

5.8. Liability of directors based on delictual principles

A director's liability involving delict is set out in section 77(2)(b) which essentially refers to a breach of duties under section 76(3)(c) of the Companies Act. Section 76(3)(c) provides for directors' duty of care, skill and diligence that may reasonably be expected of a person:

1050 Companies Act 2008, s 77(1).
1051 Companies Act 2008, s 77(1)(2).
1052 Public Finance Management Act 1999, s 3(3).

a) carrying out the same functions in relation to the company as those carried by that director; and
b) having the general knowledge, skill and experience of that director.

The duty of care, skill and diligence has been routinely expressed as quite subjective. This is due to the fact that directors come to a board varied in their skill, knowledge and experience and are then expected to perform in accordance therewith. Accordingly, a director who only has certain expertise could only be expected to perform his duties commensurate with the expertise associated with him.[1053] Equally, a director with no meaningful skills, but who finds himself appointed to a board is treated with the appreciation of his status.

It has even been said that for the level of skill and experience a director may possess, such maybe his escape route from liability.[1054] Bekink, with regards to the erstwhile common law position indicated that 'the standard according to which the degree of such care and skill is to be measured is by no means clear.'[1055] It can be seen in reference to the principle long established in common law specifically in *Re Brazilian Rubber Plantations and Estates,*[1056] where the court laid out the principle calling upon directors to exhibit reasonable care when attending to the affairs of the company in the same manner as a director would, when attending to their own affairs.

To ascertain the standard with which a director should exercise his or her duty of care resort should be had to how a director may have deviated from acceptable and reasonable conduct in so acting. Though it may be a point to argue, an assessment should rather be whether a director deployed such care, skill and diligence as he or she was expected to, given his ability to do so in discharging their duty. It is, therefore, not to be understood that directors may escape liability because they did not possess certain skills. For every transaction in which a director is involved in deciding or acting on behalf of the company the duty of care, skill and diligence should be exercised. In other words, the director will be judged to the extent that he or she could exercise the care, skill and diligence which

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1053 Companies Act 2008, s 76(3)(c)(ii).
1054 Mwaura, *The Failure of Governance in State Owned Enterprises*, 50-51; *In re Brazilian Rubber and Estates Ltd* [1911] 1 Ch 425 [236].
1055 Bekink, *An Historical Overview of the Director's Duty of Care and Skill,* 95.
1056 [1911] 1 Ch 425 (ChD) [437].

he or she could. The partial codification of the duties of directors and emerging approaches have altered the position somewhat.[1057]

It is notable that the Companies Act contains two tests to determine whether the duty of care, skill and diligence has been complied with. Section 76(3)(c) of the Companies Act prescribes both an objective[1058] and subjective test.[1059] In terms of the objective test, a director will be regarded as having discharged the duties of his office with care, skill and diligence if he or she has acted in the same manner as would be expected of any reasonable person in such position. Furthermore, in terms of the subjective test, a director will have discharged his or her duties with the care, skill and diligence in accordance with his or her personal abilities. The position is not to be seen to favour the inexperienced or unskilled directors because of the dual test. The director still has the duty to perform his or her duties with care, skill and diligence similar to that of the reasonable director in his or her position.

Section 77(2)(b)(i)(ii)(iii) of the Companies Act provides that a director may be held liable for breach of duties resulting in loss, cost or damage to a company through common law principles relating to delict. Delictual principles reside in the common law in that they remain largely uncodified. At the core of delictual liability is exactly how the courts have decided on breach in relation to delict. A delict manifests in certain elements[1060] being present.[1061] This means that if a director is said to have breached his duties and such conduct should be examined on a delictual scale, the elements of delict should reflect in such impugned conduct for liability to follow. Therefore, courts would look at the impugned conduct by weighing whether the delictual elements do reflect in such conduct.[1062] The burden of proof is that on a balance of probabilities.[1063]

A delict has been defined as an act of a person which in a wrongful and blameful manner causes harm to another. The law lays an obligation on the party causing the damage to

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1057 Cassim and Others, *Contemporary Company law*, 559.
1058 Cassim and Others, *Contemporary Company law*, 559.
1059 Companies Act 2008, s 76(3)(c)(ii).
1060 Namely: act, wrongfulness, fault, damage/loss and causation.
1061 Delport, *New Entrepreneurial Law,* 243-244.
1062 *Philotex (Pty) Ltd v Synman; Braitex (Pty) Ltd v Snyman* 1998 (2) SA 138 (SCA) [141].
1063 D T Zeffert and AP Paizes, *The South African Law of Evidence,* (3rd edn LexisNexis 2017),34.

the other to remedy the damage.[1064] In order for a delict to have transpired, the elements of a delict will first have to be established in a specific set of facts.

Director liability based on delict presupposes a different kind of burden of proof and evidence to prove than that of the law of contract. The reason is that there is a distinction between contract law and the law of delict, though both fall under the law of obligations. Obligations arising from a contract and performance of such obligations are dealt with in reference to the terms of the contract.[1065] In a case of an alleged breach, parties to the contract resort to the stipulated terms of the contract.[1066] Generally, breach of contract arises either due to failure of one party to fulfil their obligations thereto or through a sub-standard performance.[1067] Although poor performance or non-performance by a party in terms of a contract entered into can cause loss or damage to the other party, a delict may be distinguished from a contract. In delict, there is no contract bringing about an obligation to perform in a certain manner, yet a certain performance is expected arising out of a wrong. A delict may, therefore, arise out of a position that one occupies which has certain obligations inherent to that position.[1068] That is, even if that position has no contractual obligations, liability may flow from a wrong committed in the performance of the duties attendant to the position. For instance, unless a director serves a company in an additional capacity, there is generally no contract for him or her to serve on the board of a company, yet that director can be liable in the way the director discharges his or her duties.[1069] An examination is therefore required to ascertain how breach of directors' duties can be established through a delict. It is noted that for a delict to result in liability, it is not enough for a person to have only suffered harm. All the elements that constitute a delict must be proven alongside the breach for liability to flow from such an act. The recognised elements that constitute a delict are an act, wrongfulness, fault, harm and causation (both factual and legal causation).[1070]

1064 J M Potgieter, L Steynberg and T B Floyd, *Visser and Potgieter Law of something is missing,* (3rd edn LexisNexis 2012) 6.

1065 RH Christie, *Christie's The Law of Contract in South Africa*, (6th edition LexisNexis 2011) 422.

1066 Neethling and others, *Law of Delict,* 3

1067 Cassim and Others, *Contemporary Company Law,* 747.

1068 Companies Act 2008, s 77(2)(b)(i)(ii)(iii).

1069 Delport *Henocsberg on the Companies Act 71 of 2008* 302.

1070 Neethling and Others, *Law of Delict*, 23.

For a company to succeed with a claim of liability against a director arising out of a delict, the company should prove that it suffered loss or damage arising out of the delict, which consisted of the mentioned elements. In *Knop v Johannesburg City Council*,[1071] the court with regards to liability in relation to the duty of care highlighted the importance of these factors while specifically referring to negligence. The court held that "[i]n short, recognition of a duty of care is the outcome of a value judgment, that the plaintiff's invaded interest is deemed worthy of legal protection against negligent interference by conduct of the kind alleged against the defendant." In the context of directors when carrying out their duties, it must be proven that a director breached his or her duties to the company in a way that meets the elements of delict, for the breach to be classified as one of delict and to accord with section 77(2)(b) of the Companies Act. Furthermore, the breach which was committed in a delictual manner should have caused some harm, loss or damage to the company. From the foregoing, it may be derived that delictual liability on the part of a director can be established with certainty as the elements that must be proven are fixed in law.

However, it is submitted that, although the elements founding a delictual claim for liability on the part of directors may be ascertainable, they are not mentioned in the Companies Act. The omission of the elements means that the elements can be gathered from the common law, as section 77 itself states. The reliance on the common law to establish delictual claims against directors of a company may prove difficult and inconsistent in practice, especially if cases are not resolved in courts. Another critical aspect of ascertaining liability with reliance on delict is exactly how one should go about it. What is the degree of care and skill that a director should exhibit for liability to not follow their actions? Seminal literature indicates that it would be difficult to assess all directors with an objective approach with respect to the duty of care and skill.[1072] The primary challenge is that directors are drawn from diverse backgrounds without any single standard set for them to meet. Directors may come to a board variedly educated and skilled, alternatively experienced. It will accordingly have to be determined on a case-by-case basis, appreciating

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1071 [1994] ZASCA 159; 1995 2 SA 1; [1995] 1 All SA 673 [31]. See also *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) where the court restated the same passage.

1072 Cassim and Others, *Contemporary Company Law,* 748.

that section 76(3)(c) of the Companies Act provides for an individualised approach. It is important to note that it is remiss of an unskilled director to undertake an assignment fully knowing they lack the skill required. This is the height of recklessness. It is precisely why the researcher is intolerant of non-executive director appointments that disregard requisite skills valuable in that capacity.

It is understood that no director is to be exempt on account that they are inexperienced or lack knowledge. It is a question of discharging the duties with the care, skill and diligence that one has. However, the law should be understood to imply that those without any skill, knowledge and experience to serve on a board of directors should not be thrust there. They will have nothing to offer to the company. The Companies Act somewhat moves away from that scenario by introducing what is now seen as a hybrid test, inclusive of objective and subjective elements.[1073] The submission with respect to the objective test is that it serves as a baseline in that all directors must meet it regardless of their varying levels of knowledge and experience. Directors are required to be highly experienced and knowledgeable to be able to discharge their duties.[1074]

5.9. What is the nature of liability non-executive directors face?

The Companies Act clearly states that directors who breach their duties may be held liable.[1075] The liability of directors flows from loss, damages or costs sustained by a company because of directors' breach of their duties. Whereas it is accepted that the Companies Act provides for liability based on loss, damages and costs caused by directors, these terms have not been defined. They will accordingly be evaluated below.

i. Loss

Whereas section 77 provides that directors may be held liable for loss sustained by a company upon breach of their duties, it is unclear what kind of loss is meant. It is submitted that it is loss sustained by the company which may be monetary or otherwise.

1073 Companies Act 2008, s 76(3)(c)(i)(ii).
1074 Cassim and Others, *Contemporary Company Law,* 559.
1075 Companies Act 2008, s 77(2)(a)(b)(c) and s 77(3).

Before attempting a definition of what loss may refer to, it is necessary to discuss the context of profit companies. Profit companies are set up for financial gain,[1076] generally in the nature of profits. When a profit company fails to make a profit in its business operations, it is said that it has made a loss. In the instance, a loss would result when a company has made less money from its trading operations compared to the cost of producing the goods and services it offered for sale. Additionally, a loss to a company may result from losing something such as an asset or a business opportunity it should or would have pursued.[1077] A company may lose out on a business opportunity because of how those charged with its governance may have conducted themselves in pursuing it, or for their failure to pursue such an opportunity.[1078]

A loss has been defined as 'an act or instance of losing.'[1079] The phrase 'at a loss' has been defined as 'making less money than is spent in operation or production.'[1080] Relying on the primary aids to interpretation, the definition of 'loss' would lead to absurdity in the context of this study.[1081] To avoid absurdity in the interpretation of the word 'loss' it is submitted the word 'loss' as used in section 77 of the Companies Act does not refer to loss of profit income alone. It is used with reference to loss of any other nature that has accrued to the company because of directors breaching their duties to the company.[1082] The word 'loss' does not refer to financial loss a company may incur during normal trading. It is argued that a company may less likely find that directors breached their duties to a company if in a given year it made a financial loss. However, a company may hold its directors liable for loss, financial or otherwise, based on their conduct in the performance of their duties.[1083] In any event loss should arise from breach of duties. In *AIB Group (UK) PLC v Mark Redler & Co Solicitors*,[1084] the court stated as follows:

1076 Companies Act 2008, s 1. See also Cassim and others, *Contemporary Company Law*, 2012, 70.

1077 *Da Silva v CH Chemicals (Pty) Ltd* 2008 (6) SA 620 (SCA) [18-19].

1078 *Da Silva v CH Chemicals (Pty) Ltd* 2008 (6) SA 620 (SCA) [18-19]; Cassim and Others, *Contemporary Company Law*, 729-731.

1079 Gerry Breslin and Others, *Collins Dictionary of the English Language*, (1st edn HarperCollins Publishers 2010) 476.

1080 *The South African Concise Oxford Dictionary*, (10th edn Oxford University Press 1999) 686.

1081 Botha, *Statutory Interpretation*, 112.

1082 This may include corporate opportunity or loss of revenue by the company.

1083 Companies Act 2008, s 77(2)(a)(b); Public Finance Management Act 1999, s 50(1)(b).

1084 *AIB Group (UK) PLC v Mark Redler & Co Solicitors* [2014] UKSC 58, [2015] AC 1503 [64]-[65].

> Where there has been a breach of fiduciary duty the remedy is an account or where appropriate equitable compensation which is to be calculated by reference to the loss caused to the beneficiary. Thus, the beneficiary is to be placed in the same position as he would have been in but for the breach. This may involve restoring the value of something lost by the breach or making good financial damage caused by the breach.

It is submitted that loss to a company, other than financial loss relating to normal business operations, may generally manifest in two ways. The first scenario would be where directors of a company divert or take an opportunity that belongs to the company or which the company would have explored, and which opportunity comes to the directors in their capacity as such.[1085] The second scenario would be where directors are assigned a responsibility by the company and while so carrying out the responsibility see an opportunity to make secret profits for themselves.[1086] In both instances, the company loses out on the corporate opportunities at the hands of its directors who place their own interests above those of the company. In both instances, one may argue some monetary gain would have been the end result. Whether such endeavours would have resulted in profit or loss is less clear. The misappropriation of opportunities by a director indicates an appetite for competing against their own companies rather than allowing their own interests to override those of the company. Accordingly, the company would be entitled to demand the gains made from the corporate opportunities and the secret profits received by the directors in breach of their duties.[1087]

Recently, a former executive director at the SABC was ordered to pay back millions he was paid irregularly.[1088] The irregular payments amount to a loss to the SABC as a company and the SABC succeeded in claiming the payments back from the former executive director.[1089] In this instance, credit would go to the specific board of directors of the SABC at the particular point in time. The step signals a reversal of colossal corporate

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1085 *Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 378 (HL) [385]-[386].

1086 *Dorby Ltd v Vorster* (2011) (5) SA 575 (GSJ) [5].

1087 *Phillips v Fieldstone Africa (Pty) Ltd* 2004 (3) SA 465 (SCA) [4892E]; *Da Silva v CH Chemicals Ltd* 2008 (6) SA 620 (SCA) 627 [18].

1088 See 'Motsoeneng ordered to pay back SABC millions by SA News <https://www.sanews.gov.za/south-africa/motsoeneng-ordered-pay-back-sabc-millions > accessed 19 December 2021.

1089 *South African Broadcasting Corporation SOC Ltd v South African Broadcasting Corporation-Pension Fund* [2019] 2 All SA 512 [22].

governance breaches permitted by a former board of directors, largely non-executive. One may question whether the former non-executive directors who approved these payments could not be held liable alongside the past executive director.

It may seem that when section 77 of the Companies Act provides for holding directors liable for breach of their duties to the company, it has the remedying of the loss that was occasioned to the company in mind. Clearly, once the company has been able to claim that which was due to it, it may be argued that the company has been able to hold the directors liable. However, it is unclear if claiming the loss occasioned is the only liability that a company may claim under circumstances where directors' breach merely caused a loss and no more. It is submitted that recovering any loss caused by directors should not be the only liability. Directors, especially in the sphere of SOCs where they may not be shareholders of the SOC, should face removal in addition to remedying any loss they may have caused the SOC. If directors were only held liable by requiring them to pay back or disgorge profits made for themselves and allowing them to continue serving, it goes against the principle of a fiduciary, of which directors are. SOCs have succeeded in attracting not only poor headlines but also in failing to build sustainable brands. These aspects which affect their image should be considered in exacting accountability on non-executive directors in SOCs. The poor image or brand of SOCs may affect them in several ways. For instance, when they seek access to credit or other business deals.

In the matter of *Cook v Deeks,*[1090] the court found that a corporate opportunity and profits which directors took were in fact meant for the company and were therefore taken to have been taken from the company. This conduct amounts to a breach of a director's fiduciary duty to a company, amounting to a diversion of an opportunity for themselves.[1091] The facts in the matter of *Cook v Deeks*,[1092] were that a Toronto Construction Company which was involved in the railway business and the company was held in equal shares by three directors. Two of the directors of the company learned of an imminent opportunity in the line of business of the company and subsequently took up the opportunity in their own name through a new company set up for the purpose. The court stated the following with

1090 [1916] 1 AC 554 (PC) [563].
1091 Cassim and Others, *Contemporary Company Law*, 726.
1092 [1916] 1 AC 554 (PC) [563].

regards to their actions:[1093]

> But, on the other hand, men who assume the complete control of a company's business must remember that they are not at liberty to sacrifice the interests which they are bound to protect, and, while ostensibly acting for the company, divert in their own favour business which should properly belong to the company they represent. Their Lordships think that, in the circumstances, the defendants T R Hinds and G S and G M Deeks were guilty of a distinct breach of duty in the course they took to secure the contract, and that they cannot retain the benefit of such contract for themselves but must be regarded as holding it on behalf of the company.

It offers an indication that where it has been established that directors acted in breach of their duties by placing their own interests above their company's they may be liable to relinquish the benefits obtained, to the company. It is taken that if a director misappropriates an opportunity which he should have obtained for the company, it should be disgorged to the company. In *Da Silva v CH Chemicals (Pty) Ltd,*[1094] the court found that an opportunity that befalls a company may not be averted through a director's resignation. In the said case the court held that a director would not divest himself of the duty to act in the best interest of the company by resigning and held that the opportunity which the director may have diverted from the company must be returned to that company.[1095]

ii. Damages

The Companies Act does not clarify what is meant by 'damages' in section 77. What is understood from section 77 of the Companies Act is that 'damages' referred to should have been suffered by the company at the instance of a director or directors in breach of their duties to the company. Therefore, it may be said that a director's breach of his or her duties to a company may result in a company having to pay damages or sustaining damages. The damages suffered or sustained, it is argued, should be of such a nature that their occurrence is a resultant effect of a director having breached his or her duties to the company.

1093 *Cooks v Deeks* [1916] 1 AC 554 (PC) [563].

1094 2008 (6) SA 620 (SCA) [55].

1095 *Da Silva v CH Chemicals (Pty) Ltd* 2008 (6) SA 620 (SCA) [18].

Damages implicate a restoration to the company of that which it lost had the breach not occurred.[1096] The law of delict generally demands that for compensation to be obtained, there must be a loss or damage for which the law makes compensation available.[1097] Damage has also been described as harm suffered.[1098] Accordingly, for a company to claim damages in the form of monetary compensation or some form of restoration of that which has been harmed by a director's breach, delictual principles should have been met. Loss or damage may in practice pose a challenge to distinguish from one another. Indications are that damages include loss suffered for which there must be a corrective remedy.[1099]

It may be argued that to assess damages suffered by a company it might be appropriate to do so by first quantifying the loss. Critical is how SOCs may be able to use section 77 of the Companies Act to hold directors liable for damages suffered by a SOC as a result of a director's breach of their duties. In practice the study presupposes that several SOCs in South Africa continue to suffer damage at the hands of non-executive directors with impunity. This situation needs to improve for good corporate governance to eventuate in SOCs.

The submission is that non-executive directors should subscribe to the well-founded principle of central and overall accountability.[1100] The principle holds that non-executive directors take overall accountability for damages caused to an SOC. In other words, they must account irrespective of whether the damage was caused delictually or not. This strict accountability should be seen to flow out of section 66(1) of the Companies Act.

iii. Costs

Like in the case of 'loss' or 'damage', the Companies Act does not define what is meant by costs in section 77(2) of the Act. The word 'costs', especially when used in plural presupposes various costs that may have been incurred by a company as a result of a

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1096 *Union Government v Warneke* 1911 AD 657 at 665; Cassim and Others, *Contemporary Company Law*, 849.

1097 Neethling and Others, *Law of Delict*, 195.

1098 Neethling and Others, *Law of Delict*, 3.

1099 Potgieter and Others, *Visser and Potgieter Law of Damages*, 33,34.

1100 Companies Act 2008, s 66(1).

director's breach of duty to the company. It seems that the section is open to a wide interpretation to provide for various scenarios and amplitude. Importantly, however, whatever costs have resulted from a director's breach of duties such costs should be remedied by the director. Furthermore, costs seem to refer to monetary costs. It is suggested that had the intention of the legislature been to use the term 'costs' with reference to non-monetary, this would have been indicated in clear terms. It should be noted that the word 'costs' has been defined as 'legal expenses, especially those allowed in favour of the winning party or against the losing party in a suit'.[1101] It may be assumed, therefore, that where a company has sued its director or any other party because of a director's breach of their duties, the costs incurred should be charged to a director who breached their duties to the company occasioning the expenditure in legal fees.

Recently, in an encouraging move by the High Court, a former executive director, Mr. Motsoeneng, was ordered not only to pay back millions he was illegally paid but also costs for the suit.[1102] The court case is highly encouraging and may send out a clear message to directors breaching their duties that they will be liable for costs and losses incurred due to their actions.[1103] Mr. Motsoeneng received a success fee.[1104] This payment was not sanctioned by the entire board of directors and was not provided for in the performance management system of the SABC and was therefore highly irregular and in contravention of the PFMA.[1105] The payment to Mr Motsoeneng is a clear example of a director responsible for the governance of SOCs placing his own interest above those of the SOCs.[1106] It is important to consider that the Companies Act provides for joint liability, which liability should be determined within a specific period of time.[1107]

1101 *South African Concise Oxford Dictionary*, (10th edn Oxford University Press 1999) 261; Potgieter, *Visser and Potgieter Law of Damages*, 575.

1102 Hlaudi Motsoeneng ordered to pay back more than R850k of SABC money used for personal legal fees <https://www.news24.com/news24/SouthAfrica/News/hlaudi-motsoeneng-ordered-to-pay-back-more-than-r850k-of-sabc-money-used-for-personal-legal-fees--20210129 > accessed 19 December 2021; *George Hlaudi Motsoeneng v South African Broadcasting Corporation Soc Ltd and Others* [2024] ZASCA 80 [21].

1103 Broadcasting Act 1999, s 12(c).

1104 *South African Broadcasting Corporation SOC Ltd v South African Broadcasting Corporation Pension Fund* [2019] 2 All SA 512 [4].

1105 *South African Broadcasting Corporation SOC Ltd v South African Broadcasting Corporation Pension Fund* [2019] 2 All SA 512 [47].

1106 Public Finance Management Act 1999, s 57; *South African Broadcasting Corporation SOC Ltd v South African Broadcasting Corporation Pension Fund* [2019] 2 All SA 512 [47].

1107 Companies Act 2008, s 77(6),(7) and (8).

The Companies Act itself does not specify how a miscreant director once held liable should make good the loss, damages or costs. Some guidance may be found in the PFMA. Section 83(2) of the PFMA provides for liability against accounting authorities found guilty of financial misconduct. It may be recalled that the PFMA, is centred on financial management in government and its various entities. Section 86(2) of the PFMA provides for offences and penalties stating the following:

> An accounting authority is guilty of an offence and liable on conviction to a fine, or to imprisonment for a period not exceeding five years, if that accounting authority wilfully or in a grossly negligent way fails to comply with a provision of section 50, 51 or 55.

Section 86(2) provides for both civil and criminal penalties against an accounting authority found to have breached the duties stipulated in sections 50, 51 and 55 of the PFMA. The offence that may result from a breach or misconduct associated with sections 50, 51 and 55 of the PFMA, has not been specified. However, upon non-compliance with the requirements of sections 50, 51 or 55, an accounting authority would be liable to a fine or imprisonment. Notable, the finding is based on willful or gross negligence. Liability accordingly only follows where willful or gross negligence has occurred. This standard is similar to that of the common law laid down as a foundation for director liability. For example, in *Fisheries Development Corporation of SA Ltd v Jorgensen; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd,*[1108] the court stated that a director would not be held liable for mere errors of judgment.

5.10. The Business Judgment rule

The Companies Act contains provisions relating to the business judgment rule.[1109] In terms of section 76(4)(a) of the Companies Act, the business judgement rule is a qualified defence available to directors and officers of companies under certain conditions. It is not available to insulate directors against liability in, and every action or decision taken. To serve as a defense the directors seeking to rely on the business judgment rule must satisfy the requirements it is preconditioned upon. Subsection 4 of section 76 of the

1108 1980 [4] SA 156 (W) [166].
1109 Companies Act 2008, s 76(4)(a).

Companies Act provides as follows:

> In respect of any particular matter arising in the exercise of the powers or performance of the functions of director, a particular director of a company-
>
> (a) will have satisfied the obligations of subsection (3) (b)and (c) if-
>
> (i) the director has taken reasonably diligent steps to become informed about the matter;
>
> (ii) either-
>
> (aa) the director had no material personal financial interest in the subject matter of the decision, and had no reasonable basis to know that any related person had a personal financial interest in the matter; or
>
> (bb) the director complied with the requirements of section 75 with respect to any interest contemplated in subparagraph (aa); and
>
> (iii) the director made a decision, or supported the decision of a committee or the board, with regard to that matter, and the director had a rational basis for believing, and did believe that the decision was in the best interests of the company, and
>
> (b) is entitled to rely on-
>
> (i) the performance by any of the persons-
>
> (aa) referred to in subsection (5); or
>
> (bb) to whom the board may reasonably have delegated, formally or informally by course of conduct, the board's functions that are delegable under applicable law; and
>
> (iii) any information, opinions recommendations, reports or statements, including financial statements and other financial data, prepared or presented by any of the persons specified in subsection (5).

The Business judgment rule is available to a director who acted within the confines of reliable information as supplied to him or her by designated officers in the company.[1110] It is this that forms the crux of the business judgment rule. With respect to the situation

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[1110] Companies Act 2008, s 76(5)(a)(b)(c).

in SOCs, it is not to be different from how it happens in privately held companies. Non-executive directors of SOCs can only act and decide based on reliable information supplied by executive management. They are therefore placed in such a precarious situation should executive management feed them with half-baked or incorrect information. Therefore, the business judgment rule is not merely for the asking. It is not open to any act or decision save where the action or decision taken was based on reliable information.[1111] Where a non-executive director accordingly relies on information received from management on a rational belief that the information was in the best interest of the SOC, the business judgement rule may come to the relief of the non-executive director acting within the confines of the law.

5.11. Analysis of directors' dynamics in enforcement of liability

Apart from resisting undue influences, directors may face critical challenges in enforcing adherence to good governance practices. In this regard, Finch raises the following concerns:

> Do directors possess incentives to take action on their colleagues' incompetence? At law there is no general obligation for directors to monitor their peers, although directors may be responsible where they place blind faith in colleagues or where they have collective statutory duties – for example, to render company accounts. Executive directors may be disinclined to police colleagues for a number of reasons. They may see their relationship with the company as short term, they may focus exclusively on their own responsibilities, they may not question other directors' performance for hierarchical reasons, through respect for spheres of influence for psychological, social or cultural reasons.[1112]

The concerns Finch raises are a true reflection of some of the challenges faced by boards of directors of SOCs. Though Finch specifically refers to executive directors some of the factors may equally apply to non-executive directors of a SOC. Finch's exposition is limited to some extent. For instance, while there is no general obligation for directors to

1111 Companies Act 2008, s 76(4)(a), s 76(5)(a)(b).

1112 Finch, 'Company Directors' 179, 198.

monitor their peers, as a board there are powers assigned to all directors collectively.[1113] It is these powers directors[1114] individually and collectively can use to wield compliance in the execution of their duties.[1115] This means that, when some members of the board are breaching their governance duties, the rest of the directors must not hold as their defence for non-action that they have no obligation to act. Loyalty to a company and good faith extend to directors standing up for the company in those moments when not doing so would mean that it may collapse.

Directors have been given powers in both the common law and statutory law to ensure that they act in the best interests of the company.[1116] Sitting on the fence does not in any way advance the best interests of a company. In fact, it negates any loyalty a director may profess to have towards a company. Effectively, sitting on the fence may amount to a breach of a director's duty of care, skill and diligence. It can be said that enforcement of accountability is the preserve of the board of directors. Can it be said that directors have the ability to police themselves? The challenge is when they act against the company collectively. Under these circumstances it will require a natural person outside of the board to enforce accountability on behalf of the company.

The South African Constitution should be praised for the class action it provides.[1117] Within this space any person who can prove interest, can bring an action on behalf of an SOC where those charged with the governance of the SOC cannot.[1118] The possibility exists that such enforcement action will be met with resistance. Furthermore, the general public who depend on SOCs the most may not have the financial means to litigate. In this regard, organisations such as Organisation Undoing Tax Abuse may come to the rescue, as was seen in its litigation action against a former SAA director.[1119]

The State Capture Report indicates that some non-executive directors were intent on holding one of their own accountable for governance breaches to the SAA.[1120] It was

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1113 Companies Act 2008, s 66(1).
1114 Companies Act 2008, s 66(1).
1115 Companies Act 2008, s 76(3)(a)(b)(c)(i)(ii).
1116 Companies Act 2008, s 66(1) read with s 76(3).
1117 Constitution of the Republic of South Africa 1996, s 38.
1118 Constitution of the Republic of South Africa 1996, s 38(d).
1119 Organisation *Undoing Tax Abuse NPC v Duduzile Cynthia Myeni* [2020] 3 All SA 565 (GP) [8].
1120 Judicial Commission of Inquiry into State Capture Report: Part 1 Volume 1, (2021) 43-52.

unfortunate that their efforts did not yield good results for the SAA. It may have been more appropriate for the non-executive directors concerned to have gone further than the shareholder representatives to whom they reported the various corporate governance breaches against the chairperson. They should perhaps have approached a court of law instead.

Another scenario is that non-executive directors may likewise feel distant from an SOC and have little interest in its success, as they are not full-time employees and only serve a specific term. Although these sentiments may be expressed by some of the directors, they still have a legal obligation to act in their company's best interest.[1121] Non-executive directors should avoid distancing themselves or divesting themselves of their duties to an SOC. Furthermore, non-executive directors should refrain from expressing an attitude that may suggest that not being shareholders they do not mind whether the SOC collapses or not. By being a properly qualified non-executive director, such director must act conscientiously in the performance of his or her duties to an SOC and should refrain from any action that may lead to a breach of duties or tolerate any such instance conducted by other directors. Competent non-executive directors will ensure that the interests of an SOC are put first, while placing their own interests subordinately.[1122]

This was illustrated recently where the Group Chief Executive Officer of the SABC had a run in with the board of directors, constituting mainly of non-executive directors.[1123] It appears from the case that the non-executive directors of the SABC held the view that the Group Chief Executive Officer of the SABC was incompetent and displayed conduct unbecoming of an incumbent in such position.[1124] In terms of the Broadcasting Act, a Group Chief Executive Officer of the SABC is an executive director.[1125] In this instance, the non-executive directors suspended the Group Chief Executive Officer for what they believed to be poor corporate governance at the SABC.[1126]

1121 Companies Act 2008, s 76(3)(b).

1122 Companies Act 71, 2008, s 76(3)(c); *Delport, New Entrepreneurial Law,* 141.

1123 Politicsweb, Dali Mpofu to receive R13,4 m from SABC <http://www.politicsweb.co.za/politics/dali-mpofu-to-receive-r134m-from-sabc >accessed 14 June 2022. See also *Mpofu v South African Broadcasting Corporation* (2008) 1 All (GSJ) 413 [4].

1124 *Mpofu v South African Broadcasting Corporation* (2008) 1 All (GSJ) 413 [3].

1125 Broadcasting Act 1999, s 12(b).

1126 *Mpofu v South African Broadcasting Corporation* (2008) 1 All (GSJ) 413 [3].

The decision of the board was challenged on several accounts. One of which was that the board constituting of a majority of non-executive directors did not have the power to suspend the Group Chief Executive Officer.[1127] The applicant argued that in terms of the articles of association, the Minister was responsible for his appointment and for instituting disciplinary measures such as a suspension.[1128] The argument as to who could suspend the Group Chief Executive Officer of the SABC was not correct. Its weakness arose in that it ignored the provisions of the Broadcasting Act subjecting executive management to the supervision of the board of directors.[1129] The above transpired notwithstanding that some executive management of the SABC by law comprised the membership of the SABC board of directors. Regarding the suspension of the Group Chief Executive Officer, the Court found that it was irregular.[1130] The constitution of the meeting was non-compliant in that some three directors were not in attendance. This rendered the suspension of the Group Executive Officer of the SABC irregular.[1131]

The Broadcasting Act is commendable on determining in quite clear terms who is responsible for the corporate governance of the SABC.[1132] This is particularly important given the mix of both executive and non-executive directors on the SABC board.[1133] Furthermore, the Broadcasting Act clarifies that executive directors account to the non-executive directors for the manner in which they discharge their responsibilities to the SABC.[1134] Collectively, the board of directors in turn account to the shareholder Minister of the SOC.[1135]

It is accepted from section 66 and section 165 of the Companies Act that directors have certain powers, including the power and duty to act in the interest of the company. However, the dynamics of serving on a board manifest differently in that non-executive directors may find themselves constrained to act or even choose to resign.[1136] Nonetheless,

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1127 *Mpofu v South African Broadcasting Corporation* (2008) 1 All (GSJ) 413 [15].
1128 *Mpofu v South African Broadcasting Corporation* (2008) 1 All (GSJ) 413 [14].
1129 Broadcasting Act 1999, s 14(2).
1130 *Mpofu v South African Broadcasting Corporation* (2008) 1 All (GSJ) 413 [41].
1131 *Mpofu v South African Broadcasting Corporation* (2008) 1 All (GSJ) 413 [14].
1132 Broadcasting Act 1999, s 13(11).
1133 Broadcasting Act 1999, 12(a)(b).
1134 Broadcasting Act 1999, s 14(2).
1135 Broadcasting Act 1999, s 13(11)(13).
1136 Judicial Commission Inquiry into the State Capture Report: Part 1 Volume 1, (2021), 20.

the inclusion of non-executive directors on a board of a SOC comes highly recommended.[1137] Despite the preference of including non-executive directors on a board, numerous difficulties are experienced in being a non-executive director which may impair a non-executive director's contribution to the governance of a SOC.[1138] To this end, Finch expresses certain concerns with regards to non-executive directors namely, that:[1139]

> Non-executive directors, however, share the informational difficulties of executive directors and face further problems. They may well lack day-to-day knowledge of the particular company's affairs and are highly dependent on the board's view of the information deemed appropriate for their consumption. They may have limited time and resources at their disposal and they are rarely equipped with such staff as would provide in-depth knowledge of other directors' performance.

As correctly indicated by Finch, non-executive directors' performance depends to a large extent on how well they are informed about the SOC they serve on as well as on the information conveyed to them as board members by executive management of the SOC. Lack of sufficient information on the business affairs of an SOC may translate into failure of corporate governance in the SOC. This will be a failure of the non-executive directors. Apart from being informed by the SOC, directors should also discharge their duties based on the knowledge they have of the business affairs of the SOC. Although it is fair to assume that when non-executive directors are appointed to a board of an SOC, they ought to be fully informed of their duties and expectations on that board experience and results in various SOCs depicting a contrary picture.[1140] Non-executive directors should devise ways to be informed sufficiently about the operations of the SOC on whose board they serve. It will not be enough for them to argue later when things have gone wrong that they did not know. Arguably, the ability to enforce accountability at board level is dependent on a full picture of the affairs of a SOC. The full picture can only be obtainable through accurate information of a SOC's operations. This explains the importance of executive management supplying correct information to the board of directors. It amplifies the fortitude non-executive directors should assume to insist on accurate and sufficient

1137 Naidoo, *Corporate Governance,* 139.
1138 Finch, Company Directors, 197.
1139 Finch, Company Directors, 197.
1140 Judicial Commission of Inquiry into State Capture Report: Part 1 Volume 1 (2021), 26.

information of the business operational affairs of the SOC.

5.12. Performance evaluation in enforcing director liability

Non-executive directors should be fully aware of the standard of conduct they are required to meet. If a non-executive is downright incompetent and unqualified, the submission is that such director will not appreciate that they breached any governance duty to an SOC. Breach of duties occurs through either a commission or omission of duties by a non-executive director. Arguably, with a commission, a non-executive director contravenes his or her duties by acting contrary to the standard required of him or her.[1141] With respect to an omission, a non-executive director would have failed to carry out an act or decision in accordance with the standards for directors' conduct.[1142] It is equally important to ascertain exactly how breaches of directors' duties can be detected. That is, is there a way to determine whether a non-executive director of an SOC has failed to perform his or her duties before a loss or damage to the SOC occurs?

