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AN EXAMINATION OF THE LEGAL FRAMEWORK FOR THE GOVERNANCE OF PUBLIC UNIVERSITIES IN SOUTH AFRICA: THE CASE OF THE VAAL UNIVERSITY OF TECHNOLOGY

By

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DECLARATION

I, 0714535J (Student number, declare that this Research Report is my own unaided work. It is submitted in partial fulfilment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

I have submitted my final Research Report through TurnItIn and have attached the report to my submission.

Word Count: 9999 Incl. the body of your report, footnotes **BUT** excl. title page, declaration, abstract, table of contents and bibliography]

1. INTRODUCTION AND BACKGROUND

The South African public higher education sector, hereinafter referred to as "public universities," presents a diverse composition. It encompasses eleven traditional universities, nine comprehensive universities, and six Universities of Technology (UoTs), culminating in a total of twenty-six public universities.[1] Although public universities enjoy autonomy regarding their operations and management, their independence is not absolute. Their activities must align with the enabling legislation, specifically the Higher Education Act 101 of 1997 (hereinafter referred to as "the Act")[2], as well as their respective statutes as mandated by sections 32 and 33 of the Act. Additionally, they are accountable to the Minister of Higher Education, Science and Technology (hereinafter referred to as "the Minister"), particularly through the annual submission of statutory reports. This requirement is seen as another measure to ensure public accountability.[3]

The resilience demonstrated by South African public universities, from enduring the apartheid regime to transitioning into a democratic dispensation, compellingly suggests that the sector possesses the agility to withstand any challenges and obstacles it may encounter. This historical endurance showcases the sector's adaptability and strength, affirming its capacity to navigate and overcome adversity while continuing to evolve and progress.[4] The repressive, racist, and oppressive system that was brought about by the National Party in 1948 through the system of apartheid further segregated the sector that was already fragmented on racial lines.[5] However, recent governance challenges in public universities have thrust into the spotlight the governance of public universities more especially the societal view, which may potentially

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[1]Combing Skills Info Creative Education: Department of Higher Education and Training Annual Report (2021-2022) vote 17' https://nationalgovernment.co.za/department_annual/412/2022-department-of-higher-education-and-training-(dhet)-annual-report.pdf.

[2] Higher Education Act 101 of 1997.

[3]Council on Higher Education Report (2008) 'Academic Freedom, Institutional Autonomy and Public Accountability in South African Higher Education Independent Task Team *Higher Education, Institutional Autonomy and Academic Freedom*' https://www.che.ac.za/publications/research/task-team-higher-education-institutional-autonomy-and-academic-freedom-heiaaf.

[4]The systematic racial segregation that was legalized by the then government deliberately sought to have white and black students enrolled at different institution. The classification can broadly be divided amongst those Universities that cater for English/Afrikaans speaking people and black people were housed at the University of Fort Hare. See J Davis 'The State and the South African University System under Apartheid' (1996) 32 (3) *Comparative Education* 319-332 at 323. See also A Griffin 'Toward deliberative democracy: The Institutional Forum as an innovative shared governance mechanism in South African higher education' (2018) 8(1) *African Journal of Business Ethics* 1-21 at 2.

[5]Ibid.

erode public confidence in public universities and render the higher education system questionable.[6]

The governance of public universities in South Africa has come under intense public scrutiny due to a series of high-profile incidents. These include the public standoff involving the Council of the University of South Africa (hereinafter referred to as "UNISA") and the Minister; [7] the shootings and assassination attempts on the life of the Vice-Chancellor and Principal (hereinafter "VC") of Fort Hare University;[8] and the Independent Panel report on governance failures at the University of Cape Town, which precipitated the resignation of the VC. Furthermore, the resignation of the University of Pretoria's VC amid sexual harassment allegations—of which the VC was ultimately exonerated—along with the University of Western Cape's Council decision to restart the appointment process of VC due to disagreements with the appointing Committee, [9] and allegations of nepotism against the VC of Stellenbosch University, are among the incidents that have significantly highlighted the challenges facing the governance of public universities.[10]

It is these incidents that have prompted this study which seeks to critically examine the adequacy of the legal architecture for the governance of public universities. The current state of the sector, as depicted in recent reports, is so critical that the Minister has suggested the possibility of introducing comprehensive legislative reforms to the governance framework of universities. The current state of the sector, as depicted in recent reports, is so critical that the Minister has suggested the possibility of introducing comprehensive legislative reforms to the governance framework of universities.[11] These reforms are geared not only to address the governance lapses that, according to the Minister, are perpetuated by University Council [12](Council) members who lack prerequisite skills to occupy Council positions but also to uproot

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[6] *B Johnson and M Hlatshwayo 'Anchor Universities and Communities: The Power of Community Engagement' (2025) 39(2) South African Journal of Higher Education* at 19.
[7] https://www.timeshighereducation.com/news/unisa-administration-block-means-more-tough-times-students>
[8] https://mg.co.za/thoughtleader/opinion/2023-01-13-shooting-at-fort-hare-university-highlights-corruption-at-south-african-universities/>
[9] https://www.dailymaverick.co.za/article/2023-10-31-drama-over-university-of-the-western-cape-decision-to-terminate-vice-chancellor-recruitment-process/>
[10] https://www.businesslive.co.za/bd/national/2023-04-18-nepotism-claims-against-stellenbosch-university-vc-to-be-investigated/>
[11] Parliamentary Monitoring Group 'Department of Higher Education and Training Briefing on the State of Governance of Higher Education Institutions with a Focus on UCT, UNISA, UFH and UKZN' (2023) https://pmg.org.za/committee-meeting/37238/.
[12] Higher Education Act defines "council" to mean the governing body of a public higher education. Section 27 of the Act states that institution. — (1) The council of a public higher education institution

corruption and mismanagement that has allegedly riddled the sector.[13] In providing the parliamentary portfolio committee of education on what is currently faced by the public universities, the Minister painted a very bleak picture of the state of public universities.[14] In response to the concerning situation that directly impacts the governance of public universities, the Minister is considering the development of a "warning system." This system aims to primarily identify potential challenges at an early stage within public universities, thereby mitigating the catastrophic effects of governance failures and facilitating prompt interventions.[15] Furthermore, the Minister is contemplating the establishment of an ombudsman office. This initiative aims to aid the prominent governance issues facing public universities, serving as an additional layer of resolution before matters are escalated to the Minister's office for intervention.[16] Lastly, the Minister is considering the establishment of a governance office within the Minister's office with the mandate to deal only with governance issues of universities when they arise.[17]

The interventions indicate and support the proposition that the current governance framework is inadequate. A total of sixteen independent assessors have been appointed by the Department of Higher Education and Training (hereinafter referred to as "DHET") to investigate allegations of poor governance in public universities from the year 2000 to the year 2023.[18] In certain cases, the response to these challenges was accompanied by the appointment of administrators to assume both the administrative tasks previously managed by the university's management and the governance duties carried out by the council.