In terms of the foregoing, the concern is whether boards should be evaluated regularly to ascertain where breaches in their performance may have occurred. It is however cautioned that evaluation of board performance should not be limited to just results but should be widened to include the manner of performance or actual discharge of board duties by directors. The control and management affairs of an SOC rest fully on a board of directors.[1143] Evaluating the performance of a board of directors will give an indication of its compliance, including that of its individual directors.[1144] The submission is that non-executive directors are central to the SOCs through decision making in meetings. It is appreciated in the context of long-established principles of how non-executive directors interact with the company they serve.[1145] It is argued that when breach of governance

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1141 For example, if a director places his interests in a transaction before the interests of the company so that he or she can profit personally, the director commits an offence is thus in breach of duty to the company.

1142 Companies Act 2008, s 77(3)(c); a director whose duty it is in a transaction to ensure that he or she discharges his or her duty loyally to the company but fails to do so resulting in the company suffering harm or damage is in breach of duty to the company.

1143 Companies Act 2008, s 66(1).

1144 Pat Mahony, *How to do Board Evaluations,* (Juta 2012) 5-9.

1145 *Fisheries Development Corporation of SA Ltd v Jorgensen; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd* 1980 (4) SA 156 (W) [165].

duties on the part of non-executive directors in SOCs is to be examined, decisions made should be evaluated. This should include decisions made by the executive management and approved by the board of directors in terms of the principles of the Companies Act, PFMA and applicable legislation relevant to the SOC. Compliance with such legislation should be evaluated as both omissions and commissions on the part of the board could constitute negligence which may attract liability.[1146]

The PFMA suggests that executive authorities, in addition to the National Treasury,[1147] being cabinet ministers, do account for how SOCs are being managed.[1148] This implies that accounting authorities' performance with respect to SOCs should be checked by executive authorities designated to the SOCs. The executive authority would account competently to Parliament if the work performance of boards of SOCs is regularly evaluated.[1149] Parliament should be interested not only in the state of affairs but also in the result and impact of what is being implemented in SOCs. The advantage of regular board performance evaluations is to determine performance of directors regarding their duties.[1150] Without a systematic way of examining how directors perform their duties, breaches of directors' duties may become a common occurrence and go unnoticed,[1151] until such time as big scandal become known in the media. Furthermore, enforcement of accountability against non-executive directors should happen on a foundation of performance results. It should not be done in a vacuum.

Minichilli asserts that: [i]t is important to assess the extent to which boards are fulfilling their fiduciary duties and meeting the expectations of different stakeholders.'[1152] Without conducting performance assessments of non-executive directors it may be difficult to know whether any breach or neglect of their duties transpired. Although not all losses,

1146 Companies Act 2008, s 77(2) and (3); Public Finance Management Act 1999, s 85(c).

1147 Public Finance Management Act 1999, s 6(2)(c).

1148 Public Finance Management Act, 1999, s 1(c) under the definition of 'executive authority.

1149 The Constitution of the Republic of South Africa 1996, s 92(2), s 3(b).

1150 Alessandro Minichilli, Jonas Gabrielsson and Morten Huse, 'Board Evaluations: making a fit between the purpose and the system' (2007) Corporate Governance: An International Review, 609-610.

1151 Minichilli and others, 'Board Evaluations' 616.

1152 Minichilli and others, 'Board Evaluations' 616.

damages or costs will manifest through a performance evaluation of the board of directors it is a valuable starting point. Losses, costs and damages can manifest inherently, but which may require a full trail of events to locate where and how they arose and the impact thereof. A performance assessment will indicate what performance was required and how such performance was executed.

There are some noticeable advantages to subjecting boards of directors to regular evaluations. Such evaluation will inevitably show the board of directors' involvement in crafting the strategy of the SOC. It is upon this mechanism and the mandatory objects of an SOC that a board's evaluation should be conducted. Evaluation of board performance should be seen in the context of their duties to the SOC blended with the duty to sustainably govern the SOC. This connects to the purpose of the evaluation. It is not to be divorced from the business affairs of the SOC in so far as the board of directors' role in achieving the objects of the SOC are concerned. In other words, the contribution or disservice to the objects of the SOC will be traced from the evaluation outcomes. It is through the evaluation which is rooted in the objective business affairs of the SOC that the board of directors' contribution will be easily traced. If the board's contribution was poor and board members have conducted themselves in breach of their duties, it is this formal evaluation that will reveal all or at least function as a good starting point.

The submission is that a board evaluation cannot be conducted merely to record results. There should be actions to flow from a properly conducted board evaluation.[1153] It should be conducted to help improve overall corporate governance of SOCs. For improved corporate governance to happen poorly performing boards should account for the poor performance. The performance of boards on SOCs should inevitably show in the overall performance of the SOCs. Additionally, acts by board directors which impact on the performance of the SOCs are also to be incorporated in the evaluation outcomes. Notwithstanding, in the pursuit of these improvements, accountability is part of the process. Accountability should be seen as lending impetus to improvement achievements and performance of SOCs.

1153 Ram Charan, *Boards That Deliver: Advancing Corporate Governance from Compliance to Competitive Advantage*, (Jossey-Bass, 2005), 43.

In comparison, the Public Enterprises Governance Act[1154] in Namibia provides for some form of performance management for boards of directors in public enterprises.[1155] In terms of the Public Enterprises Governance Act[1156] a shareholder minister and a board of directors must enter into two agreements, namely the governance agreement and individual performance agreements.[1157] These agreements are meant to be deployed and employed with good intentions and as such can serve as a way to measure board performance periodically. In this way, the performance of directors is evaluated properly, and accountability can be based on formal evaluation outcomes.[1158]

Although the Public Enterprises Governance Act provides for the two agreements, it is silent on the evaluation of the performance of the boards of directors as a collective. This is so in spite of the fact that directors on the boards failing to perform in terms of the agreements may be dismissed.[1159] How it will be ascertained that directors have not complied with a term or condition in the agreement without an evaluation of performance is unclear. There may be a view that performance evaluation may be implied in the concluded governance and performance agreements. The opposite view and implication may be that some SOCs may not feel compelled to conduct any evaluations of directors merely because the law does not say so. It is hoped that where a statute provides for performance evaluation of board of directors that it is in fact carried out.

It is therefore important that a concerted evaluation effort of expected performance takes place. Performance evaluation may serve as a mechanism of revealing how directors are exercising their powers and performing their functions. A performance evaluation can also point to areas of shortages of skills and where additional capacity is required on the board of directors. It is contended that without evaluating directors' performance, enforcement of the breach of duties remains an uncoordinated exercise which may not happen in the absence of a formal procedure to ascertain how non-executive directors perform their duties. Enforcement of accountability should be based on clear outcomes

1154 Public Enterprises Governance Act, 2019.
1155 Public Enterprises Governance Act, 2019, s 11 and 12.
1156 Public Enterprises Governance Act, 2019.
1157 Public Enterprises Governance Act 2019, s 11 and s 12.
1158 The King IV Report, Principles 5 and 9.
1159 Public Enterprises Governance Act 2019, s 11(4) and 12(6).

on various transactions relating to SOCs' operational performance. A lack of consistent and regular performance evaluation of directors' performance may leave the performance of an SOC to chance. Without performance evaluations, breach of directors' duties would manifest on an ad hoc basis which if carefully concealed may remain undetected while an SOC continues to suffer harm. It is argued that had SOCs in South Africa been subjected to constant appraisal of board of directors' performance, many of the losses and governance breaches recorded in the various State Capture reports would have been nipped in the bud.

It is thus submitted that in order for performance to be properly evaluated the standards of duties encompassed in the Companies Act and other relevant legislation should be reduced into performance agreements for non-executive directors of SOCs. Currently, the legal frameworks in place do not prescribe performance agreements.[1160] Notwithstanding, King IV clearly recommends performance agreements with respect to SOCs listed under schedule 2 of the PFMA.[1161] Furthermore, courts have also noticed the impact King Codes can have on companies by openly holding them as authoritative.[1162]

Performance agreements can be concluded between a shareholder minister and the board of directors. A comprehensive assessment of each non-executive director's performance may then be conducted quarterly or as agreed. In other jurisdictions,[1163] a legal instrument is provided for requiring board members to conclude individual performance and governance agreements.[1164] Conversely, the conclusion of governance and individual performance agreements have not in all cases been a model of performance to be emulated. Even where they exist, SOCs may still collapse or be pushed to the brink of liquidation.[1165] Despite them not being guarantees for better results, performance and governance agreements can serve at least two purposes. They indicate an intention to be bound by those who conclude them. They also clarify expected performance simplified

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1160 That is the enabling statutes and the PFMA.

1161 The King IV Report, Part 6.6.

1162 *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd* 2006 (5) SA 333 (W) [16.7].

1163 Such as Namibia.

1164 Public Enterprises Governance Act 2019, s 11 and 12.

1165 For example, Air Namibia which closed down, and the Road Contractor Company barely retaining any relevance for existence.

and synthesised from legal provisions to a performance indicator or measure. In a jurisdiction where SOCs are subjected to regular performance reviews, a performance management system can be a useful tool to measure board performance, sustainability and enhanced good corporate governance.[1166]

It is imperative that once liability against a director is established it is also enforced. Hence, an evaluation of the enforcement of liability against non-executive directors in SOCs within the sphere of the common law and statutory law is necessary. The enforcement of liability against non-executive directors in SOCs within the sphere of the common law and statutory law is accordingly discussed below.

5.13. Common Law: enforcement of non-executive director liability

As was alluded to above,[1167] accountability which is effective may not take place in the boardroom and may require the involvement of courts of law. Notable, many of the court cases that evaluated the breach of directors' duties have enhanced the law in respect of the principles laid down by the courts.[1168] For instance, a marked departure from the common law defence of directors not being expected to be highly skilled flows from case law developments. A departure from earlier position is noted in *Fisheries Development Corporation of SA Ltd v Jorgensen; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd.*[1169] In terms of the dictum directors may rely on information they receive although they ought not to blindly accept it. Directors should accordingly apply their minds to the information given and only rely on it if it is in the best interests of the company.

It appears that a distinction should be made between earlier common law and later developments in the common law. That is, the common law has developed to now require much more improved accountability from directors. In terms of the common law a

1166 King IV, Institute of Directors in South Africa, (2016), Principle 4.

1167 Refer to paragraphs 6.1-6.3.

1168 In *re Brazilian Rubber Plantations and Estates Ltd* [1911] 1 CH 425; In *re City Equitable Fire Insurance Co Ltd* [1925] 1 Ch 407; *Fisheries Development Corporation of SA Ltd v Jorgensen; Fisheries Development of SA Ltd v AWJ Investments (Pty) Ltd* 1980 (4) SA 156 (W).

1169 1980 (4) SA 156 (W).

company would be entitled to hold a director liable even when no costs, losses or damage are suffered, but merely in furtherance and protection of the directors' fiduciary duty that exists between directors and their companies.[1170] In *Canadian Aero Service Ltd v O'Malley*, the court held as follows:[1171]

> The reaping of a profit by a person at a company's expense while a director thereof is, of course, an adequate ground upon which to hold the director accountable. Yet there may be situations where a profit must be disgorged, although not gained at the expense of the company, on the ground that a director must not be allowed to use his position as such to make a profit even if it was not open to the company, as for example, by reason of legal disability, to participate in the transaction.

Enforcing director liability under the common law entails two approaches, namely, where a company has suffered costs, losses or damages arising out of directors' breach of duty to the company or on account of the fiduciary relationship of director which does not require actual loss, cost or damage to the company.[1172] In the latter instance, liability against a director can arise from breach of duty based on the mere fact of a director being a fiduciary, without any loss, costs or damages having eventuated. It is notable that holding directors liable in the absence of any costs, losses or damages occasioned against the company but solely in the fiduciary relationship that exists enhances the importance of directors adhering to this duty. This development brings a stricter approach to directors' duties. In this regard principles alone must be respected and adhered to, at all times not only when there is attendant loss, costs or damages.

In *Industrial Development Consultants v Cooley*,[1173] the court confirmed that the relationship that exists between the company and the director is at the core of enforcing liability against directors who breach their duties to the company. In instances involving corporate opportunities, it is not whether a company in question would have taken the opportunity which a director exploited for himself but whether he used the information acquired

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1170 Delport, *New Entrepreneurial Law,* 155; *Canadian Aero Service Ltd v O'Malley* (1974) 40 DLR (3d) 371 (SCC) [381].

1171 *Canadian Aero Service Ltd v O'Malley* (1974) 40 DLR (3d) 371 (SCC) [383].

1172 Delport, *New Entrepreneurial Law,* 155.

1173 *Industrial Development Consultants Ltd v Cooley* [1972] 1 WLR 443; [1972] 2 All ER 162 para 175.

while being a director to obtain an opportunity for himself seemingly at the expense of the company. It was canvassed that while a director serves on a board, information that comes under his remit is not meant for his personal interest, but that of the company being the conduit through which the information came to him.[1174] Correspondingly, with the common law position, the Companies Act provides against directors using company information for their own or others' benefits.[1175] Furthermore, a director may not use information of the company to cause harm to the company.[1176]

Although the plethora of court cases confirm that South African courts are willing to hold directors to account for breach of corporate governance duties,[1177] the concern and especially so for SOCs, is how to ensure that the enforcement of director's duties are done proactively and not only retroactively through court cases. For instance, it is unclear from the common law whether a suspicion of a director or directors having breached their duties to the company is a random exercise or a systematic approach.

This is further complicated by the absence of a functionary within the structure of the most important organs of governance in SOCs to enforce accountability. Testimony of this difficulty may be found in the case of *Outa v Myeni* where enforcement of accountability had to be privately initiated.[1178] Clearly, the entire judgment betokens a situation at the SAA where non-executive directors were not subjected to performance evaluation to gauge their conduct in the handling of the affairs of the SAA. An appreciation of the length of time late Ms. Myeni served as a non-executive chairperson of the SAA to the detriment of the SOC illustrates the lack of periodic performance evaluations. A considerable amount of time expired within which her conduct to the detriment of the SAA should have been exposed and possibly could have been halted to lessen harm on the SAA. However, it is difficult to unearth poor and damaging directors' conduct in SOCs when there is a glaring absence of mechanisms to measure the way and impact of non-executive directors are discharging their duties on behalf of SOCs.

1174 Companies Act 2008, s 76 (2)(a)(i)(ii).

1175 Companies Act 2008, s 76(2)(a)(b).

1176 Companies Act 2008 2008, s 76(2)(b).

1177 *Treasure Trove Diamonds Ltd v Hyman* 1928 AD 464; *Mills v Mills* (1938) 60 CLR 150 (High Court of Australia); *In re Exchange Banking Company Flitcroft's case* (1882) 21 ChD 519.

1178 *Organisation Undoing Tax Abuse and Another v Myeni* and Others [2020] 3 All SA 578.

The common law and the Companies Act do not provide for ongoing monitoring of non-executive directors' performance of their duties. It is submitted that the enforcement of non-executive director duties in SOCs would be significantly improved by the mandatory introduction of performance management at board and executive levels, coupled with regular evaluations of non-executive directors' performance. King IV recommends evaluation of board performance at regular intervals.[1179] It would be appropriate to replicate similar recommendations in binding legal instruments such as the PFMA and the Companies Act, at least with respect to SOCs. It is further submitted that board evaluations and performance management should be carried out with the serious intentions, namely, to ensure improved corporate governance and not merely as a tick box exercise. Results gathered from any board evaluations and performance assessments carried out should be acted upon. Where breaches of governance duties are revealed decisions to enforce accountability should be taken.

Another critical aspect of enforcing director liability which remains largely disintegrated is how proceedings aimed at holding directors liable for the breach of duties are commenced with. The submission is that they take the form of civil proceedings based on the principles of delict.[1180] Although non-executive directors may act individually when assigned to perform certain tasks on behalf of a board, generally, non-executive directors act as a collective. When non-executive directors have breached their duties to a company, as a collective, holding them to account may prove to be problematic. This may be due to the fact that none of them may wish to act against the other or may serve as a reliable witness. For example, it is believed that had it not been for the Organisation Undoing Tax Abuse bringing a lawsuit against the former chairperson of the SAA none of the directors, let alone the shareholder representative[1181] would have acted on the rampant breaches of governance duties. It is clear from the way the SAA's affairs were being handled that nobody charged with the SAA's governance was prepared to act against the suspected culprit amongst the non-executive directors.[1182]

1179 King IV Report, Part 6.6, Principle 9.

1180 Companies Act 2008, s 77(2)(a)(b) and s 77(9)(a)(b).

1181 *Organisation Undoing Tax Abuse and Another v Myeni and Others* [2020] 3 All SA 578 [50] and [110].

1182 Judicial Commission of Inquiry into State Capture: Part 1, Volume 1 (2021), 35.

Although only the chairperson of the SAA was sued, the court in *OUTA v Myeni*[1183] in terms of the dictum of the case indicated that the entire board's conduct was believed to be in contravention of its corporate governance duties to the SAA. Regrettably, the plaintiff in this matter stated that there was no means to pursue all directors involved in the mismanagement of business affairs at the SAA.[1184] With such glaring revelation of mismanagement at the SAA, some honest non-executive directors (if any) on the SAA's board of directors including the shareholder representative should have stood up on behalf of the SAA to bring a lawsuit against miscreant directors in a bid to hold them liable. The enforcement of liability against non-executive directors who wantonly breach their duties to the SOCs is evidently unorganised.

It is argued that, in the sphere of SOCs non-executive directors and shareholder representatives are properly situated to bring proceedings against any directors for liability arising out of directors' misconduct. Directors who themselves are not the subject of poor conduct and mismanagement must act on behalf of the company to hold those accountable within their ranks who breached their duties to the SOC.[1185] This should be seen as acting in the best interests of the SOC. Where no member of the board of directors is prepared to act on behalf of an SOC when corporate governance breaches have occurred, it means the entire board of directors is acting against the best interests of the SOC. Those non-executive directors who look the other way or remain silent when the SOC needs their involvement are not any better.

In *Cook v Deeks*,[1186] involving the Toronto Construction Company (TC), which was held in equal shares by Cook, GS Deeks, GM Deeks and TR Hinds, two of the directors heard of an upcoming contract in the line of business of TC. Instead of obtaining the contract for the company they obtained it in their own names.[1187] For this purpose they formed a different company, Dominion Construction Company, (DC) and went ahead to exploit the corporate opportunity. Mr Cook brought an action against the other directors. This serves

1183 *Organisation Undoing Tax Abuse and Another v Myeni and Others* [2020] 3 All SA 578 [23].
1184 *Organisation Undoing Tax Abuse and Another v Myeni and Others* (2020) 3 All SA 578 [24].
1185 Companies Act 2008, s 20(4)(5).
1186 [1916] 1 AC 554 (PC).
1187 *Cook v Deeks* [1916] 1 AC 554 (PC) [559-560

as a clear demonstration that it is possible for directors to bring proceedings against the wrongdoer director who may have acted in breach of their duties to the company. It may be argued that Mr Cook' action was motivated by the fact that he was not tainted and as a shareholder of TC, the company, proceeded to do so to recover losses due to the loss of the corporate opportunity. It is this approach that the thesis suggests to non-executive directors in SOCs. Untainted non-executive directors should always stand up against colleagues who act against the interests of the SOC.

A non-executive director in the context of SOCs may likewise bring an action against other directors on behalf of the company to recover losses, costs or damages the company may have suffered.[1188] It is not necessary for the non-executive director to be a shareholder to bring proceedings to hold miscreant directors liable. Directors' duties are clear in that they must act in the best interest of the company. There have been concerns about the level of interest non-executive directors may have vested and invested in the success of a company.[1189] This is where the agency problem becomes relevant for discussion. Non-executive directors, especially those in SOCs, do not exercise shareholding in the SOC. The State as the main or only shareholder is merely represented by a shareholder minister. Both the shareholder minister and the non-executive directors are agents. Agents are not known to be interested in the company as the principal would be. It is suspected that non-executive directors lightly engage with a company and do not really care as they would if they had material interest.[1190] Irrespective of the absence of material interests by non-executive directors, they should act in accordance with the law. The law enjoins directors to act in the best interests of the company, to be loyal to the company, or face liability should they fail to act in accordance with that duty.[1191] That includes them bringing actions against fellow directors on behalf of the SOC for loss or damages caused to the SOCs.[1192]

1188 Companies Act 2008, s 20(4).

1189 Cassim, *The Removal of Directors: And Delinquency Orders under the South African Companies Act*, 28.

1190 The conduct of various non-executive directors of SOCs featured in the Judicial Commission of Inquiry into State Capture Report, elucidate conduct of recklessness total disregard of SOCs by NEDs. It is doubtful if they owned the institutions, they would have allowed them to decay in the manner they did.

1191 Companies Act 2008, s 76(3)(a)-(c)(i)(ii).

1192 Companies Act 2008, s 76(3)(a)-(c)(i)(ii).

Where all directors are tainted by illegal conduct and breaches of duties to the SOC, a shareholder representative[1193] should bring an application to hold the directors liable. To date, it has been uncommon in SOCs for shareholder representatives to bring action proceedings to court to hold non-executive directors liable for breach of their duties.[1194] For instance, in the matter involving the SABC and Mr. Motsoeneng, a former Chief Operations Officer and executive, he was found to have been illegally paid fees not due to him.[1195] It took a succeeding board of directors in the SABC for legal proceedings to be brought against Mr. Motsoeneng requiring him to pay back the money illegally paid to him.[1196] Clearly, the former board of directors acted improperly and in breach of their duties to the SABC approving an illegal payment. For this conduct, the former board should have been reigned in. It is here that the thesis suggests that even former directors in SOCs should be recalled and brought to account for the governance breaches they committed in their time in office.[1197] Nothing in the Companies Act regime precludes the levelling of accountability on former directors for how they discharged their duties to the company.

Though the common law is geared towards holding non-executive directors in SOCs accountable for breach of governance duties, the apparent lack of shareholder action taken renders it less valuable. Legal precedents may serve to enhance director accountability. Shareholder representatives, non-executive directors and executive management of SOCs should in turn be held to account for failing to act against directors responsible for the reckless mismanagement of public resources that has come to characterise SOC administration.

5.14. Statutory Law: the procedures for enforcing director liability in SOCs in South Africa

The statutory enforcement of director liability in SOCs alongside the common law is

1193 Companies Act 2008, s 20(4).

1194 It being understood that executive directors can be charged internally since they are employees of a SOC.

1195 Executive director in terms of the Broadcasting Act 1999, s 12(b).

1196 *South African Broadcasting Corporation SOC Ltd v South African Broadcasting Corporation Pension Fund* [2021] ZAGPJHC 822, orders [1-3].

1197 Companies Act 2008, s 19(3).

imperative for the sustainability of SOCs. Breaches of corporate governance duties, unless systematically approached, are consigned to a random process or a revelation of a scandal. The more clandestine the breach, the more difficult it may be to detect. In the event that breaches of governance duties go undetected, the ultimate outcome may be the collapse of the SOC.

i. Companies Act

Section 77(9) of the Companies Act confirms that the determination of liability for breach of directors' duties is vested with the court. Consequently, when section 77(2) and (3) of the Companies Act state that a director may be held liable or is liable, such determination is made in a competent court. The separation of powers principle thus ensures that an independent body, namely the judiciary, is empowered to make a determination on possible liability. This is welcomed in that it prevents interference by shareholder representatives that may be compromised.[1198]

The courts will not *mero motu* make findings against non-executive directors of a company. This means someone on behalf of the company should approach the courts. It is here where the issue of enforcement becomes problematic as the Companies Act does not name a specific official to be responsible for approaching the courts. Where those charged with corporate governance, specifically in SOCs, are compromised; there may be no one to approach a court on behalf of an SOC. It is accepted that in privately held companies this is not a problem as shareholders will take the lawsuits to court without being reminded because they are materially interested in the success of the company.[1199]

Notwithstanding, the foregoing cognisance should be taken of section 84 of the PFMA, which provides for a disciplinary proceeding for accounting authorities and other officers. It is submitted that, though the PFMA provides for disciplinary procedures for financial misconduct, it does not subtract from the provisions relating to the determination of liability for directors in the Companies Act.[1200] The submission is that non-executive directors are not employees of an SOC. It is plain that they cannot be subjected to any form

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1198 In SOCs if a shareholder is the cause of the breach in governance it defeats the purpose to seek remedy anywhere other than the courts.

1199 Pretorius and Others, *South African Company Law*, 207.

1200 Companies Act 2008, s 77(2), s 77(3).

of discipline as would be the case with employees. There is lack of basis for accounting authorities to be subjected to a correction in their conduct. Where accounting authorities' conduct fell short of the standard required, the discipline fitting such conduct is of appropriate accountability such as removal from the board and liability for recovery of any loss, cost or damages caused to the company.[1201]

ii. Public Finance Management Act

The PFMA sets out certain responsibilities and duties for the accounting authority and executive authority.[1202] For the purposes of the thesis, the focus lies with the provisions that relate to the enforcement of liability against accounting authorities responsible for the control and management of SOCs.[1203] Section 1 of the PFMA includes, amongst other entities the board of a public entity within the definition of an 'accounting authority.'[1204] Moreover, the PFMA sets out specific fiduciary duties[1205] and other duties[1206] for such accounting authorities of SOCs. Two forms of actions may be taken where accounting authorities failed to discharge their duties as per law, namely, civil and criminal actions. It is notable that Part 1[1207] deals with disciplinary procedures whereas Part 2[1208] deals with criminal procedures.

In terms of the disciplinary proceedings section 83 of the PFMA clearly provides for the duties for which board members may face disciplinary action. Notable relevant parts of section 83 of the PFMA provide as follows:

> (1) The accounting authority for a public entity commits an act of financial misconduct if that accounting authority willfully or negligently—
>
> (a) fails to comply with a requirement of section 50, 51, 52, 53, 54 or 55; or

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1201 Companies Act 2008, s 71(1); *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC) [79].

1202 As section 1 of the PFMA defines them, accounting authority and executive authority; Public Finance Management Act 1999, s 49 and 50.

1203 Defined in section 1 of the PFMA as a body or person mentioned in section 49.

1204 Public Finance Management Act 1999, s 49: where a public entity has a board or a controlling body that is the accounting authority of that public entity. Where a public entity has no controlling body then it refers to the chief executive officer of that public entity.

1205 Public Finance Management Act 1999, s 50.

1206 Public Finance Management Act 1999, s 51.

1207 Public Finance Management Act 1999, s 81-85.

1208 Public Finance Management Act 1999, s 86.

(b) makes or permits an irregular expenditure or a fruitless and wasteful expenditure.

(2) If the accounting authority is a board or other body consisting of members, every member is individually and severally liable for any financial misconduct of the accounting authority.

……

(4) Financial misconduct is a ground for dismissal or suspension of, or other sanction against, a member or person referred to in subsection (2) or (3) despite any other legislation.

Financial misconduct in the context of the PFMA is provided for under Chapter 10 Part 1. What appears from the chapter is that there are various forms of misconduct which are tailored to specific sections in the PFMA.[1209] The different forms of misconduct relate to duties assigned to various functionaries in institutions of government.[1210] For current purposes, the financial misconduct applicable is that which applies to accounting authorities and thus being the board of directors of SOCs. The discussion of the various sections is therefore pertinent and forms part of the thesis.[1211] No definition for financial misconduct is stipulated in the PFMA. However, section 83 of the PFMA lists conduct that may constitute financial misconduct. Financial misconduct by accounting authorities is twofold. It transpires if an accounting authority fails to comply with the provisions in the relevant sections of the PFMA[1212] such as sections 50 and 51 or when an accounting authority makes or permits an irregular expenditure or a fruitless and wasteful expenditure.[1213] Subsection 1(a) lucidly indicates that the duties of directors of public entities are broad. Critical to the section is that it pronounces an offence of financial misconduct. Financial misconduct should be understood in context. That is because the PFMA primarily aims to ensure prudent financial management in public entities and other government-controlled entities.[1214]

1209 Public Finance Management Act 1999, s 83(1) – (4).

1210 Public Finance Management Act 1999, s 83(1) – (4).

1211 Public Finance Management Act 1999, s 83 and 84.

1212 Public Finance Management Act 1999, s 83(1)(a), which refers to sections 50, 51,52, 53, 54 or 55 being the sections which an accounting authority must comply with.

1213 Public Finance Management Act 1999, s 83(1)(b).

1214 Public Finance Management Act 2008, s 3.

Significantly, the section betokens that every member of an accounting authority may be individually and severally liable for the offence of financial misconduct. This liability is limited to cases where willfulness or negligence was established as provided for in sub-section 1.[1215] In terms of subsection 4[1216] the sanction for financial misconduct can be a dismissal or suspension or other sanction, in addition to punitive measures in any other legislation. The latter is confirmed because subsection 4 stipulates that it finds application *'*despite [what] any other legislation*'* may provide. The section itself does not clarify the exact procedure that needs to be followed in determining and subsequently meting out a sanction against an accounting authority. Section 84 of the PFMA, however, provides guidance as to the procedure that must be followed during the disciplinary proceedings, namely:

> A charge of financial misconduct against an accounting officer or official referred to in section 81 or 83, or an accounting authority or a member of an accounting authority or an official referred to in section 82, must be investigated, heard and disposed of in terms of the statutory or other conditions of appointment or employment applicable to that accounting officer or authority, or member or official, and any regulations prescribed by the Minister in terms of section 85.

It is noted that section 85 of the PFMA clarifies the situation as to how the procedure unfolds. Section 85 indicates that the National Treasury significantly determines whether disciplinary proceedings should be taken against an accounting authority or criminal charges should be levelled against such accounting authority.[1217] The provision clearly enlarges the scope of persons who may act against non-executive directors in SOCs. The clarity is that it may no longer just be shareholder ministers or other unimplicated non-executive directors.[1218] It is submitted that the National Treasury may have *locus standi* if the infringement relates to a financial duty in the PFMA.

Section 84 of the PFMA determines that for financial misconduct to be established, a charge should have been laid against an accounting authority. The matter must,

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1215 Public Finance Management Act 1999, s 83(1).
1216 Public Finance Management Act 1999, s 83(4).
1217 Public Finance Management Act 1999, s 85(c) and (d).
1218 Companies Act 2008, s 20(4).

moreover, be investigated, heard and disposed of 'in terms of the statutory or other conditions of appointment or employment applicable to that accounting officer or authority,' including in terms of any applicable regulations made by the Minister[1219] in line with section 85 of the PFMA. It is unclear what is meant by 'statutory' in section 84 and 'other conditions.' It is assumed that 'statutory' may mean statutory provisions in any law applicable to the disciplinary procedures involving the parties mentioned in the various sections.

Section 84 refers to '*any* regulations prescribed by the Minister in terms of section 85,' thereby affording the Minister a wide discretion to draft applicable regulations.[1220] The regulations made would serve the purpose of clarifying how disciplinary or criminal procedures with respect to breaches of duties under the PFMA may be determined by the National Treasury and the Auditor General.[1221] According to the relevant section of the PFMA, the regulations can be varied for different categories of accounting authorities.[1222] It is unclear what the rationale of varying the regulations based on the designation of parties may be. It is assumed that it is so drafted to provide for the different public entities and different officials involved in the entities. It is further unclear whether regulations produced by the Minister[1223] (of Finance) would be applicable in the disciplinary processes of accounting authorities placed in various departments only or also in alleged offences unrelated to finance. The above concern may be addressed in the wide provision of section 85(2)(f) of the PFMA. Furthermore, variations in regulations across different accounting authorities and other functionaries may breed a spectre of inconsistencies.

In addition, it is unclear whether the reference to disciplinary proceedings in section 84 of the PFMA is suitable where liability for breach of directors' duties in SOCs is an issue. Disciplinary proceedings invoke a regime aimed at disciplining with a view to encouraging behavioural change. Section 85 of the PFMA provides for the laying of criminal charges for the financial misconduct. It is assumed that the criminal proceedings will be conducted in terms of part 2 and specifically section 86 of the PFMA.

1219 Public Finance Management Act 1999, s 1 – defines 'Minister' as the Minister of Finance.
1220 Own emphasis.
1221 Public Finance Management Act 1999, s 85(1)(a). Own emphasis.
1222 Public Finance Management Act 1999, s 85(2)(a)(ii).
1223 Public Finance Management Act 1999, s 1, defines 'Minister' as the Minister of Finance

Section 86 of the PFMA provides for liability on conviction to a fine or imprisonment for a predetermined time. It appears from the wording of section 86 of the PFMA that the offences and penalties provided for are not for financial misconduct only but provides for an assortment of misconduct on the part of accounting authorities. For instance, section 86(3) of the PFMA indicates that the misconduct referred to is in reference to accounting authorities' duties provided for in sections section 50, 51, or 55 of the PFMA. The various sections of the PFMA discussed above do not provide for the occurrence of a loss, costs or damages suffered by an SOC and caused by an accounting authority as a prerequisite for a fine or other forms of punishment. It is accordingly submitted that accountability may follow even in the absence of loss, cost or damage to the SOC. As is apparent from section 83, financial misconduct thus relates to the misconduct of non-executive directors committed in breach of their duties stipulated in the PFMA.[1224] Although the provisions of the PFMA relating to director liability focus on financial[1225] aspects of institutions to which it applies,[1226] cognisance should be taken of the duties of directors provided for in section 50 (fiduciary duties) and section 51 (general duties) of the PFMA.

Notably, some of the duties and responsibilities assigned to directors are of a compliance nature and are, in practice, performed by management rather than non-executive directors.[1227] However, non-executive directors have an accounting duty in relation to these duties. It is accordingly justifiable for non-executive directors to 'monitor' executive directors in the performance of such duties in the daily operations of SOCs. When it comes to holding non-executive directors of SOCs accountable for how SOCs' finances have been handled, an overall awareness of the provisions is required. A good understanding of the PFMA may help establish breaches of governance duties by non-executive directors. This is because one would look at the duties they are required to perform under that legislation.

It appears with respect to the regulations[1228] that functionaries named have a critical role

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1224 Public Finance Management Act 1999, s 50 and 51.
1225 Public Finance Management Act 1999, s 2.
1226 Public Finance Management Act 1999, s 3.
1227 Public Finance Management Act 1999, s 52, s 53, s 54 and s 55.
1228 Public Finance Management Act 1999, s 85(1)(a).

to play in ensuring that the provisions of the PFMA and the duties of accounting authorities are discharged properly.[1229] Furthermore, such an initiative will require that SOCs measure their performances periodically. This will ensure that breaches of director duties are picked up before those who may have caused harm to an SOC have exited the SOC. It is important that any functionary that is to be involved in any proceedings aimed at establishing liability against directors should be well-versed in the provisions of the PFMA. The scope of breach of duties and associated impact should all come to bear on non-executive directors who breached their duties.

Whereas the PFMA primarily concerns itself with financial prudence in SOCs, it also provides for the National Treasury to monitor budgets.[1230] It is submitted that section 6 of the PFMA provides wide powers to the National Treasury.[1231] The powers and functions apply to public entities as they apply to other institutions of government.[1232] In this regard section 6(2)(c) of the PFMA provides that the National Treasury is responsible for monitoring and assessing the implementation of the PFMA. How this should be implemented in practice is unclear. It is however proposed that request for quarterly management accounts of SOCs as a way to begin monitoring expenditure and financial management of SOCs should be employed. This places a large responsibility on National Treasury. Accounting authorities especially those who are non-executive should complement the efforts of the National Treasury in ensuring financial accounting in SOCs.

Another aspect is that although SOCs may generate their own financial resources, the Treasury should have regard to how the resources are in fact spent or invested. It may appear that allowing National Treasury to be involved in how public entities conduct their financial affairs may improve public welfare and reduce misappropriation even in the SOCs. It is suspected that the National Treasury has not been using its powers under section 6 of the PFMA to reign in SOCs' expenditure patterns. Such a failure may have allowed substantial mismanagement of financial resources at SOCs. As accounting authorities, non-executive directors and all other directors must account for financial management in SOCs.

1229 Public Finance Management Act 1999, s 85(1)(c) and (d).
1230 Public Finance Management Act 1999, s 6.
1231 Public Finance Management Act 1999, s 6.
1232 Public Finance Management Act 1999, s 6(2)(c).

It is submitted that mechanisms should be put in place for the National Treasury to constantly monitor and where appropriate guide the financial affairs of SOCs. Consistent compliance with the duties under sections 50 and 51 of the PFMA should be monitored and evaluated periodically to ensure accountability. Without a constant monitoring and evaluation of how directors are discharging their duties under the sections, it is difficult to see how accountability will be measured and any liability meted out. The concern is that any liability as contemplated would be unstructured and thus dependent on an investigated event.[1233] An investigation would itself be dependent on a reported incident. Without a reported incident, corporate governance breaches would in turn go unnoticed and unpunished. It is imperative that corporate governance breaches in SOCs should be exposed in the normal course of business. This would be the case with regular monitoring and evaluation of directors' conduct. Corporate governance of SOCs should not be dependent on chance discoveries of directors' breaches.

The PFMA provides for scope to investigate breaches.[1234] This is commendable as it suggests that enforcement cannot happen without evidence. Notwithstanding that investigation of breach is supported, the PFMA defers the conduct of investigation to other instruments applicable to accounting authorities. If there are no instruments applicable to accounting authorities dealing with investigation of breach of directors' duties, it becomes problematic. Exactly where the powers to investigate lie and how they are initiated are procedural aspects that remain unclear. Should any breaches of directors' duties remain unacted upon for a considerable time other legal implications may set in. Another concern is that investigation presupposes a reported case of breach of duties. There may be instances of breach of directors' duties without a report of such breaches. These could be breaches happening in the normal course of directors discharging their duties without a prominent event of breach. As suggested below, these instances of breach should be uncovered during systematic performance evaluations of SOCs.

It is a common feature of law that claims for debt[1235] or damages of various kinds should be lodged within a certain period of time. After such time the claims would have

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1233 Public Finance Management Act 1999, s84.

1234 Public Finance Management Act 1999, s 84.

1235 Being the asset side of an obligation: M M Loubser, *Extinctive Prescription*, (1st end Juta 1996) 2.

prescribed, leaving the plaintiff without any recourse. The Companies Act provides for prescription in terms of proceedings against directors suspected of breach of duties to a company.[1236] The provision is to the effect that proceedings against a director for any loss, costs or damages to the company should not be commenced with more than three years after the act or omission that gave rise to that liability. The said statutory provision,[1237] it is argued, would override any practices in the common law since its enactment was to substitute the common law and bring certainty in this area.[1238] Without clear provisions on the procedures to follow in investigating breaches of duties and with timelines, many breaches of directors' duties may go with impunity.

iii. Enforcement of directors' liability under enabling statutes

In Chapter 1 of this thesis it was indicated that SOCs are created in at least one of two ways, namely, through their own enabling law or directly out of the Companies Act.[1239] The effect of this is that an SOC created in terms of its own statute will be required to observe not only its statute, but also the provisions of the Companies Act as well as the provisions of any other statute that applies to SOCs.[1240] Consequently, SOCs are regulated from a variety of legal instruments including codes of good practice.[1241] Of importance for this thesis is to examine the legal regime of enabling laws pertaining to SOCs with a view to analyse any applicable provisions relating to the enforcement of liability for governance breaches against non-executive directors.

As a start, it may be noted that the enabling laws surveyed do not specifically provide for any form of enforcement of liability against non-executive directors. Essentially, the absence of an approach through which to effect liability and the mechanisms to enforce it in enabling statutes by implication defer such mechanisms to other relevant

1236 Companies Act 2008, s 77(7). See also the Prescription Act, 1969, s 10(1) which provides for the extinction of debt after the lapse of a prescribed period of time.
1237 Companies Act 2008, s 77(7).
1238 Loubser, *Extinctive Prescription*, 4.
1239 Companies Act 2008, s 8(1) (2)(a).
1240 For the example the Public Finance Management Act 1999, s 3, and the National State Enterprises Bill, 2024, should it become law.
1241 For example, the King Code Reports I, II, III and IV.

instruments.[1242] That means non-executive directors would be subject to the existing regime of holding all other directors accountable. Notwithstanding, it is submitted that enabling statutes that do not provide for the appointment, composition, duties and powers of boards of directors should do so. That would serve to ensure that no uncertainty exists as to the duties of a board of directors of an SOC established in terms of the enabling Act. An enabling Act of an SOC should include sufficient information as to the board's duties to act as a comprehensive guide as to what is expected of the board and the consequences of noncompliance with its requirements. It is thus necessary and of value to investigate the enabling Acts of the SOCs.

As indicated in 5.6 above,[1243] SOCs enabling statutes may not provide for director liability. A few of them may provide for some form of accountability. An example is the Broadcasting Act which established the SABC. It is notable that section 15 of the Broadcasting Act provides for the removal of board members from the board of directors of the SABC. It states the following:

> The appointing body may remove a member from the office on account of misconduct or inability to perform his or her duties efficiently after due inquiry and upon recommendation by the Board.

Although the Broadcasting Act does not contain any provisions as to how the members of the SABC would be held accountable for the breach of the duties they must fulfil, section 15 signifies accountability. Furthermore, applied properly and consistently, the section on removal can lead to some form of accountability.

It is positively noted that section 17 of the Broadcasting Act determines that a person who is conflicted may not be appointed to the board of the SABC. Ideally, the section should additionally provide for what would happen if a director is later discovered to have concealed conflict of interest to secure appointment. The section merely provides that a meeting where a conflict of interest should have been disclosed and was not would be rendered null and void.[1244] It is also unclear at which stage the nullity would be

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1242 Such as the Companies Act 2008 and the Public Finance Management Act 1999.

1243 Refer to Chapter 5 para 5.6; 5.6.1, 5.6.2, 5.6.3, 5.6.4 and 5.6.5.

1244 Broadcasting Act 1999, s 17(3).

pronounced and if an additional board meeting will have to be held for this purpose. The Broadcasting Act is also silent about the effect of the proceedings being declared null and void or on any liability being imposed on the director in question. It is submitted that as the Broadcasting Act being the enabling Act of the SABC does not provide for director liability, the Companies Act will have to be utilised for this purpose.

In conclusion, the Board of the SABC is not subjected to a performance assessment in terms of the Broadcasting Act. Therefore, discovery of breaches of corporate governance duties would most probably have to be subjected to possible reports by the media. Corporate governance breaches not reported on will go unnoticed and continue to harm the SABC. To prevent this from occurring the SABC's performance should be reported on which will in turn reflect the performance of the board of directors. Notwithstanding the absence of the usual provisions of strict accountability, the Broadcasting Act requires of the board to submit audited financials[1245] as well as an annual report[1246] to the Minister failure of which would result in a breach of their duties to the SABC.

5.15. Audited financials and annual general meetings as mechanisms and platforms for accountability

Directors' duties discussed under Chapter 4 implicate other lawful activities of SOCs. These activities such as ensuring audited financials are an annual occurrence for mostly public companies.[1247] SOCs, irrespective of how they are incorporated, will have reporting obligations under the PFMA. This means that they will have their financials annually audited. In this regard, the PFMA states as follows:

> 55. Annual report and financial statements. —
>
> (1) The accounting authority for a public entity—
>
> (a) must keep full and proper records of the financial affairs of the public entity;
>
> (b) prepare financial statements for each financial year in accordance with generally accepted accounting practice, unless the Accounting Standards Board approves the application of generally recognised accounting practice for that public entity;
>
> (c) must submit those financial statements within two months after the end of the

1245 Broadcasting Act 1999, s 25.
1246 Broadcasting Act 1999, s 28.
1247 Companies Act 2008, s 30(1)(2)(a).

financial year—

(i) to the auditors of the public entity for auditing; and

(ii) if it is a business enterprise or other public entity under the ownership control of the national or a provincial government, to the relevant treasury.

The excerpt indicates that public entities such as SOCs are required to have their financial statements audited and even tabled in Parliament.[1248] In addition to being tabled in Parliament, audited financial statements should necessitate an annual general meeting for the shareholder.[1249] The holding of annual general meetings for SOCs may serve as a platform for directors to openly account for their performance to the shareholder representative. Furthermore, it is a platform for the shareholder representative to remain well-informed about the financial affairs of the SOC they represent as the shareholders. It is submitted that an annual general meeting may equip a shareholder representative when the audited financials are tabled in Parliament to provide sufficient explanations to any questions and concerns which may arise.

For the interest of the thesis, the submission is that audited financial statements tabled at an annual general meeting further provides evidence of how the SOC is performing, and the basis upon which the shareholder representative may take critical decisions in the best interests of the SOC.[1250] For instance, it is at this platform the shareholder representative may resolve to hold directors accountable for the performance they have just presented to the annual general meeting. It may further be a platform to dismiss the board of directors and to facilitate a process of appointing a new one. It is apparent from the provisions of section 67(8) of the Companies Act that the items which can be transacted at an annual general meeting are crucial aspects in relation to the corporate governance of an SOC. It is, moreover, submitted that shareholder representatives should know their duty and right in terms of calling for a shareholders' meeting where the board of directors appears unwilling to do so.[1251] The National State Enterprises Bill also provides for the

1248 Public Finance Management Act 1999, s 55(3).

1249 Companies Act 2008, s 61(7).

1250 Companies Act 2008, s 61(8).

1251 Companies Act 2008, s 61(12)(a)(b)(c).

audit of the holding company[1252] once it becomes law.[1253]

5.16. Conclusion

In improving the governance of SOCs, it remains necessary to have a proper legal structure to hold directors accountable.[1254] In holding directors accountable for the breaches of governance duties, provisions on implementing such accountability are necessary. The most critical organ charged with duties of governing a company is the board of directors. The Companies Act and the PFMA both provide for director's duties in SOCs.[1255] Correspondingly, the statutes provide for liability[1256] for directors with respect to their conduct when carrying out their governance duties. It has been noted that the critical statutes do not distinguish between executive and non-executive directors' liability. The distinction between executive and non-executive has been noted in certain statutes and in codes of good governance practices. In addition, the common law discusses and lays out certain nuances of executive and non-executive directors.

The common law indicates that non-executive directors are in a much less strict position because they are intermittently involved with the company in comparison to executive directors who are salaried employees of the company. However, neither the common law nor statutory law provides that liability for non-executive directors would be truncated based on their engagement with an SOC. In other words, the law treats liability for breach of directors' duties the same way regardless of their engagement status within the company. Additionally, that non-executive directors are only intermittently involved within a company is no defence for the breach of duties.

It is important that the various designations of directors on a board are treated fairly, and such treatment correspond to the expected duties, albeit to the duties they should perform and actually perform. As indicated, duties of executive directors entail day-to-day

1252 National State Enterprises Bill 2024, s 2(b).
1253 National State Enterprises Bill 2024, s 14.
1254 Public Finance Management Act 1999, s 49(1)(2)(a).
1255 Companies Act 2008, s 76(3) and Public Finance Management Act 1999, s 50 and 51.
1256 Companies Act 2008, s 77(2)(3) and Public Finance Management Act 1999, s 83(2).

involvement within the SOC while those of a non-executive director are more intermittent but at all times engaged and involved. More is expected of the executive directors for the success and overall performance of the SOC. Although this is true, the value of an oversight role that non-executive directors are to perform cannot be underestimated.

Non-executive directors may play an important role in strategically guiding executive directors to ensure that SOCs are controlled and managed properly. Accordingly, non-executive directors should when fulfilling these roles be held to account for the oversight and ancillary roles played on a board of directors of SOCs. It therefore may not be a shield for non-executive directors to be lightly exonerated for any poor performance of SOCs which in any event point to governance breaches, or to acquire a 'get out of jail' ticket on the premise that they are not involved in the day-to-day management of the SOC. Arguably, both executive and non-executive directors should be held accountable for breaches of their duties. Overall, however, non-executive directors may perhaps carry the most accountability for the success or failure of corporate governance in SOCs.[1257]

This may be the case when regarding the responsibility of non-executive directors to supervise and monitor executive management.[1258] The Companies Act does not make it a duty for non-executive directors to monitor and supervise executive management. However, as will be seen below, the Canada Business Corporations Act makes it a board duty.[1259] Thus, there may be a basis to suggest that non-executive directors monitoring and supervising executive management should be made an express duty.

The Companies Act allows other interested parties to bring a lawsuit on behalf of a company if those who should primarily have brought it are themselves the subject of the problem.[1260] Concerning the Myeni case, the shareholder representative was not the subject of the complaint. It appears that the shareholder representative's instructions were not

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1257 *Francis v New Jersey Bank* 432 A 2d 814 (NJ 1981); Felix I. Lessambo, *The International Corporate Governance System: Audit Roles and Board Oversight*, (2014 Palgrave Macmillan) 47-48.

1258 Broadcasting Act 1999, s 14(2); Canadian Business Corporations Act 1985, s 102.

1259 Canada Business Corporations Act 1985, s 102(1). Refer to chapter 6 for more on the topic.

1260 Companies Act 2008, s 165(1)(2)(5) and Companies Act 2008, s 157(1). See also *Hlumisa Investment Holdings (RF) Ltd and Another v Kirkinis* 2020 (5) SA 419 (SCA) [32].

heeded by Ms Myeni because she tended to deal directly with the President of South Africa in matters of the SAA. The court found that the President had directed Ms Myeni not to go ahead with a particular business deal.[1261] This manner of dealing undermined several business opportunities and rendered the shareholder representative powerless as he, too, would report to the highest office. It is submitted that the complexity of control, management and ownership of SOCs render effecting liability and accountability for governance breaches weak. In some instances, as illustrated in the Myeni case, it is evident that SOCs may fail in part because of the level of political interference in their operations.[1262]

The Companies Act or the PFMA have no scope to extend liability beyond the board of directors of a company. It is accepted that there are instances where a shareholder may be held liable for breach of duty to a company.[1263] It is generally possible where the shareholder is at the same time the director of the company.[1264] In the case of SOCs, the shareholder is a mere representative of the State and owns no material, personal interest in the SOC. Accordingly, such shareholder may contribute to the collapse of an SOC.

Furthermore, the Companies Act and the PFMA do not have provisions to regulate unique scenarios that prevail in SOCs where breach of directors' duties may have been caused by illegal instruction from the shareholder representative or from the highest office. Under these circumstances, it should be noted that nobody would be held liable and accountable for the financial losses and governance breaches in SOCs. The resultant effect, however, is that the SOC may collapse. To improve on this complex relationship, which is only detrimental to SOCs, the scope of liability should extend to all those who may seek to act on behalf of an SOC. The argument is that express or ostensible authority should be visited with corresponding levels of accountability. It might be extremely difficult to properly govern SOCs if there is scope of authority that lies outside that which the law defines,[1265] and for which there is no effective accountability.

1261 Organisation *Undoing Tax Abuse NPC v Duduzile Cynthia Myeni* [2020] 3 All SA 565 (GP) [79].

1262 Thabane and van Deventer, Pathological Corporate Governance Deficiencies, 3-5.

1263 *Cook v Deeks* [1916] 1 AC 554 (PC).

1264 *Cook v Deeks* [1916] 1 AC 554 (PC).

1265 The Constitution of the RSA, 1996, s 85(2)(a)(c)(e); s 92(1)(a), s 92(2)(3)(a)(b). see also Companies Act 2008 s 66(1) and the Public Finance Management Act 1991, s 63(2), s 50 and s 51.

What is not clear from the various legal instruments is the scope of liability that can be meted out on certain functionaries beyond the board of directors. Their involvement in discharging certain governance responsibilities may on some occasion be detrimental to good corporate governance. However, there is no mechanism provided for in the Constitution or the PFMA to hold the executive to account for their poor governance performance. For instance, the Constitution, the PFMA and the Companies Act do not provide for what must happen when an SOC has suffered losses or damages at the hands of the executive authority representing the shareholder in that SOC. Furthermore, the discussed legal instruments remain silent when it comes to the role or influence the President of the Republic may exert on an SOC through its shareholder representative or board of directors.

Accepting that the Constitution provides for accountable governance,[1266] it does not go far enough in that the accountability that is placed in the statutes is only targeted at board directors and none to those in high offices, despite the fact that they too may occasion poor governance in SOCs. The Constitution, however, must be seen as devolving accountability for the administration of public entities which includes SOCs on ministers.[1267] With this submission the effect must be that ministers must discharge some level of accountability which is to hold non-executive directors to account for the duties the law places on them.[1268]

Enforcing liability against non-executive directors in SOCs in South Africa is a matter that has not been treated with the effort it deserves. In fact, the enforcement of liability that has been to date achieved took nearly extra-ordinary steps to accomplish.[1269] What is of concern is that SOCs are regulated from a multiplicity of legal instruments some of which are limited in their application. The two Acts that play the most important role in the enforcement of accountability being the Companies Act and the PFMA. Though the two Acts differ in their approach to enforcement of liability, if properly enforced, it may lead

1266 The Constitution of the Republic of South Africa 1996, s 195(1)(f).

1267 The Constitution of the Republic of South Africa 1996, s 92(2), s 3(b).

1268 The Companies Act 2008, s 66(1).

1269 Reference is made to Ms Dudu Myeni being declared a delinquent at the instance of OUTA: *Organisation Outdoing Tax Abuse and Another v Myeni and Others* [2020] 3 All 578 (GP) [285].

to accountability for directors breaching their duties. The Companies Act provides for directors' duties as well as for liability in the event of a breach of these duties.[1270] For liability to follow the presence of loss, costs and damages to the company needs to be confirmed.[1271]

The PFMA also provides for the accountability of its accounting authority but does not specifically require loss, costs and damages as a prerequisite. It provides for other sanctions which resemble punishment in both civil and criminal matters. In essence, the PFMA provides for fines and imprisonment.[1272] It is submitted that regardless of whether the Companies Act or the PFMA is utilised, enforcing liability against non-executive directors will ensure that only competent and committed candidates will venture to serve on the boards of SOCs. Without proper enforcement of the principles of these statutes corporate governance will not see improvement at SOCs.

It may be counterproductive to have directors' duties placed in laws but which nobody is prepared to enforce, let alone assess how they have been discharged or not discharged. For SOCs, regular assessment of directors' performance is critical given the importance of the institutions to public welfare and to economic growth.

Conversely, while it is accepted that non-executive directors can be held liable in terms of the available legal instruments, some concerns remain. The concerns stem largely from a haphazard nature of initiating the process of holding non-executive directors accountable. The pertinent concern is that the legal instruments regulating corporate governance duties of directors fail to provide for evaluation of directors' performance.

Enforcement has to start from a standardised premise and not be left to the emergence of scandals or other sensational media reports. The submission is that without regular board performance evaluations, it will in practice be difficult to establish a good number of breaches of board duties. Random enforcement of accountability which are not based on a holistic performance of a board are discouraged. Had there been regular evaluation and monitoring of board performance in SOCs in South Africa, the actual scope of misconduct of non-executive directors in SOCs would have been known.

1270 Companies Act 2008, s 76(3) and s 77(2) and (3).

1271 Companies Act 2008, s 77(2)(a)(b).

1272 Public Finance Management Act 1999, s 82.

It is accordingly recommended that SOCs should adopt a policy framework where board performance evaluations are regulated. The outcome of such performance evaluations would positively inform decisions that are in the best interest of the SOCs. In this regard, the King IV Report's recommendation of regular board evaluations are concurred with. The evaluations will not only serve to measure the boards' contribution to the success or failure of an SOC but will also indicate the nature of their performance. The performance of a board, properly evaluated will feed into the mechanism of subjecting directors to account for the way they discharge their governance duties to an SOC. It may be suggested that the lack of a mechanism to ensure that non-executive directors conduct their duties in accordance with the legal regime should be replaced with the era where constant monitoring and evaluation become the norm.

It is the way of not only accounting for results an SOC is achieving, but also to justify why it exists. It also helps to expose what actions non-executive directors in those institutions are engaging in. The suggested approach may enhance public knowledge of how their SOCs are being managed. The performance evaluations of boards and by reflection, that of SOCs, would form the basis of the information presented to Parliament by the accountable executive of a particular SOC. In addition to performance evaluations, the study found that the audited financials tabled both in Parliament and at a general meeting should assist the shareholder representative to enforce any required accountability. The essence of audited financials and of presenting them to an annual general meeting and to Parliament is one which can be taken advantage of by the shareholder representative.

CHAPTER 6

NON-EXECUTIVE DIRECTOR LIABILITY IN AUSTRALIA, CANADA AND THE UNITED KINGDOM

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6.1. Introduction

In this chapter, just like the position of SOCs in South Africa was discussed, three jurisdictions (Australia, Canada and the United Kingdom (UK),[1273] will be discussed with the intention of ascertaining whether there are lessons available for recommendation to South African law and policy makers. In the introduction of this thesis, it was specifically indicated that only three jurisdictions would be selected for comparison.

It is notable that all three jurisdictions have SOCs which are owned and controlled by the respective governments like the position in South Africa.[1274] It is on this basis that it is justified to conduct a comparative study. Like South Africa, the SOCs in the three jurisdictions[1275] are subject to the applicable company law as well as the common law and other enabling legislation. Despite the similarities, differences in the regulatory environments are present. These similarities and differences will form the focus of this chapter. The evaluation of the three jurisdictions will proceed in accordance with non-executive directors' duties as well as accompanying accountability for dereliction of directors' duties. The chapter discusses both the statutory instruments and the common law applicable in each jurisdiction with a keen focus on those features that may enhance the position for SOCs in South Africa.

6.2. THE POSITION IN AUSTRALIA

6.2.1. Introduction

Economically, Australia is ranked as the 12th wealthiest country in the world with its economy buttressed by various economic activities.[1276] Constitutionally, Australia is a federal[1277] state and is part of the Commonwealth of Nations.[1278] Australia

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1273 Australia, Canada and the United Kingdom.

1274 For example ESKOM SOC Limited, SABC SOC Limited and Transnet SOC Limited.

1275 Australia, Canada and United Kingdom.

1276 Worlddata.info: The World's largest economies: <https://www.worlddata.info/largest-economies.php > accessed 05 December 2023.

1277 Tony Greenwood, David Williamson, Jim Armitage and Gary Rumble, 'Corporatization and Privatization of State-Owned Enterprises; Some Australian Perspectives, (1994) 17 Hastings Internal and Comparative Law Review 741.

1278 See Preamble of the Original Commonwealth of Australia Constitution Act, 1901.

is ruled by the Monarch of the United Kingdom.[1279] As a federal state, it encompasses government-owned entities at the various levels of government, namely local, state, provincial, and federal levels.[1280] Although there are government owned entities akin to SOCs, some attempt at privatisation has nonetheless been made.[1281] Despite the attempts to privatise some government owned companies, the Australian government still owns a number of corporations such as the Australian Broadcasting Corporation[1282] and the Snowy Hydro Limited.[1283] Notably, the Australian government owns and controls corporations, across states. These corporations assume several formations such as statutory corporations or government-owned or government-controlled corporations.[1284]

An understanding of the importance of non-governmental interference in the fulfilment of good corporate governance of government owned corporations has led to the Commonwealth Government withdrawing from the oversight of the day-to-day operation of many of its business and statutory authorities.[1285] The withdrawal equally applies to SOCs since they fall under what is known as statutory corporations. The purpose of the withdrawal is to allow those appropriately charged with the governance of the entities to do so unhindered. The withdrawal of government from operations of various entities, including statutory corporations, however resulted in certain ramifications which were expressed as follows:[1286] 'It has been expressed that some problems were identified.' The problems identified include where Ministers changed from the effective legal governance of SOCs; instead

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1279 See the Preamble of the Original Commonwealth of Australia Constitution Act, 1901.

1280 Australia in Brief <https://www.gov.au/about-us/publications/australia-in-brief < accessed 13 February 2024.

1281 FA Bland, 'Some implications of the Statutory Corporation' (1937) 9 The Australian Quarterly 37; Greenwood and others, 'Corporatization and Privatization of State-Owned Enterprises; Some Australian Perspectives' 741.

1282 Australian Broadcasting Corporation Act, 1983, s5 and s 78(1). How the ABC is run <https://about.abc.net.au/how-the-abc-is-run -> accessed 13 February 2024.

1283 Corporate Governance < https://www.snowyhydro.com.au/about/corporate-governance/ >accessed 13 February 2024.

1284 Yee-Fui Ng, 'In the Moonlight: The Control and Accountability of Government Corporations in Australia' (2019) 43 Melbourne University Law Review 304.

1285 Christos Mantziaris (Consultant), *Department of Parliamentary Library, Ministerial Directions to Statutory Corporations,* 1998, Research Paper No. 7 1998-99, i

1286 Mantziaris, *Department of Parliamentary Library, Ministerial Directions to Statutory Corporations,* 1998-99, i.

they exercised informal influence.[1287] The problem of Ministers side- stepping the law and going on to impose their own will on the SOC has likewise been observed in South Africa.[1288]

The court's finding underscored the constitutional importance of SOCs in interpreting legislation governing them.[1289] Previously, it appeared that courts were accustomed to interpreting legal provisions of statutory corporations in line with convention. There are indications of a departure from the conventional interpretation in this area of law.[1290] The second problem, which is a solution viewed from another perspective, is that, in recent years it has become evident that courts of law are interpreting legal provisions concerning accountable organs in statutory corporations by giving regard to the Constitution of Australia.[1291]

The position highlights common concerns faced by SOCs in South Africa regarding their governance structures. Whereas boards of directors should attend to the governance of SOCs, it is evident that Ministers retain not only powers, but also certain influence, which they can use outside the sanctioned purposes of the allocated powers. The sanctioned purposes are those related to the SOC's business interests. How shareholder representatives may use their self-imposed influence remains unguided.[1292]

Australia's statutory corporations are comparable to South Africa's SOCs.[1293] From this point of view it is of value to traverse the Australian model of statutory corporations to establish how they may differ from the SOCs in South Africa. Importantly, the nuances which offer lessons to SOCs in South Africa provide a healthy focus for this discussion. As can be deduced from the discussion above, it

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1287 *Hughes v Australia* (1997) 146 ALR 1.

1288 For instance, at the SABC where the Minister was involved in pathological failure of corporate governance.

1289 Mantziaris, *Department of Parliamentary Library, Ministerial Directions to Statutory Corporations,*
1998-99, i; the Original Commonwealth of Australia Constitution Act, 1901.

1290 *Hughes v Australia* (1997) 146 ALR 1.

1291 Mantziaris, *Department of Parliamentary Library, Ministerial Directions to Statutory Corporations,*
1998-99, i; the Original Commonwealth of Australia Constitution Act, 1901.

1292 *Hughes v Australia* (1997) 146 ALR 1.

1293 Note that some SOCs in Australia go by different names, such as statutory corporations, corporations law companies and government business enterprises: Mantziaris *Department of Parliamentary Library, Ministerial Directions to Statutory Corporations,* 1998-1999.

appears that the Australian Parliament sought to regulate statutory corporations by balancing the attendant powers. Whereas all role players would have a distinct role to play in the governance of the corporation, some powers are reserved for the Minister responsible for a specific corporation.[1294] It would be interesting to establish the scope and nature of powers that are reserved for a minister responsible for a corporation. What is apparent is that powers reserved are for use to intervene in the affairs of a corporation to streamline its governance and efficient administration.[1295] This alone suggests that a Minister would intervene when the governance of a corporation is going off the prescribed statutory path.[1296] Moreover, Parliament's regulation of ministerial intervention appears to be rooted in the Constitution providing for responsible governance.[1297]

Australian statutory corporations are established through own legislation whilst still acceding to the principles of the Corporations Act.[1298] Generally, other corporations such as those under the category of being government-owned are established directly under the Corporations Act.[1299] The study explores the regulation of statutory corporations in Australia with respect to directors' duties and accountability. Conversely, similar to the South African position, the duties of directors have been partially codified in the Corporations Act.[1300] In light hereof and to provide background to the statutory position, the common law position is discussed, albeit briefly. Thereafter, an evaluation of the Corporations Act,[1301] which applies to all corporations, irrespective of the corporations' establishment, is provided.

In Australia there is, in addition to the Corporations Act and enabling laws of SOCs, the Public Corporations Act.[1302] The Public Corporations Act applies to

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1294 Darrel Barnett, Statutory Corporations and the Crown, (2005) Volume 28, UNSW Law Journal, 191.

1295 State-Owned Enterprises Act 1992, s 37.

1296 State-Owned Enterprises Act 1992, s 37.

1297 Commonwealth of Australia Constitution, 1906, item iv; Benjamin B Saunders, Ministers, Statutory Authorities and Government Corporations: The Agency Problem in Public Sector Governance, (2022), University of Melbourne Law Review 697.

1298 Victorian Government Solicitor's Office: 'What Can Statutory Corporations Do': <https://www.vgso.vic.gov.au/what-can-statutory-corporations-do> (accessed 20 June 2023).

1299 Victorian Government Solicitor's Office: 'What Can Statutory Corporations Do': <https://www.vgso.vic.gov.au/what-can-statutory-corporations-do> (accessed 20 June 2023).

1300 Corporations Act 2006, s 179(1).

1301 Corporations Act 2001.

1302 Public Corporations Act 1993; Government Business Enterprises Act 1995; State-Owned Enterprises Act 1992.

SOCs in Australia.[1303] Section 6 of the Public Corporations Act indicates that a public corporation is an instrumentality of the Crown which holds its property on behalf of the Crown.[1304] It has substantial provisions regulating directors' conduct and provides for their duties and liability. Of interest is that it provides for holding directors in public corporations accountable for the performance of a public corporation. The requirement of a performance statement for the year ahead stipulated in the Public Corporations Act is a critical inclusion recommended for South African SOCs.[1305] This not only ensures that the SOC has a direction but also indicates the nature of performance the SOC will be working towards. This makes it easier for non-executive directors to monitor executive management. The Public Corporations Act also includes duties of a reporting nature which, when performed, would keep the Minister responsible informed of the affairs of a public corporation.[1306] This will also be evaluated below.

6.2.2. Common law duties and liability for directors in Australia

The duties of directors at common law are very similar to their codified duties under the Corporations Act. At common law, directors have fiduciary duties and the duty of care, skill and diligence. These duties are all owed to the company.[1307] Langford describes the fiduciary duties as follows:

> A foundational fiduciary duty of company directors in both Australia and the UK is the duty to act bona fide in the interests of the company. This duty which requires directors to act in good faith in what they consider to be the interests of the company as a whole, is central to the fiduciary loyalty exacted of directors.[1308]

The application to the fiduciary duties in Australia tends to be reduced to the duty of loyalty and of good faith.[1309] Courts have summed up this duty as one which permeates all other aspects of fiduciary duties, inclusive of the duty of care, skill

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1303 Public Corporations Act 1993, s 5(1).

1304 Public Corporations Act 1993, s 6.

1305 Public Corporations Act 1993, s 13.

1306 Public Corporations Act 1993, s 13 and 14.

1307 *Claremont Petroleum NL v Cummings* (1992) 10 ACLC 286; 10 ACSR 43.

1308 Rosemary Teele Langford, 'The Duty of Directors to Act Bona Fide in the Interests of the Company: A Positive Fiduciary Duty? Australia and the UK Compared' (2011) 11 Journal of Comparative Law Studies, 215; *The Bell Group Ltd (in liq) v Westpac Banking Corp* (No 9) [2008] WASC 239 [4574], [6304], (2008) 39 WAR 1.

1309 Langford, 'The Duty of Directors to Act Bona Fide in the Interests of the Company, 227.

and diligence.[1310] In *Chew v R*,[1311] the court summarised the requirements of the duty to act in good faith as including the following, namely, that a director:

> *(1)* must exercise their powers in the interests of the company, and must not misuse or abuse their power;
>
> (2) must avoid conflict between their personal interests and those of the company;
>
> (3) must not take advantage of their position to make secret profits; and
>
> (4) must not misappropriate the company's assets for themselves. The words "in the best interests of the corporation" emphasise the significance of the relevant constituencies - in particular, the shareholders as a whole, and the creditors in the case of impending insolvency. This duty is imposed not to secure compliance with the various requirements of the Corporations Act, but, as it was at general law, to prevent abuses of directors' powers for their own or collateral purposes.

However, whether fiduciary duties are reduced to only one broad duty of loyalty or are divided into many names has not been at issue. The issue, from a common law point of view, has been the standard with which to hold directors liable for breach of the duties.[1312] There has been a fair amount of comment[1313] on how the common law has accounted for poor directorships in the past, especially that of non-executive directors. Since they are not full-time employees of a company the sustained viewpoint was held that they should not be burdened with much of the affairs of the company.[1314] Neither should they be judged harshly or for mere errors of judgment unless their conduct was gross and egregious.[1315]

The main concern related to the existence of lack of skills for those appointed as it was practice that they did not have to exhibit sophisticated skills.[1316] While the lack of an appropriate standard to hold directors accountable prevailed, it did not mean that directors' duties were lowered based on the level of skill a director possessed. The problem was the threshold to hold a director accountable. The threshold

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1310 Langford, 'The Duty of Directors to Act Bona Fide in the Interests of the Company, 227.

1311 *Chew v R (*1991) 5 ACSR 473 [499].

1312 Bird and Hill, 'Regulatory Rooms in Australian Corporate Law' 560-563.

1313 John H Farrar, 'Corporate Governance, Business Judgment and the Professionalism of Directors', (1993) 6, Corporate and Business Law Journal, 2; Vanessa Finch, Company Directors,55.

1314 *Re Brazilian Plantations and Equitable Ltd* (1911) 1 Ch 425 [437].

1315 *Re Equitable Fire Insurance Co Ltd* (1925) Ch 407 [428]–[429].

1316 *Re Equitable Fire Insurance Co Ltd* (1925) Ch 407 [428]–[429].

was too low and buttressed by the practice of not requiring directors to exhibit high levels of skill, care or diligence in the conduct of their duties. This would mean that many breaches would result as long as those who caused them were understood to be without certain skills. On this point, some distinction is required between skills and care. Skill would point to the ability to perform a task, whereas care would point to informed steps taken in performing an act or in deciding on a course of action.[1317] Would it be said that those directors who did not have requisite skills were equally unable to exercise care in the performance of their duties?

This situation has since evolved and most jurisdictions have begun to embrace an improved standard in relation to the duty of skills, care and diligence, culminating into a stricter requirement for accountability on directors.[1318] The position with non-executive directors also changed in that Australian courts demonstrated a shift in thinking towards the actions of non-executive directors. In *Daniels v Anderson,*[1319] the court indicated that it expected a high standard of care and diligence of directors, including that of non-executive directors. The court stated as follows:[1320]

> As the complexity of commerce has gradually intensified…the community has of necessity come to expect more than formerly from directors…In response the parliaments and the courts have found it necessary in legislation and litigation to refer to the demands made on directors in more exacting terms than formerly; and the standard of capability required of them has correspondingly increased. In particular, the stage has been reached when a director is expected to be capable of understanding his company's affairs to the extent of actually reaching a reasonably informed opinion of its financial capacity. Moreover, it is under a statutory obligation to express such an opinion annually. I think it follows that he is required by law to be capable of keeping abreast of the company's affairs and sufficiently abreast of them to act appropriately if there are reasonable grounds to expect that the company will not be able to pay all its debts in due course and he has reasonable cause to expect it.

The standards through which directors may be held liable are no longer highly

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1317 *ASIC v Healey* [2011] FCA 717; Cassim and Others, *Contemporary Company Law*, 754.

1318 *Daniels v Anderson,* (1195) 13 ACLC 614.

1319 *Daniels v Anderson,* (1995) 13 ACLC 614; *Statewide Tobacco Services v Morley* (1990) 2 ACSR 405.

1320 *Commonwealth Bank of Australia v Friedrich* (1991) 9 ACLC 946 para 956; ACSR 115 [126].

flexible. There has been a tightening of the standards; only allowing limited room for escape from director liability. The duties of directors require serious commitment, and the position should not be seen as a mere status symbol. The duties of directors are exacting in nature, and the success of the company may be dependent on how they are discharged.[1321] It may be argued that the evident departure from the long-established common-law application of subjective standards has been driven by the need to improve corporate governance.[1322] The movement appears to be heading towards a permanent objective standard test.[1323]

6.2.3. The Corporations Act, 2001 (the Corporations Act)

The Corporations Act[1324] applies to various forms of companies which are incorporated in terms of its provisions. Its application also affects corporations that are unincorporated in terms of the Act but are doing business in Australia.[1325] The application of section 5 of the Corporations Act, moreover, encompasses statutory corporations and government owned enterprises.[1326]

The regulation of the duties of directors of statutory corporations and government owned enterprises, which are directly incorporated under the Corporations Act, accordingly, falls under its provisions. It is appropriate to examine the Corporations Act's provisions relating to directors' duties and accompanying accountability. Inquiry into directors' duties is necessary because holding non-executive directors accountable begins with ascertaining their duties. It is to the performance of the duties one would seek to trace accountability. Liability of non-executive directors follows from the way these duties are discharged. If these duties are breached, the next inquiry is for the directors to account for the breach.

6.2.3.1. Directors' duties under the Corporations Act

The Corporations Act provides for directors' duties. This signals an intention to depart from the common law as the only pinnacle source of directors' duties, to a

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1321 Cassim and others, *Contemporary Company Law,* 751 [2021].

1322 Cassim and Others, *Contemporary Company Law,* 751 [2021].

1323 Finch, 'Company Directors, 203; *Commonwealth Bank of Australia v Friedrich* (1991) 9 ACLC 946 [956]; Bird and 'Hill, Regulatory Rooms in Australian Corporate Law' 568.

1324 Corporations Act, 2001.

1325 Corporations Act, 2001, s 5(2)(a), s7(i)(ii).

1326 Corporations Act 2001, s 5 and 5E.

partially codified position.[1327] The Corporations Act itself states that it does not provide a conclusive and ultimate scope of duties for directors.[1328] The view that the Corporations Act has partially codified directors' duties has also been expressed by others in the field.[1329] The Corporations Act provides for what it terms as the general duties of directors of a corporation. These duties are set out in sections 180 - 184 of the Act and are discussed below.[1330]

(a) Section 180; care and diligence – civil obligations

Section 180 of the Corporations Act determines that:

> (1) A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:
>
> (a) were a director or officer of a corporation in the corporation's circumstances; and
>
> (b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.