In addition to the above, allegations of the sale of academic qualifications, fraud and corruption at Fort Hare University intertwined with the allegations of fake qualifications at UNISA, further erode the credibility of public universities.[19] Any conduct that seeks to ignore the

must govern the public higher education institution, subject to this Act, and the institutional statute. institution (set out their functions as well and what legislative framework empowers them)

[13]Parliamentary Monitoring Group 'Department of Higher Education and Training Briefing on the State of Governance of Higher Education Institutions with a Focus on UCT, UNISA, UFH and UKZN' (2023) https://pmg.org.za/committee-meeting/37238/ Accessed on the 12 March 2024

[14] One of the concerns raised by the Minister was Council members who lack experience in the governance of the Higher Education Sector, corruption was also another factor the Minister identified. See note 16 on page 3/10

[15] note 13.

[16]Ibid

[17]Ibid

[18]Ibid.

[19]B Johnson and M Hlatshwayo (note 7) 21.

existence of this problem faced by public universities will amount to what is referred to as an "analytical error."[20]

The Vaal University of Technology (hereinafter referred to as "VUT") which is the case study for this study, is one of the UoTs that have been subjected to three assessments by the Minister and three administrations to deal with governance issues that the university has faced. The focus of the study is to examine the legal framework that governs public universities in the Republic and in the process, the study will highlight pitfalls and or fault lines in so far as the interpretation and application of this framework by the Minister as well as the councils.

This study primarily seeks to investigate the adequacy of the governance framework for public Universities. Following from the above, the study will also seek to determine whether the past interventions by the Minister have been sufficient to deal with the governance issues facing the higher education sector. The study will also consider evaluating the governance reforms proposed by the assessor's reports and implemented by the administrators and determine whether such reforms were adequate to address the governance challenges uncovered by the assessors during the assessments.

The main question that will guide the study is what is the legal architecture that governs public universities in South Africa? Following this, the research will also investigate whether the legal framework is sufficient to ensure the proper governance of public universities in South Africa. How has the legal framework been implemented at VUT? What lessons can be learned from the VUT case study in reforming the legal framework for the governance of public universities?

The study is organised into five Parts. Part 1 introduces the study, providing an overview and background. Part 2 delves into the Legal Governance Framework, focusing on the Higher Education Act 101 of 1997. It evaluates specific sections of the Act—namely sections 26(2), 27(1), and 34(2)—and discusses instances in which the Minister is empowered to appoint an independent assessor, as well as the administrator, alongside lessons learned from these cases. Part 3 offers a brief background of VUT and its governance landscape, highlighting governance challenges at VUT and Ministerial interventions and evaluating the assessor's reports concerning the university. Part 4 makes conclusions, findings and recommendations that have emerged from the study.

[20]Ibid.

Fundamentally, as a means of laying a solid foundation, it is important to drill down to the foundational aspects that hold the sector together and that is the Constitution as well as the enabling legislation.

2.1 GOVERNANCE FRAMEWORK: HIGHER EDUCATION ACT 101 OF 1997

In 1995, the then President of the Republic, President Nelson Mandela, appointed the 13-person panel to constitute what came to be known as the National Commission on Higher Education, which was chaired by Dr Jairam Reedy to advise and assist the government in developing a system to govern the higher education sector in South Africa.[21]

In August 1996, the Commission submitted its report titled, "A Framework for Transformation,"[22] which served as the basis of both the White Paper on Higher Education[23] and the Higher Education Act.[24] In discharging its duties, the Commission took into consideration the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as "the Constitution").

2.2 THE CONSTITUTION AND GOVERNANCE OF HIGHER INSTITUTIONS

The Constitution is an unwavering hallmark that provides marching orders on what must be done and under which conditions for the enjoyment of the rights it enshrines. As the highest law of the land, it explicitly outlines the rights enjoyed by everyone and dictates what the states must do to fulfil the enjoyment of the rights[25] and 'renders law or conduct that is inconsistent with it invalid'.[26] In providing clarity on the usage of the term "the State", the Constitutional Court outlined that the duty to ensure the realisation of the rights as laid down in the

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[21]SM Bengu 'Green Paper on Higher Education and Transformation' (1996). https://www.gov.za/sites/default/files/gcis_document/201409/green-paper-higher-education-transformation0.pdf.

[22]Ibid.

[23]Council On Higher Education General Notice 1196 'A Programme for the Transformation of Higher Education' (1997). https://www.google.com/search?q=Council+On+Higher+Education+General+Notice+1196+%E2%80%98A+Programme+for+the+Transformation+of+Higher+Education%E2%80%99+(1997)&rlz=1C1GCEU_enZA870ZA870&oq=Council+On+Higher+Education+General+Notice+1196+%E2%80%98A+Programme+for+the+Transformation+of+Higher+Education%E2%80%99+(1997)&gs_lcrp=EgZjaHJvbWUyBggAEEUYOdIBCDEyMjBqMGo3qAIAsAIA&sourceid=chrome&ie=UTF-8.

[24] https://www.accord.org.za/people/professor-jairam-reddy/.

[25]Section 2 of the Constitution Act 108 of 1996 (hereinafter the Constitution).

[26]*Women Legal Centre Trust v President of the Republic of South Africa and Others* 2022 (5) SA 323 (CC) para 67.

Constitution lies both with the State as well as the organs of the State. [27] In the case of MEC *for Health, Eastern Cape v Kirland Investments* the Constitutional Court had the following to say:

> *"…there is a higher duty on the State to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights".*[28]

As there is no blanket approach, roadmap or blueprint to the fulfilment of the constitutional obligation, such is dealt with on the facts of each case.[29] Section 195 of the Constitution further outlines principles that must be observed at all material times by the State in performing its duties and responsibilities.[30] However, these principles are not as exhaustive as the "Batho Pele"[31] principles which, in part, require fairness in response to the fulfilment of what the Constitution dictates as well as the enacted legislation.[32]

On the other hand, if the execution of the duties and responsibilities as enshrined in the Constitution requires a particular skill set or services that the organ of state does not possess section 217 of the Constitution dictates that the procurement of such services must be undertaken in a process that is 'fair, equitable, transparent, competitive and cost-effective'.[33] In the context of the current study, this encompasses services procured by the Minister, as empowered by the Act, aimed at addressing challenges faced by public universities. This effort aligns with the objective of ensuring access to further education, a right stipulated in section 29 of the Constitution, thereby underlining the Minister's role in facilitating educational advancement and rectifying systemic issues within higher education institutions.[34]

Commenting on the importance of constitutionalisation of the right to education, some academics have argued that this is meant to ensure that this right is not dependent on the

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[27](note 29) para 17-19 *AllPay Consolidated Investment Holdings v CEO South African Social Security Agency* 2014 (4) SA 179 (CC) para 49.
[28]2014 (3) SA 481 (CC) para 82.
[29]Please see footnote 25 para 82.
[30]Section 195 (1)(a)-(i) of the Constitution.
[31]*Mathale v Linda and Another* [2015] ZACC 38 para 54.
[32]*Joseph and Others v City of Johannesburg and Others* 2010 (3) BCLR 212 (CC) para 46.
[33]Section 217 of the Constitution.
[34]*Niekara Harrielall v University of KwaZulu-Natal* [2017] ZACC 38 para 15.

government of the time thus making it difficult to be repealed or to be amended.[35] In the context of our historical realities, this right is enshrined in the Constitution as a means of redressing and uprooting the past inequalities that were legislatively created by the political system of apartheid [36]and is an essential tool to enable the betterment of the citizens and the economic growth of the country and enhance its competitiveness with other economies.[37] As mandated by the Constitution, it is incumbent on the legislature to develop the legislative framework within which higher education can be provided.[38] Flowing from the above mentioned, the following section will outline and evaluate the functions of the governance structures of the public universities as empowered by the enabling legislation.

2.3 EVALUATION OF GOVERNANCE STRUCTURES OF THE PUBLIC UNIVERSITY

The constitutional mandate mentioned above played a crucial part in facilitating the making of the law regulating higher education which led to the enactment of the Higher Education Act on 19 December 1997. This legislative action occurred approximately eight months after the Constitution came into effect, reflecting a direct response to the constitutional provisions regarding education.[39] What the Act intend to achieve include, among others:

> *"To regulate higher education, to provide for the determination of transformation policy and oversight mechanisms for the public higher education system, to provide for the development of articulation and recognition of prior learning frameworks across the education system."*[40]

In its endeavour to promote autonomy but within the context of cooperative governance between the state and universities, the Act[41] also states that:

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[35]J Heymann, A Raub & A Cassola 'Constitutional Rights to Education and Their Relationship to National Policy and School Enrolment' (2014) 39 International *Journal of Educational Development* 131 -141 at 131.
[36]*Head of Department: Mpumalanga Department of Education and Another v Hoerskool Ermelo and Another* 2010 (2) SA 415 (CC).
[37]*Governing Body of the Juma Musjid Primary School v Essay NO* 2011 (8) BCLR 7 61 (CC) at para 42-43.
[38]A Skelton 'The role of the courts in ensuring the right to a basic education in a democratic South Africa: a critical evaluation of recent education case law' (2013) 46(1) *De Jure Law Journal page numbers at 3. See also The Governing Body of the Juma Musjid Primary School v Essay NO (Centre for Child Law and Another as amicae curiae)* 2011 7 BCLR 651 (CC) para 37.
[39] Higher Education Act 101 of 1997.
[40]Ibid
[41]Ibid

"It is desirable for higher education institutions to enjoy freedom and autonomy in their relationship with the State within the context of public accountability and the national need for advanced skills and scientific knowledge."[42]

The governance structure of public higher education is stipulated in section 26 (2) of the Act.[43]These structures, according to the Act,[44] serve different purposes but in the main are responsible for ensuring that public universities deliver on the key constitutional mandate to provide further education and 'contribute to the advancement of all forms of knowledge and scholarship, in keeping with international standards of academic quality'.[45]

The functions of these structures are crafted in such a way that there is a clear demarcation in the powers vested in each structure and what the structure may or may not perform. Simply put, each structure has its unique function, duties, and responsibilities. The Act further confers these structures with powers and responsibility to make decisions and bestows the council with ultimate powers to govern the university, [46]the senate to deal with all academic and research-related functions[47] and the executive with the administrative functions.[48] All in all, this structure must act in the best interest of the university.

The council of a university is recognized as the supreme authority within the institution,[49] tasked with establishing the strategic governance direction. It is vested with the responsibility of ensuring proper financial governance, playing a critical oversight role in the university's management, holding management accountable to performance agreements, and ensuring that all annual statutory reporting to the Minister's office is conducted efficiently. The council's role is important as it sets the strategic direction that the university must take. Through these duties, the council ensures the university operates efficiently, transparently, and in alignment with its overarching goals and regulatory requirements. This includes reporting

[42]Ibid
[43]See Section 26(2) of the Higher Education Act.
[44]Section 27, 28,29,30 and 31 of the Higher Education Act.
[45]Preamble to the Higher Education Act. See also van der Walt &MK Havenga 'Governance Failure in South Africa Public Institutions – Lessons to be learnt from Company Law' (2023) 4 TSAR 647-659.
[46]Section 27 of the Higher Education Act.
[47]Section 28 of the Higher Education Act.
[48]Section 30 of the Higher Education Act.
[49]https://www.scottishuniversitygovernance.ac.uk/>.

on how the finances of the university were spent in the previous financial year and its annual report just to mention a few.[50]

In executing the above-mentioned duties and responsibilities, the persons appointed to serve as council members of the university and its committees are expected to be individuals who possess exceptional expertise and knowledge in the governance of the public universities.[51] These requirements extend to both the internal and external members of the council.[52] Justice Cameron articulated this clearly by stating that:

> *"No sensibly functioning higher education institution can afford to be without senior persons in its governance structures who are both skilled in finance and knowledgeable about the institution's own needs, risks and opportunities."*[53]

The above-mentioned responsibilities such as annual reporting to the DHET is the sole responsibility of the council which is meant to provide the Minister with the yardstick of ascertaining compliance with the Act by the public universities as well as ensuring that public funds that are annually provided to the universities are utilised for what they were earmarked for.[54] This council's responsibilities are not unique to South African public universities. These functions are also performed by similar bodies at universities in other parts of the world. In Scotland, for example, the Scottish Code of Good Higher Education Governance[55] stipulates the following as the primary roles of the University Council:[56]

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[50]Department of Higher Education and Training *Regulations for Reporting by Public Higher Education Institutions, issued in terms of Higher Education Act, 1997, Government Gazette Notice No. 37726* (9 June 2014), regulations 6-7.
[51]Section 27(7) (a) of the Higher Education Act.
[52]Section 27(4) (c) and 27(4) (h) of the Higher Education Act.
[53]*Gelyke Kanse and Others v Chairperson of the Senate of the University of Stellenbosch and Others* 2020 (1) SA 368 (CC) para 43.
[54]Department of Higher Education and Training Regulations for Reporting by Public Higher Education Institutions" (2014) 15.
[55]https://www.scottishuniversitygovernance.ac.uk/wp-content/uploads/2023/04/GOOD-HE-GOVERNANCE-A4-REPORT-2023.pdf .
[56]https://www.scottishuniversitygovernance.ac.uk/wp-content/uploads/2023/04/GOOD-HE-GOVERNANCE-A4-REPORT-2023.pdf>. In terms of the provisions therein the Scottish Council held 'The governing body must take responsibility for ensuring the effective management of the institution, planning the institution's strategic direction and future development, and advancing its mission. The governing body has ultimate responsibility for all the affairs of the institution and must ensure that there are appropriate arrangements for financial management. It must satisfy itself that the institution is compliant with all relevant legal and regulatory obligations and operates with high levels of social responsibility. The governing body must adopt and publish a Statement of Primary Responsibilities.'