The duty of care and diligence in the Corporations Act like that of South Africa[1331] appears to have been transformed from its common law position to a contemporary one. Bird and Hill highlight that the duty of care that was required of directors in the past was undemanding.[1332] This characterisation may have stemmed from the gross negligence test[1333] that was the determinant for a breach of the duty of care. The duty of care and diligence was not seen exclusively objectively as it contained nuances of subjectivity. Mere errors of judgment on the part of a director were not concerned with.[1334] It would mean that much more would be required to hold a director accountable. This may no longer hold as every decision of directors needs to be made carefully and with all other duties in check.

1327 Corporations Act 2001, s 180-184.
1328 Corporations Act 2006, s 179(1).
1329 Report of the HIH Royal Commission (Owen Report), Volume 1, Department of Treasury, (2003), xiii-xiv, Cambridge University Press 240.
1330 Corporations Act 2001, s 180-184.
1331 See section 76(3) of the Companies Act 71 of 2008.
1332 Joanna Bird and Jennifer Hill, 'Regulatory Rooms in Australian Corporate Law' (1999) XXV: 3 Brook Journal of International Law 561.
1333 *Overend & Gurney Co v Gibb* 5 L.R.E and I App. 408, [486-87], (1872).
1334 *Re Brazilian Rubber Plantation & Estates Ltd* [1911] 1 Ch 425, [436-437].

Paragraphs (a) and (b) of section 180 of the Corporations Act appear to raise a reasonable person's test as it requires of a director to discharge his or her duties as any reasonable person would, occupying the same office and with the same responsibilities. The subjective test[1335] which has for a long time reduced the standard of care required of directors is accordingly replaced by an objective test. Furthermore, it is apparent from section 180 of the Corporations Act[1336] that a breach of the duty would raise civil obligations to the corporation or in favour of whoever may suffer loss or damage arising from the lack of care and diligence.

However, the Corporations Act incorporates a defence for duties discharged with care and diligence based on appropriate information relied upon by a director. In this instance, the provision avails the business judgment rule to directors as a defence to avoid liability provided they had acted in reliance on information upon which they should rely while acting in the best interests of the corporation, and in good faith.[1337] Reasonable care and diligence would therefore have been exercised, provided the director, when taking a decision, had relied on information supplied from knowledgeable, accepted, and regarded functionaries, and within this scope of reliance on information supplied. It is not the foregone conclusion that a director would blindly rely on any information. This stance will be applicable if a director has some appreciation of the nature of information and transactions on which a decision should be made.

Anything that may raise suspicion should render a director alert and possibly make him or her ask further questions to clarify aspects of the information supplied.[1338] Should the information appear highly unreliable a director should decline to rely on it. This may only happen if a director has some level of skill to assist him or her in adjudging the information as unreliable.

The duty of care and diligence appear to require of non-executive directors to act informed and properly.[1339] In terms of section 180 of the Corporations Act a director would have adhered to his or her duty to act with care and diligence, if before taking

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1335 *Re Equitable Fire Insurance Co Ltd* [1925] Ch 407.

1336 Corporations Act 2001, s180.

1337 Corporations Act 2001, s 180(2)(a)(b)(c)(d).

1338 Geoffrey Flint, Non-Executive Directors' General Law Duty of Care and Delegation of Duty: But do we need a Common Law Duty of Care? (1999) 9, Bond Law Review, 199.

1339 *ASIC v Healy* [2011] FCA 717.

a decision affecting or on behalf of the company, took steps to ensure it is the best decision for the company.[1340] Not only would a director be required to be informed of a matter upon which his or her decision is required, a director should be informed about the business affairs of the company itself.[1341] It is submitted that a significant knowledge of the business affairs of a company may go a long way in assisting non-executive directors to discharge their governance duties in a professionally competent manner. It is this preferred level of knowledge of the business of the corporation which may assist non-executive directors not to feed nonchalantly on any information they are given by executive management. For SOCs in South Africa the recommendation is that non-executive directors appointed to boards of SOCs should have a level of knowledge in the business affairs to which they are appointed. It might be one way to guarantee at least a minimum contribution to the business of the SOC by a non-executive director.

The duty of care and diligence is also recognised in South Africa and is, as in Australia, regulated in both statutory and common laws.[1342] The Companies Act provides for the duty of care, skill and diligence that directors of companies should discharge. The understanding is that the provision graduates from a more subjective approach to a more demanding one, where the duty would be assessed objectively.[1343] Australia has moved away from burdening the duty of care and diligence with subjective assessment.[1344] This means that directors would be required to do more and not merely rely on their level of skills to justify the loss or damage they may cause. In any event, a director acting without knowing merely perfects his or her negligence. The right approach would be to only act once one has been properly informed about a matter on which they are required to act.[1345]

With the enactment of directors' duties in the Companies Act, the South African position regarding the duty of care and diligence is to be regarded as less transformed in comparison to how the duty is treated in Australia.[1346] As evidenced

1340 Corporations Act 2001, s 180(1)(a)(b).
1341 *Francis v United Jersey Bank* (1981) 432 A 2d [821]-[823]; *Daniels v Anderson* (1995) 37 NSWLR 438.
1342 Corporations Act 2001, s 180(1)(a)(b); Companies Act 2008, 76(3)(c)(i)(ii).
1343 Cassim and others, *Contemporary Company Law*, 747-751 [2021].
1344 *Daniels v Anderson* (1995) 37 NSW LR 438; (1995) 16 ACSR 607 (NSW).
1345 *Miletic v Capital Territory Health Commission* (1995) 69 ALJR 675 [677].
1346 Cassim and Others, *Contemporary Company Law,* 750-751.

above,[1347] Australia is applying an objective test in assessing the duty of care.[1348] South Africa still accommodates the common law approach of assessing the duty of care and all other duties.[1349] The South African approach lacks rigour and requires some development going forward. What may be required is to ensure that there is compliance with the duty on the part of non-executive directors. While a board of directors regularly acts collectively, it is noted that non-executive directors would have significant scope of actions based on information supplied by executive management.

(b) Section 181; good faith – civil obligations

Section 181 of the Corporations Act is paraphrased as follows: *'*Good faith has been reduced to the duty of loyalty to the corporation'.[1350] It presupposes that a director will act only in the best interest of the corporation and for a proper purpose. The provision states that acting outside the scope of good faith infringes on the duty to act in good faith and is a contravention upon which accountability may be based and liability against a director pursued. This duty when breached results into a civil obligation[1351] that needs to be satisfied by the director accountable for the breach.[1352]

(c) Section 182; use of position – civil obligations

While serving in that capacity, directors engage in various transactions all of which should be in the interests of the corporation. According to section 182 of the Corporations Act, directors are required to use their powers and position for the purpose for which they were conferred. Directors are not allowed to use their director status to harvest advantages for themselves or for others. Any conduct aimed at placing advantages outside of the corporation is an abuse of a director's position, for which contravention and accountability should follow.[1353] The position in South

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1347 Refer to (a) above and to footnote 543.

1348 Cassim and Others, *Contemporary Company Law*, 751; *Daniels (formerly practising as Deloitte Haskins & Sells) v Anderson* (1995) 37 NSWLR 438; (1995) 16 ACSR 607 (NSW).

1349 Cassim and Others, *Contemporary Company Law*, 750; *Fisheries Development Corporation of SA Ltd v Jorgensen* 1980 (4) SA 156 (W).

1350 Rosemary Teele Langford, 'The Duty of Directors to Act Bona Fide in the Interest of the Company: A Positive Fiduciary Duty? Australia and the UK Compared' (2011) 11 Journal of Comparative Law Studies 215.

1351 For example, avoiding misuse of company information.

1352 Corporations Act 2001, s 181(2).

1353 Corporations Act 2006, s 182(1)(a)(b).

Africa is similar to the Australian position. Section 76(2) of the Companies Act prohibits a director from using his or her position to gain an advantage for him or herself or for any other person.[1354] This means that a director has a duty to only use their position for the interests of a company to which they are appointed. In the context of SOCs in South Africa, any maladministration or other forms of poor corporate governance is a breach of this provision.[1355]

(d) Section 183; use of information – civil obligations

Section 183 regulates how information which belongs to the corporation is circulated, and for what purpose. Evidently, from the section itself, information of the company is that of the company; it belongs to the company and must only benefit the company.[1356] A director, past or present should not use the corporation's information to benefit themselves or others or to cause harm to the corporation.[1357] Directors being loyal to the corporation would act with care and would ensure that the information of the corporation is not used for the profit of others but for the corporation itself. The Companies Act[1358] contains a provision similar to the Australian position with respect to how company information should be used.[1359] The Companies Act[1360] arguably goes further than the Corporations Act,[1361] in that it places a duty on a director to inform the board, at the very earliest opportunity, if information in his or her possession may cause harm to the company.

(e) Section 184; good faith, use of position and information – criminal offences

Section 184 of the Corporations Act takes the duties that were provided for as civil obligations in prior sections and determines them as criminal offences.[1362] The section introduces a criminal offence in respect of the use of a director's position and information of the corporation in a manner outlawed by the provision. Contrary

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1354 Companies Act 2008, s 76(2)(a)(i).
1355 Companies Act 2008, s 76(2).
1356 Corporations Act 2001, s 183(2).
1357 Corporations Act 2001, s 183(1)(a)(b).
1358 Companies Act 2008, s 76(2)(a)(i)(ii).
1359 Companies Act 2008, s 76(2)(b).
1360 Companies Act 2008, s 76(2)(b).
1361 Section 183 of the Corporations Act 2001 does not place a duty on a director to timely inform the board if in possession of information which can harm the corporation.
1362 Corporations Act 2001, s181, s 182 and s 183.

to the breach of good faith in section 181 of the Corporations Act, section 184,[1363] affords criminal liability to directors who breach the duty as defined in the section.[1364] According to the section, dishonesty and recklessness on the part of the director in the use of his or her position or information relevant to the corporation may lead to a breach of the duty of good faith. Good faith includes acting honestly in the corporation's best interest.[1365]

The Companies Act does not provide for criminal offences with respect to breach of directors' duties under section 76. Notwithstanding, the Companies Act provides for criminal liability which may affect both executive and non-executive directors.[1366] However, the Companies Act provides for clear liability for breach of governance duties against directors who breach these duties.[1367] The contemplation reveals that although the provisions of directors duties under section 76 do not provide criminal offences, it does not exonerate errant directors as other provisions of the Companies Act still provide for criminal liability.[1368] Furthermore, there are indications in other sections that directors can still be held criminally liable for the way they may have conducted the affairs of the company.[1369]

It is fitting to observe that section 184(1) determines the crux of the criminal offences for breach of the duties under section 181, 182 and 183 as being acting recklessly and intentionally in breach of governance duties.[1370] The criminal liability provisions in the Corporations Act appear to correlate with the provisions in the Companies Act.[1371] To this end there is not much to suggest for the South African position save to encourage prudent enforcement and application of the existing provisions.

6.2.3.2 Directors' Liability under the Corporations Act

Having been assigned substantial powers in relation to the corporation's

1363 Corporations Act 2001, s 181.
1364 Corporations Act 2006, s 184(1)(a)(b)(c)(d) and ss 2 and 3.
1365 Lowry John, The Duty of Loyalty of Company Directors: Bridging the Accountability Gap Through Efficient Disclosure, (2009) 68 Cambridge Law Journal, 614.
1366 Companies Act 2008, s 214 (1)(c), and s 216(a).
1367 Companies Act 2008, s 77(2)(3).
1368 Companies Act 2008, 214(1)(c) and s 216(a).
1369 Companies Act 2008, s 213- s 215.
1370 Corporations Act 2001, s 184(1)(a)(b).
1371 Companies Act 2008, s 214(1)(c).

governance, directors should account for how the powers have been used.[1372] The duties set out in the Corporations Act are coupled with an indication of the nature of the obligations which may arise upon a breach of the duty stated. The duties generally attract civil obligations.[1373] However, a breach of good faith impacting on abuse of a director's position and of company information attracts both civil and criminal liability.[1374] It does not appear that the threshold to succeed with a claim for breach is gross negligence on the part of a director who stands accused of having breached his or her duties to the corporation.[1375] Rather, it appears that dishonest intention to gain an advantage for oneself and being reckless with the performance of one's governance duties are the threshold used to impute liability on a director for breach of the duty of acting in good faith.[1376]

Section 1(3) of the Small Business section in the Corporations Act contemplates that directors may be held liable for breach of their duties. It further makes provision for holding directors liable for racking up debts for the corporation when it was unable to service the debts.[1377] A quick observation here is that some SOCs in South Africa trade from one loss to another, whilst still accumulating further debts.

A thorough reading of the section,[1378] however, indicates that the liability is not merely for debts. The liability extends to losses that may have been suffered from a director's breach of a director's duties. The section further states that the duties are those provided for in section 5(3) of the Corporations Act.[1379] Any ambiguities with respect to the resultant impact and repercussions of a breach of duties under section 5(3) is clarified in section 1(3) of the Corporations Act. In other words, the breach of duties mentioned in section 5(3) would attract liability on directors, when it has led to a loss or debt to the company. The conclusion is reached out of logic and contextual interpretation as liability cannot be unhinged from debt or loss to the company.[1380]

In *ASIC v Adler,* to reiterate the rationale for meting out pecuniary penalties as a

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1372 Corporations Act 2001, s 198A (1)(2).
1373 Corporations Act 2001, s 181, s 182, and 183.
1374 Corporations Act 2001, s 184.
1375 Corporations Act 2001, s 184(1)(a)(b), ss 2.
1376 Corporations Act 2001, s 184(1)(a)(b), ss 2.
1377 An example of such SOCs is SAA.
1378 Corporations Act 2001, 1(3) under the Small Business Guide.
1379 Corporations Act 2001, s 5.3 under the Small Business Guide.
1380 Companies Act 2008, s 76(2), ss 3.

deterrent to would be offenders of breach of directors' duties, the court held as follows:

> It is well established that the principal purpose of a pecuniary penalty is to act as a personal deterrent and a deterrent to the general public against a repetition of like conduct.[1381]

Section 180 provides for the duty of care and diligence as a civil obligation and treats the duty with an objective standard. The treatment of the duty with an objective standard leads to a much stricter approach. This is in line with the approach by the courts. In *Daniels v Anderson*,[1382] the court applied the objective standard with respect to the duty of care and diligence. A distinction between executive and non-executive directors, although acknowledged, has received little support from the Supreme Court in the *AWA Appeal* case.[1383] The contemporary understanding is that each director has a role to play, and none is expected to be passive on a board.[1384] That means that a non-executive director would not be in a position to advance a defence of a lack of certain skills, knowledge or experience that they do not possess.[1385] A non-executive director would be treated according to objectively required standard of care and diligence in discharging the duties of the company. With respect to section 180(1) a court applies a certain test to determine breach, namely:[1386]

> In determining whether a director has exercised reasonable care and diligence one must ask what an ordinary person, with the knowledge and experience of the defendant might have expected to have done in the circumstances if he or she was acting on their own behalf.

It appears that skill is not considered in the determination of reasonable care and diligence a director would be required to discharge. What then may be the defence of a non-executive director who may have acted in breach of their duties, but who

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1381 *ASIC v Adler* (1995) 37 NSWLR 438; Report of the HIH Royal Commission (Owen Report), Directors' Duties and Liability 244.

1382 *Daniels v Anderson* (1995) 37 NSWLR 438.

1383 *AWA v Daniels* (1992) 7 A C S R 759, [866-67]; AWA Appeal (1995) 16 A C S R 607, 664.

1384 *AWA v Daniels* (1992) 7 A C S R 759, [865-68]: "However, it appears that functions can no longer be divided in such a way as to give a director an entirely passive role. All directors are now required to perform certain minimum functions."

1385 Report of the HIH Royal Commission (Owen Report), Directors' Duties and Liability 244, 245.

1386 *ASIC v Adler* (2002) 41 ACSR 72.

was so advised to act or rely on certain information? Such a director may be able to rely on the business judgement rule. The business judgement rule is believed to have developed in the United States of America alongside the duty of care.[1387] It is understood to link very closely to the aspect of decision making. In other words, when a director decides, such a decision should be based on certified information. The business judgment rule has been defined to refer to any decision taken or not taken in respect of a matter relevant to the business operations of the corporation based on sound reliance on information.[1388]

Consequently, the business judgment rule is a defence aimed at protecting honest directors. In essence, the business judgment rule finds application in a situation meeting the following requirements:

> When directors make a decision in good faith, with care and on an informed basis, and reasonably believing it to be in the best interest of the corporation, they will have no liability for the results of that decision, however bad those may be.[1389]

The Corporations Act provides for the business judgment rule as a defence for directors who act informed, with care and in the best interests of the corporation. Pertinently, section 180(1) of the Corporations Act provides as the requirement for a director to enjoy the safe harbour offered by the business judgment rule, that such a director must act as follows:[1390]

> (a) make the judgment in good faith for a proper purpose; and
>
> (b) do not have a material personal interest in the subject matter of the judgment; and
>
> (c) inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and
>
> (d) rationally believe that the judgment is in the best interests of the corporation.

A director must reasonably believe in making the decision that it is indeed in the best interest of the corporation, in addition to observing the requirements in

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1387 Havenga, The Business Judgment Rule, 27.

1388 *ASIC v Adler* (2002) 41 ACSR 72; *ASIC v Rich* (2009) NSWSC 1229; Corporations Act, 2001, s180(3).

1389 Havenga, The Business Judgment Rule, 28.

1390 Corporations Act 2001, s 180(2)(a)(b)(c)(d).

paragraphs (a)-(c).[1391] The business judgment rule is a defence that a director who acted on behalf of the company under the conditions set out in section 180(2) may utilise to escape liability.[1392] The business rule does not, however, offer protection for every breach in the book. It is limited to a breach of care and diligence which happened while pertinent requirements were in effect. For instance, a breach of duties provided for under section 181 and 182 of the Corporations Act fall outside the realm of the business judgment rule protection.[1393] The duties set out in sections 181 and 182 of the Corporations Act are those done in contravention of the provisions of the Act and for own gain or for others gains[1394] other than the corporation.[1395]

South Africa (as discussed in Chapter 5)[1396] has also introduced the business judgment rule in its Companies Act.[1397] It is apparent from section 76(4) that the business judgment rule is aimed at protecting directors who have performed their governance duties in accordance with the law.[1398] Therefore, the protection offered by the business judgment rule in South Africa under the Companies Act is comparable to the Australian scheme.[1399] In SOCs for instance, there is usually executive management on whom a board of directors would rely for the day-to-day performance of the SOC. It is upon the executive management, which is tasked with the day-to-day management of the SOC, that the board of directors will rely to make decisions for the SOC. The converse is that, where a board of directors makes decisions uninformed or against the advice and information provided by executive management, on whom the board must rely, such board should be held accountable if the decisions made are wrong. In the SAA case, the court heard that the board chair consistently acted contrary to the information supplied by the executive management.[1400] For instance, the late Ms Myeni constituted her own committee

1391 Corporations Act 2001, s 180(2).
1392 Corporations Act, 2001, s 180(2)(a)(b)(c)(d).
1393 Corporations Act 2001, s 180(2)(a)(b)(c)(d).
1394 *ASIC v Visard* (2005) 145 FCR 57, 28-29; Corporations Act, 2001, s 183.
1395 Report of the HIH Royal Commission (Owen Report), Directors' Duties and Liability, 246; *Hospital Products Ltd v United States Surgical Corporation* (1984) 55 ALR 417, 488.
1396 Refer to 5.8, Chapter 5.
1397 Companies Act 2008, s 76(4).
1398 Companies Act 2008, s 76(4)(a).
1399 Companies Act 2008, s 76(4)(a)(i)(ii)(iii), (b)(i)(ii); Corporations Act 2001, s 180(2)(a)(b)(c)(d).
1400 *Organisation Undoing Tax Abuse NPC v Duduzile Cynthia Myeni* [2019] ZAGPPHC 957 (12 December 2019) [62], [125].

composed largely of middle managers,[1401] thereby sidelining executive management on whom the board of directors should have relied. That meant the decisions the board of SAA made lacked any form of care and interest of the SAA and were therefore in bad faith. It may appear that at board level decisions made should be buttressed on certain information as their foundation. In other words, a board of directors can make decisions only on sound information.

In addition to liability flowing from the general directors' duties,[1402] provision has been made in the Corporations Act for liability resulting from trading under insolvent circumstances.[1403] The rationale for this level of accountability stems from the fact that trading under insolvent circumstances connotes negligence as the company is perpetually being indebted, usually to pay salaries rather than to break even and be profitable. Directors' actions allowing a corporation to trade while being insolvent may amount to recklessness and may lead to liability for saddling the corporation with additional debts.[1404]

In South Africa, the Companies Act prohibits various forms of reckless trading.[1405] An SOC which is unable to pay its debts as they become due and payable should be considered to be trading recklessly.[1406] It is doubtful whether provisions relating to reckless trading in the Companies Act are in practice being applied to SOCs in South Africa. For instance, SAA and ESKOM as SOCs had over the years amassed substantial amounts of debts they will continue to service for years to come.[1407] It is submitted that this has been an incident of reckless trading and continuous absorption of more debts should not have been allowed. All board members on the ESKOM board who allowed it to continue trading while it went on taking more debts should have been held to account. All indications were that ESKOM was unable to already service the debts incurred, to allow it to take on more debts was clearly against the clear provisions of the Companies Act. The continuous trading by

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1401 *Organisation Undoing Tax Abuse NPC v Duduzile Cynthia Myeni* [2019] ZAGPPHC 957 (12 December 2019) [65]-[66].

1402 Corporations Act 2001, s 180-184.

1403 Corporations Act 2001, s 588G.

1404 Corporations Act 2001, s 5.3 of the Small Business Guide.

1405 Companies Act 2008, s 22(1)(2).

1406 Companies Act 2008, s 22(2).

1407 See an article titled South Africa to take half of struggling Eskom's debt, by Olivia Kamwenda-Mtambo and Wendell Roelf and Kopano Gumbi: <https://www.reuters.com/world/africa/south-africas-eskoms-debt-2023-02-22/ >accessed 26 November 2023; Eskom Debt Relief Amendment Act Bill, 2025, s 1.

ESKOM and other SOCs while they were clearly commercially insolvent and otherwise is an example of a lack of compliance. The submission is not made that debts are in their nature generally an indication of reckless trading. SOCs, through the leadership of non-executive directors, should however borrow responsibly.[1408] Debts should be to utilise either to expand the business operations of the SOC than for example to sustain jobs that add no value to the sustenance of the SOC. Eskom's current situation indicates an improvement from consistent load shedding episodes to steady power supplies, with minimum load shedding expected going into the future.[1409]

An important feature of the Australian corporate law is the creation of the Australian Securities and Investments Commission (the ASIC).[1410] The ASIC is a creature of statute with its functions being partly to enforce director liability based on directors' duties under the Corporations Act. Whereas the Companies Act provides for directors' duties and for director liability, enforcing liability is one neglected area in the space of SOCs.[1411] South Africa has no similar institution which independently exists to reign in board directors who breach their governance duties in SOCs. While investigations[1412] and inquiries such as those led by the Public Protector and the Zondo Commission[1413] of Inquiry confirmed pervasive breaches of corporate governance in SOCs, few directors have been taken to task for the breaches. The main issue is that there is no specialised body that is expressly tasked to do so when those involved in the corporate governance of SOCs fail to hold themselves accountable.

The Government Business Enterprises Act casts a duty on the directors of a government business enterprise of preventing insolvency.[1414] In other words, the

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1408 Public Finance Management Act 1999, s 66 and s 69.

1409 SABC News < https://www.sabcnews.com/sabcnews/eskom-has-sufficient-electricity-to-meet-winter-peak-demands/ > accessed 25 May 2025.

1410 Australian Securities and Investment Commission Act 2001, s 1;Corporations Act 2001, s 1 Part 9, s 9.4; <https://asic.gov.au/for-business/starting-a-small-business-company/small-business-company-directors/company-director-liabilities-when-things-go-wrong > accessed 24 January 2025; Australian Securities Investments Commission Act 2001, s 1.

1411 Companies Act 2008, s 76(3) and s 77.

1412 Public Protector – Investigations by Categories: https://www.pprotect.org?q=content/investigation-reports-categories > accessed 17 August 2025.

1413 Judicial Service Commission of Inquiry into State Capture Report: Part 1 Volume 1, South African Airways and its Associated Companies.

1414 (1) A director must prevent a Government Business Enterprise from incurring a debt if –
(a) the Government Business Enterprise is insolvent at that time or will become

provision enjoins a director to prevent a government business enterprises becoming insolvent or further indebting it. A provision such as section 25 of the Government Business Enterprise Act is a good fit for South African SOCs.[1415] In South Africa SOCs have been trading and piling insolvency on themselves.[1416] This would be in stark contrast to section 22 of the Companies Act which prohibits reckless trading. Where directors are expected in terms of their oversight role to be aware of the financial position of an SOC it is reckless to continue taking on more debt to finance fruitless expenditure. When a SOC is not in a position to service its own debts to a point of annihilating it, it is reckless to take on more debts when it is already clear it will not be serviced. Whereas the Companies Act provides for an offence when a company trades recklessly in circumstances where those putting it through continuous debt knew, it does not require directors to prevent insolvency. While the Companies Act prohibits reckless trading, SOCs in South Africa do trade when they are insolvent and do so without accountability. Being insolvent only comes when financial resources have run out and the inability to service debts has set in.[1417]

6.2.4. Public Governance, Performance and Accountability Act 2013(PGPA Act)[1418]

Apart from the Corporations Act the Public Governance, Performance and Accountability Act (PGPA Act)[1419] also plays a key role in the corporate governance of corporations in Australia. This is apparent from the Long Title of the PGPA Act which reads as follows:

> An Act about the governance, performance and accountability of, and the use and management of public resources by, the Commonwealth, Commonwealth entities

insolvent by incurring at that time the debt or debts which include that debt; and
(b) at that time there are reasonable grounds for suspecting that the Government Business Enterprise is insolvent or would become insolvent by incurring the debt or those debts; and
(c) the director is aware of those grounds or a reasonable person in the position of director would be aware of those grounds.

1415 Government Business Enterprises Act 1993, s 25(1).

1416 Examples include Eskom SOC Limited and Denel SOC Limited.

1417 Companies Act 2008, s 22(2).

1418 Australian Government: PGPA legislation, associated instruments and policies <https://www.finance.gov.au/government/managing-commonwealth-resources/pgpa-legislation-associated-instruments-and-policies > accessed 14 May 2024.

1419 Public Governance, Performance and Accountability Act 2013.

and Commonwealth companies, and for related purposes.

Section 5 of the PGPA Act sets out the objects of the statute and states that it applies to all kinds of government owned and controlled corporations. Section 5 is of particular interest to the thesis in that it is focused on the governance and performance of Commonwealth entities, which includes Australia's SOCs. Notably, section 5 specifically provides for the object of the Act stating as follows:

> The objects of this Act are:
>
> (a) to establish a coherent system of governance and accountability across Commonwealth entities; and (b) to establish a performance framework across Commonwealth entities; and
>
> (c) to require the Commonwealth and Commonwealth entities:
>
> (i) to meet high standards of governance, performance and accountability; and
>
> (ii) to provide meaningful information to the Parliament and the public; and
> (iii) to use and manage public resources properly; and
>
> (iv) to work cooperatively with others to achieve common objectives, where practicable; and
>
> (d) to require Commonwealth companies to meet high standards of governance, performance and accountability.[1420]

The objects of the PGPA Act may be regarded as being ambitious in that they require the achievement of high standards of governance in government entities in Australia.[1421] However, if consistently applied to the entities it targets, governance of SOCs in Australia may act as a role model for many countries, including South Africa. The PGPA Act applies to government-owned companies of various formations, including what are termed Commonwealth companies.[1422] Commonwealth companies appear to be a hybrid of Commonwealth entities and corporate Commonwealth entities.[1423] Of critical importance to the thesis is not an exact classification of the entities, but to examine directors' regulated affairs in those

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1420 Public Governance, Performance and Accountability Act, 2013, s 5.
1421 Public Governance, Performance and Accountability Act, 2013, s 5 and s 6.
1422 Public Governance, Performance and Accountability Act, 2013, s 89(1).
1423 Public Governance, Performance and Accountability, 2013, s 10 and s 11.

incorporated entities owned and controlled by the government. Commonwealth entities are divided into those that are commercial and those that are not.[1424]

The commercial entities are geared towards profits and entrepreneurship. However, both the non-corporate Commonwealth and the corporate Commonwealth entities are part of the Australian government. They may be wholly owned,[1425] or their ownership may be diluted.[1426] Corporate commonwealth entities are comparable with SOCs in other jurisdictions such as South Africa.[1427] It is notable that the PGPA Act provides for directors and for accountable authorities. Accountable authorities have been defined as the governing body of a Commonwealth entity that is established by law.[1428] The submission is that reference to a governing body is reference to the governance organ called a board of directors.[1429]

Furthermore, the PGPA Act provides for directors in various sections relating to corporate Commonwealth entities.[1430] It is then appropriate to refer to a director of a Commonwealth company which has the meaning given by the Corporations Act.[1431] As is evident in the PFMA of South Africa, the words 'accounting authorities', refer to a board of directors in instances of public entities. It is used in a similar sense in the PGPA Act. What is interesting is that directors are by virtue of the name or title itself, required to account for the affairs of the entities to which they have been appointed.

6.2.4.1. Directors' duties and liability under PGPA Act

The PGPA Act not only provides for Commonwealth companies which are defined

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1424 Australian Government, Department of Finance: 'Types of Australian Government Bodies:<https://www.finance.gov.au/government/managing-commonwealth-resources/structure-australian-government-public-sector/types-australian-government-bodies > accessed 26 November 2023.

1425 Public Governance, Performance and Accountability Act 2013, s 90.

1426 Australian Government, Department of Finance: Types of Australian Government Bodies':<https://www.finance.gov.au/government/managing-commonwealth-resources/structure-australian-government-public-sector/types-australian-government-bodies > accessed 26 November 2023.

1427 Australian Government, Department of Finance: Types of Australian Government Bodies<https://www.finance.gov.au/government/managing-commonwealth-resources/structure-australian-government-public-sector/types-australian-government-bodies > accessed 26 November 2023.

1428 Public Governance, Performance and Accountability Act, 2013, s 12 (4) and s 13.

1429 Public Governance, Performance and Accountability Act, 2013, s 12 (4) and s 13.

1430 Public Governance, Performance and Accountability Act 2013, s 90-96.

1431 Public Governance, Performance and Accountability Act, 2013, s 8; Corporations Act 2001, s 9.

as those companies whose whole shares are owned by the Commonwealth; it also provides for directors' duties.[1432] Principal among the duties are to keep the Minister informed of the activities of the company. This may have the advantage of permitting the Minister to intervene where necessary if the directors appear to or actually make decisions contrary to the interests of the company.[1433] Wedutenko asserts as follows:

> Underpinning the PGPA Act is a policy that the resources held and managed by various types of Commonwealth entities are inherently public in nature and should be managed to the same standards of accountability, reporting and control.[1434]

Notable is that the duties of directors of Commonwealth entities are those designed to enhance the achievement of its objects.[1435] These duties are framed differently from the core fiduciary duties and the duty of care, skill and diligence. The duties entail clearly specified tasks that must be carried out.[1436] For instance, section 19 of the PGPA Act refers to the duty to keep the responsible Minister and the Minister of Finance informed. The subsections clarify how and what the various Ministers should be informed about.[1437] The duty falls strictly on the board of directors. The duty implies that directors must account for the way in which they govern the Commonwealth company. Section 92 of the PGPA Act places a duty on the board of directors to ensure that there is an audit committee. The Act also includes provisions which require directors to prepare a corporate plan, prepare a budget and attend to the reporting and accountability of the Commonwealth affairs.[1438]

The duties expounded in the various sections of the PGPA Act may be examined in light of the duties of directors in the Corporations Act. This may be the case as a synergy has been created with the way the PGPA Act defines 'director' by deferring to the Corporations Act.[1439] By implication, directors of the Commonwealth entities will be subject to the full scope of duties as set out in the Corporations Act.

1432 Public Governance, Performance and Accountability Act 2013, s 90- s91.

1433 Public Governance, Performance and Accountability Act 2013, s 91(1)(a)-(e).

1434 Alexander Wedutenko, The Public Governance, Performance and Accountability Act: implications for CAC bodies, (2013), Mondag Business Briefing, Mondag Ltd, 1.

1435 Public Governance, Performance and Accountability, 2013, s 91.

1436 Public Governance, Performance and Accountability Act 2013, s 19-25 and s 29.

1437 For example: keep the Minister informed of the activities of the entity and of the subsidiaries of the entity; supply information to the Minister and the Minister of Finance as they may require.

1438 Public Governance, Performance and Accountability Act, 2013, s 94, s 95, s 96 and s 97.

1439 Public Governance, Performance and Accountability Act 2013, s 8.

The further implication is that they would have the same scope of accountability as that provided for in the Corporations Act.[1440] Hill highlights the application of cross-vesting of legislation across Australia with a view to harmonise law by stating that:[1441]

> Although Australia technically has a state-based system of corporate law, the primary legislation, the Corporations Act 2001 (the Corporations Act), effectively operates as a 'federal' rule. This is due to a reference by each state of its powers relating to corporations to the federal government. This broad referral of powers constituted an attempt to unify and harmonise corporate law rules and improve efficiency in Australia.[1442]

Sections 12 and 13 of the PGPA Act are of particular importance in that they make provisions for liability in relation to gifts and other transactions. These sections appear to have mere liability for accountable authorities, officials and ministers.[1443] Accountable authorities and officials[1444] have been defined in section 13 in such a broad way as to include directors.[1445] Accountable authorities,[1446] being the governing bodies of Commonwealth entities, have expansive duties, including foundational duties of governing the entities.[1447] The way directors' duties are discharged determines the consequences for breach of the duties.

The PGPA Act can be compared to the PFMA in South Africa. For instance, the preambles of both the PGPA Act and the PFMA reflects that it is concerned with regulating financial management in a responsive and accountable manner. While both statutes require accountability and sound management of public resources,

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1440 Public Governance, Performance and Accountability Act, 2013.

1441 *Re Wakim: Ex parte McNally* (1999) 198 CLR 511; *R v Hughes* (2000) 202 CLR 535.

1442 Jennifer G Hill, The Architecture of Corporate Governance in Australia: Corporate Governance National Report, 2010, European Corporate Governance Institute, 2.

1443 Public Governance, Performance and Accountability Act, 2013, s 67, s 68 and s 69.

1444 Section 13 of the PGPA Act defines 'official' as: (2) An official of a Commonwealth entity (other than a listed entity) is a person who is in, or forms part of, the entity.(3)Without limiting subsection (2), an official of a Commonwealth entity (other than a listed entity) includes:(a) a person who is, or is a member of, the accountable authority of the entity; or (b) a person who is an officer, employee or member of the entity; or (c) a person, or a person in a class, prescribed by an Act or the rules to be an official of the entity.

1445 Section 13 of the PGPA Act defines accountable authority as; the person or group of persons prescribed by an Act or the rules to be the accountable authority of the entity, or the governing body of the entity, unless otherwise prescribed by an Act or the rules.

1446 Public Governance, Performance and Accountability Act 2013, s 12(2).

1447 Public Governance, Performance and Accountability Act, 2013, s 15, s 16 and s 19.

the PGPA Act[1448] contains a more extensive list of objectives that covers corporate governance, performance and accountability beyond the prudent management of public resources.[1449]

6.2.5 Duties of directors in enabling statutes in Australia

The Australian government owns and controls corporations serving the country's national development agenda. The discussion below focuses on a few of the corporations selected as a focal point to enrich the thesis. In this way, the study does not only focus on federal statutes such as the Corporations Act, but it also discusses enabling legislation. It is important to examine the targeted corporations' legislation in relation to the duties and liabilities of non-executive directors to form a comparative view. Coupled with this and in line with the topic of the thesis is the importance of establishing whether the legislations provide for any form of accountability against non-executive directors.

6.2.5.1 The Australian Broadcasting Corporations Act

The Australian Broadcasting Corporation Act, (the ABC Act) provides for a board of directors of the Australian Broadcasting Corporation, (the ABC).[1450] The composition and membership of the ABC board of directors is stipulated in section 12 of the ABC Act. It also provides for the appointment of non-executive directors to the board.[1451] The duties of directors are furthermore stipulated in section 8 of the ABC Act as follows:

> (1) It is the duty of the Board:
>
> (a) to ensure that the functions of the Corporation are performed efficiently and with the maximum benefit to the people of Australia;
>
> (b) to maintain the independence and integrity of the Corporation;
>
> (c) to ensure that the gathering and presentation by the Corporation of news and information is accurate and impartial according to the recognized standards of objective journalism; and

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1448 Australian Government: PGPA legislation, associated instruments and policies<https://www.finance.gov.au/government/management-commonwealth-resources/pgpa-legislation-associated-instruments-and-policies > accessed 14 May 2024.

1449 Public Governance, Performance and Accountability Act, 2013, s 5.

1450 Australian Broadcasting Corporation Act, 1983, s 3 and s 7.

1451 Australian Broadcasting Corporations Act 1983, s 12(1)(c), ss 3.

(d) to ensure that the Corporation does not contravene, or fail to comply with:

(i) any of the provisions of this Act or any other Act that are applicable to the Corporation; or

(ii) any directions given to, or requirements made in relation to, the Corporation under any of those provisions; and

(e) to develop codes of practice relating to:

(i) programming matters; and

(ii) if the Corporation has the function of providing a datacasting service under section 6A—that service; and to notify those codes to the ACMA.

The essence of the operation and management of the Australian Broadcasting Corporation is rooted in the public interest. It has to deliver to the people of Australia by keeping them informed of various governmental affairs and entertaining them.[1452] The duty to ensure that the Australian Broadcasting Corporation Act provisions are applied is placed on the board of directors. Subsection 1 states that the duty of the board of directors of the ABC is to ensure that the ABC succeeds in the greater public interest, inclusive of maintaining the ABC's independence.[1453] It is supposed that the independence of the ABC referred to includes its corporate governance and editorial services. It is also significant that the duties include the duty to ensure effective governance and adherence to the ABC Act and other laws.[1454] Subsection 2 o section 8 establishes the link between the Minister and the board of directors of the Australian Broadcasting Corporation. It states as follows:

(1) If the Minister at any time furnishes to the Board a statement of the policy of the Commonwealth Government on any matter relating to broadcasting or digital media services, or any matter of administration, that is relevant to the performance of the functions of the Corporation and requests the Board to consider that policy in the performance of its functions, the Board shall ensure that consideration is given to that policy.

From subsection 2, it is evident that the Minister may devolve certain tasks on the board of directors, including policy matters which the board is required to consider. Within this aspect, corporate governance of the corporation may be improved if the policy matters that is suggested by the Minister and considered by the board of

1452 Australian Broadcasting Corporation Act 1983, s 8(1)(a).

1453 Australian Broadcasting Corporation Act, 1983, s 8(1)(b).

1454 Australian Broadcasting Corporation Act, 1983, s 8(1)(d).

director aids to enhance the Australian Broadcasting Corporation's mandate. The takeaway on this aspect is that, where the Minister indicates a policy direction, it must be aligned to the objects of the corporation.

In terms of section 10 of the ABC Act the overall powers of the management of the ABC have been devolved on the Managing Director of the ABC, who acts under the supervision of the board of directors.[1455] This provision is contrary to where generally substantial powers are bestowed on the board of directors by an enabling Act and which allows the directors to delegate to management.[1456] Notably, in the discharge of his or her duties on behalf of the ABC, the Managing Director binds the board of directors.[1457]

The fact that non-executive directors may be bound by acts of the Managing Director is indicative that the board has to monitor the exercise of such powers. This means that the board should not co-sign itself to the mere status of being non-executive or fail to exercise due care, skill and diligence in all the transactions done on behalf of the ABC. The ABC Act does not provide for consequences for breach of governance duties by the board of directors. Although there is such an omission, the board of the ABC has overall powers with respect to the governance of the ABC and accounts for the Managing Director's performance.[1458] That omission may be explained by deferring to the PGPA Act[1459] and the Corporations Act.[1460] In the event of a breach of governance duties non-executive directors will accordingly be held accountable in accordance with the Corporations Act, the PGPA Act and the common law.

The Broadcasting Act of South Africa shows some similarities with the ABC Act in relation to the composition of the board with both having a Managing Director as part of the board.[1461] The Broadcasting Act, unlike that of the ABC Act, provides clearly that the Group Chief Executive Officer, the Chief Financial Officer and the

1455 Australian Broadcasting Corporation Act, 1983, s 10(1)(2).
1456 For example, section 66(1) of the Companies Act 2008.
1457 Australian Broadcasting Corporation Act, 1983, s 10(3).
1458 Australian Broadcasting Corporation Act, 1983, s 1(a) and s 10(3).
1459 The PGPA applies to commonwealth entities of all kinds, including the Australian Broadcasting Corporation.
1460 Corporations Act, 2001, s 5 and s 5A
1461 Australian Broadcasting Corporation Act, 1983, s 12(1)(a).

Chief Operations Officer form part of the board of the SABC.[1462] Interestingly, the composition of the board of directors of the ABC includes an elected employee.[1463] It is unclear at which level in the organisational structure this employee should be.[1464] By implication, an elected board member can be a junior staff member.[1465] An instance which may frustrate the hierarchy in the ABC as the Managing Director would, at board level, be required to account for certain performances by a junior employee on the board. Cognisance should be taken that, irrespective of the level of contribution an elected staff director may be able to make on a board, the director is part of the accounting authority of that board and thus subject to its duties.[1466]

Another distinct provision worth noting relates to the appointment of a chairperson in the ABC and the SABC. This thesis favours the approach taken by the ABC Act as it contains certain competency requirements of the person appointed as chairperson.[1467] There is no similar provision in the South African Broadcasting Act. The President merely designates one of the directors to serve as chairperson.[1468] This *lacuna* is perhaps resolved to some extent in that, and encouragingly, both the ABC Act and the Broadcasting Act provide for the appointment of competent persons *per se*.[1469] It is also hoped that this requirement of competency is maintained with staff-elected directors in the case of the ABC. Furthermore, the ABC Act and the Broadcasting Act clarify the role of the directors with respect to the affairs of the ABC and the SABC.[1470]

With relation to the removal of directors, the Broadcasting Act has been noted to be silent. It only provides for the removal of employees.[1471] Contrary thereto, the ABC Act provides for the removal of directors from office and may offer guidance

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1462 Broadcasting Act 1999, s 12(b).

1463 Australian Broadcasting Corporation Act, 1983, s 12(1)(ba).

1464 Australian Broadcasting Corporation 1983, s 13A.

1465 Australian Broadcasting Corporation 1983, s 13(2)(i)(ii).

1466 Public Governance, Performance and Accountability Act 2013, s 12.

1467 Australian Broadcasting Corporation 1983, s 12(5)(a)(c)(d)(e).

1468 Broadcasting Act 1999, s 13(3).

1469 Australian Broadcasting Corporation 1983, s 12(5)(a)-(e);Broadcasting Act 1999, s 13(4)(a)-(e).

1470 Australian Broadcasting Corporation 1983, s 8(1)(a)-(e); Broadcasting Act 1999, s 10(4), s 13(11).

1471 Broadcasting Act 1999, s 15; Australian Broadcasting Corporation Act 1983, s 18(1)(2)(a)(aa),(b)(c); Public Governance, Performance and Accountability Act 2013, s 30; the Public Finance Management Act 1999, has no similar provision of removal of board of directors from office but provides for dismissal and suspension upon financial misconduct under s 83(4).

to the South African position. Overall, the provision in the ABC Act enjoins the board of the corporation to ensure efficiency for the maximum benefits of Australian citizens. The directors serving on the ABC board can be removed for miscarriage of their governance duties. The ABC Act clearly subjects directors to the provisions of the PGPA Act in terms of which they can be removed for breach of their governance duties.[1472]

6.2.5.2. Snowy Hydro Limited

The Australian government, similar to its South African counterpart, is involved in the energy sector.[1473] However, there appears to be stability with energy generation and distribution in Australia in comparison to South Africa.[1474] The Australian government's involvement is through its own corporation called Snowy Hydro Limited (Snowy). It is incorporated under the Corporations Act, and the State is the sole shareholder.[1475] Snowy is committed to achieving best practice corporate governance, stating as follows in relation to their corporate governance:[1476]

> Our corporate governance framework and practices have been developed with regard to the provisions of the Corporations Act, the PGPA Act, GBE Guidelines, the Statement of Expectations issued by our Shareholder Ministers, and the ASX Corporate Governance Principles. Snowy moreover has an independent Board that is responsible for the corporate governance of the Company. It also has a Board Charter in which the core purpose and responsibilities of the Board are set out.
>
> Snowy has been in existence for over seventy years securing energy for Australia. It prides itself in rendering excellent service to the citizens of Australia and in paying dividends to the shareholder, the Australian government out of profits made.[1477]

1472 Australian Broadcasting Corporation Act 1983, s 18; Public Governance, Performance and Accountability Act 2013, s 30.

1473 South Africa has put a Just Energy Transition Plan to explore other sources of energy away from fossils; <http://pccomissionflow.imgix.net/uploaqds/images/PCC-analysis-and-recommendations-on-the-JET-IP-May-2023.pdf - > accessed 25 May 2025.

1474 Snowy Hydro Is A Dynamic, Integrated Energy Business:<https://www.snowyhydro.com.au/about/our-company> -accessed 28 November 2023.

1475 Our Corporate Governance: <https://www.snowyhydro.com.au/about/our-company> accessed 19 June 2023.

1476 Our Corporate Governance: <https://www.snowyhydro.com.au/about/corporate-governance/ - accessed 19 June 2023.

1477 Our Corporate Governance: <https://www.snowyhydro.com.au/about/corporate-governance/ - > accessed 19 June 2023.

It is submitted that the success of Snowy can be attributed to its good corporate governance practices over a period of time. In this regard the non-executive directors of Snowy contribute towards its good corporate governance culture. Snowy's board consists of a majority of non-executive directors and at least one executive director.[1478] Its board is described as being independent and operates on a strictly commercial basis.[1479]

The composition and competence of the independent board of Snowy clearly influences its success. Cognisance should be taken of the fact that, though the non-executive directors may form a majority on a board, any lack of independence in the exercise of their duties may negate their contribution towards excellence. This independence should be reflected in the way the board discharges its governance duties, such as in uncompromisingly putting the interests of the corporation first.

This may serve as an example for other SOCs, and especially Eskom in South Africa. The situation at ESKOM may likewise be improved provided it is led by competent directors and management executives and have a shareholder representative who accords ESKOM sufficient independence. In recent months ESKOM has started showing effects of its new leadership evidenced in the absence of frequent load shedding. Another commendable aspect is the resolve of Snowy to operate on commercial basis as a corporation.[1480] This pronouncement should be made for all SOCs in South Africa. It is accepted that as state-owned they may have social goals. That does not take away their primary objective which is to stay commercial. Without maintaining the commercial character in the way SOCs in South Africa operate, they cannot be sustainable and will find it difficult to continue in business. They may have to resort to seeking financial assistance from government, which it does not have.

As indicate above, Snowy is incorporated under the Corporations Act[1481] and must

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1478 About Leadership: <https://www.snowyhydro.com.au/about/leadership/ - > accessed 19 June 2023.

1479 About Our Company:<https://www.snowyhydro.com.au/about/our-company/ - > accessed 23 June 2023.

1480 About Our Company:<https://www.snowyhydro.com.au/about/our-company/ -> accessed 23 June 2023.

1481 Corporations Act, 2001; Public Governance, Performance and Accountability Act, 2013; Corporate Governance Principles and Recommendations 4th edition, 2019.

abide by other laws including the Australian Corporate Governance Code. Snowy's board of directors also has to comply with the duties provided for under the Corporations Act. Furthermore, as an SOC, it is subjected to the regulation of the PGPA Act, including the codes of good governance. Liability for noncompliance by non-executive directors will accordingly follow from the common law and the relevant statutes.[1482]

The position in Canada will accordingly be considered. A combined conclusion on the comparative part of this thesis relating to Australia, Canada the United Kingdom will be provided at the end of this chapter.

6.3 THE POSITION IN CANADA

6.3.1 Introduction

In economic terms, Canada is more advanced than South Africa. As a country, it also ranks well in anti-corruption measures.[1483] Canada's population[1484] sits at less than forty million people and is thus far less populated than South Africa. South Africa's population is over sixty million making it a large market to be globally competitive. Conversely, while Canada comfortably sits in position ten in the world economy, South Africa sits in thirty-ninth position among the world's advanced economies.[1485]

Therefore, it is of value to evaluate how Canadian SOCs are governed, as well as how this in turn impacts its economy. Through this evaluation, it is hoped that a determination may be made as to whether SOCs in South Africa are discharging their mandate optimally in comparison to their counterparts in Canada. Importantly, the aim is to glean from the Canadian experience how those charged with the governance of its SOCs conduct their governance duties, given their regulatory environment.

1482 Corporations Act 2001, s 1 (1.3), s 197.

1483 Statistics Canada: Gross Domestic Product, Income and Expenditure, Fourth Quarter, 2021 <https://www.150.statcan.gc.ca/n1/daily-quotdien/220301/dg22030/a-eng.htm >accessed 25February 2024.

1484 Canada Population:<https://www.worldometers.info/world-population/canada-population/>accessed 25 February 2024.

1485 Statistics South Africa: Census<https://www.statssa.gov.za > accessed 28 November 2023.

Like South Africa, Canada has its own SOCs. Canada is part of the Union and is for that purpose under the Crown of the United Kingdom.[1486] Canada is made up of four provinces, namely, Ontario, Quebec, Nova Scotia and New Brunswick.[1487] Effectively, it is a federal State with national and provincial government entities.[1488] The SOCs in Canada are popularly known as Crown corporations.[1489] Crown corporations are defined and described as corporations wholly owned by the Crown. The further definition and description are that Crown corporations are formed by legislation and may be formed by incorporation under the Canada Business Corporations Act (the CBC Act).[1490] Furthermore, Crown corporations are regulated by the Canada Business Corporations Act and under Part X of the Financial Administration Act (FAA).[1491]

It is apparent from this that Crown Corporations are a mixture of ordinary public enterprises and corporations owned and controlled by the Canadian government. They can have commercial offerings.[1492] They are, therefore, comparable to public entities and SOCs found in South Africa. Crown Corporations are state-owned and state-controlled and regulated from various legal instruments. For instance, some are established through their own legislation and incorporated as companies under the CBC Act.[1493] For example, the Broadcasting Act of Canada is a statute regulating a specific Crown corporation.[1494] Furthermore, the corporations are regulated by the Financial Administration Act (the FAA).[1495] The FAA[1496] appears to be

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1486 See Preamble of the Constitution Act, 1867.

1487 The Constitution Act, 1867, s 5.

1488 Malcom G. Bird, 'Canadian State-Owned Enterprises: A Framework for analysing the evolving Crowns' (2015) 36 Policy Studies 133; Luc Bernier, 'The Future of Public Enterprises: Perspectives from the Canadian Experience' (2011) 84 Annals of Public and Cooperative Economics 404-405.

1489 Edward M Lacobucci and Michael J Trebilcock: 'The Role of Crown Corporations in the Canadian Economy: An Analytical Framework (2012), 5 The School of Public Policy, University of Calgary 1; Bernier, 'The Future of Public Enterprises: Perspectives from the Canadian Experience' 407.

1490 The Canada Business Corporations Act (RSC 1985, c. C-44).

1491 Canada Business Corporations Act, 1985; Financial Administration Act 1985;Directors of Crown corporations <https://www.canada.ac/en/treasury-board-secretariat/services/guidance.crown-corporations/charters/crown-corporation-board-directors-board-committees.html ->accessed 25 May 2025.

1492 Alastair R Lucas, Judicial Review of Crown Corporations, (1987) Volume XXV, Alberta Law Review, 364.

1493 The Canada Business Corporations Act (RSC 1985, c. C-44) ; Bernier, 'The Future of Public Enterprises: Perspectives from the Canadian Experience' 407.

1494 Broadcasting Act 1991.

1495 Financial Administration Act 1985.

1496 An Act to provide for the financial administration of the Government of Canada, the

a peer statute to the PFMA.[1497] Essentially, the FAA regulates government owned and controlled entities in Canada.[1498] It is not exclusive only to Crown Corporations. Crown Corporations' regulation under the FAA is consigned to Part X of the statute.[1499] Part X determines the control and accountability mechanism of Crown corporations.

In Canada Crown Corporations must constantly comply with both its commercial and public policy objectives.[1500] This model of operation is expected of mostly state-owned institutions even when they are commercially operated. The rationale is partly due to the reality that States, although appearing to be in business, have social developmental roles to fulfil. In effect, the profit gains earned from Crown Corporations are for deployment in the developmental agenda. However, even where there are no profits from Crown Corporations, they are still expected to render some services directly to the citizenry at social rates.[1501] They are furthermore subject to government policy. Lucas describes it as follows:

> On the face of their operations, these Crown corporations may be indistinguishable from similar private sector corporations. They may even be established as ordinary joint stock companies. However, their "shareholder" is the government, and they are either, explicitly in their statutes, or at least implicitly, through government control of the general meeting, instruments in some sense of government policy.[1502]

Importantly, for the focus of the thesis is to examine not only the expectations of the Canadian government on the Crown corporations, but to ascertain how the regime of accountability of non-executive directors is implemented in Crown

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establishment and maintenance of the accounts of Canada and the control of Crown Corporations.

1497 See: Directors of Crown corporations: an introductory guide to their roles and responsibilities-<https://www.canada.ca/en/treasury-board-secretariat/services/guidance-crown-corporations-introductory-guide-roles-responsibilities.html > accessed 28 November 2023; Public Finance Management Act 1999, s 3.

1498 Directors of Crown corporations: an introductory guide to their roles and responsibilitie<https://www.canada.ca/en/treasury-board-secretariat/services/guidance-crown-corporations/list-crown-corporations.html >- accessed 28 November 2023.

1499 Financial Administration Act 1985, Part X.

1500 Treasury Board of Canada Secretariat, Review of the Governance Framework for Canada's Crown Corporations <www.tbs-sct.gc.ca> accessed 09 May 2023.

1501 Treasury Board of Canada Secretarial Review of the Governance Framework for Canada's Crown Corporations <https://www.canada.ca/en/treasury-board-secretariat/services/guidance-crown-corporations-introductory-guide-roles-responsibilities.html >accessed 28 November 2023 –accessed 28 November 2023.

1502 Alastair R. Lucas, Judicial Review of Crown Corporations, (1987), XXV Alberta Law Review 364.

corporations in Canada. To determine the regulation of accountability on the part of non-executive directors in Canada, the pertinent common law as well as available statutory law sources will be evaluated. The study also found that a Canadian province may have its own corporations' laws. For example, the Business Corporations Act may only apply in Alberta and not in other provinces.[1503] This would mean that, in addition to the Canadian Business Corporations Act, a Crown corporation operating in a province with its own corporations' law will also apply the provincial statute.[1504]

6.3.2. Common law perspective

Canadian common law, like the South African one has been the backbone of corporate law for as long as there has not been substantial codification of company law. From a common law perspective, two directors' duties exist in terms of Canadian common law, namely, the fiduciary duty and the duty of care. Fiduciary duties have been briefly expressed in the following terms:[1505]

> Directors are fiduciaries of the corporation they serve. This long-standing common law principle governs all aspects of the directors' relationship to the corporation and is codified in the corporate statutes by the requirement that directors act "honestly and in good faith with a view to the best interests of the corporation" in exercising their powers and discharging their duties.

The duty of care has been described as when a director discharges his duty while being informed about the subject matter.[1506] In other words, directors should make decisions on an informed basis and should not act impromptu or carelessly.[1507] Though the duties of directors have been codified in Canada, directors must still conform to the general common law standards of loyalty, good faith, and avoidance of conflict of duty and self-interest.[1508] In this regard the common law complements the statutory law. However, the CBC Act does suggest that it has been

1503 Business Corporations Act, RSA 2000 c B-9.
1504 For example, BC Hydro, Manitoba Hydro and Ontario Power Generation.
1505 C. Graham W. King, Extending Fiduciary Principles to the Director-Creditor Relationship: A Canadian Perspective, (2022) Volume 29, Manitoba Law Journal, 243, 244.
1506 *Canadian Aero Service v O'Malley* [1973], 40 D L R (3d) 371 [391].
1507 C. Graham W. King, Extending Fiduciary Principles to the Director-Creditor Relationship, 244.
1508 *Canadian Aero Service v O'Malley* [1973], 40 D L R (3d) 371 [391].

partially codified with respect to directors' duties. Notwithstanding, there have been suggestions that the common law has been notched up somewhat especially on the objective part of the conduct of directors.[1509] The influence of the common law in Canada which was transposed to the CBC Act is traced to the report titled "Proposals for a New Business Corporation Law for Canada (the Dickerson Report). It is through the Dickerson Report, that the standard of care was elevated from the common law one which required a subjective test to an objective standard.[1510]

As to the duty of care, the Supreme Court indicated that it is required of directors to be diligent in supervising and managing the corporation's affairs.[1511] That means a substantial delegation of certain duties and powers is exercised by the board of directors.[1512] The work of a board of directors folds into monitoring and evaluating management performance. It is to management that the board would have delegated some of its powers especially those concerned with the day-to-day affairs of the company. Having delegated the powers, it is only just that at set intervals, the board should supervise and monitor the performance of management in running the day-to-day affairs of the company. However, what seems to be an issue is how directors should skillfully and carefully supervise the work of executive management when fulfilling these duties.[1513]

The lack of supervision or monitoring on the part of the board of directors has been blamed for catastrophic losses to corporations.[1514] Furthermore, case law has confirmed instances where directors have been appointed to a board and the appointer expects the directors to act in the interests of the appointer. This may likewise be prevalent in corporations owned by the State where the shareholder representatives use their powers wrongly or against the interest of Crown corporations.

1509 *Peoples Department Stores Inc (Trustee of) v Wise*, 2004 SCC 68, [2004] 3 SCR [61].

1510 The Dickerson Report – Proposals for a New Business Corporation for Canada (1971) Volume I, 242.

1511 *Peoples Department Stores Inc (Trustee of) v Wise,* 2004 SCC 68, [2004] 3 SCR 461 [32].

1512 See Institute of Corporate Directors, Directors Responsibilities in Canada:<https://www.osler.com/osler/media/Oslaer/reports/corporate-governance/Director-Responsibilities-in-Canada.pdf >accessed 30 November 2023.

1513 *Peoples Department Stores Inc (Trustee of) v Wise,* 2004 SCC 68, [2004] 3 SCR 461 [32].

1514 Eric J. Pan, 'A Board's Duty to Monitor' (2010) 54, New York Law School Law Review, 719.

In *PWA Corp v. Gemini Group Automated Distribution Systems Inc*,[1515] the court highlighted that a director nominated by a particular shareholder of a company is not in any way discharged of his fiduciary duties owed to the company. He must exercise his judgment in the interests of the company and must comply with his duties of disclosure. Further, a director must not compromise the interests of the company to those who appointed him.[1516] It has been said that 'the overriding principle governing a director's behaviour is that the director has a fiduciary responsibility to the corporation, rather than to one or more shareholders or any other constituency.'[1517]

In *Ontarios Incorporation v Harold E Ballard,*[1518] the court emphasised that a nominee director must have sufficient courage of conviction to act contrary to the wishes of his appointer if the best interest of the company requires it. Though it may be a typical expectation of political functionaries in the sphere of SOCs to seek certain performances from Crown corporations, such action should not be tolerated. This position has been explained with reference to the Liquor Control Board of Ontario (LCBO) directors who were discouraged from seeking or relying on counsel from politicians and use that to make decisions on behalf of Crown corporations.[1519]

The directors' duties of acting in the best interests of a company and exercising good faith permeate all forms of companies.[1520] Directors on SOCs' boards are bound as much as any other directors to the same standards. The LCBO is a typical example of an SOC that can be transformed into a successful corporation. The preconditions are also clear. This includes that those charged with the corporate governance should be unshaken by those who appointed them to the positions

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1515 (1993), 64 O. A C 274 [136] – [145].

1516 *Ontario Incorporation v Harold E Ballard (1991), 3 B.LR (2d) 113; Lac Minerals Ltd v International Corona Resources Ltd* [1989] 2 S.C.R 574 [646-47]; See Institute of Corporate Directors, Directors Responsibilities inCanada: <https://www./osler/media/Osler/reports/corporate-governance/Directors-Responsibilities-in-canada.pdf > accessed 30 November 2023.

1517 See Institute of Corporate Directors, Directors Responsibilities in Canada: <https://www./osler/media/Osler/reports/corporate-governance/Directors-Responsibilities-in-canada.pdf > accessed 30 November 2023.

1518 *Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113.

1519 *Ontarios Incorporation v Harold E Ballard* (1191) (2d) 113; Bird, 'Radical Institutional Change at a Crown Corporation, 6.

1520 *Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113.

but must at all times act in the best interest of the corporation. That is the epitome of carrying out one's fiduciary duties. As it is, in South African politicians are notorious for interfering in SOCs' affairs. The interference has the effect of destabilising the corporate governance in those institutions. Relevant comparisons include the SAA where some of the non-executive directors such as the chairperson received instructions to act in ways contrary to the best interest of SAA.[1521] A non-executive director of impeccable competence and integrity would not accept to carry out any instructions unrelated to the best interests of the SOC.

The Canadian common law with respect to directors' duties found its way into the various corporations' Acts.[1522] On a comparison, the South African common law admits to having been influenced from outside.[1523] The common law duties applicable in Canada have in some instances found application in the South African jurisdiction without any significant adjustment.[1524] Therefore, not only is the common law of South Africa with respect to directors duties similar to that of Canada; this similarity has shaped the partial codification of directors' duties.[1525] Admittedly, the partial codification of directors' duties is not a novel idea of South African origin. Other jurisdictions such as Australia and the United Kingdom have moved ahead to codify directors' duties.[1526]

6.3.2.1. Common law liability of directors

The common law continues to apply to some extent in relation to the liability of directors despite directors' duties being codified.[1527] In this regard it is in addition to the full range of statutory liabilities possible for the directors to be held liable for

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1521 Judicial Commission of Inquiry into the State Capture Report, Part 1 Volume 1, 54.

1522 Canadian Business Corporations Act 1985, and various provincial corporations acts: Alberta, Ontario, Quebec and British Columbia.

1523 Cassim and Others, *Contemporary Company Law,* 721; *Keech v Sanford* (1726) Sel Cas Ch 61.

1524 *Sibex Construction (SA) (Pty) Ltd v Injectaseal CC* 1988 (2) SA (T) [66D]; *Canadian Aero Service Ltd v O'Malley* (1974) 40 DLR (3d) 371 (SCC).

1525 Companies Act 2008, s 76(3)(a)(b).

1526 Cassim and Others, *Contemporary Company Law*, 685.

1527 Canadian Business Corporations Act 1985, s 122(3); *Phillips v Boardman* [1967] 2 A. C 46; See Liability for Directors in Canada< https://www.ellynlaw.com/app/uploads/2014/08/Liability-of-Directors-in-Canada-An Excerpt.pdf> accessed 01 December 2023.

certain common law breaches arising from the actions of the corporation.[1528] The common law provides a platform on which the statutory law builds. In terms of the common law directors in Canadian corporations of all kinds are regarded as stewards of the capital of the corporations they serve.[1529]

In this way, the directors are considered as trustees of the corporation funds. When the funds are misapplied or employed contrary to the purposes of the corporation, the directors will be held liable for such misuse of funds which were in their trust. They are liable to recoup the loss or compensate the company for the loss they have occasioned or which happened under their watch.[1530]

Despite still being in effect some academics regard the Canadian common law relating to director liability as being in a fractured state. The views have been prompted, for example by the Ontario Court of Appeal, where the court found that directors would rarely be found liable in terms of the common law in the absence of such corporate governance vices as deceit, fraud, dishonesty and lack of authority.[1531]

The court's finding seems to suggest that directors have a broad shield and are insulated from liability.[1532] However, the court's finding holistically viewed indicates that directors can be found liable for breach of duties to a corporation. The court stated that it had to be shown that the acts complained of on the part of a director were themselves tortious or exhibited a separate identity or interest from that of the company to render such acts or conduct the directors own.[1533]

It appears that the act or acts complained of would not in itself impute liability on a director without it having been shown that the director was clearly wrong. If the director carried out the acts complained of on behalf of a corporation in good faith

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1528 See –Institute of Corporate Directors, Directors Responsibilities in Canada <https://www./osler/media/Osler/reports/corporate-governance/Directors-Responsibilities-in-canada.pdf> accessed 30 November 2023.

1529 *Angus et al. v R. Angus Alberta Ltd. et al* (1988), 39 B L R 1 (Alta. C.A).

1530 *Angus et al. v R. Angus Alberta Ltd. et al* (1988), 39 B L R 1 (Alta. C.A).

1531 *ScotiaMclead Inc v Peoples Jewellers Ltd* (1995), 26 OR (3d) 481 at 491 (CA); *Hogarth v Rocky Mountain Slate Inc*, 2013 ABCA 57, 360 DLR (4th) 119.

1532 Shannon O'Byrne, Yemi Philip and Katherine Fraser, 'The Tortious Liability of Directors and Officers to Third Parties in Common Law Canada' (2017) 54, Alberta Law Review 871.

1533 *ScotiaMclead Inc v Peoples Jewellers Ltd* (1995), 26 OR (3d) 481 at 491 (CA).

and with due care, it is unjustified to hold such director liable for the resultant harm to the corporation.[1534] From a common law perspective, a departure without good cause from the standard duties by a director will result in liability against the director.[1535]

This was further explained in *Mentmore Manufucturing C. v. National Merchandise Manufacturing Co* where the court held as follows:[1536]

> What is involved here is a very difficult question of policy. On the one hand, there is the principle that an incorporated company is separate and distinct from its shareholders, directors and officers, and it is in the interests of the commercial purposes served by the incorporated enterprise that they should as a general rule enjoy the benefit of the limited liability afforded by incorporation. On the other hand, there is the principle that everyone should answer for his tortious acts.

The principle of liability has come a long way in company law. The baseline for accountability seems to be that directors will be personally liable when acting outside the scope permissible by law.[1537] There are authorities that support the conclusion that directors can only be held liable if they strayed away from the confines of the law when acting on behalf of a corporation. For instance, authorities suggest that to exonerate directors is in keeping with the separate legal personality of a corporation.[1538] Seen from this perspective, it is said that when the controlling mind of the corporation commits a delict, the corporation has committed the delict.[1539] Courts have long established the principle of liability for directors along the following thinking:[1540]

> A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these; it must act through living persons, though not always one or the same person. Then

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1534 See Liability for Directors in Canada <https://www.ellynlaw.com/app/uploads/2014/08/Liability-of-Directors-in-Canada-An Excerpt.pdf > accessed 01 December 2023.

1535 See Liability for Directors in Canada< https://www.ellynlaw.com/app/uploads/2014/08/Liability-of-Directors-in -Canada-An Excerpt.pdf > accessed 01 December 2023.

1536 *Mentmore Manufacturing Co. v National Merchandise Manufacturing Co*., (1978) 89 DLR (3d) 195, 202-203. (FCA).

1537 *Phillips v Boardman* [1967] 2 A. C 46; *Industrial Development Consultants Ltd. v Cooley* [1972] 2 All E. R. 162.

1538 *Salomon v Salomon & Co*, [1897] AC 212 (HL); Business Corporations Act 2000, s 16; Canada Business Corporations Act 1985, 15.

1539 *Canadian Dredge & Dock Co v The Queen,* [1985] 1 SCR 662 [693].

1540 *Tesco Supermarkets Ltd v Nattrass,* [1972] A.C 153 [170], [1971] 2 All E.R 127 (H.L).

> the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind, then that guilt is the guilt of the company.

To transplant the liability from the corporation on behalf of which the controlling mind acted, some evaluation of the conduct of the controlling mind should reveal a marked departure from the scope permissible in law. To hold directors personally liable for the acts carried out on behalf of the corporation, there must be some overt act on the part of directors that takes them out of the role and scope of the directing mind of the corporation.[1541]

In *Condominium Corporation No 0321365 v Prairie Communities Corp,*[1542] the court explored a two-fold test on director liability respecting when a director's conduct can be said to be his own. In this regard the director must have done something delictual in itself and must have demonstrated a separate identity or interest from that of the corporation.[1543] It is the exact scope of where liability begins and ends that may still pose a challenge in determining directors' liability. The views may be correct although courts are delivering judgments that could bring some stability into this area of corporate law.[1544] Eventually, it may boil down to what can be proven. In *R. v. Fell*,[1545] the court pointed out as follows:[1546]

> It is not a bar to personal conviction that the acts were committed on behalf of a corporation, and that the corporation itself is liable. The director and/or officer can still be held liable, either as the principal, or as an aider or abettor, as the facts may prove.

A successful prosecution of a director regarding accountability hinges on the facts

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1541 *ScotiaMcLeod Inc. v. Peoples Jewellers Ltd* (1995), 26 OR (3d) 481 [491].

1542 *Condominium Corporation No 0321365 v Prairie Communities Corp,* 2015 ABQB 753, 52 BLR (5th) 120.

1543 *Condominium Corporation No 0321365 v Prairie Communities Corp,* 2015 ABQB 753, 52 BLR (5th) 120.

1544 *Condominium Corporation No 0321365 v Prairie Communities Corp,* 2015 ABQB 753, 52 BLR (5th) 120 [49].

1545 (1981) 64 C.C.C. (2d) 456 (Ont. C.A.).

1546 (1981) 64 C.C.C. (2d) 456 (Ont. C.A.).

of the conduct complained of. If the facts point to an act on a director's part indicating that he or she acted outside the limits of the law and powers and for his or her own purposes, then such director will be liable for breaching his or her duty to the corporation.[1547] The common law position in Canada accordingly recognises director liability for directors arising out of breach of governance duties.

Canadian authorities point at certain conduct which identify as conduct outside the interest of the company. In this regard a list of conduct appears to attract liability under Canadian law, which has not been pronounced to the same wide extent in South Africa.[1548] For instance, in *ScotiaMcLeod Inc v Peoples Jewellers Ltd*,[1549] the court listed the following conduct as depicting a basis for liability: fraud, deceit, dishonesty and lack of authority among others. Accordingly, broad breaches of directors' duties as often stated in South Africa could be distilled to more basic words such as dishonesty and a lack of authority, especially in SOCs.

It is common to refer to breach of directors' duties broadly in such terms as breach of fiduciary duties and the lack of care and diligence. However, within these broad terms the actual conduct impugned may be deceit or dishonesty which amplifies the unsuitability of a director to be on a board. An act of deceit may possibly be event-linked. However, dishonesty may be a character trait or may be linked to an event. In whichever form these vices may manifest attributed to a director, they call for liability on the part of such director. That is because the breaches would have inflicted some harm on the corporation.

An important lesson drawn from the Canadian experience is that directors acting outside their role as the controlling mind of the company will be subject to liability for loss or damage caused.[1550] It is submitted that it is possible for dishonest directors or those with conflicting intentions to act in a blended manner appearing to serve the interest of the company while in fact serving other interests. It is critical that a careful assessment of directors' actions or decisions are made so that the true extent of their actions may be determined. Where a clear deviation from their

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1547 *ADGA Systems International Ltd. vs Valcom Ltd* 43 OR (3d) 101 (CA) (1999); *Scotia Mcleod Inc. vs Peoples Jewellers Ltd* 26 OR 481 (CA) (1995).

1548 *ScotiaMcLeod Inc v Peoples Jewellers Ltd* (1995), 26 OR (3d) 481 at 491 (CA).

1549 (1995), 26 OR (3d) 481 at 491 (CA).

1550 *ScotiaMcLeod Inc v Peoples Jewellers Ltd* 26 OR 481 (CA) (1995).

duties is revealed this should lead to liability.

6.3.3. Statutory law

Canada's Crown Corporations are regulated through several statutes. This regulation stems from at least three sources, namely, the CBC Act,[1551] the FAA and enabling statutes applicable to a Crown Corporation. The CBC Act will be discussed first whereafter the FAA will be evaluated. Lastly, the enabling statutes of the selected Crown corporations will be discussed.

6.3.3.1. Canada Business Corporations Act

The CBC Act in section 3(1) provides that it applies to all corporations and body corporates that have been incorporated under it.[1552] The application of the CBC Act to Crown Corporations lends standing for the study to evaluate the pertinent provisions of directors' duties and liability of non-executive directors of Crown Corporations in terms of the CBC Act.

Directors' duties and the nature and extent of the liability of non-executive directors in Crown Corporations in Canada will accordingly in line with the topic of the thesis be evaluated. It is also important to ascertain whether the CBC Act distinguishes between executive and non-executive directors.

6.3.3.1.1. Directors' duties under the Canadian Business Corporation Act

The CBC Act provides for various directors and officers' duties under Part X, namely, in sections 102 to 125. Within these sections,[1553] directors' duties and liabilities have been stipulated under various headings. For purposes of a clear flow and context, the duties relevant to the thesis will be discussed together although they are separately provided for under the CBC Act.