'In performing the above-mentioned functions, the United Kingdom Committee of University Chairs[57] has identified six primary elements of Higher Education Governance that the council of the university must possess to deliver on its mandate. These are "accountability, sustainability, reputation, equality, inclusivity and diversity, effectiveness and engagement."[58] The practical application of these elements is also considered to be the core function of the university council.'[59]

The University Senate on the other hand, as another governance structure, performs functions that are *sui generis* in nature. That is so because no governance structure is responsible for the delivery of the academic agenda of the University[60] except the Senate of the University. Furthermore, the Senate is charged with ensuring that measures are in place for teaching, learning and research in universities.[61] Like the council, the role of the senate is crucial in the functioning of the university so much so that the Constitutional Court, when it was dealing with a matter that fell within the competence of the Senate, noted that "those entrusted with the institution's well-being should be accorded what this Court has called appropriate respect"[62].

The role of the Senate has proven not to be limited only to dealing with academic affairs or attending to the work delegated to it by the Council. In the UCT matter, it can be noted that universities senates are capable of holding both the executive and the council liable for actions and practices that are inconsistent with good governance.[63] In that matter, the investigation was instigated when the Senate learned that the VC as well as the Council through its Chairperson was not honest regarding the reasons and surrounding circumstances of the departure of the Deputy Vice-Chancellor of Teaching and Learning, Associate Professor Lis Lange .[64] As a result of the active participation of the Senate in the governance of the university, all other governance related issues that were left unattended were ultimately confronted and dealt with.

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[57]https://www.universitychairs.ac.uk/wp-content/uploads/2020/09/CUC-HE-Code-of-Governance-publication-final.pdf>. See also Birch Rhiannon 'The Policy Work of the National Committee of Inquiry with Higher Education in the United Kingdom (the Dearing Committee, 1996-1997)' *LLD Thesis* The University of Sheffield.
[58]Ibid.
[59]Ibid.
[60]Section 28 of the Higher Education Act.
[61]https://www.wits.ac.za/about-wits/governance/governing-structures/senate/#:~:text=The%20Senate%20is%20accountable%20to,to%20it%20by%20the%20Council>
[62]Ibid.
[63]Independ Investigation into UCT Governance Executive Summary (2023) Unpublished Report. Findings by Judge Lex Mpati Judge Azhar Cachalia, Dr Bernadette Johnson, and Dr Patricia Hanekom.
[64]Ibid.

The Act also establishes institutional forums to ensure that provisions of the Act are implemented by universities and to serve as an advisory structure to the Council on issues of transformation in universities.[65] Even though this structure does not hold any decision-making powers, it is an important platform that fosters debates on issues of transformation that universities would ordinarily discuss, in a transparent way that is aimed at strengthening good governance.[66]

A persuasive argument may be made that the Institutional Forum serves as the consciousness of the university that wakens its nervous system to the realities of social, cultural and economic conditions of the university as well as the realities of the surrounding communities in which it operates as it endeavours on community engagement projects.[67] These governance structures are an extension of cooperative governance that the sector embraces that entails varies views from all the stake holders[68] which is meant to ensure that there is a widespread and maximum representation and participation of competing voices that make up the university ecosystem.

The hegemonic nature of these governance structures enables robust debates whilst ensuring that resolutions are taken, recorded, and communicated in a coordinated manner.[69] To discourage the interference of the Minister in the running of the university, the council of the university is bestowed with the powers to govern the university and to ensure that there are proper measures in place through policies and procedures for the attainment of their 'mission'.[70] The daily operations of the university are exclusively meant to be executed by the management of the universities under the stewardship of the VC and Principal who account to the council which in turn plays an oversight role.[71]

2.4 THE RELATIONSHIP BETWEEN THE STATE AND PUBLIC UNIVERSITIES

[65]Section 31 of the Higher Education Act.
[66]Griffin (note 5) 7.
[67]Ibid.
[68]Department of Education, Education White Paper 3 'A programme for the transformation of higher education' (1997) https://www.gov.za/sites/default/files/gcis_document/201409/18207gen11960.pdf..
[69]M Fourie '*Institutional Governance in SA Higher Education; for the common good or pollical power-play*?' In Blitzer E 'Institutional Governance in SA Higher Education' (2009) at 352 https://scholar.sun.ac.za/server/api/core/bitstreams/9c11fcab-1445-4b80-ab53-3bba2a2cb5d2/content..
[70]ibid(note 47).
[71]Ibid.

Harman provides a succinct definition of higher education governance.[72] Flowing from this definition, it may be argued that the fundamental object of the Act is to ensure that there is a blueprint for how public universities' structures are constituted, the powers that this structure has and the relationship that the public universities have with the office of the Minister to enable proper governance and management of the universities.[73]

In so far as the relationship between these structures and the Minister's office is concerned, the distinguishing feature of it is the respect for autonomy as well as academic freedom that public universities enjoy. It has been noted that to ensure a productive relationship between the state and educational sectors, the Constitution mandates a significant degree of institutional autonomy, especially in academic matters.[74]

This point of examining the governance of higher education through the constitutional lens was further made by the Council on Higher Education when it noted that the Constitution, by entrenching and protecting the right to academic freedom, institutional autonomy as well as the right to education, has already provided a framework to which governance in higher education should be examined.[75]

The point of emphasis that the study makes is that the provisions of the Act when applied and interpreted, should first take into consideration the constitutionally enshrined rights that universities enjoy such as freedom of expression, academic freedom and freedom of scientific research[76], as well as autonomy as it relates to its relationship with the State.[77]

This I argue, will ensure that there is harmony between the Minister's office and other statutory governance bodies within public universities that are precisely established to support the public

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[72] See G Harman '*Governance, Administration and Finance'* In B. Clark & G. Neave (eds) *Encyclopedia of Higher Education* (1992) at 1280 where the author defined governance in higher education as "how higher education systems and institutions are organized and managed, and how authority is distributed and exercised, and how both systems and institutions related to governments."

[73]T Luescher, M Hall & A Symas *'*Governance in South Africa Higher Education: Research Report' (2002) *Council of Higher Education.*

[74]A Symes *Overview of Recent and Current Debates in South African Higher Education: Academic Freedom, Institutional Autonomy and Public Accountability* Commissioned Report to the HEIAAF Task Team (2005).

[75]Council on Higher Education Independent Task Team *Academic Freedom, Institutional Autonomy and Public Accountability in South African Higher Education* (2008).

[76]Section 16 of the Higher Education Act.

[77]Preamble of the Higher Education Act.

universities to execute on their mandate and these bodies also enjoy constitutional protection as they are established to enable the universities to achieve the realisation of the rights as provided for in the Constitution.

Putting the argument in context, when examining both the Act as well as the institutional architecture for the governance of public universities holistic consideration in interpreting the Act and as well as the statute of the universities will be considered in conjunction in this study[78] because the legislature does not contradict itself.[79]

2.5 EVALUATING INSTANCES WHERE THE MINISTER IS EMPOWERED TO APPOINT AN INDEPENDENT ASSESSOR

When interpreting any legislation, it is imperative that such interpretation consistently aligns with the Constitution. Compliance with the Constitution is paramount, serving as the ultimate guide and benchmark for legal interpretation and application. As was stated in the case of *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others*[80]

> *"[t]he Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values."*[81]

Section 39(2) of the Constitution further dictates that:

> *"When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."*[82]

As such, because of the need for the legislative interpretation to give effect to the Constitution, the foundational call when evaluating any legislation regard will be made to the Constitution

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[78] *Commander v Collector of Customs* 1920 AD 510 para 513.
[79] *Principal Immigration Officer v Bhula* 1931 AD 323 para 335.
[80] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) para 22 See also *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 para 128.
[81] https://www.accord.org.za/people/professor-jairam-reddy/> Accessed on the 12 of March 2024.
[82] See section 39(2) of the Constitution of Republic of South Africa.

which provides for values and applicable standards that are to be considered.[83] The above was buttressed by the court in the case of *Independent Institute of Education (Pty) Limited v KwaZulu-Natal Law Society and Others.*[84]

> *"It would be a woeful misrepresentation of the true character of our constitutional democracy to resolve any legal issue of consequence without due deference to the pre-eminent or overarching role of our Constitution."*[85]

Section 44 of the Act empowers the Minister to appoint an independent assessor from the list of independent assessment panel to conduct an independent investigation when such a request is made in writing by the university[86], where there is serious maladministration that undermines the stability and operations of the university which the council has failed to resolve.[87] Additionally, the Minister is empowered to act when the circumstances mentioned in s42 of the Act emerge intertwined with the fact that the decision to appoint the independent assessors is in the interest of the institution as well as the sector as a whole.[88]

The purpose of the appointment of the independent assessor is to investigate and provide the Minister with a report on what measures may be taken to restore normalcy in the university.[89] The Minister's statutory intervention in the governance of universities was always on the cards as observed by the commission that:

> *"Since May 1994, there have been calls for the Minister of Education to 'intervene' in several institutional 'crises. The issues have varied from allegations of corruption, of staff and students being 'ungovernable', and of 'recalcitrant managements' who do not want to change, to loss of confidence in the management or Council of an institution".*[90]

However, the exercise of the Minister's intervention was originally intended to be a negotiated one as stated by the National Council of Higher Education that:

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[83] *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) para 26.
[84] 2020 (2) SA 325 (CC).
[85] ibid (note 85) para 1.
[86] Section 44(1) of the Higher Education Act.
[87] Section 45(b)(i)(aa) of the Higher Education Act.
[88] Section 45(i)(bb) of the Higher Education Act.
[89] *University of the North and Others v Ralebipi and Others* (JA20/02) [2003] ZALAC 14 para 2.
[90] National Commission on Higher Education '*A Framework for Transformation Final Report'* (1996) 197. See https://www.che.ac.za/sites/default/files/publications/Chapter%201.pdf.

"... the Minister and the two intermediate bodies negotiate to establish which ministerial actions, procedures and interventions are acceptable and under which conditions. The agreements reached after such negotiations should be incorporated into the proposed new Higher Education Act".[91]

It is critical to note that between 1999 and 2017, the Act underwent 10 amendments.[92] According to some public institutions, this frequency of amendments is indicative of a departure from the ministerial actions negotiated by the National Council of Higher Education, especially concerning the relationship between universities and the state. This perspective suggests a perceived betrayal of the principles and agreements previously established to guide this relationship.[93]

While it is an accepted fact that most of the amendments introduced were intended to strengthen the governance of universities—which, by all indications, has faltered under its governance structures—the amendments have also significantly increased the powers of the Minister over public universities.[94]

Among the notable amendments to the Higher Education Act were:

- The 1999 amendment, was introduced to empower the Minister to appoint an administrator.[95]
- The 2000 amendments, aimed, among other things, at extending the power of the Minister to determine higher education policy.[96]
- The 2002 amendments, were introduced to authorise the Minister to make regulations.[97]

[91]Ibid.
[92]Higher Education Amendment Act, No. 55 of 1999; Higher Education Amendment Act, No. 54 of 2000; Higher Education Amendment Act, No. 23 of 2001; Higher Education Amendment Act, No. 63 of 2002; Higher Education Amendment Act, No. 38 of 2003; Higher Education Amendment Act, No. 39 of 2008; Higher Education Laws Amendment Act, No. 26 of 2010; Higher Education Laws Amendment Act, No. 21 of 2011; Higher Education and Training Laws Amendment Act, No. 23 of 2012; Higher Education Amendment Act, No. 9 of 2016; Government Gazette 40548 dated 17 January 2017.
[93]University of Pretoria Report 'Brief Analysis of Proposed September 2012 Amendments to The Higher Education Act 101 of 1997' (2012). See https://pmg.org.za.
[94]Ibid.
[95]See the Higher Education Amendment Act No 55 of 1999.
[96] Ibid.
[97]Ibid.

- The 2003 amendments, aimed at compelling the University Council to do annual reporting on the state of the institutions to the Minister's office.[98]

- The 2011 amendments, were introduced to give powers to the Minister to intervene in instances of poor performance or maladministration by the board of the National Student Financial Aid Scheme.[99]

- The 2012 amendment, aimed at enabling the Minister to intervene in cases of poor performance or maladministration by public universities.[100]

- The 2016 amendment, was introduced to empower the Minister to issue ministerial directives.[101]

The concerning issue with bestowing the Minister with such significant power, which has been argued to occur at the Minister's discretion without meaningful engagement with key stakeholders, is that it creates an impression of sliding into chaotic interference. This situation, where the state enjoys an unfettered amount of power, undermines the principle of cooperative governance. Such a concentration of authority raises concerns about the balance of power between the state and educational institutions, potentially threatening the autonomy and collaborative spirit that should underpin the governance of public universities.[102]

In its report, the Council on Higher Education[103] observed that in recent years, particularly from 2001 to 2004, the government's direction of higher education has become more authoritative, less inclined towards consultation, and at times, inclined towards top-down mandates. With the floods of amendments that further endow the minister with significant powers over universities, the relationship has proven to be uneven. It is contended that it is not permissible for the state to employ legislative means to gain direct access to universities when there are competent bodies, such as the Council, capable of carrying out the work the Minister might wish to accomplish.[104]

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[98]Ibid.
[99] Ibid.
[100] Ibid.
[101] Ibid.
[102]Council on Higher Education 'New Higher Education Institutional Types in South Africa: A Missed opportunity for Articulation and Differentiation?' (2022) See https://www.che.ac.za/file/6587/download?token=iRs5vxYi:Accesed on 19 March 2024.
[103] note 4 above.
[104]A du Toit 'Revisiting 'Co-operative Governance' in Higher Education A Discussion Document' (2014) Higher *Education South Africa* at 16. See https://www.usaf.ac.za/wp-content/uploads/2017/03/Revisiting-Co-operative-Governance-in-Higher-Education-A-Discussion-Document.pdf .

This argument is especially valid because no evidence has been produced that the current Act is insufficient to address the governance challenges faced by public universities. The frequent amendments seem to threaten the autonomy that institutions previously enjoyed, as they now constantly must be vigilant for any exercise of ministerial intervention, which has proven to be imposing.