Section 102(1) provides for the duty to manage or supervise management and places the duty squarely on especially non-executive directors.[1554] The duty can

1551 Canada Business Corporation Act 1985.
1552 The Canada Business Corporations Act 1985, s 3(1).
1553 Canadian Business Corporations Act 1985, s 102 – s 125.
1554 Maria Gutierrez and Maribel Saez, 'Deconstructing Independent Directors' (2013) 13 Journal of Corporate Law 63.

be examined on two levels, namely, whereas in SOCs non-executive directors are encouraged,[1555] but not explicitly required to oversee the work of executives (including executive directors), and whereas in the South African Companies Act, a board of directors is provided with powers to control and manage the affairs of a company.[1556] The takeaway from the provision under discussion is the explicit assignment of powers on directors to manage or supervise the management of a company. The provision leaves no doubt in that it specifies the duty to manage and supervise management and is therefore not limited to controlling or managing the company. The duty extends to the supervision of those charged with the day-to-day management of the company.[1557] There may be complexities for non-executive directors to discharge this duty successfully, given that they sit outside the company and depend for the exercise of their duties, powers and functions on the very same people they should supervise and manage. If executive management consists of some unscrupulous elements, the work of non-executive directors to properly manage and supervise may be strenuous as information coming to them may be sanctioned to conceal any wrongdoing occurring. Nonetheless, directors remain responsible for whatever goes wrong under their watch, and they should oversee the conduct of company executives.[1558] It is for the directors to devise efficient mechanisms to assist them to monitor and supervise management.

Section 122(1) of the CBC Act encodes two broad duties of directors, the fiduciary duties and the duty of care and provides every director and officer of a corporation in exercising their powers and discharging their duties shall:[1559]

> (a) act honestly and in good faith with a view to the best interests of the corporation; and
>
> (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

Subsection 1 determines how the best interests of the corporation should be

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1555 Gutierrez and Saez, 'Deconstructing Independent Directors' 67.

1556 Companies Act 2008, s 66(1).

1557 C. Graham W. King, Extending Fiduciary Principles to the Director Relationship, 246.

1558 Canada Business Corporation Act 1985, s 102(1); Renee M. Jones and Michelle Welsh, 'Toward a Public Enforcement Model for Directors' Duty of Oversight' (2012) 45 Vanderbilt Journal,351.

1559 The Canada Business Corporations Act 1985, s122(1); Paul Blyschak, 'Corporate Foreign Corrupt Practices and Director Liability' (2014) 51 Alberta Law Review 559.

ensured by stating that acting with a view to the best interests of the corporation the directors and officers of the corporation may consider, but are not limited to, the interests of shareholders, employees, retirees and pensioners, creditors, consumers, governments, the environment and the long-term interests of the corporation.[1560]

It is noted that the duties outlined extend beyond directors to officers of the corporation. To this extent, the provision of the CBC Act compares to that of the South African Companies Act.[1561] It is further observed that the duties provided are a combination of what is known as fiduciary duties and the duty of care, skill and diligence. As such, the CBC Act provides for both the subjective and objective tests. This also corresponds with the duty of care, skill and diligence test used by the South African Companies Act.[1562] What is interesting is that the CBC Act specifically lists the stakeholders and other interests that must be taken into account when performing this duty. Such interests include several stakeholders and constituencies which are either inside of the corporation or outside.[1563] The South African Companies Act does not expressly state the list of stakeholders which a director has to have in mind while acting in the best interests of the company.[1564] The submission on this point is that it is accepted that a director owes his or her duty to the company.[1565] There seems to be little argument on this point. However, from a Canadian perspective there is an evident shift of recognising other stakeholders who matter to the company's corporate governance existence.[1566] This might be so because the performance impact of directors' duties may go beyond the company and its shareholders and affect its stakeholders positively or negatively depending how they are performed.

Of importance for South African directors is that when acting in the best interest of the SOC it may mean that it should be appreciated that a company involves various constituencies, internally and externally. Therefore, a breach of corporate

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1560 The Canada Business Corporations Act 1985, s122(1); Paul Blyschak, 'Corporate Foreign Corrupt Practices and Director Liability' (2014) 51 Alberta Law Review 559.

1561 Companies Act 2008, s 66(1).

1562 Companies Act 2008, s 76(3)(c)(i)(ii).

1563 Corporations Act 2001, s 122(1.1) (i)-(vi).

1564 Companies Act 2008, s 76(3)(b).

1565 *Re Smith & Fawcett Ltd* [1942] Ch 304 at 306 (CA); Cassim and Others, *Contemporary Company* Law, 693.

1566 Canadian Business Corporation Act 1985, s 122(1)(1.1)(a)-(c).

governance duties may in the final analysis not only include the incorporated establishment itself but also any parties connected therewith. It is for this reason that it is argued that poor corporate governance of SOCs poses an accompanying burden to the economy. The listing of broad stakeholder interest may result in directors facing claims or lawsuits from beyond the company. Claims could also emanate from all or any of the stakeholders affected by a governance breach.

The CBC Act in addition determines that a director may not be in a position to serve conflicting interests.[1567] Not only are directors required to avoid conflict of interests with the company on which they serve, they are required to disclose any conflict of interests that arise or is likely to arise in various situations.[1568] It is submitted that disclosing a conflict of interest is itself not enough.[1569] A director who has disclosed a conflict of interest should refrain from being involved in the related matter or transaction.[1570]

In addition to the general duties listed in the CBC Act, section 122(2) and (3) provide that 'every director and officer of a corporation shall comply with this Act, the regulations, articles, by-laws and any unanimous shareholder agreement.' This duty resonates section 218 in the South African Companies Act that also requires compliance with the Act.

The CBC Act enjoins all directors and officers of corporations in Canada to comply with its provisions. The provision determines that it applies to all directors and all officers, and no distinction is made between executive and non-executive directors, but the provisions apply to *'every'* director and officer of a corporation. Furthermore, the use of the word *'shall'* demonstrate that compliance by the directors and officers with the Corporations Act is peremptory.

6.3.3.1.2. Directors' liability under the Canada Business Corporations Act (CBC Act)

1567 Canadian Business Corporation Act 1985, s 122(1.1)

1568 Canadian Business Corporation Act 1985, s 122(1.1)

1569 Canadian Business Corporation Act 1985, s 120(5); See: –Directors and Officers Liability:<https://www.fasken.com/en/knwoledge/doing-business-in-canada/10-directors-officers-liability> accessed 01 December 2023.

1570 Directors and Officers Liability < https://www.fasken.com/en/knwoledge/doing-business-in-canada/10-directors-officers-liability > accessed 01 December 2023.

In Canada directors of corporations are subject to liability provided for breach of duties in both the common law and statutory law.[1571] In terms thereof, directors owe expanded duties to shareholders, employees, creditors and other stakeholders, and are increasingly being held personally responsible for the corporation's conduct.[1572]

Liability attaches to directors in terms of the statutory law under the Canada Business Corporations Act (CBC Act), as well as under provincial corporations Acts.[1573] In terms of the CBC Act director liability[1574] flows from a breach of the duties assigned to directors at law.[1575] Section 122(2) of the CBC Act requires every director to comply with the CBC Act, the regulations, articles, by-laws and any unanimous shareholder agreement.

Section 122 (3) which is subject to subsection 146(5) state that "no provision in a contract, the articles, the by-laws or a resolution relieves a director or officer from the duty to act" in accordance with the CBC Act or the regulations or relieves them from liability for a breach thereof. This provision seeks to pre-empt some groundless defences which the CBC Act itself does not recognise and attempts to narrow the scope of defences a director or officer can use to avoid liability for failure to discharge their duties.[1576]

The level of compliance required with the provisions of the CBC Act can be gathered from section 122(3), as it prohibits exculpation.[1577] Non-compliance with the CBC Act should result in liability for directors and officers, without exculpation. This, however, does not strictly take away valid defences. In light of the exculpatory provision, it is appropriate to consider the liability of directors in terms of the CBC Act. Liability under the CBC Act is broad and necessitates categorisation for a comprehensive discussion. For that reason, the discussion first centres on liability in

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1571 Canadian Business Corporation Act 1985; Liability for Directors in Canada < https://www.ellynlaw.com/app/uploads/2014/08/Liability-of-Directors-in-Canada-An Excerpt.pdf > accessed 01 December 2023.

1572 Canadian Business Corporation Act 1985, s 122(3) and s 146(5); Liability for Directors in Canada<https://www.ellynlaw.com/app/uploads/2014/08/Liability-of-Directors-in-Canada-An Excerpt.pdf> accessed 01 December 2023.

1573 Liability for Directors in Canada < https://www.ellynlaw.com/app/uploads/2014/08/Liability-of-Directors-in-Canada-An Excerpt.pdf > accessed 01 December 2023.

1574 Canadian Business Corporation Act 1985, s 122(3) and s 146(5).

1575 Canadian Business Corporation Act 1985, s 102(1), s 122(1)(2).

1576 Canadian Business Corporation Act 1985, s 122(3).

1577 Canadian Business Corporation Act 1985, s 122(3) and 145(6).

respect of the duties of directors and officers under section 122 of the CBC Act.

The departure point is to link the provisions of sections 102(1) and 122(3) of the CBC Act. Directors' liability is subject to the powers they have been assigned by shareholders in a shareholders' agreement,[1578] relating to the supervision and management of a corporation. In other words, directors in Canadian corporations cannot be held liable for duties not assigned to them in terms of the shareholders' agreement.[1579] Furthermore, directors' assigned duties are linked to their liability. Section 146(5) of the CBC Act clarifies this position as follows:

> To the extent that a unanimous shareholder agreement restricts the powers of the directors to manage, or supervise the management of, the business and affairs of the corporation, parties to the unanimous shareholder agreement who are given that power to manage or supervise the management of the business and affairs of the corporation have all the rights, powers, duties and liabilities of a director of the corporation, whether they arise under this Act or otherwise, including any defences available to the directors, and the directors are relieved of their rights, powers, duties and liabilities, including their liabilities under section 119, to the same extent.

Directors under the CBC Act are only liable in accordance with the powers assigned to them to supervise and manage the corporation. Though this may seem to be a limitation on the liability directors may face the duty to supervise and manage a corporation in terms of a shareholders' agreement is not isolated from the broad duties specified in the CBC Act.[1580]

In terms of the South African Companies Act,[1581] liability for directors is primarily confined to the performance of their duties under the Companies Act and the common law. Though certain similarities exist between the CBC Act and the Companies Act the Companies Act does not subject the control and management of companies to a shared discharge and performance of directors' duties with the shareholders. This does not render shareholders powerless as they have powers reserved during a shareholder's meeting. The Companies Act gives clear powers[1582]

1578 Canadian Business Corporations Act 1985, s 146(5).
1579 Canadian Business Corporation Act 1985, s 146(5).
1580 Canadian Business Corporations Act 1985, s 122(1)(a)(b) and (1.1) (a)-(c).
1581 Companies Act 2008, s 66(1).
1582 Companies Act 2008, s 66(1).

to directors and gives them duties which they should perform and fully discharge.[1583] The powers reserved for shareholders in the Companies Act can be exercised without displacing those which directors must perform, and for whose breach they can be held liable.

There may be occasions where directors are unable to exercise certain of their powers and shareholders can step in on behalf of the company to act.[1584] It is submitted that the unintended involvement of shareholders in directors' duties may complicate accountability. Shareholders so utilised are uninvolved in the day-to-day control and management of a company and risk the company's success by retaining powers that directors should have been given. It is submitted that to this extent, the CBC Act's provisions in relation to the allocation of duties between the board of directors and shareholders and consigning such allocation to a shareholders' agreement may prove problematic as a model for SOCs to emulate. Such a model may complicate SOC's corporate governance structures.

Apart from the liability flowing from director's duties as set out in their respective shareholders' agreements, directors can still be held liable for any transgression of the duties provided in the CBC Act. In this regard section 118 of the CBC Act provides specifically for directors' liability by determining in subsection 1 as follows:

> Directors of a corporation who vote for or consent to a resolution authorizing the issue of a share under section 25 for a consideration other than money are jointly and severally, or solidarily, liable to the corporation to make good any amount by which the consideration received is less than the fair equivalent of the money that the corporation would have received if the share had been issued for money on the date of the resolution.

Directors are furthermore in terms of section 118 (2) of the CBC Act jointly and severally, or in solidarity liable to restore to the corporation any amounts so distributed or paid and not otherwise recovered by the corporation if they vote for or consent to a resolution authorizing any of the following:

1583 Companies Act 2008, s 76(3)(a)(b)(c)(i)(ii).

1584 Canadian Business Corporation Act 1985, s 146(1) and (2). For example, in addition to powers shareholders have such as those under section 135(5) of the CBC Act, shareholders can, under an agreement reserve powers for themselves. This may have the effect of limiting certain powers the board of directors may by law exercise.

(a) a purchase, redemption or other acquisition of shares contrary to section 34,[1585] 35[1586] or 36[1587]

(b) a commission contrary to section 41;

(c) a payment of a dividend contrary to section 42;

(d) a payment of an indemnity contrary to section 124,[1588] or

(e) a payment to a shareholder contrary to section 190 or 241.[1589]

Directors can be held liable under the CBC Act for various transactions relating to the shares of the corporation.[1590] The liability under section 118 of the CBC Act points to the conduct of directors while exercising their duties towards the corporation in relation to sections 102 and 122 of the CBC Act. Directors are required to conduct themselves in a manner placing the corporation's single interest first and to do so with care, skill and diligence.

1585 34 (1) Subject to subsection (2) and to its articles, a corporation may purchase or otherwise acquire shares issued by it. Limitation:(2) A corporation shall not make any payment to purchase or otherwise acquire shares issued by it if there are reasonable grounds for believing that (a) the corporation is, or would after the payment be, unable to pay its liabilities as they become due; or
(b) the realizable value of the corporation's assets would after the payment be less than the aggregate of its liabilities and stated capital of all classes.

1586 35 (1) Notwithstanding subsection 34(2), but subject to subsection (3) and to its articles, a corporation may purchase or otherwise acquire shares issued by it to (a) settle or compromise a debt or claim asserted by or against the corporation; (b) eliminate fractional shares; or (c) fulfil the terms of a non-assignable agreement under which the corporation has an option or is obliged to purchase shares owned by a director, an officer or an employee of the corporation.

1587 36 (1) Notwithstanding subsection 34(2) or 35(3), but subject to subsection (2) and to its articles, a corporation may purchase or redeem any redeemable shares issued by it at prices not exceeding the redemption price thereof stated in the articles or calculated according to a formula stated in the articles.

1588 124 (1) A corporation may indemnify a director or officer of the corporation, a former director or officer of the corporation or another individual who acts or acted at the corporation's request as a director or officer, or an in dividual acting in a similar capacity, of another entity, against all costs, charges and expenses, including an amount paid to settle an action or satisfy a judgment, reasonably incurred by the individual in respect of any civil, criminal, administrative, investigative or other proceeding in which the individual is involved because of that association with the corporation or other entity.

1589 241 (1) A complainant may apply to a court for an order under this section. Grounds: (2) If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates (a) any act or omission of the corporation or any of its affiliates effects a result, (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

1590 Canadian Business Corporations Act 1985, s 118(1).

Further liability can be found in section 119(1) of the CBC Act. This liability arises in respect of directors' conduct if a corporation traded under reckless circumstances. In this instance directors will be held liable for employees' wages for the time they were directors, and the corporation was in debt. The precondition for the liability is found in subsection 2 of section 199 of the CBC Act. The corporation must be sued within six months for the condition to take effect.[1591]

The liability under section 119 of the CBC Act may appear rather strict and harsh on directors. Directors should be mindful of discharging their duties appropriately to avoid such and other related liabilities. The South African Companies Act also imposes liability on directors who trade under insolvent circumstances,[1592] although it does not saddle directors with employees' wages. The South African legislature may consider SOCs, imposing a similar liability on its SOCs' directors.

6.3.3.1.3. Defences against liability under the CBC Act

Balancing the interests between attracting the best personalities to a board of directors and the undertaking of risks necessary in running a corporation justifies the existence of the business judgment rule. The roots of the business judgment rule (discussed earlier) are firmly planted in the need to facilitate an environment of innovation and growth in business while taking cognisance of the fact that running a business often involves taking risks.[1593] This rule has been "developed to shield directors and officers who are willing to take calculated chances to propel a corporation forward"[1594] Without the defence the business judgment rule provides directors with, would result in them being exposed to liability for decisions they have made in good faith and with care and diligence.[1595] It is for this reason that various jurisdictions, including Canada, have embraced the statutory enactment of the

1591 Canadian Business Corporation Act 1985, s 119(2)(a).

1592 Companies Act 2008, s 22 and 77(3) (b).

1593 Denis Grisgoras, The Business Judgment Rule: A Director's Guide to Risky Business <https://grigoraslaw.com/the-business-judgment--rule-a-directors-guide-to-risky-business> accessed 02 December 2023.

1594 Denis Grisgoras, The Business Judgment Rule: A Director's Guide to Risky Business <https://grigoraslaw.com/the-business-judgment--rule-a-directors-guide-to-risky-business> accessed 02 December 2023.

1595 Denis Grisgoras, The Business Judgment Rule: A Director's Guide to Risky Business <https://grigoraslaw.com/the-business-judgment--rule-a-directors-guide-to-risky-business> accessed 02 December 2023.

business judgment rule.[1596]

Sections 123(4) and (5) of the CBC Act provide for two provisions to affording valid defences against liability that may otherwise attach to directors for their conduct.[1597] Section 123(4) provides a defence of reasonable diligence. It determines that a director will not be held liable if in discharging his or her duties to the corporation, the director exercised the care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances.

The defence appears to be that of a reasonable prudent person's test in which a director who utilises the defence should prove that he or she acted as any reasonable person in his or her position would have acted. In other words, a director cannot use a subjective standard in terms of which he or she acted as they saw fit or in accordance with their skill, knowledge or expertise.[1598] This subsection further extends to incidences where a director in fulfilling the duty of care and skill exercised good faith in reliance on information received.[1599] The reliance by directors on credible information supplied by designated officers when making a decision, even if the decision may turn out to be wrong and perhaps injurious to the company, is also accepted as a defence under South African company law and is referred to as the business judgment rule.[1600]

In Canada, the parameters of the business judgment rule were set by Supreme Court in *Kerr v Danier Leather,*[1601] as follows:[1602]

> The court looks to see that the directors made a reasonable decision not a perfect decision. Provided the decision taken is within a range of reasonableness, the court ought not to substitute its opinion for that of the board even though subsequent events may have cast doubt on the board's determination. As long as the directors have selected one of several reasonable alternatives, deference is accorded to the board's decision.

1596 Canadian Business Corporation Act 1985, s 123(5).
1597 Canadian Business Corporations Act 1985, s 123(4) and (5).
1598 Canadian Business Corporations Act 1985, s 123(4).
1599 Canadian Business Corporations Act 1985, s 123(4)(a)(b).
1600 Companies Act 2008, s 76(4)(b).
1601 2007 SCC 44, [2007] 3 SCR 331 [54]; *Maple Leaf Foods Inc v Schneider Corp*. (1998), 42 OR (3d) 177 (CA), 44 BLR (2d) 115.
1602 2007 SCC 44, [2007] 3 SCR 331 [54]; *Maple Leaf Foods Inc v Schneider Corp*. (1998), 42 OR(3d) 177 (CA), 44 BLR (2d) 115.

Section 123(5), on the other hand, provides in addition to the one in subsection (4) for the defence of good faith.[1603] The defence is similar to the one found in subsection (4) and appears to be a repetition of its provision by stating that a director would have complied with his or her duties under subsection 122(1) if the director relied in good faith on the information supplied from a credible source.[1604]

It appears that the defences offered by the CBC Act with respect to directors can only be met under objective circumstances, namely, the reasonable prudent director. There is a visible absence of a subjective defence under the CBC Act.[1605] The absence of a subjective defence may strengthen the shift from the common law position which appreciated a certain level of skill, experience and knowledge as a defence. Under the CBC Act a certain level of skill, knowledge and experience may be a defence only if any reasonable prudent person similarly situated would have acted the same. The Companies Act still contains both the subjective and objective tests with respect to directors' duties.[1606]

A subjective test is individualistic in nature and takes away any objective assessment of a situation. The submission is that standard duties should only be subjected to an objective standard that all reasonable persons should have to meet. A bespoke type of regime of discharging directors' duties should be consigned to history. For instance, non-executive directors on boards of directors of SOCs are appointed based on certain competencies. They would be expected to discharge their duties based on those competencies as any reasonable person in their position, having the same or matching competencies would. Seen from this point of view, the lifespan of a subjective standard appears to have been extended unnecessarily.

Bekink justifies the retention of the subjective element in the realm of directors' duties.[1607] The submission is that the retention of the subjective test should extend to non-executive directors in SOCs. Bekink contends that a director must comply with the reasonable person test first.[1608] This may mean that the objective test is

1603 Canadian Business Corporations Act 1985, s 123(5)(a)(b).
1604 Canadian Business Corporations Act 1985, s 123(4)(a)(b).
1605 Canadian Business Corporation Act 1985, s 123(5).
1606 Companies Act 2008, s 76(3)(c)(i)(ii).
1607 Companies Act 2008, s 76(3)(c)(ii); Bekink, An Historical overview of the director's duty of care and skill, 111-112.
1608 Bekink, 'An Historical overview of the director's duty of care and skill, 111-112.

somewhat intertwined with the subjective test.[1609] Furthermore, it must be noted that directors are not a homogenous group. They occupy different positions and perform different duties within a company. When different tests are applied to these divergent positions, it caters for flexibility. However, some academics reason that whatever the expertise of a director on a board, he or she is required to perform those duties in accordance with the objective yardstick.[1610]

Therefore, it is submitted that the subjective test should only be used to improve the objective test if standard conduct is to be achieved on boards of SOCs. This may augment efforts to improve accountability in SOCs which may impact on good governance.

6.3.3.2. Financial Administration Act

The Financial Administration Act (FAA) applies to a varied number of organisations in Canada. It also applies to Crown Corporations with limited exception[1611] and is therefore relevant to the study.[1612] It is important to note that Crown Corporations are accountable to Parliament.[1613] In terms of section 88[1614] of the FAA the accountability of Crown Corporations to Parliament transpires through a Minister. This accountability mechanism entails that boards of Crown Corporations must account to the Minister and Parliament. Furthermore, the Governor in Council,[1615] may issue directives to Crown Corporations to aid their governance in the public interest.[1616]

The appointment of directors in Crown Corporations is provided for under the FAA.[1617] The composition of boards of directors of Crown Corporations are largely non-executive,[1618] with generally the chief executive officer as the only executive

1609 Bekink, 'An Historical overview of the director's duty of care and skill, 111-112.
1610 Bird and Hill, 'Regulatory Rooms in Australian Corporate Law' 563.
1611 Financial Administration Act 1985, s 85(1.1): contains the following exception: Divisions I to IV, except for sections 89.8 to 89.92, subsection 105(2) and sections 113.1, 119, 131 to 148 and 154.01, do not apply to the Canada Council for the Arts, the Canadian Broadcasting Corporation, the International Development Research Centre or the National Arts Centre Corporation.
1612 Financial Administration Act 1985, Part X.
1613 Financial Administration Act 1985, s 88.
1614 Financial Administration Act 1985, s 88.
1615 Governor in Council, Centre for Constitutional Studies <https://www.constitutionalstudies.ca/2019/07/governor-in-council/ > accessed 28 May 2023.
1616 Financial Administration Act 1985, s 89(1); s 89(2).
1617 Financial Administration Act 1985, s 105(1).
1618 Financial Administration Act 1985, s 105(2).

director and employee on the board. Section 109 of the FAA places the board of directors of Crown Corporations at the centre of their management operations. It specifically states that 'the board of directors of a Crown corporation is responsible for the management of the businesses, activities and other affairs of the corporation.'

The FAA also provides for the duties of directors. Directors' duties in Crown Corporations are encapsulated in section 155 of the FAA as follows:

> Every director and every officer of a Crown corporation in exercising his powers and performing his duties shall:
>
> (a) act honestly and in good faith with a view to the best interests of the corporation; and
>
> (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

The duties in the FAA resonate with the general duties of directors as set out in the CBCA, namely, the fiduciary duties and the duty of care, diligence and skill. Directors are required to observe the duties once again in favour of Crown Corporations. In terms of section 115(2) of the FAA directors have an additional duty to comply with Part X, regulations, by-laws and any directives issued.[1619]

While the FAA is not elaborate on liability for directors of Crown Corporations, it is included by implication. The FAA, like the CBCA, has included a reference to the business judgement rule in section 115(3) of the FAA. In terms of this subsection, directors are offered a defence against liability should it be found that they have breached their duties having relied in good faith on the statements of the parties specified in the section such as a lawyer, accountant, engineer, appraiser or other person whose position or profession lends credibility to a statement.[1620]

The opposite is implied, which is that, should it be found that directors breached their duties without a reasonable or justifiable ground, they will be held liable. This conclusion is supported by the requirements of directors to comply with Part X of

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1619 Evident from section 84, Part X of the Financial Administration Act 1985 applies to Crown Corporations and provides generally for the governance of the entities.

1620 Financial Administration Act 1985, s 115(3)(a)(b).

the FAA and other instruments.[1621] It is evident that under section 115 directors are required to discharge their duties without fail.[1622] The provision is peremptory in that the adverb 'shall' has been used. Furthermore, the presence of an indemnification provision is testimony to the desire to hold directors liable for breach of duty. Indemnification may serve directors who did not act intentionally or negligently to the detriment of the corporation. Directors who may have acted outside the parameters of the relevant sections under the FAA may accordingly be found liable for breach of their governance duties to a Crown Corporation.[1623]

With respect to directors the FAA provides for both sanctions[1624] and offences.[1625] Although there are no sections dedicated to liability in the FAA, it is nonetheless embedded. With respect to sanctions, the FAA provides for the suspension of a director who may have breached their duties provided for in Part X or other instruments.[1626] It is noticed that section 154 of the FAA applies to both the board of directors and the chief executive officer.[1627] It is unclear whether the suspension may be applied to non-executive directors, who in any case are not employed by the corporation. A concern with the provision is that it states that the suspension can be with or without remuneration. It may be recalled that the FAA states that it is only the chief executive officer (officer-director)[1628] who may serve on a board as an executive director and therefore an employee. The rest of the directors are non-executive directors.[1629] The understanding is that the sanction of suspension with respect to non-executive directors means that they will not be further involved in the affairs of the corporation such as attending meetings or carrying out any activities of the board of directors.[1630] Furthermore, for the duration of the suspension no remuneration in terms of board fees will be payable to such suspended non-executive directors.

It is submitted that the use of the sanction of suspending directors from a board is

1621 Financial Administration Act 1985, s 115(2).
1622 Financial Administration Act `1985, s 115(1)(a)(b).
1623 Financial Administration Act 1985, s 115(3)(a)(b) and s 119(1)(a)(b).
1624 Financial Administration Act 1985, s 154.
1625 Financial Administration Act 1985, s 154(1).
1626 Financial Administration Act 1985, 154.01, ss1.1.
1627 Financial Administration Act 1985, s 154(1), s 154.
1628 Financial Administration Act 1985, s 104(1).
1629 Financial Administration Act 1985, s 105(1).
1630 Financial Administration Act 1985, s 154.

recommendable for SOCs in South Africa. It may encourage proper accountability as non-executive directors will know that they may be suspended and may lose out on sitting and other fees when on suspension. The suspension of non-executive directors could act as a first step in holding non-executive directors accountable, upon suspicion of wrongdoing, pending investigation. Once the wrongdoing is proven all other forms of liability provided for in the Companies Act and the PFMA can then kick in as the following step.

6.3.3.3 Enabling statutes of Crown Corporations

As referred to in the introduction, Canada has both federal and provincial Crown Corporations.[1631] Importantly is that the provinces in Canada have corporations' Acts.[1632] This is a marked difference with the situation in South Africa. Crown Corporations at provincial level incorporated under a provincial corporation's Acts would be subject to such an Act. In addition, Crown Corporations are either established by enabling statutes or directly incorporated under a corporation's Act, whichever is relevant. This part of the thesis looks at a few Crown Corporations which have own enabling statutes, in addition to other applicable statutes discussed above. The purpose of this discussion is to determine the scope of directors' liability provided for in selected enabling statutes. Possible differences between such liability and that provided for in the CBCA and other statutes of federal application will be discussed.

6.3.3.3.1. Broadcasting Act

The Canadian Broadcasting Corporation (CBC) is defined as a corporation in section 1 of the Broadcasting Act.[1633] The CBC is a Crown Corporation established in terms of the Broadcasting Act.[1634] As a Crown Corporation, the CBC provides valuable insight for the thesis topic.[1635] Section 36(2) of the Broadcasting Act provides for a board of directors and for its constitution. The section stipulates that the board of directors should consist of twelve members including the chairperson and

1631 *Canada Metal Co. Ltd. v. C.B.C.* (No. 2)(1915) II O.R. (2d) 167 (Ont. C.A.).
1632 For example: Manitoba Business Corporations Act and Nova Scotia Business Corporations Act.
1633 Broadcasting Act 19991, s 1.
1634 Broadcasting Act 1991, s 1 and s 36(1).
1635 Broadcasting Act 1991.

its President.[1636] The appointment of the board of directors is conducted by the Governor in Council. Interestingly, the tenure of the board of directors is linked to good behaviour of the board.[1637] Provision is also made for removal on good reason.[1638] Another interesting feature of the Broadcasting Act is that directors are subjected to an oath of office in which they swear to discharge their duties to the corporation as prescribed in the oath and the law.[1639]

The Broadcasting Act bars the appointment of persons to the board of directors of the CBC whose interests' conflict with those of the CBC. In an event that such persons have already been appointed and are serving on the board, they shall cease to serve as such. The prohibition to serve on the board extends to persons who by virtue of an inheritance may hold an interest in a business that encroaches on those of the CBC.[1640] Such persons shall be required to divest themselves of such interest.[1641] It is notable that the board of directors of the CBC is composed of largely non-executive directors as the only executive director mentioned is the President of the CBC.[1642] The President of the CBC is at the same time the Chief Executive Officer of the CBC.[1643]

The responsibilities to manage the CBC are accompanied by a requirement to account on how the responsibilities are discharged.[1644] This account for the management of the business affairs of the CBC must be given to the Minister and to Parliament.[1645] Section 71(1) of the Broadcasting Act in turn specifies what should be contained in the report,[1646] including the time and format[1647] in which the report should be transmitted. Since the overall responsibility of managing, the CBC is bestowed on the board of directors, with some day-to-day functions delegated to the President of the CBC. The board of directors is responsible for the overall

1636 Section 42(1) of the Broadcasting Act clarifies that the President as defined in the Broadcasting Act, is the Chief Executive Officer of the Canadian Broadcasting Corporation.
1637 Broadcasting Act 1991, s 36(3).
1638 Broadcasting Act 1991, s 36(3).
1639 Broadcasting Act 1991, s 37.
1640 Broadcasting Act 1991, s 38(1)(a)(b)(c).
1641 Broadcasting Act 1991, s 38(2).
1642 Broadcasting Act 1991, s 36(1).
1643 Broadcasting Act 1991, s 42(1).
1644 Broadcasting Act 1991, s 39.
1645 Broadcasting Act 1991, s 40.
1646 Broadcasting Act 1991, s 71(3)(a)(b)(c).
1647 Broadcasting Act 1991, s 71(1).

accounting to Parliament.[1648] Moreover, the Broadcasting Act provides for the accountability of directors.[1649] Should the CBC businesses, activities and other affairs be conducted in a manner that is outside the provisions of the Broadcasting Act or any other relevant statutes, directors will be held liable. This liability flows from the overall responsibility of directors under the Broadcasting Act.[1650]

6.3.3.3.2. Canada Post Corporation Act

The Canada Post Corporation Act (CPCA) establishes the Canada Post Corporation (CPC) and bestows on the corporation[1651] its objects.[1652] Notably, the CPCA provides for a board of directors[1653] and for a chairperson[1654] of the board of directors. The constitution[1655] and appointment[1656] of the board of directors of the CPC are provided for in the CPCA and largely consist of non-executive directors,[1657] with only one executive director, the President of the CPCA.[1658] Similar to the CBC, the President of the CPCA is the Chief Executive Officer of the CPC.[1659]

As is customary with many corporations, the administration of the CPC is placed in the hands of the board of directors by the CPC Act. It states that the 'board shall direct and manage the affairs of the Corporation and may for such purposes exercise all the powers and perform all the duties of the Corporation.'[1660] The wording of the provision placing the powers of the CPC in the hands and domain of the board of directors is peremptory, as the word 'shall' is used in the provision, suggesting a strong and compulsory bestowment of duties on the board of directors of the CPC.[1661]

Non-compliance would result in sanctions for the board of directors. The CPCA

1648 Broadcasting Act 1991, s 39.
1649 Broadcasting Act 1991, s 60(7) and s 71(1).
1650 Broadcasting Act 1991, s 39 and s 40.
1651 Section 2(1) of the Canada Post Corporation Act defines 'Corporation' as the Canada Post Corporation.
1652 Canada Post Corporation Act 1985, s 4 and s 5.
1653 Canada Post Corporation Act 1985, s 2(1).
1654 Canada Post Corporation Act 1985, s 2(1) and s 7.
1655 Canada Post Corporation Act 1985, s 6(1).
1656 Canada Post Corporation Act 1985, s 6(2).
1657 Canada Post Corporation Act 1985, s 6(1).
1658 Canada Post Corporation Act 1985, s 8(1) (1.1).
1659 Canada Post Corporation Act 1985, s 8(1)(1.1).
1660 Canada Post Corporation Act 1985, s 10(1).
1661 Botha, *Statutory Interpretation,*178; Canada Post Corporation Act 1985, s 10(1).

itself does not provide for what happens when the board of directors breaches its governance duties to the corporation. However, the board's accountability and liability may be found in the common law, the FAA and the CBCA.[1662] The CBCA applies to the CPC since it is a corporation.[1663] The regime of liability provided for in the CBCA will be applicable to directors in the CPC.[1664] Furthermore, there are provisions which implicate the accounting of the affairs of the CPC.[1665] There is no shortage of regulation of the conduct of directors' duties by the directors of the CPC. Importantly, directors of the CPC have legal duties to discharge on behalf of the CPC.[1666] Correspondingly, they can be held liable for improperly discharging the duties. Clearly, section 10 of the CPC Act provides that '[t]he Board shall direct and manage the affairs of the Corporation and may for such purposes exercise all the powers and perform all the duties of the Corporation.[1667]

The position in the United Kingdom will be evaluated next. As indicated above a combined conclusion of the position in Australia, Canada and the United Kingdom will be given at the end of this chapter.

6.4 THE POSITION IN THE UNITED KINGDOM

6.4.1. Introduction

The United Kingdom (UK), which consists of various states, is regarded to be the sixth largest economy in the world.[1668] The UK's legal influence on South African law has been acknowledged and many legal principles in circulation in South Africa today have been inspired by English law.[1669] Company law is not an exception.[1670] Thus, an evaluation of the government-owned corporations in the UK is of

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1662 *Imageview Management Ltd v Jack* [2009] BCLC 725 739 (CA); Financial Administration Act 1985, s109; Canadian Business Corporations Act 1985, s 122(1).

1663 Business Corporations Act 1985, s 3(1).

1664 Canada Business Corporations Act 1985, s 122(3).

1665 Canada Post Corporation Act 1985, s 10(1).

1666 See – Responsibilities of the Directors of Canada Post Corporation; Standards of Conduct:<https://www.canadapost-postescanada.ca/cpc/doc/en/about-us/our-leadership/11_a_2_Standards-of-Conduct-of-the-Board-of-Directors.pdf.> accessed 02 December 2023.

1667 Canada Post Corporation Act 1985, s 10(1).

1668 GDP Ranked by Country in 2024:< https://worldpopulationreview.com/countries/by-gdp >accessed 26 February 2024.

1669 Cassim and Others, *Contemporary Company Law*, 684.

1670 Cassim and Others, *Contemporary Company Law*, 684; Havenga, 'The Business Judgment Rule, 25.

value to SOCs in South Africa.

Despite the privatisation of various state-owned entities in the UK several of them have survived and remain in government ownership.[1671] Generally, these SOCs are known as statutory corporations in the UK.[1672] The designation bears semblance to how the majority of the government owned entities are established in the UK, namely, by its own statute.[1673] The presence of statutory corporations in the UK provides for valuable comparison. The objective is to ascertain the regulatory environment of statutory corporations in the UK, with particular emphasis on directors' liability in relation to the breach of their governance duties. It is accepted that boards of directors are constituted by a combination of both executive and non-executive directors.[1674]

The evaluation of the UK position is in line with the topic of the thesis particularly focused on the accountability of non-executive directors serving in SOCs in the UK. Such an evaluation will include both the statutory position and the common law. In accordance with the foregoing, the study will include the various legal instruments that provide for directors' duties and accountability in statutory corporations in the UK. This evaluation is conducted with the objective of ascertaining whether South African SOCs can learn from the UK in relation to the governance of statutory corporations owned and controlled by the UK government.

6.4.2. Common law directors' duties and liability in the UK

The precise scope of directors' duties under the common law has not been identified with certainty. Recent codifications of directors' duties found their source and strength from the common law reservoirs of these duties, without which any meaningful codifications would have been a challenge for the drafters.[1675] The Companies Act (hereinafter the CA) in section 178 affirms the relevance of the common

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1671 Darrel Barnett, 'Statutory Corporations and 'The Crown'', (2005) 28(1), UNSW Law Journal, 186-190.