In 2012, the Minister appointed independent assessors to investigate Tshwane University of Technology (TUT), University of Zululand (UniZulu), Walter Sisulu University (WSU), Vaal University of Technology (VUT), and Central University of Technology (CUT). The Minister's decision to appoint independent assessors to investigate the affairs of the above-mentioned public universities led to the University South Africa (USAF) investigating and preparing a report on the common features or common points of concern that were identified by the independent assessors in the conduct of their duties.[105]

According to the report, the challenges fell within the ambit of the following categories: failures of the University Council, unsavoury relationship between the Council and the VC, weak or incompetent Senate and Institutional Forum, mismanagement of funds by the universities, lack of proper financial practice and improper human resources administration as well as challenges related to the registrar's office.[106]

Additionally, the reports identified a lack of experience on the part of the chairs and deputy chairs of the councils to provide leadership, especially during council meetings, as a prime factor that led to the degenerating of the council meetings.[107] Furthermore, it was noted that the lack of leadership led to instances whereby meetings were not conducted procedurally and where issues such as the conclusion of the declaration of interest by council members were ignored.[108]

Intertwined with this issue of governance was the lack of skill by members of the councils. The reports noted that councils of the universities were flooded with members who lacked the basic

[105]https://www.usaf.ac.za/wp-content/uploads/2017/08/2012_HESA_Analysis-of-Assessor-Reports-of-Universities-in-SA_Oct.pdf> .
[106]https://www.usaf.ac.za/wp-content/uploads/2017/08/2012_HESA_Analysis-of-Assessor-Reports-of-Universities-in-SA_Oct.pdf> .
[107]https://www.usaf.ac.za/wp-content/uploads/2017/08/2012_HESA_Analysis-of-Assessor-Reports-of-Universities-in-SA_Oct.pdf> .
[108]<https://www.usaf.ac.za/wp-content/uploads/2017/08/2012_HESA_Analysis-of-Assessor-Reports-of-Universities-in-SA_Oct.pdf> .

understanding of the duties they were expected to perform due to their inexperience in higher education governance.[109] Members who were also appointed from a particular constituency the reported noted that they contributed to the dysfunctionality of the councils. These members viewed their council membership as a vehicle of advancing the agenda of the constituencies that elected them, rather than focusing on promoting issues in the best interests of the university. By extension, the active participation of these members in the council would be limited only to issues of interest to their constituencies. [110]

Another worrying issue highlighted in the report was that in some instances, council members interfered with the operations of the universities. These members of the council would involve themselves in the procurement processes which did not fall within the monetary jurisdiction of the council, and which did not warrant the involvement of the council. Usually in instances where this interference occurred, there were underlying interests that members of the council had in the said procurement processes.[111]

Furthermore, members of the council would also interfere in the operations of the university by involving themselves in the appointment processes. In this interference, members of the council would be advocating for the appointment of candidates they have a relationship with or who at the very least are considered as strategic appointments to advance the ulterior agenda that they may have.[112]

Concerning the unsavoury relations between the council and the VC, it was a common theme in the reports of the independent assessors that there was a tendency for some of the council members to bypass the authority of the VC and discuss issues with subordinates of the VC.[113] In most instances, issues that were discussed with the subordinates were operational, improper

[109]<https://www.usaf.ac.za/wp-content/uploads/2017/08/2012_HESA_Analysis-of-Assessor-Reports-of-Universities-in-SA_Oct.pdf> .
[110]<https://www.usaf.ac.za/wp-content/uploads/2017/08/2012_HESA_Analysis-of-Assessor-Reports-of-Universities-in-SA_Oct.pdf> .
[111]<https://www.usaf.ac.za/wp-content/uploads/2017/08/2012_HESA_Analysis-of-Assessor-Reports-of-Universities-in-SA_Oct.pdf> .
[112]<https://www.usaf.ac.za/wp-content/uploads/2017/08/2012_HESA_Analysis-of-Assessor-Reports-of-Universities-in-SA_Oct.pdf> .
[113]<https://www.usaf.ac.za/wp-content/uploads/2017/08/2012_HESA_Analysis-of-Assessor-Reports-of-Universities-in-SA_Oct.pdf> .

and remote from the university operations but were meant to advance the self-interests of those involved.[114]

This conduct inevitably led to instances of a deficiency of trust between the councils and the VCs' offices. On the other hand, the unsavoury relationship was identified to have been motivated by the failure of the VC to either take decisive disciplinary actions against those in senior management who happened to have contravened the policies of the University or misconducted themselves.[115] In this instance, the failure of the VC to take decisive action was seen as a display of a lack of leadership. Furthermore, it was a common theme among the assessor's reports that management had challenges in safeguarding the financial health of the universities while contravening some human resources policies which led to institutional instability.[116]

Surprisingly, eleven years later, the same issues persist in the universities which threaten the stability of the universities and lead to governance crises. According to the Minister's report, the lack of experience among council members was identified as the primary issue, followed by the fraught relationship between the councils and VCs, including a deficiency in capable leadership at both the council and management levels.[117]

Corruption was also highlighted as a singular issue that significantly contributed to the governance instability of the universities as universities were considered the fountain of wealth through corrupt activities by both management and council members.[118]

As Johson and Hlatshwayo correctly observed, 'corruption thrives in a dysfunctional university'.[119] For universities not to fall prey to corruption, there must be proper management and coordinated manner of accountability from its governance structures especially council and

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[114]<https://www.usaf.ac.za/wp-content/uploads/2017/08/2012_HESA_Analysis-of-Assessor-Reports-of-Universities-in-SA_Oct.pdf> .
[115]<https://www.usaf.ac.za/wp-content/uploads/2017/08/2012_HESA_Analysis-of-Assessor-Reports-of-Universities-in-SA_Oct.pdf>.
[116]<https://www.usaf.ac.za/wp-content/uploads/2017/08/2012_HESA_Analysis-of-Assessor-Reports-of-Universities-in-SA_Oct.pdf>.
[117]<https://pmg.org.za/committee-meeting/37238/>.
[118]<https://pmg.org.za/committee-meeting/37238/>.
[119]B Johson and M Hlatshwayo (note 7) 21.

substructures of the council such as the risk and audit committee and the finance committee.[120] The following part will examine instances where the Minister may appoint the administrator.

2.6 INSTANCES WHERE THE MINISTER MAY APPOINT THE ADMINISTRATOR

After the independent assessor has concluded their investigation and concluded the report, such a report must be submitted to the Minister.[121] The Act further dictates that within 90 days of being furnished with the report, the Minister must share the report with the council of the concerned university.[122] Furthermore the Minister 'must present the report in the National Assembly and attend to publishing such report in the government gazette'.[123] This process may be argued to be consistent with the principle of open democracy where information is not the preserve of the executive but is also shared with the legislature and the society at large.[124]

Based on the report's findings, which could include evidence of serious financial maladministration or other forms of maladministration that hinder the effective operation of the university, the Minister may decide to appoint the administrator to take over the affairs of the affected university.[125] On the appointment of the administrator, the council of the university will automatically be dissolved,[126] as the administrator will assume the role that was played by the council as well as the executive functions played by management.[127] The appointed administrator will, therefore, be tasked with ensuring that the concerned university governance and administrative functions are restored to normality.[128] The ultimate task that the administrator must conclude is to ensure that the new council of the university is appointed.[129]

Additionally, the Minister on request may appoint an administrator if the council of the public university voluntarily requests that the university be placed under administration.[130] When the

[120]Ibid.
[121] Section 47(1) (b) of the Higher Education Act.
[122] Section 47(2) of the Higher Education Act.
[123]Section 47(2) of the Higher Education Act.
[124] J Klaaren 'Constitutional Authority to Enforce the Rights of Administrative Justice and Access to Information' (1997) 13 (4) *South African Journal of Human Rights* 549- 564 at 562.
[125] Section 49B(a) of the Higher Education Act.
[126] Section 49E of the Higher Education Act.
[127]Section 49F of the Higher Education Act.
[128]Ibid.
[129]Ibid.
[130]Section 49B (c) of the Higher Education Act.

council of the public university cease to exist, the Minister is empowered to appoint the administrator.[131]

It should be noted that the Minister's intervention in the governance of public universities has been legally challenged, not only by the respective universities but also by student political formations. This indicates a complex landscape of legal disputes surrounding the Minister's role in university governance.[132] In 2012, the Minister appointed Professor Julian Smith as an independent assessor to investigate the affairs of the Central University of Technology.[133] The decision was motivated by anonymous staff complaints which alleged mismanagement of finances, non-adherence with the Labour Relations Act,[134] as well as allegations of civil rights violations.[135]

Upon receipt of the complaints, the Minister held several meetings with the University management, engagements that were not fruitful resulting in the minister exercising his powers to appoint the independent assessor.[136]

The independent assessor's finding was that the Council failed to adhere to its fiducial responsibilities by permitting acts that were contrary to the principles of good governance.[137] Furthermore, the investigation found that measures taken to safeguard the University against financial mismanagement by the Chief Financial Officer of the University and the oversight role that was played by the Audit and Risk Committee were inadequate and exposed the University to potential risk.[138]

Following the aforementioned findings as well as the recommendation that the Council should be dissolved to restore good governance,[139] the Minister decided to place the University under administration, and Professor Stanley Ridge was appointed as the administrator of the

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[131]Section 49B(d) of the Higher Education Act.
[132]*Economic Freedom Fighters Student Command v Minister of Higher Education, Science & Technology and Others* [2021] JOL 40227 (GP).
[133] Government Gazette No. 35333 of 28 February 2012.
[134] 66 of 1995.
[135]Department of Higher Education and Training Government Gazette Number 48696 'Report of the Independent Assessor into the Affairs of Central University of Technology, Free State (CUT)' at page 38.
See https://www.gov.za/sites/default/files/gcis_document/202306/48696gon3490.pdf.
[136]Ibid.
[137]Department of Higher Education and Training *Government Gazette Number 35333 Report of the Independent Assessor into the Affairs of the Central University of Technology, Free State, Appointed by the Minister of Higher Education and Training* (11 May 2012).
[138]Ibid
[139]Ibid

University.[140] In arriving at his decision to place the University under administration, the Minister had the following to say:

> *"The Minister has received and considered the report of the Independent Assessor. It is evident in the report that there are serious problems in the governance and management of the University, which are undermining the effective functioning of the university."*[141]

This decision led to protracted legal action being taken by the Minister as well as the Council. The Minister approached the court to have his decision to appoint Professor Stanley Ridge as the administrator declared lawful and valid.[142]On the other hand, the Council took separate legal action, approaching the court to review, correct, and seek to have the report of the independent assessor set aside in its entirety. Additionally, they sought a review of the Minister's decision to appoint an administrator, aiming for it to be corrected and set aside.[143] As its alternative prayer, the University Council prayed for an order to have the decision of the Minister to appoint Professor Stanley Ridge as the administrator declared unlawful and invalid.[144]

The main reasons for the decision on the part of the Minister to place the University under administration were motivated by the findings of the independent assessor that pointed to instances of the failure of the Council to play its governance oversight role over management effectively.

The court ruled that the decision of the Minister constituted administrative action[145] and could not be set aside. The decision to dissolve the Council[146] was ruled to be without merit as the Act did not bequeath the Minister with such powers. [147]In terms of how the Minister applied his mind when considering the assessor's report, the court had the following to say:

> *"Universities in our country have a significant role to play and they should enjoy freedom and autonomy in their relationship with the State within the context of public accountability. The Minister and his department must accept the autonomy of universities*

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[140]Government Gazette No 476 in *Government Gazette* 35457 of 20 June 2012
[141] Ibid.
[142]*Minister of Higher Education and Training and Others v Mthembu and Others, Council of Central University of Technology, Free State v Minister of Higher Education and Training and Others* [2012] ZAFSHC 144 (13 August 2012 hereafter referred to as CUT case) para 4.
[143]Ibid (note 143) para 7.
[144]Ibid (note 143) para 7.
[145] Ibid (note 143) para 37.
[146]Ibid para 38.
[147]Ibid para 38.

and should not be allowed to intervene in the affairs of a university unless the jurisdictional facts set out in section 41A (1) have been shown to exist. There is no doubt that the step taken by the Minister is a drastic one."[148]

The court further confirmed the position as articulated in the case of *New Clicks South Africa (Pty) Ltd v Minister of Health and Another*[149] that:

"The existence of a jurisdictional fact (which trigger administrative action) is an objective reality, and its validity must undergo judicial evaluation[150]*, furthermore, all exercise of public power is required to be justified.*"[151]

In the *CUT* case, the High Court found that no rational decision-maker could have come to the Minister's decision, indicating that the Minister had made a pre-matured judgement on the matter.[152]

In 2023, the sector also witnessed the stand-off between the Council of the University of South Africa (UNISA) and the Minister.[153] UNISA is currently challenging the decision of the Minister to place Unisa under administration. In the case of *Council of the University of South Africa v Minister of Higher Education Science and Innovation and Another***,**[154] the University's Council is challenging the Minister's decision to appoint an administrator and has approached the court to declare it unlawful. It must be noted that at this stage the substantive merits of the case are yet to be argued. Furthermore, the independent assessor's report that empowered the Minister to appoint the administrator is being reviewed and challenged by the Council of UNISA on grounds that the investigation that the independent assessor undertook failed to afford UNISA's Council opportunity to respond to the allegations that were found against it, thus violating the *audi alteram partem* rule.[155]

Finally, UNISA argues that the recommendation of the independent assessor that the University should be placed under administration is draconian as prerequisite legislative requirements that empower the Minister to make such a decision are absent in its case. To the University, such

[148]Ibid para 44.
[149]2005(3) SA 238 (SCA).
[150]Ibid para 75
[151]Ibid para 75.
[152]Ibid para 75.
[153]<www.timeshighereducation.com/news/unisa-administration-block-means-more-tough-times-students>.
[154]*Council of the University of South Africa v Minister of Higher Education Science and Innovation and Another* (076693/23; 082535/23) [2023] ZAGPPHC 1779 (6 October 2023)
[155] Ibid.

findings are irrational and biased and warrant judicial intervention.[156] The actions of the Council of UNISA provided the sector yet again with the opportunity to test and strengthen the governance framework.