1672 Barnett, 'Statutory Corporations and 'The Crown'', 186-190.

1673 For example, the Post Office Limited in the UK is established by the Post Services Act, 2011, s 6.

1674 A J Boyle, Company Law and The Non-Executive Director – The USA and Britain Compared, (1978) 27, International and Comparative Law Quarterly, 505.

1675 Cambridge University Press, Directors' Duties and Liability, (2012): <https://www.cambridge.org/core/books/abs/principles-of-contemporary-corporate-governance/directors-duties-and-liability/982E80551A73C70B9F5BF17B1CA2670 > accessed 26 February 2024.

law with respect to directors' duties.[1676] Since directors' duties at common law are sourced from various court precedents, it is not an easy task to state and locate them fully from one source. For this reason, this part of the thesis will draw on existing case law for directors' duties. Furthermore, the enforcement and accountability with respect to the duties discussed will be aligned to the UK's jurisdiction. The common law recognises directors as an important organ in the governance of companies. In *Aberdeen Railway Co v. Blaike Bros,* the court stated the following:[1677]

> The directors are a body to whom is delegated the duty of managing the general affairs of the company. A corporate body can only act by agents, and it is of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting.

It has been stated that a board of directors is the controlling mind of a company.[1678] That explains the wider amplitude of the duties and powers of directors. From a common law perspective, the duties of directors should be understood in the context and purpose for which they exist namely to act in the best interest of the company.[1679] Courts have developed a practice of avoiding substituting its own view about what would be the best interest of the company with the view of the directors in each situation. That does not preclude the courts to assess the conduct in question. For example, in *Item Software (UK) Ltd v Fassihi,*[1680] the court found that if a director proceeds on a course of action, guided by what he or she believes reasonably to be in the best interest of the company, but if the belief is devoid of a rational basis or conclusion that such course of action was indeed in the best interest of the company, the director is in breach of his or her duties to the company. A careful judgment of what is in the best interests of the company must be continuously made. Directors should carefully consider the interests of the company upon every transaction in which they are required to transact on behalf of the company.

6.4.2.1. Fiduciary duties of directors

1676 Davies and Worthington, *Principles of Modern Company Law,* 486.
1677 *Aberdeen Railway Co v. Blaike Bros* (1854) 1 Macq. 461 [471].
1678 *Canadian Dredge & Dock Co v The Queen,* [1985] 1 SCR 662 [693].
1679 *Item Software (UK) v Fassihi* [2005] 2 B.C L.C 91 [14].
1680 *Item Software (UK) Ltd v Fassihi* [2005] 2 B C L 91.

The directors' duties at common law include the fiduciary duties, which may be divided into the duty to act in good faith and the duty to avoid a conflict of interest (the duty of loyalty)[1681] as well as the duty of skill, care and diligence.[1682] The duties of good faith and loyalty have often been linked to the duties of trustees. Directors have been associated with agents of a company whilst in other cases as being in a position peculiar to themselves, thus disavowing many of the labels.[1683]

In *Bristol and West Building Society v Mothew*,[1684] Millett LJ defined a fiduciary as "someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence." He elaborated on the duty by focusing on the duty of loyalty as follows:[1685]

> The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations.

This unique position was affirmed in *Regal (Hastings) Ltd. v Gulliver and Others*[1686] where LJ Porter, put it as follows:[1687]

> Directors, no doubt, are not trustees, but they occupy a fiduciary position towards the company whose board they form. Their liability in this respect does not depend upon breach of duty but upon the proposition that a director must not make a profit out of property acquired by reason of his relationship to the company of which he is director. It matters not that he could not have acquired the property for the company itself - the profit which he makes is the company's, even though the property by means of which he made it was not and could not have been acquired on its behalf.

1681 Davies and Worthington, *Principles of Modern Company Law,* 478, 485.
1682 Davies and Worthington, *Principles of Modern Company Law,* 478.
1683 Davies and Worthington, *Principles of Modern Company Law,* 485.
1684 [1997] 2 W.L.R. 436.
1685 *Bristol and West Building Society v Mothew* [1997] 2 W.L.R. 436.
1686 [1967] 2 A.C. 134.
1687 *Regal (Hastings) Ltd. v Gulliver and Others* [1967] 2 A.C. 134.

In *British Midland Tool v Midland International Tooling Ltd*,[1688] the court held that the duty to act bona fide in the interests of the company included a duty to disclose to the company any activity, actual or imminent which may cause damage to the interests of the company. It being known as the duty of loyalty to the company, it was held in *Item Software v Fassihi,*[1689] that a director has a duty to disclose his or her own misconduct as part of the duty of acting in good faith in the interests of the company. The disclosure from the common law point of view manifests in directors' duty to declare interest in a transaction which is provided for in the CA.[1690] Furthermore, the common law holds that a director may only retain an opportunity or profits if he or she before venturing had disclosed and obtained the company's informed consent.[1691] The converse is that where a director headlong acquired secret profits or exploited a corporate opportunity, these would be disgorged to the company. They are rightly considered to be for the company, for they were acquired by virtue of a director serving in that office.

6.4.2.2. Care, skill and diligence

This duty of care, skill and diligence has been said to be incapable of a clear separation from the fiduciary duties with which it is generally applied, associated or even confused.[1692] The duty of care, skill and diligence primarily exists in common law,[1693] as it keeps transforming.[1694] The question is usually how the evidence of or absence of the employment of this duty manifests in practice. The summation of the duty from a historical and common law perspective takes the following form:[1695]

> Historically, it was widely asserted in the UK that the common law did not require directors to exhibit a greater degree of skill than may reasonably be expected from a person with their knowledge and experience (a subjective test). This test allowed inherently poor directors to escape liability for company losses, even when most reasonable people would have regarded their decisions as negligent. In the absence of legislative reforms the courts had to act to raise standards.

1688 *British Midland Tool Ltd v Midland International Tooling Ltd* [2003] EWHC 466 (Ch) [81], [2003] 2 BCLC 523 [89]-[92].
1689 *Item Software (UK) Ltd v Fassihi* [2004] EWCA Civ 1244 [41], [2005] 2 BCLC 91.
1690 Companies Act 2006, s 177.
1691 *Bristol and West Building Society v Mothew [*1996] 4 All ER 698 (CA) 711.
1692 Finch, 'Company Directors, 200-201.
1693 *Re City Equitable Fire Insurance Co Ltd*, [1925] 1 L R Ch 407.
1694 *Commonwealth Bank v Friedrich* (1991) 5 A C S R 115.
1695 Sealy and Worthington, *Company Law,* 353.

Re City Equitable Fire Insurance Co Ltd,[1696] is famed for having entrenched the subjective standard from which both the common law and statutory law have since departed.[1697] What exactly reflects in the duty of care is beyond the tests generally visited to ascertain whether care, skill and diligence were deployed by directors in discharging their governance duties. For instance, in *Re Dan of London Ltd*,[1698] a director was found negligent for signing an insurance proposal document without having read it. In comparison, any director in the same position would have exercised reasonable care and diligence in reading the document before signing it. Failure to read it results in negligence. If a director is illiterate, then supplying them a document to consider in making a decision is unhelpful. That director has no ability to read. Their being on a board without this ability which should be seen as a primary skill to serve on a board is another debate. Where a director is literate, but decides not to read, he or she displays negligent conduct and negates an opportunity to inform his or her decision.

The duty to exercise reasonable care, skill and diligence permeates an entire board of directors, executive and non-executive. The one notable aspect of the duty is that non-executive directors who sit outside the company will have to exercise such care, skill and diligence when interacting with executive management or interacting with information prepared by executive management. For instance, it was pointed out by the Supreme Court in *Daniels v Anderson,*[1699] that an objective approach requires non-executive directors to take reasonable steps to place themselves in a position to guide and monitor the management of the company.[1700] The stated position in which non-executive directors should place themselves, not only confirms the contentious role of monitoring and guiding executive management, it confirms that they ought to do so with care, skill and diligence. It is in the reception of, and consideration of the information they receive from executive management and upon which they must decide, where the application of the duty is highly necessary.

The general assumption is that non-executive directors only act informed. They are

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1696 Sealy and Worthington, *Company Law,* 353.

1697 Sealy and Worthington, *Company Law,* 353; *Brooks v Armstrong* [2015] EWHC 2289 (Ch); [2015] B C C 661.

1698 *Re D' Jan London Ltd* [1994] 1 B C L C 561.

1699 *Daniels v Anderson* (1995) 16 A.C.S.R 607.

1700 *Daniels v Anderson* (1995) 16 A.C.S.R 607 [664].

informed from, but not always exclusively, information supplied by executive management. It is on this information that they ought to apply their minds successfully and continuously with the use of the duty, to ensure well-informed decisions, which are to the best interests of the company. This level of examining information supplied by executive management on which to base board decisions is suggested for South African SOCs boards.

6.4.3. The Companies Act, 2006 (CA)

Companies in the UK, including statutory corporations, are regulated by the CA.[1701] In some instances the statutory corporations are also regulated in terms of their own enabling statutes some of which will be discussed below.[1702] The CA contains duties of directors as its embodiment of the codification. The codification of duties of directors signifies a departure from the common law. The departure is not total in that the common law still finds application.[1703] Thus, the codification is like that of South Africa, a partial codification.[1704] The codification has been met with much acceptance. In this regard Lowry indicates that it will assist in accessing and providing certainty and understanding of the duties of directors.[1705] The CA has assigned several sections to duties of directors.[1706] These duties include the duty to act within one's powers,[1707] the duty to promote the success of the company,[1708] the duty to exercise independent judgment,[1709] the duty to exhibit skill, care and diligence,[1710] and the duty to avoid conflict of interest,[1711] among other duties.[1712] In terms of section 171, a director has the 'duty to act within [his or her] powers' which entails that a director of a company must act in accordance with the company's constitution, and only exercise powers for the purposes for which they are conferred. Certainly, a departure from acting within the scope and purpose of the

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1701 Companies Act 2006.
1702 Companies Act 2006, s 1040(1)(a)(b)(i)(ii)(iii); Davies and Worthington, *Gower's Principles of Modern Company Law,* 1; see para 6.4.4 below.
1703 Companies Act 2006, s 170(3) and (4).
1704 Sealy and Worthington, *Sealy and Worthington's Cases and Materials in Company Law*, 3-4.
1705 John Lowry, 'The Duty of Loyalty of Company Directors: Bridging the Accountability Gap Through Efficient Disclosure' (2009) 68, The Cambridge Law Journal 610.
1706 Companies Act 2006, s 170(1).
1707 Companies Act 2006, s 171.
1708 Companies Act 2006, s 172.
1709 Companies Act 2006, s 173.
1710 Companies Act 2006, s 174.
1711 Companies Act 2006 s 175.
1712 Companies Act 2006, s 176-177.

duty conferred should attract sanctions against the directors so acting.

Clearly, directors are given powers to control and manage the affairs of the company. The company must be controlled and managed in terms of the duties assigned to directors. Importantly, the powers are not unlimited nor are they to be used in any way that is not aimed at putting the interests of the company first.[1713] Whereas the CA confers duties on directors, directors are also given powers to exercise the duties stipulated in the constitution of the company.[1714] The internal regulation of a company's affairs by the company itself in its constitution is regarded as a significant feature of the CA.[1715] Matters not prescribed by the CA are accordingly discharged in the constitution of the company.[1716]

The context within which the duty to act within a director's powers should be understood is that of the law's ability to restrain the exercise of such powers to what is within the scope of the company's interest. The exercise of directors' powers outside the limits set in the law or the company's constitution may imply the powers have been exercised for other purposes.[1717] Furthermore, a company can only act through its agents. Directors are loosely referred to as agents, especially non-executive directors. In this scenario, the company is the principal. As such, a non-executive director acting on behalf of a company can only do so as per the mandate given by the principal.[1718] It is important to consider what section 40 of the CA says with respect to a director's powers to bind the company, namely that:[1719]

> In favour of a person dealing with a company in good faith, the power of the directors to bind the company, or authorise others to do so, is deemed to be free of any limitation under the company's constitution.

Clearly, a director can act on behalf of the company with third parties and thereby bind the company. The director is said to be unlimited in so acting with third parties. However, there is a limitation, which is that the director can only bind the company in accordance with the constitution that gives him the power to bind the company. Furthermore, while using such powers as conferred, the director ought to be

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1713 Companies Act 2006, s 170(1)(3)(4).
1714 Companies Act 2006, s 17(a)(b), and s 18(1).
1715 Companies Act 2006, s 18; Davies and Worthington, *Modern Company Law,* 58.
1716 Davies and Worthington, *Modern Company Law,* 58.
1717 Companies Act 2006, s 170(1), s 171(a)(b).
1718 Companies Act 2006, s 170(1) and s 171(a)(b).
1719 Companies Act 2006, s 40(1).

discharging his or her duties to the company. Section 40(4) of the CA clarifies the position as follows:[1720]

> This section does not affect any right of a member of the company to bring proceedings to restrain the doing of an action that is beyond the powers of the directors. But no such proceedings lie in respect of an act to be done in fulfilment of a legal obligation arising from a previous act of the company.

Section 40(4) determines that a director's powers to bind the company are within certain confines. It is this confinement which corresponds with section 171 of the CA: the duty of directors to act within their powers. Accordingly, a director of any company regulated under the CA, inclusive of government owned companies, can only act in accordance with the law and the constitution of the company. It can be inferred from this duty to act within powers that a director may attract some unwarranted consequences acting outside the limits of their conferred powers. This should be seen as justifiable in that it is that which lies beneath the motivation to act outside the powers conferred which deserves no impunity.

In terms of section 172 a director has a duty to promote the success of the company. This duty entails the following:

> (1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—
>
> (a) the likely consequences of any decision in the long term,
>
> (b) the interests of the company's employees,
>
> (c) the need to foster the company's business relationships with suppliers, customers and
>
> others,
>
> (d) the impact of the company's operations on the community and the environment,
> (e) the desirability of the company maintaining a reputation for high standards of business conduct, and
>
> (f) the need to act fairly between members of the company.

1720 Companies Act 2006, s 40(4).

(2) Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes.

(3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company.

Certain literature holds that the duty to act bona fide has been seen as a bedrock which permeates and overrides essentially all the duties of directors in the CA.[1721] The success of the company can only be promoted when those who act on its behalf act in its single interest.[1722] It is evident from the supporting factors which can be used as guidelines that the duty is one where a director has to make constant judgment and evaluation about the interests of the company.[1723] The portion which buttresses the constant judgment directors have to exercise is that they have to act in what they consider to be in the best interest of the company.[1724] Directors ought to make a judgment about what is best. They are presumed to know what is in the best interest of the company. Because of being regarded as foundational in nature, the duty to act in good faith in terms of section 172 has been summed as follows:[1725]

> It was traditional under the common law to give a list of the breaches of fiduciary duties of directors under headings such as; misappropriation of company property; exercise of powers for an improper purpose; fettering discretion; and permitting interest and duty to conflict. While no one would dispute that these are all areas where directors have been found to be in breach of duty, the listing of the duties in this way has tended to obscure the fundamental point that a director is under one duty and that is to act *bona fide*[1726] in the interests of the company. The list of duties that grew out of the case law was in fact a list of situations where a director is most likely to be in breach of his fundamental duty. Thus, for example, if a

1721 Langford, 'The Duty to act Bona Fide in the Interests of the Company, 215.
1722 Companies Act 2006, s 172.
1723 Companies Act 2006, s 172(1)(a)-(f).
1724 Companies Act 2006, s 172(1).
1725 Janet Dine and Marios Koutsias, *Company Law,* (6th edn, Palgrave MacMillan, 2007) 11.5.
1726 Own emphasis.

director finds himself in a position where he has a conflict of interests he is in dire peril of being found to be in breach of his overriding duty to act *bona fide* for the benefit of the company.

Courts have similarly weighed in, suggesting that the duty to act bona fide is a cornerstone of the duties of directors of a company. For instance, in *Item Software (UK) Ltd v Fassihi*,[1727] the court underscored the duty in the following terms, stating that the 'fundamental duty [of a director] is the duty to act in what he in good faith considers to be the best interests of his company.' The court held that the duty to act bona fide is a time-honoured duty which directors should hold with esteem. What ought to be examined is the scope of decision-making a director is entrusted with to consider the best interest of the company, bona fide. The question is whether directors are skilled enough to make consistent judgments in favour of the company and to proceed acting bona fide. In *Item Software (UK) v Fassihi,*[1728] it was determined that if a director were to embark on a course in which he or she acts without considering the interests of the company, such a director would be in breach of the duty. In such circumstances, the director would be subject to the consequences outlined in the CA.[1729]

In terms of section 173 of the CA a director has the duty to exercise an independent judgement. According to subsection 2 of the CA, this duty is not infringed by a director if his acting is in accordance with an agreement duly entered into by the company that restricts the future exercise of discretion by its directors, or the director acted in a way authorised by the company's constitution. The duty to exercise independent judgment had at common law been termed as the duty not to fetter the exercise of discretion.[1730] It has been commented that the exercise of independent judgment does not preclude the seeking of counsel from those suitably situated to give it.[1731] What independent judgment may amount to should be understood in general terms because the CA provides no definition for it. It is

1727 *Item Software (UK) Ltd v Fassihi* [2005] 2 B C L 91 [41].

1728 *Item Software (UK) Ltd v Fassihi* [2005] 2 B C L 91 [41].

1729 Companies Act 2006, s 178(1).

1730 *Fulham Football Club Ltd v Cabra Estates plc* (1994) 1 BCLC 363 (Court of Appeal); Davies and Worthington, *Principles of Modern Company Law* 498.

1731 KPMG Board Leadership Centre: Independent Judgment <https://assets.kpmg.com/content/dam/kpmg/cn/pdf/en/2021/09/independent-judgment.pdf> - accessed 04 December 2023.

submitted that exercising an independent judgment may not amount to a judgment that is outside or away from the company's interests even as it may remain un-interfered.[1732] That is because all duties directors carry out on behalf of the company should openly be in the interest of the company.

What then ought to be understood by independent judgment? Is independent judgment to be expected from both executive directors and non-executive directors? Although a distinction exists between the designations, it seems that the ability to exercise independent judgment is not confined to either. It is argued that the ability of a director to exercise independent judgment may not be hinged on his status as executive or non-executive director. It is a duty both should discharge religiously. It is therefore to be expected of all directors, executive and non-executive, to exercise independent judgment. It is submitted that exercising independent judgment is linked to the ability to make decisions in the company's best interests, without interfering with the exercise of the judgment itself. It unfolds into pure and clear thinking in that a director can think and decide in the best interests of the company with a single mind. It has been expressed that 'when directors exercise their powers and make decisions, they must be single-minded in acting in good faith in the best interests of the company.'[1733]

Beecha-Monas[1734] has written eloquently about the ability to exercise independence on the board of directors. Although her thesis is about the independence of directors in terms of how they think and how they can raise differing perspectives, it impacts the independence of judgment, as judgment should relate to a director's assessment of an issue on a board meeting's agenda. In other words, what does each director think of a matter before the board without being influenced by anybody on the board or outside it? The discussion provides promotion to the duty to exercise independence. What can be extracted from Beecha-Monas' discussion is that directors are called upon to be able to think independently[1735] without being coerced into group thinking or any other influence foreign to the company's

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1732 KPMG Board Leadership Centre, Independent Judgment <https://assets.kpmg.com/content/dam/kpmg/cn/pdf/en/2021/09/independent-judgment.pdf - accessed 04 December 2023.

1733 Langford, The Duty of Directors to Act Bona Fide in the Interests of the Company, 221.

1734 Monas, 'Marrying Diversity and Independence in the Boardroom, 392.

1735 Companies Act 2006, s 173(1): A director of a company must exercise independent judgment.

interests.

The CA gives contours within which independent judgment may be exercised. It should still be within the confines of any relevant agreement and the constitution of the company.[1736] For statutory companies, one may submit that such independent judgment should still conform to any requirements of the corporation prescribed or proscribed in the enabling statute.[1737] As to holding a director accountable for failure to exercise independent judgment, it is unclear how such an inquiry may be proceeded with. However, there is guidance in case law on holding non-executive directors accountable.[1738]

Another factor is that the ability to make independent judgment may not be common from one director to another, irrespective of their level of education.[1739] In other words, what may be an independent judgment for director A may be a compromised judgment for director B. For as long as each director reaches their judgment without influence from anyone on the board or elsewhere, the judgment is at least reflective of independence. Independent judgment may add value to the work of the board in monitoring the work of executive management.[1740] That is because it may assist the board to look at executive management's performance with integrity and free from undue influence.

Essentially, the duty to exercise independent judgment should be seen as assisting directors to act in good faith. It encourages avoidance of compromises on a board of directors which may affect the company. With respect to accountability, there should be ways to ascertain that directors failed to exercise independent judgment. This may be the case when it is revealed that a different result was achieved from the one, that had an independent judgment been exercised. It may also manifest in how a decision by a board was made. For instance, did the board make the decision with no force or threat or from any other compromised position. This may call for the application of some form of test to be able to judge a lack or presence of independent judgment in decisions made by directors. The

1736 Companies Act 2006, s 173(1)(2)(a)(b).
1737 Companies Act 2006, s 173(1)(2)(a)(b).
1738 *Organisation Undoing Tax Abuse v Myeni* [2020] 3 All SA 578 (GP) para 32; *Howard v Herrigel and Another NNO* 1991 (2) SA 660 (AD) [678].
1739 Companies Act 2008, s 76(3)(c)(ii).
1740 Cheffins, 'Corporate Governance in the United Kingdom, 74, 86.

submission is that should the decision appear not to be in the best interest of the company, given the probability of any other decision which would have been made, then it may be said directors failed to exercise independent judgment. Where directors fail to exercise independent judgment the usual consequences of liability and accountability should be visited on the board of directors.

Similar to company laws in other jurisdictions, such as South Africa, the CA in section 174(2) provides for duty the care, skill and diligence that would be exercised by a reasonably diligent person with:

> (a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company, and
>
> (b) the general knowledge, skill and experience that the director has.

Directors are required to act with the necessary care, skill and diligence. The duty to exercise care, skill and diligence includes both an objective and subjective test.[1741] The objective part of the test requires of a director to exercise the care skill and diligence that would be exercised by a reasonable diligent person in that position. In addition, this should be exercised with the general knowledge, skill and experience that may reasonably be expected of a person performing the functions that are being performed by the director.[1742] In other words, the director should act like a reasonable diligent person with the same general knowledge, skill and experience. Here it means that the law expects a director to have a certain level of knowledge, skill and experience to be able to carry out the duty. The objective test is one which accords with the reasonable man's test.[1743] This also entails that a director should not act without being informed and without the requisite knowledge, skill and experience generally expected that the person so acting must have. In other words, a director would not assume a headlong approach. Directors, especially non-executive directors, can no longer extend intermittent and passive attention to a company.[1744] Before a director acts, certain assessments should be

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1741 Bird and Hill, 'Regulatory Rooms in Australian Corporate Law' (565.

1742 Bird and Hill, 'Regulatory Rooms in Australian Corporate Law' 565.

1743 Bird and Hill, 'Regulatory Rooms in Australian Corporate Law' 565

1744 AWA Appeal (1995) 16 A C S R 607, 664*; Statewide Tobacco Services, Ltd v Morley* (1990) 2 A C S R 405; *Morley v Statewide Tobacco Serv Ltd* (1992) 8 A C S R 305.

conducted to inform the director whether the act or decision about to be taken is one that a reasonable diligent director would make. This is in addition to the knowledge, skill and experience that director may possess.

With respect to the subjective part of the test, a director is entitled to act within the realms of the general knowledge, skill and experience that the specific director has. This test respects the level of skill, knowledge and experience the director has. The South African Companies Act similarly provides for at least two tests in determining the way a director may have discharged his or her duties to a company.[1745] Even with the subjective test, a director should have knowledge, skill and experience. That means a director who does not have any of these attributes is an intruder on a board. What will the director offer, as he or she comes to a board with nothing. There is nothing to be expected from that director in the very first place. It is this which often bears on the appointment of directors. For South African SOCs, the suggestion is that all those appointed to boards of SOCs must come with valuable attributes to be able to discharge the duty of care skill and diligence, including all other duties of a director.

Furthermore, the CA includes a duty to avoid a conflict of interest. Section 175 of the CA determines that a director of a company must avoid a situation in which he has or can have a direct or indirect conflict of interest with that of the company. Specific reference is made to the exploitation of any property, information or opportunity.[1746] The rule applies irrespective of whether the company could take advantage of the property, information or opportunity. However, the duty does not apply to a conflict of interest arising in relation to a transaction or arrangement with the company.[1747]

The codification of directors' duties and particularly the duty to avoid a conflict of interest has contributed to greater clarity in this area of directors' duties. For instance, the duty clearly stipulates the circumstances in which a conflict of interest may and may not be excusable.[1748] The authorisation referred to in section 175 may be seen as synonymous with the common law requirement of frank disclosure

1745 Companies Act 2008, s 76(3)(c)(i)(ii).
1746 Companies Act 2006, s 175(2).
1747 Companies Act 2006, s 175(2).
1748 Companies Act 2006, s 175(5)(a)(b) and (6)(a)(b).

and subsequent consent by the company.[1749] It is submitted that the provision outlines activities and transactions which together may be seen as constituting a conflict of interest.

The duty includes the avoidance of usurping a corporate opportunity, using information or property of the company for self-interest.[1750] It is submitted that the duty should encompass the spectre of secret profits given its wide nature. The duty's delineations are quite broad in that it still applies regardless of the company itself not taking up the opportunity. The duty to avoid a conflict of interest in the CA builds on the common law. In the common law the duty to avoid a conflict of interest also revolved around the duty of being loyal to the company and putting its interest first. If a director makes a secret profit or takes up an opportunity the company would be entitled to disgorge the gains by that director, provided the director acted in his or her line of office as director.[1751]

The codification in the CA is an enhancement in that it provides clarity as to what amounts to a conflict of interests and what it is not. Furthermore, the codification of the duty lays down a distinction between conflict of interests and conflict of duties. This has been achieved by indicating that reference to a conflict of interest also includes a conflict of duty.[1752] It is unclear whether a disgorgement of secret profits and abandonment of a corporate opportunity would be enough accountability for a director in breach of the duty. It may seem fair to make directors account for the secret profits they made and for the corporate opportunities they abrogated to themselves and to require no more from them. This would appear to make good the loss or damage which had been occasioned to the company. The foregoing may be seen from a point of view that it is not the intention of the company to seek to obtain more from a director in breach of his or her duties than the harm or damage inflicted on the company. If that were allowed, it is submitted with reliance on pertinent authorities, that it would result in a company being unjustifiably enriched in addition to recovering a loss or damage attributable to a director.[1753]

1749 *Bray Ford* [1896] A.C 44, 51-52 HL.

1750 Companies Act 2006, s 175(2).

1751 *Breitenfeld UK v Harrison* [2015] EWHC 399 (Ch) [68].

1752 Companies Act 2006, s 175(7). The section states that any reference in this section to a conflict of interest includes a conflict of interest and duty and a conflict of duties.

1753 *Dorbyl v Vorster* [2011] JOL 27671 (GS); *Regal (Hastings) Ltd v Gilliver* [1942] 1 All ER 378 (HL); 1967 2 AC 134.

The CA moreover specifically determines that a director has a duty not to accept benefits from third parties. In this regard section 176 states that a director may not accept such benefit by reason of being a director, or by doing (or not doing) anything as director. Section 176(2) of the CA defines a third party by stating that it 'means a person other than the company, an associated body corporate or a person acting on behalf of the company or an associated body corporate.' It further provides in section 176(3) that 'benefits received by a director from a person by whom his services (as a director or otherwise) are provided to the company are not regarded as conferred by a third party'.

Section 176(4) further provides that 'this duty is not infringed if the acceptance of the benefit cannot reasonably be regarded as likely to give rise to a conflict of interest'. Section 176(5) is of further significance as it provides that any reference 'to a conflict of interest includes a conflict of interest and duty and a conflict of duties.' Importantly, it should be noted that the duty to not accept benefits from third parties has been worded in broad terms in the sense that the word 'benefit' may not be availed on account of an action or inaction on the part of the director. It is appreciated that a director may be accorded a benefit within certain limits, from persons who may render services to the company.[1754]

Directors serve at the instance of the company. The company should afford them benefits when appropriate. As stated, the word 'benefit' is assumed to involve any accolade that a third party gives to a director against the prescription of the provision in question. The provision includes and excludes benefits in question. Benefits from third parties which cannot reasonably be regarded as likely to cause any conflict of interest have been accommodated.[1755] The benefit should thus, other than being a benefit from a third party, have the effect of being in conflict with the company.[1756] Therefore, if a director receives a benefit which does not conflict with his or her duty to the company, such benefit may be acceptable. In the event that it does conflict with the company, the matter may be resolved by a director declaring such an interest.

1754 Companies Act 2006, s 176(3).
1755 Companies Act 2006, s 176(2)93).
1756 Companies Act 2006, s 176(4).

In terms of section 177 of the CA a director has a duty to declare an interest in a proposed transaction or arrangement. Section 177(1) determines that a declaration, or popularly known as a 'disclosure', is required from a director who has interest in an imminent transaction which may implicate the company. The understanding is that this is a disclosure in which the company itself will be involved. The disclosure by an interested director must be made to the company. The purpose of such disclosure is to make other directors aware of and to safeguard any conflict of interests in a transaction that involves the company.[1757]

Subsection 2 of section 176 of the CA provides the way the disclosure should be made and provides for some flexibility. It may be made at a meeting of the directors or through written notice to the other directors of the company.[1758] A disclosure offers a platform where interests by directors in imminent transactions are freely and openly made to the company. The provision encourages avoidance of conflict of interests. Subsection 3 of section 177 of the CA indicates that the disclosure should be made in advance, and not after the fact. Furthermore, a director will only be held responsible for non-disclosure if he or she ought to have known or knew of the transaction but failed to disclose. A transaction that if, entered by a director even if undisclosed but does not raise a conflict situation is immaterial to the provision.[1759] Equally, a transaction that is already known by other directors does not have to be disclosed to them.[1760]

The South African position is similar in that the Companies Act provides for personal financial interests.[1761] The disclosure provided for is of a financial nature.[1762] A director is required to disclose in advance or as soon as they become aware of a potential conflict of interest.[1763] Disclosure impacts on financial interests of related persons.[1764] That is, a director who is related to a person with financial interests in a transaction must disclose this fact.[1765] A director who discloses financial interests should proceed to recuse him or herself from the meeting and must not

1757 Davies and Worthington, *Principles of Modern Company Law,* 519.
1758 Companies Act 2006, s 177(2).
1759 Companies Act 2006, s 177(6)(a).
1760 Companies Act 2006, s 177(6)(b)(c).
1761 Companies Act 2008, s 75.
1762 Companies Act 2008, s 75.
1763 Companies Act 2008, s 75(4)(5).
1764 Companies Act 2006, s 75(5)(6).
1765. Companies Act 2006, s 75(5)(6).

take any other role in the matter.[1766]

It is submitted that subsection 7 of section 177 of the CA raises loopholes of how certain transactions, although not meeting the outlined requirements of disclosure, may be authorised. For instance, the ratification of a transaction in terms of which there was no disclosure defeats the purpose of proper accountability and avoidance of conflict of interest or duty.[1767] The argument is that if there was no disclosure in a transaction and disclosure is only made after the transaction has been approved, no ratification should be made on an irregularly processed transaction. The ratification clearly weakens the mechanism of prior disclosure in that disclosure that could have been made in advance may strategically be made only after approval and be placed for ratification. An additional concern is that failure to disclose may, upon a court order, not invalidate a concluded agreement.[1768] This is a further loophole whose efficacy remains unclear from the vantage point of the thesis. In the sphere of SOCs potential conduits for improper conduct only exacerbate the problem of disclosure of financial interest.

It is noted that the CA does not have a similar provision where a court order validates an agreement approved by the board of directors without the disclosure requirements having been satisfied. The court order provided for under section 75(8) of the Companies Act can be sought by any interested person. This is a concern because the mechanism seeks to invalidate or temper with the disclosure requirements.[1769] It is submitted that instead of a director or any other interested person approaching a court of law, they must merely satisfy the clear disclosure requirements.

These statutorily listed duties are only general and non-exhaustive. Compliance with them would not excuse directors from breaches of other duties, as the general duties are supplemented by a comprehensive body of common law precedents dealing with the matter of directors' duties, as well as by other statutorily established duties (e.g. the insolvency and health and safety legislative Acts).

1766 Companies Act 2008, s 75(5)(d)(e).

1767 *Software (UK) Ltd v Fassihi* [2004] EWCA Civ 244, 2004 WL 2077421 [11].

1768 Companies Act 2008, s 172; Companies Act 2008, s 75(8).

1769 Companies Act 2008, s 75(4)(5).

6.4.3.1. Liability for breach of duties under the CA

Following on the directors' duties provided for in the CA, the consequences of the breach of the duties for directors is stipulated in section 178 thereof. Section 178 of the CA stipulates that the consequences of breach (or threatened breach) of sections 171 to 177 are the same as would apply if the corresponding common law rule or equitable principle applied. According to section 178(2), the duties so listed except for the duty to exercise reasonable care, skill and diligence are, accordingly, enforceable in the same way as any other fiduciary duty owed to a company by its directors.

What can be deduced from the section is that the CA defers to the common law respecting liability and accountability for breach of directors' duties.[1770] In other words, the consequence that the common law would have assigned or applied for a certain breach will likewise apply in terms of the CA. Subsection 2 of section 187 of the CA confirms the difference between fiduciary duties and that of the duty of care skill and diligence in that the subsection points out that the fiduciary duties will be enforced differently from the duty of care, skill and diligence. While the provision states that the fiduciary duties will be enforced in line with common law, it does not state how the duty of care, skill and diligence will be enforced. It is assumed that the general provisions relating to this duty will apply.

An interesting aspect of section 178 of the CA is the provision of holding directors accountable for threatened breach of corporate governance duties.[1771] This implies that it is not in all cases necessary to find actual breach before making a director account for breach. A threatened breach of duty would result in liability against a director. The submission is that a threat must have resulted into some form of belief that a breach of duty would eventuate. Alternatively, the threat of breach must have brought some negative effect to the company although it may not have fully materialised. The provision, it is submitted, may strengthen the departure from gross negligence to strict liability.

An express absence that has been noted in the CA is that of the business judgment

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1770 The South African Companies Act has a similar provision respecting the establishment of liability, with the common law being a crucial determinant in findings of liability against directors.

1771 Companies Act 2006, s 178(1).

rule. A director is in terms of section 173 of the CA required to exercise independent judgment.[1772] Independent judgment does not exclude reliance for making that judgment on information supplied by designated officers. However, it is to be accepted that acting with care, skill and diligence implicates reliance on information.[1773] It is unclear if reliance on reliable information to decide may lend a director in trouble. This uncertainty has arisen because the CA has comparably failed to provide for an express judgment rule.[1774] It is submitted that such a defence may be available through the application of the common law interpretation which is recognised in the CA.[1775]

6.4.4. Enabling statutes of statutory corporations in the UK

The study considers the presence of incorporated companies that may be found in the geographies identified for comparisons. It is essential to ascertain from any available enabling laws establishing and regulating such government owned entities how directors' duties are provided for. Importantly, there is need to examine what enabling legislation provides with respect to accountability for the failure of the performance of the directors' duties.

6.4.4.1. British Broadcasting Corporation Charter

In the UK, companies can be formed through the CA,[1776] by an act of Parliament or by royal charter.[1777] The British Broadcasting Corporation (the BBC) is an example of a company created by royal charter.[1778] A royal charter has been defined as an instrument of incorporation, granted by the King, which confers independent legal personality on an organisation and defines its objectives, constitution and powers to govern its own affairs.[1779] The terms of each charter are therefore

1772 Companies Act 2006, s 173(1) and (2)(a)(b).
1773 Companies Act 2006, s 174(1) and (2)(a)(b).
1774 Companies Act 2008, 76(4) and (5); Companies Act 2001, s 588GA (1); Canadian Business Corporations Act 1985, s 123(a)(a)(b) and 5(a)(b).
1775 Companies Act 2006, s 170(1) and (2)(a)(b).
1776 Companies Act 2006.
1777 Davies and Worthington, *Principles of Modern Company Law,* 1.
1778 Charter and Agreement: <https://www.bbc.com/aboutthebbc/governance/charter/ downloads.bbc.co.uk/bbctrust/assets/files/pdf/about/how_we_govern/2016/charter.pdf> accessed 04 December 2023.
1779 The Privy Council Office, Royal Charters <https://privycouncil.independent.gov.uk/royal-charter > accessed 12 June 2023.

somewhat different, depending on the individual requirements of the type of organisation that is being incorporated.[1780] It may be asked how a royal charter ranks or what its effect is on the organisation established through it. It appears that a royal charter has significance as it is a royal establishment and is seen as more highly placed than other organisations incorporated under the CA. The significance of a royal charter has been explained as follows:[1781]

> Incorporation by Charter is a prestigious way of acquiring legal personality and reflects the high status of that body. The authority for the grant of a Charter comes from the Royal Prerogative, that is to say, the grant is made by the Sovereign (on the advice of the Privy Council).

It is argued that a royal charter company is so called because it is intended to carry royal significance for the sovereign and the public in the UK. The Royal Charter for the Continuance of the BBC is the BBC's constitutional basis. It sets out the BBC's object, mission and public purposes. The Charter also outlines the BBC's governance and regulatory arrangements, including the role and composition of the BBC Board. It must be noted that a royal charter is still subject to general law.[1782] In this instance, the BBC is subject to the Charter through which it was formed and to other laws, significantly, the CA.

The BBC Charter provides for its governance framework. It specifically provides for the board of directors' appointment,[1783] composition; determining clearly that non-executive directors form the majority of directors.[1784] The duties of directors are also provided for in the BBC Charter. It should be noted that the duties provided for are not an exhaustive list as the duties listed in the CA likewise bind the directors of the BBC. Importantly, there is an overriding duty which bars members of the board of directors of the BBC from taking instructions from Ministers or any other person. The section provides as follows:[1785]

1780 The Privy Council Office, Royal Charters <https://privycouncil.independent.gov.uk/royal-charter > accessed 12 June 2023.

1781 The Privy Council Office, Royal Charters <https://privycouncil.independent.gov.uk/royal-charter > accessed 12 June 2023.

1782 The Privy Council Office, Royal Charter <https://privycouncil.independent.gov.uk/royal-charter >accessed 12 June 2023.

1783 Royal Charter for the Continuance of the British Broadcasting Corporation, 2016, s 23(3) providing for open and fair competition.

1784 Royal Charter for the Continuance of the British Broadcasting Corporation, 2016, s 21(2).

1785 Royal Charter for the Continuance of the Broadcasting Corporation, 2016, s 20(2).

> In accordance with article 3 (independence of the BBC), each member of the Board must at all times uphold and protect the independence of the BBC including by acting in the public interest, exercising independent judgement and neither seeking nor taking instructions from Government Ministers or any other person.

This provision of requiring directors to be independent and barring them from taking or seeking instructions from just anyone including government Ministers is commendable. If applied consistently it would strengthen the independence of directors and allow them to exercise independent judgment in the interest of the BBC, thus impacting on the public interest. A similar provision is recommended for SOCs in South Africa where government Ministers have often been seen to interfere in the dealings of the board of directors' duties at various SOEs causing them to act contrary to the best interest of the SOC's.[1786]

The BBC Charter provides for openness, transparency and accountability to the extent that board of directors' meetings minutes must be made public.[1787] The broadcasting of board of directors' meetings minutes, including board committees' minutes is a robust step towards transparency and accountability which is essential in the governance of public entities. This innovation is highly recommended for South African SOCs.

Making board minutes public and by implication decisions taken there at will ensure the public is kept informed about the affairs of SOCs and can act timeously should governance be a concern. Additionally, the publication of minutes would curtail improper board agenda items as these can inflame public outcry of how an SOC is being managed. The publication of board minutes is certainly a deterrent and an accountability measure. It is for the foregoing reasons recommended for South African SOCs where the citizens have shown the ability to openly express themselves on the governance of SOCs. The beauty of this recommendation may be that the public may know about certain decisions before they are implemented. This may assist in nipping some wrong decisions in the bud, before they see the light of day at implementation level. Resultantly, this may enhance proper

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1786 *Molefe & Others v Minister of Transport & Others* [2017] ZAGPPHC 120 at 1, 15 and 16; Tebello Thabane, The Removal of Directors in State Owned Companies: Shareholders' Franchise in Jeopardy? Molefe and Others v Minister of Transport and Others, (2018) 1 SA Mercantile Law Journal 155-156.

1787 Royal Charter for the Continuance of the Broadcasting Corporation, 2016, s 12(1)(2)(a)(b)(c).

accountability and good corporate governance of SOCs in South Africa.

The Charter itself does not provide for any liability for any harm or damage caused to the BBC by directors. The Charter nonetheless consists of commendable provisions which contribute to good corporate governance through open broadcasting of directors meeting minutes, and its insistence on the independence of directors. Furthermore, liability for any harm or damage to the BBC can still be pursued under the common law and the CA, which applies to the BBC.

6.4.4.2. Postal Services Act

The Post Office Company (or Post Office Limited) is established in terms of the Postal Services Act.[1788] The ownership of the Post Office Company is largely vested in the government.[1789] It is a publicly driven SOC.[1790] The Postal Services Act does not provide for a board of directors nor for their accountability. The Post Office Limited does, however, have directors, the majority of whom are non-executive directors, distinctly qualified.[1791] Apart from being subject to the Postal Service Act the Post Office Limited's directors are also bound by other applicable laws and codes.[1792]

In comparison, the South African Postal Services company has moved from being declared insolvent to business rescue.[1793] It may be recalled that its financial woes have been long standing and glaringly foreseen but ignored, with no accountability on the board of directors. It is poignant to establish whether some lessons can be gathered from like SOCs in the targeted jurisdictions of the thesis.

The Post Office Company is defined as a company.[1794] This definition places it in

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1788 Postal Services Act 2011, s 6(1)(a)(b)(i)(ii).

1789 See Articles of Association: Useful Information <https://corporatepostoffice.co.uk/ en/governance/our-structure/useful-corporate-information > accessed 26 February 2024; Postal Services Act 2011, s 4(1).

1790 Postal Services Act 2011, s 4(1)(a)(b).

1791 Useful Information <https://corporate.postoffice.co.uk/en/governance/our-structure/our-board/ > accessed 12 June 2023.

1792 UK Legislation Relating to the Postal Industry <https://www.ofcom.org.uk/postal-services/information-for-the-postal-industry/uk-leg > accessed 26 February 2024.

1793 The Citizen: Post Office rescue plan is working, but more money is needed – https://www.citizen.co.za/business/post-office-rescue-plan-is-working-but-more-money-is-needed/ - accessed 10 June 2025.

1794 Postal Services Act 2011, s 6 defines the Post Office Company as: a company that – a. is engaged in the provision of post offices, b. is or has at any time been-, (i) subsidiary of the original holding company, or (ii) in the same group as a company that is or (as the case may

the realm of the CA. Being a company, the Post Office Limited is regulated in addition to other statutes such as the Postal Services Act, by the CA. Directors' duties and its accompanying liability provided for in the CA will thus apply to the board of the Post Office Limited. Furthermore, the directors of the Post Office Limited will be subject to codes of good governance applicable to public bodies.[1795] The code of conduct relating to board members of public bodies provides for useful information with respect to duties of directors. For instance, it provides for how directors must account for public funds, how to navigate conflict of interest situations and general responsibilities applicable to non-executive directors and chairpersons.[1796] The code of conduct for board members of public bodies in the UK is an instrument that seeks to regulate board members' conduct in their official affairs on the board.[1797] The code of conduct as its name clarifies applies to public bodies inclusive of SOCs in the UK. The code is commendable and is recommended for SOCs in South Africa.

The rationale for recommending it stems from its contents and the clear manner and style in which it is drafted.[1798] It focuses on pertinent issues which have compromised boards of directors when serving on boards of public bodies. For example, the Code prohibits political interference and deployment of financial resources for political and other activities, unrelated to the success of a public body.[1799] South African SOCs may not be immune to these vices. Being placed in check with a

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be) was at that time designated under this section, and, c. is designated for the purposes of this subsection by order made by the Secretary of State.

1795 Cabinet Office: Code of Conduct for Board Members of Public Bodies June 2019 <https://www.gov.uk/government/publications/code-of-conduct-for-board-members-of-public-bodies/code-of-conduct-for-board-members-of-public-bodies-june-2019 > accessed 13 June 2023.

1796 Cabinet Office: Code of Conduct for Board Members of Public Bodies June 2019 <https://www.gov.uk/government/publications/code-of-conduct-for-board-members-of-public-bodies/code-of-conduct-for-board-members-of-public-bodies-june-2019 > accessed 13 June 2023.

1797 Cabinet Office, Code of Conduct for Boards of Public Bodies: https://www.gla.gov.uk/media/2514/code-of-conduct-for-board-members-of-public-bodies.pdfwww.cabinetoffice.gov.uk/content/public-bodies-and-appointments > accessed 04 December 2023.

1798 The essential features of the Code are the following: the seven principles of public life, general conduct (use of public funds), gifts and hospitality and board members' responsibility. See Cabinet Office, Code of Conduct for Boards of Public Bodies < https://www.gla.gov.uk/media/2514/code-of-conduct-for-board-members-of-public-bodies.pdf ; www.cabinetoffice.gov.uk/content/public-bodies-and-appointments> accessed 04 December 2023.

1799 Cabinet Office, Code of Conduct for Boards of Public Bodies<https://www.gla.gov.uk/media/2514/code-of-conduct-for-board-members-of-public-bodies.pdf ; www.cabinetoffice.gov.uk/content/public-bodies-and-appointments > accessed 04 December 2023.

legal provision or compulsory code could go a long way in preventing the happening of detrimental occurrences.

6.4.5. Conclusion

The comparative study of the three jurisdictions has revealed that SOCs are not unique to South Africa. They exist in all three of the jurisdictions which were examined in this chapter. What has however been observed is that the three jurisdictions are all more economically advanced than South Africa in that they are highly ranked in world economics.

The study further revealed some differences that can be transplanted into the South African company law regime. All in all, the SOCs in the three jurisdictions are regulated quite similarly to the SOCs in South Africa. However, the three jurisdictions do not display the corporate governance inefficiencies associated with many SOCs in South Africa and instead demonstrate high levels of corporate governance.

An investigation of the various legal instruments in use in Australia that apply to SOCs indicates that Australia aims to consistently improve its corporate governance. Of the literature evaluated, none suggests that state-corporations in Australia are on the wrong path. Significantly, the PGPA Act, although it reflects some similarities with the PFMA, goes beyond regulating just financial management in state entities, to actual corporate governance, performance and accountability.

An evaluation of Snowy, for example, illustrates a well governed energy entity in comparison to ESKOM which is beset by a perpetual set of governance challenges, with little to no accountability, albeit with recent improvements. The ABC Act contains several provisions relating to the removal and the appointment of the chairperson of the board based on merit.[1800] Chairpersons in SOCs take on the work of leading the board. If they are incompetent or compromised, the entire board may not function properly. The failure to maintain transparent merit in the appointment of board members may be a concern in that, it becomes a conduit for the wrong appointments to boards of SOCs.

1800 Australian Broadcasting Corporation Act 1983, s 18; Public Governance, Performance and Accountability Act 2013, s 30.

The legal comparison highlighted a few provisions worthy of further mention. These provisions appear to embolden directors' powers to not be interfered with. In some cases, the provisions specifically mention that directors are not to be given instructions by a Minister for them to carry out. For example, section 20 of the BBC Charter[1801] forbids the board from seeking or taking instructions from government Ministers or any other person. There is also a similar provision in the Australian Corporation Act which preserves the independence of the ABC.[1802]

As for the various companies Acts surveyed, the conclusion is that the UK's CA provides the most elaborate list of duties of directors. The submission is that the list consists of the main duties and sub duties. It is argued that the drafting that went into the directors' duties under the CA may aid a clearer understanding of the broader duties. The additional points accompanying the duties as listed appear to explain what the main duty is all about, which can assist with comprehension of the scope of the duty given.

The detail with which the duties have been described makes it easier for directors to understand what is expected of them. For instance, a duty that requires directors to work for the success of the company may engender a different but positive understanding that their role as directors is geared central and geared towards the success of the company. This may imply to them that all other duties they execute on behalf of the company is to ensure that the company succeeds. This means that directors may move away from a rigid approach of merely reciting the duties of directors to actually applying them in practice in a way that ensures the success of the company.

Furthermore, the PGPA Act provides for the duty of the board of directors to keep the minister informed.[1803] In the South African context this would ensure that a shareholder representative is kept informed of the performance of the SOC. The advantage of this duty is for the shareholder representative to know and to appreciate how the SOC is being governed. Should there be any concerns regarding the governance of the SOC, the reports would assist the shareholder

1801 British Broadcasting Corporation Charter, s20(1) available at; https://www.bbc.co.uk/about/thebbc/governance/charter/ accessed 19 June 2023.

1802 Australian Broadcasting Corporation Act 1983, s 8(1)(b), and s 2.

1803 Public Governance, Performance and Accountability Act, 2013, s 19(1)(a)(e).

representative to decide on interventions aimed at correcting any anomalies in governance, presumably while there is still time. Equally, the suggested provision would prevent any shareholder minister from pleading ignorance.

As indicated above, the PGPA Act may be assimilated to the PFMA in South Africa.[1804] The PFMA provides for reporting on financial affairs of all government entities inclusive of SOCs.[1805] The difference is that the PGPA Act provides for prompt reporting sometimes at the instance of an event or decision which may affect a corporation.[1806] It is suggested that the PFMA may also benefit from such a provision. Another aspect that deserves examination is the actual enforcement of available provisions in the regulation of SOCs in South Africa. This area of enforcement requires a consistent, constant approach based on standardised mechanisms generally applied. For instance, the effective application of relevant provisions of the PFMA,[1807] the Companies Act[1808] and primary laws of SOCs.

According to a publication titled "Department of Public Enterprises: Challenges Facing State Owned Companies (SOCs),[1809] it is evident SOCs in South Africa still have a long way to go before becoming some of the well-governed SOCs in the region. In essence, many of them are not yet properly governed. To engender some improvement in the governance of SOCs in South Africa, it is not the finding that the laws are inadequate, rather it is that those charged with governance such as directors should discharge their duties effectively. One way is to robustly and consistently enforce accountability for non-executive directors of SOCs to ensure that they effectively carry out their governance duties.

The governance of corporations in Canada, inclusive of Crown Corporations, was found to be set in several instruments.[1810] This is the case with the regulation of SOCs in South Africa discussed in Chapter 2. The Canadian regime of corporate governance flowing from the CBCA, FAA and from various enabling statutes may

1804 Refer to page 18 and footnote 111.
1805 Public Finance Management Act, 1999, s 55(1)(a)-(d).
1806 Public Governance, Performance and Accountability Act, 2013, s 19(1)(c)(d)(e).
1807 Public Finance Management Act 1999, s 50, s 51, s 83 and s 84.
1808 Companies Act 2008, s 76(3) and 77(1)(2)(3).
1809 Lee Bramwell, Parliament of South Africa: Department of Public Enterprises: Challenges Facing State Owned Companies (SOCs), Research Unit, 2021.
1810 Refer to 6.3.1.

be helpful to SOCs in South Africa. In this regard a few of the provisions in the FAA may be of value to South Africa. For instance, section 154 of the FAA which provides for the suspension of directors for contravening the law may also benefit the South African position. With respect to disclosure of interest, it is submitted that the FAA's procedure for how to disclose interest on the part of a director is more elaborate than that of the PFMA and provides for enhanced accountability.[1811] It is thus recommended that similar provisions be included in the PFMA.

As highlighted above indications are that some governance breaches in SOCs were the result of wrongful shareholder representative (political) influences.[1812] In some instance, non-executive directors were complicit in carrying out the wrongful directives while others opted to resign. Non-executive directors who refused to comply were either dismissed from the SOCs or resigned from the SOCs.[1813] This scenario presents a blended challenge of politics and corporate governance nuances that SOCs in South Africa should be prepared to harmonise or overcome.

In this regard the Canadian position offers some guidance. The Canadian Liquor Control Board of Ontario's decision to insulate the affairs of the Board from political interference is commendable and should likewise be followed.[1814] Political interference is generally fingered in the affairs of SOCs where poor governance is the concern. South African SOCs have had their own unfair share of political interference.[1815] Therefore, there is a basis to suggest that such political interference should be turned into intervention where corporate governance is lacking in SOCs.

An evaluation of the National State Enterprises Bill which seeks to create a holding company under which SOCs will resort does not appear to have provisions which will insulate them from political interference. Given the size that the holding company will command in terms of all resources including financial, human and

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1811 Public Finance Management Act 1999, s 50(3)(a); Financial Administration Act 1985, s 116(1) and (2).

1812 An example is the shareholder minister then responsible for the SABC altering memorandum of incorporation.

1813 Reference is made to the State Capture report with respect to Eskom non-executive directors who chose to resign.

1814 *Ontario Inv v Harold E. Ballard Ltd* (1991), 3 B L R 113; see paragraph 6.3.2.

1815 Judicial Commission of Inquiry into State Capture Report: Part 1 Vol. 1: South African Airways and its Associated Companies (2021) page 18-19; Thabane and Van Deventer, Pathological Corporate Governance Deficiencies, 4.

technological, a need exists to contemplate that a pooling of financial resources of SOCs into the holding company will heighten the risk of losses. SOCs in South Africa could consider the location of a provision such as section 122 of the CBC Act which provides for, amongst others that, directors shall supervise management. This provision makes supervision mandatory while it is still debated or merely implied in other jurisdictions. Literature seems to suggest that it is inevitable that management should accept to be monitored and supervised by the board of directors.[1816] The only thing lacking, in some jurisdictions is to have the principle as part of corporate law. In the case of South Africa, as it embarks on the National State Enterprises Bill, the legislature should consider including such a provision in the Bill.

[1816] King, Extending Fiduciary Principles to the Director-Creditor Relationship, 248.

CHAPTER 7

CONCLUSION AND RECOMMENDATIONS

7.1. Introduction and discussion of the research question

The research was embarked upon in the context of the important role of SOCs in the welfare of South Africans. While SOCs are very important in providing many public services, their management has frequently been called into question. With the publication of various reports on the function of SOCs and the practical effect of some of them on public welfare, it is justified to examine the corporate governance of the entities in so far as those who are charged with the efficient management are held to account. For it is accepted that the success of SOCs is underpinned by the performance of those who govern them. The study was premised on the perspective of the laws applicable to SOCs in an attempt to unravel their fitness for purpose and how they apply to engender accountability in the governance of SOCs.

The South African government, as an institution, is formed as per the Constitution. Part of the government architecture is the three spheres of governance.[1817] In addition to providing for the three spheres of government, the Constitution provides for cooperative and accountable governance.[1818] Commendably, the Constitution goes on to provide for basic principles to buttress public administration.[1819] Possibly, the Constitution employs the word 'basic' because legislation or other policy measures can be taken to provide for effective public administration as contemplated. Some institutions that form part of the public administration installed in the Constitution, are public entities in the form of SOCs.[1820] Thus, SOCs are organs of the State.[1821] The Constitution has been intentional in its provisions to cater for the foundational principles of SOCs.[1822] It has laid a foundation not only for their

1817 See Chapter 1 para1.4 above.
1818 See Chapter 1 para 1.4 and Chapter 2 para 2.2.
1819 For more details see Chapter 1 para 1.4.
1820 For more details see Chapter 1 paras 1.4, 2.1 and 2.2 above.
1821 See Chapter 2 para 2.2 above.
1822 See Chapter 2 para 2.2.

evolution and spells out their basic governance framework.[1823] It is therefore the submission that the Constitution applies to the management of SOCs.[1824] The application of the Constitution to SOCs makes their existence a constitutional concern and elevates the kind of governance they should depict at the highest level.

The research set out to investigate the existence of SOCs within the South African legal framework and how exactly they are governed.[1825] SOCs in South Africa have attracted quite a large share of negative headlines. In the main, the headlines have focused on how SOCs are governed and on the evident failures they are experiencing.[1826] The failure to achieve successes leads to the public suffering the consequences, as the SOCs were created to render valuable, and in some cases, basic services to the public. SOCs, if well governed, are catalytic to the growth of the South African economy.[1827] The corollary is that where they are poorly managed, as has tended to be the case, the supportive industries critical to a thriving economy will fail to bring their part on board. In terms of the above scenario, the research had as its object the evaluation of the role of non-executive directors serving on boards of SOCs in relation to the SOCs' success. It also included an evaluation of the circumstances surrounding accountability for non-executive directors on SOCs boards where they failed to perform their duties as directors.

The research was conducted within the critical context of the role of specifically non-executive directors in fostering good corporate governance in SOCs. It was further premised from the perspective that non-executive directors are strategically placed to enhance the corporate governance of SOCs. Serving as non-executive directors separate from the management of SOCs, they can contribute significantly to the good governance of SOC's. This measure of independence remains a critical component to the success of SOCs, provided that non-executive directors have what it takes and can be made to account. Despite the presence of non-executive directors on SOCs' boards, an alarming measure of governance failures in SOCs has been encountered to date. This necessitated an evaluation of

1823 See Chapter 2 para 2.2 and the Constitution of the Republic of South Africa 1996, s 195(1)(f).

1824 Refer to Chapter 2 para 2.2 above.

1825 See Chapter 2 para 2.3.

1826 Refer to Chapter 4 para 4.3.2.2 for the discussion of some of the findings at the Zondo Commission Inquiry.

1827 See Chapter 2 para 2.2.1.

the incidences of corporate governance breaches and overreach by non-executive directors as a contributing factor to the failures of SOCs in South Africa.

Chapter 2 looked at the Constitution, defined SOCs and other public entities and discussed the legal framework within which SOCs operate. The research found plenty of indications of how the Constitution applies to SOCs in South Africa.[1828] The Constitution not only defines Organs of State,[1829] which includes SOCs, but it also provides for principles of public administration which bind SOCS. Furthermore, other laws applicable to SOCs were discussed.[1830] These include the Companies Act, the PFMA and enabling laws, where applicable. The research also discussed the National State Enterprises Bill, which, if it becomes law, will apply to all SOCs. Apparently, the introduction of the National State Enterprises Bill is a sign that not all is working well under the current arrangement of SOCs in South Africa.

Chapter 3 examined the historical overview of corporate governance.[1831] Under this chapter, the history of corporate governance in the context of South Africa was examined. This included how SOCs were established and how they are governed from a legal point of view.[1832] It is within this context that boards of directors of SOCs which are organs of corporate governance were discussed as rendered in various sources.[1833] The sources were examined in relation to the governance of SOCs and the aspects of accountability against non-executive directors overreaching on their governance duties.[1834]

Chapter 4 examined the duties of directors from at least two major known sources, being the common law and statutory law.[1835] Other sources were acknowledged, for example codes of conduct. The research found that directors' duties are well-defined in law and are now accessible with minimum effort. The accessibility stems from the partial codification of the directors' duties under the Companies

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1828 See Chapter 2 para 2.2.
1829 See Chapter 2 para 2.1.
1830 See Chapter 2 para 2.3 discussing the Legal Framework of SOCs.
1831 See Chapter 3 para 3.1.
1832 Refer to Chapter 3 paras 3.2 and 3.3.
1833 Refer to Chapter 3 para 3.4.
1834 See Chapter 3 para 3.4.1.
1835 Refer to Chapter 4 para 4.2 and 4.3.

Act.[1836] Conversely, the research found that enabling laws of SOCs hardly provide for the board of directors' duties with the Broadcasting Act being an exception.[1837] Notwithstanding, no enabling law was found to expressly provide for the duties of non-executive directors, and for accountability in the same measure as the Companies Act. It is indicated that the Companies Act makes no distinction as to directors' duties and liability. This clearly means the provisions apply to directors.

Chapter 5 dealt with the liability and the enforcement of liability against non-executive directors in SOCs[1838] as provided for in the various legal instruments applicable to SOCs.[1839] It was found that while there are laws governing the management and operation of SOCs, the enforcement of such laws is evidently inadequate.[1840] Furthermore, though the laws provide for directors' duties assigned to SOCs, the failure to discharge the required duties appears to attract no liability.[1841] This impelled the research to unravel where the problem lies.

The role of non-executive directors in holding one another and executive directors to account were examined. It was found that although the law does not prohibit it, non-executive directors may in practice find it problematic to hold one another and/or executive directors accountable.[1842] The possibility of another party or organ fulfilling this role was investigated. The role of shareholder representatives of the SOCs in ensuring director accountability within the provisions of applicable laws were accordingly evaluated. [1843]

The study revealed that non-executive directors contributed to the failure of corporate governance in various SOCs, from the SABC to Eskom. No accountability of non-executive directors could be found.[1844] This is precisely because nobody has been ready to hold them accountable. There is no independent mechanism created to ensure accountability, especially when those involved are incapable of

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1836 Refer to Chapter 4 para 4.1; 4.2 and 4.3.
1837 Refer to Chapter 4 para 4.3.3.2.
1838 Refer to Chapter 5 para 5.1.
1839 These being the Companies Act, 2008; Public Finance Management Act, 1991, the Common Law and enabling statutes.
1840 See Chapter 5 paras 5.3 and 5.4.
1841 See Chapter 5 paras 5.2, 5.3 and 5.4.
1842 See Chapter 5 para 5.5.1.1.
1843 Refer to Chapter 5 paras 5.5.1.1 and 5.5.2.
1844 Refer to Chapter 5 para 5.1.

holding each other or themselves accountable.[1845]

With both the failure of corporate governance in SOCs and the failure to hold those responsible for the failure to account, a turnaround or sustainable corporate governance of failing SOCs may be near impossible. Things going wrong must be fixed than for them to be carpeted. Nothing improves when wrong decisions are not corrected and those making them are left to have a field day. It was pointed out that performance assessment of SOCs on an ongoing basis may contribute significantly to enhance good corporate governance of SOCs and serve to hold those who fail to discharge their obligations to account.[1846] The performance results would inform accountability. Bad results inexplicably and unjustifiably must inform and attract equal accountability for the results. The thesis accordingly advocates for the use of regular performance assessments of SOCs as a tool to determine non-executive directors' performance and accountability.[1847]

Performance appraisals may serve as an early indicator of SOCs performance and steps can still be taken early enough to reposition the eminently failing SOCs. Where poor performances are picked up, non-executive directors may be held to account at an early stage and when they are still in office.[1848] This will prevent poor performing non-executive directors from merely exiting SOCs without consequence.

Chapter 6 comprised a comparative analysis of three jurisdictions, Australia, Canada and the United Kingdom.[1849] The comparative study examined the legal liability framework against non-executive directors who overreach their corporate governance duties in the selected jurisdictions. To determine liability the comparative analysis included an evaluation of the duties of directors. Liability of non-executive directors would only be justified if it flowed from the legal duty to perform certain duties. Critical to the study of the selected jurisdictions was to ascertain what lessons if any, South African SOCs could draw from the legal instruments in use in the jurisdictions.

7.2. Suggested enhanced framework for liability of non-executive

1845 Refer to Chapter 5 para 5.2.
1846 Refer to Chapter 5 para 5.3.
1847 Refer to Chapter 5 para 5.3 and 5.7.
1848 Refer to Chapter 5 para 5.7.
1849 See Chapter 6 para 6.1.

directors in SOCs

The South African government is currently engaged in the development of a new Bill on SOCs, the National State Enterprises Bill.[1850] The Bill is an acknowledgement that SOCs cannot be managed entirely within the existing company law and other fragmented legislative framework.[1851]

SOCs, as was pointed out in Chapter 2, are unique to other companies with its own complexities and blend of social and commercial objectives.[1852] The Bill is thus welcomed. However, it is submitted that it may be improved even further. A few recommendations that could improve corporate governance of SOCs not currently addressed in the Bill are accordingly proposed. These also form the recommendations of the study. These recommendations may be incorporated to the Bill to operate concurrently with other applicable laws as envisaged in the Bill.[1853]

Recommendations to effect changes in the corporate governance of SOCs and to improve accountability for breach of governance duties by non-executive directors are as follows.

7.3. RECOMMENDED PROVISIONS TO PROBLEMS IDENTIFIED

Existing instruments regulating non-executive directors' duties are the Companies Act and the PFMA. Both provide for directors' duties generally. The thesis has further noted the proposed National State Enterprises Bill which will be in application alongside the existing legal instruments when enacted. The legal instruments have been examined and it was found that they lack a mechanism for standard and robust enforcement of corporate governance against directors in general and non-executive directors in SOCs specifically.

It is evident from the provisions that SOCs are governed by some common regulatory instruments, like other entities or companies. Although an attempt was made to have specific provisions applicable to SOCs in the

1850 Refer to the National State Enterprises Bill, 2024 and Chapter 4 para 4.3.3.4.
1851 This would include enabling laws of SOCs and the Public Finance Management Act 1999.
1852 See Chapter 2 para 2.2.; section 11 of the National State Enterprises Bii, 2024.
1853 The National State Enterprises Bill 2023, s 22(1)(2)(3).

Companies Act, these do not adequately address corporate governance in SOCs. The formation and operation of SOCs present them as unique entities and even when their governance structure is blended or modelled against private sector companies, this proves problematic as SOCs are managed uniquely. Many problems associated with SOCs' poor governance arise from their unique formation and management. This calls for an individualised approach.

The accountability relating to the corporate governance of SOC's in South Africa is underpinned from the perspective of the Constitution. In terms of South Africa's Constitution SOCs as juristic persons and Organs of State are subject to the relevant provisions of the Constitution. The Constitution further provides for accountability distilled from Cabinet Ministers for institutions (SOCs) under their portfolios. The contemplated accountability is further found in the context of section 195 of the Constitution that provides for accountable governance. Section 195 of the Constitution applies specifically to public entities including SOCs.

There is a synergy to be found which proceeds from the accountable governance contemplated in the Constitution, defined in the PFMA and further elaborated on in the Companies Act in so far as the duties of accounting authorities are concerned. The lesson is that accountability of non-executive directors in South African SOCs must be understood and appreciated from a Constitutional perspective requiring supreme compliance.

Therefore, where non-executive directors of SOCs breach their governance duties consequence must follow. Despite this constitutional requirement, enforcing accountability on directors including non-executive directors for breach of their duties is seriously lacking across SOCs in South Africa. The current arrangement where enforcement of director liability is reliant on other directors not involved in the corporate governance breach or overreach or a shareholder representative has already proven to be unsustainable in South African SOCs. This may be due to collusion amongst those who govern the SOCs, or may result from fear of reprisals,

making the current arrangement difficult if not impossible to carry through. This accordingly calls for an independent oversight body that can ensure that the directors of SOC's fulfil their corporate governance duties. An independent body similar to the Australian Securities and Investments Commission may prove as a possible solution to enhance South African SOCs corporate governance

The foundational fiduciary duty in the compared jurisdictions has been defined as the duty to act bona fide in the interests of the company. Directors' duties from both the common law and statutory law result in liability where a breach has been proven. In Australia, the breach of directors' duties to a company has been assigned a new liability threshold. Australia has seen a marked departure from a wide latitude based on gross negligence, to a narrow one, where the test to be met has become strict which makes director liability not to be dependent on loss or damage to the company, but on breach of a governance principle. As was alluded to in Chapter 7, the Australian provisions require that directors' duties should be aligned to a seemingly increasing objective standard. The Australian court has held that there is now a high standard of care and diligence required of directors, inclusive of non-executive directors.

Whereas South Africa has partly codified directors' duties and provides for accompanying liability for the breach of such duties, the determination of breach is rooted in the common law. The threshold for finding liability as established in the common law must be used even when a statutory directors' duty has been breached. South African law, on this point of determining director liability for breach, can embrace the shift from seeking to establish gross negligence to a strict test. There is no reason why non-executive directors in South African SOCs cannot be subjected to a high degree of care and diligence in their performance of board duties. To establish liability for breach, there may not be a need to amass evidence of gross negligence as this would mean the loss or damage to the SOC would already have been too great to correct.

The Canadian comparative position also offers possible enhancements for South African SOCs. In this regard the Canadian Broadcasting Corporations Act contains an important provision which crystalises the duty of directors to manage and oversee the affairs of a SOC. Section 102(1) of the Canadian Business Corporations Act introduces not only a management role of directors, but also a supervisory or monitoring role. The Canadian provision differs from section 66(1) of the Companies Act which places the management affairs under the direction and control of the board of directors. The Canadian provision involves the directors in managing and monitoring the business affairs of the corporation. Non-executive directors may in practice fulfil a monitoring role specifying it in the Companies Act. This may assist them in fulfilling this role without opposition from other parties or being perceived as interfering.

7.4. SUGGESTIONS

There must be a mechanism in the relevant legal instruments to track non-executive directors' performance of their duties and of applying good corporate governance in SOCs.

There must be a mechanism in the legal instruments providing for impartial and apolitical performance assessment of non-executive directors of SOC's and for remedial actions on poor performance.

There must be a consequence framework depending on the nature of breach involved. The current enforcement of director liability in the PFMA is poorly structured as it treats directors as employees who can be disciplined. In the case of SOCs, the provisions on director liability under the Companies Act require an enforcement mechanism regarding SOCs, where breach of governance duties has tended to go without consequence.

The Legal framework must stipulate the responsible party/parties

accountable for corporate governance in SOCs that must take action to effect director liability. The suggestion is that the shareholding Minister must take full accountability for effecting director liability in SOCs. this should form part of the report on SOCs' performance tabled in Parliament.

The available legal instruments must be amended to expressly provide for the responsible party/parties who must be responsible for appraising non-executive directors' performance and for taking action when there is poor performance.

There must be an express legal framework requiring shareholder Ministers to fully account to Parliament for the performance of SOCs. The framework must require the shareholder Minister to indicate the interventions he or she may apply to improve corporate governance in SOCs if needs be.

There must be a legal framework stipulating that appointments to board of directors of SOCs must be impartial and on merit and that politically exposed persons are disqualified.

There must be a legal framework requiring the holding of annual general meetings by shareholder Ministers where boards of directors of SOCs account for the performance of SOCs. The legal framework must indicate that boards of directors of SOCs can be replaced based on indicated performance of the SOC irrespective whether they were appointed for a longer term.

7.5. ADDITIONAL RECOMMENDATIONS

7.5.1. The Development of a Dedicated Legal and Corporate Governance Framework for SOCs:

The existing legislative and corporate governance framework for SOCs, such as founding legislation, PFMA and the Companies Act regulate directors' duties in general but lack targeted SOCs' specific corporate

governance provisions.

It is recommended that a SOCs tailored framework, alongside the National State Enterprises Bill be developed to regulate SOCs and to specially provide for a fit for purpose governance structure.

7.5.2. Introduction of a Monitoring and Evaluation Framework for Non-executive Directors in SOCs:

Drawing from the Canadian Broadcasting Corporations Act, it is recommended that South Africa could amend section 66(1) of the Companies Act to explicitly include a supervisory and monitoring role for non-executive directors. The National State Enterprises Bill, to the extent that it is consistent with the Companies Act could incorporate the suggested provision. The Clarity in the role of non-executive directors would encourage improved their oversight and performance and clarify their contours to alleviate the perception of interference or meddling in daily operations of SOCs.

7.5.3. Introducing an Independent Oversight and Enforcement Body:

Monitoring and evaluating performance alone cannot go a long way. For this and other reasons, it is recommended that an enforcement mechanism of good corporate governance be introduced. The introduction of an oversight and enforcement body such as the Australian Securities and Investments Commission could improve the governance of SOCs in South Africa. The oversight body recommended could, amongst others, investigate, monitor and enforce compliance with corporate governance frameworks across SOCs, and exist external to boards and shareholder representatives.

7.5.4. Adopt a Stricter Liability Standard for Non-Executive Direc- in SOCs:

South Africa should consider to expressly embrace a shift from a gross negligence test to a stricter liability, similar to that of Australia. This raised standard would encourage improved adherence by non-executive

directors to their corporate governance duties in SOCs. The liability contended would arise from breach of governance duties without loss, cost or damage to the company as a determinant for it. The recommendation is suggested to encourage and improve a higher standard of care and diligence and proactive governance from non-executive directors.

7.5.5. Constitutional Accountability must be Enforced:

Non-executive directors in SOCs must be held accountable to the Constitutional obligations, standards and principles as outlined in section 195 of the Constitution. The recommendation would require supreme compliance with public accountability and ethical standards. SOCs' legislation must penalise breaches of governance duties by non-executive directors and clearly provide effective penalties.

7.5.6. Introducing SOCs Specific Corporate Governance Provisions in Multi Regulating Instruments:

SOCs should not in all aspects be regulated identically to private companies as they are a different type of company. Specific corporate governance frameworks tailored to SOCs must be incorporated into legislation, recognising the public interest mandate and complex stakeholder interests involved.

7.5.7. Enhance Legal and Corporate Governance Education for SOCs' Boards:

To promote, support and strengthen effective corporate governance of SOCs, non-executive directors should submit to regular training relating to their constitutional, statutory and a full spectrum of directors' duties. The recommendation will likely enhance non-executive directors' awareness of their obligations and the consequences of non-compliance. This may also lessen scope of ignorance of the applicable governance duties on non-executive directors.

7.5.8. Strengthen Interlinkages Between Constitutional, Statutory,

and Common Law Corporate Governance Duties:

SOCs should be subjected to and be regulated by a harmonised legal framework that synergises their impact on SOCs to ensure the successful governance of SOCs. A comprehensive legal framework that buttresses the Constitution and incorporates contemporary governance principles applicable to SOCs must be designed

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