The significance of the two cases, especially the CUT case from the governance perspective, reinforces the independence of the universities within the context of cooperative governance. It also advocates for universities to pursue academic freedom without restraint in their relationship with the Minister. Accepting the independent assessor's report as the sole reason for placing a university under administration is not sufficient on the part of the Minister. Additionally, there are lessons to be learned from these cases, which are discussed below.

2.7 LESSONS LEARNED FROM THE CASES

Several lessons may be learned from the CUT case. Key among those lessons is that, though it is a discretionary power of the Minister to appoint the administrator for the concerned university, such powers should only be exercised if doing so is in the best interests of the said university.[157] The Act does not define the best interests of the Universities. However, the principle of best interests has been explored fully in family law matters.[158] The principle finds expression in section 28(2) of the Constitution.[159] In providing what the words mean as enshrined in the Constitution, the Constitutional Court considered that section 28(2) "is an independent stand-alone right"[160] whereby its application must be done independently.

Borrowing from this interpretation, it means that there must be a separate inquiry that must be undertaken by the Minister to satisfy and fulfil this provision notwithstanding other information that the Minister might have at his/her disposal. This is a separate jurisdictional point that the Minister must fulfil mutually separated from what is contained in section 49B(a)(b)(c)(d).

Secondly, the exercise of the discretionary power to appoint the administrator should not wholly be dependent on the report that is concluded by the independent assessor and submitted to the Minister. The Minister must rely on additional evidence, most specifically documentary evidence, to justify the decision to appoint an administrator. This ensures that the decision is grounded in thorough and tangible justification beyond the contents of the independent

[156] Note 15 above.
[157] Section 49B (2) of the Higher Education Act.
[158] *Cronje v Cronje* 1907 TS 871; *Tabb v Tabb* 1909 TS 1033.
[159] See section 28(2) of the Constitution.
[160] *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC) para 17.

assessor's report. However, in doing so, the Minister must be aware that "an official who is bestowed with discretionary powers is constrained to exercise those powers within the limits of the authorising statute read in the light of the Bill of Rights."[161]

By extension, the Minister must respect the autonomy enjoyed by the universities to provide entry to higher education institutions as provided for in the Constitution. This also implies that the Minister must be conscious of the fact that in exercising the discretionary powers to appoint the administrator, the decision must not rely on operational matters that fall within the ambit of senior management or those issues that are the competence of the council. The Minister should only be permitted to intervene in the governance of a university if the said bodies are legislatively and constitutionally unable to execute their core responsibilities. This principle ensures that intervention by the Minister is a measure of last resort, respecting the autonomy and governance structures of the institution.[162]

Having dealt with the legislative requirements, I will now examine how the above-mentioned powers were exercised by the Minister concerning the VUT.

3.1. THE VAAL UNIVERSITY OF TECHNOLOGY AND GOVERNANCE LANDSCAPE

The origin of what is today known as the VUT can be attributed to the industrialization process that took place in the Vaal Triangle decades ago. This period of growth led to two significant developments in the area: the establishment of SASOL in 1950 and ISCOR, now known as Arcelor Mittal, in 1952.[163] Following the aforementioned industrial projects, the VUT was established in 1966 as an advanced technical education college. Its primary aim was to further the wave of industrialization sweeping through the Vaal Triangle. At its establishment, VUT was called Vaal Triangle College for Advanced Technical Education, the name it kept until 1979 when it became the Vaal Triangle Technikon and began to confer certificates and

[161] *Minister of Safety and Security v Sekhoto* (131/10) [2010] ZASCA 141 para 40.
[162] See section 42(1)(b) of the Higher Education Act 101 1997.
[163] S Sparks 'Between 'artificial economies' and 'the discipline of the market': SASOL from Parastatal to Privatization' (2016) 42 *Journal of Southern African Studies* 711-724.

diplomas to its graduates. As a result of mergers, it changed its name from Vaal Triangle Technikon to Vaal University of Technology in 2004.[164]

VUT was established in terms of the Higher Education Act,[165] as amended. Its governance instruments include the Higher Education Act[166], the statute of the University[167] as promulgated in government gazette No 44188, 12 February 2021, the institutional rules, guidelines for good governance practice and governance indicators for the councils of South African public higher education institutions,[168] the King Reports on Corporate Governance for South Africa.[169] VUT, like other public universities, is subject to the Constitution and exercises and enjoys fundamental rights and duties applicable to public universities, including those stipulated in Section 16, which guarantees freedom of expression and academic freedom, among others. Additionally, VUT operates under other relevant legislation and common law principles that govern its functions and responsibilities.

VUT's governance structure is composed of the following organs the Council, Senate, Institutional Forum, and the Student Representative Council. Their mandate and powers are described below. The Council of VUT is bestowed with powers of governing the university as articulated in section 27 of the Act as well as the statute.[170] It plays an ultimate oversight role in the management of the University subject to good governance and is the custodian of policy making.

The Senate of VUT on the other hand, is responsible for all the academic affairs and research activities associated with the university and may also perform any task as requested by the Council.[171] The Institutional Forum of VUT is an advisory body to the Council on issues

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[164] <https://www.gov.za/sites/default/files/gcis_document/201409/35332gon365.pdf>
A stone's thrown away from where it was established the wounds of what transpired on 21 March 1960 in the black township of Sharpeville that is adjacent to the college, were still palpable, and the memories of the horror of the events were still haunting the community that endured the wrath of the government of the time.
[165] See section 20 of the Higher Education Act.
[166] 101 of 1997.
[167]https://www.vut.ac.za/wp-content/uploads/2021/04/VUT-Statute-20210215-GG-44188-_Notice-No-668.pdf.
[168]Department of Higher Education and Training '*Guidelines for Good Governance Practice and Governance Indicators for Council of South African Public Higher Education Institutions'* (2017). https://www.dhet.gov.za/Institutional%20Governance%20Policy%20Documents/Guidelines%20on%20Good%20Governance.pdf.
[169]https://cdn.ymaws.com/www.iodsa.co.za/resource/collection/94445006-4F18-4335-B7FB-7F5A8B23FB3F/King_1_Report.pdf> the first published in 1994; the second published in 2002 and the third published in 2009, and further reports published thereafter.
[170]Section 27 of the Higher Education Act 101 of 1997.
[171]Section 21(A) of the Institutional Statue Vaal University of Technology. Government Gazette Number 4418 12 February 2021.

primarily related to transformation, followed by the Student Representative Council whose duties and responsibilities are contained in its constitution. It is now an accepted fact that VUT has been one of the universities where its governance challenges have been in the spotlight.[172]

3.2 GOVERNANCE CHALLENGES AT VUT AND THE MINISTERIAL INTERVENTIONS

As early as 1998, VUT had been grappling with governance challenges epitomised by maladministration.[173] In response to the allegation of corruption, maladministration as well as mismanagement challenges, the late Professor Jaap Durand was appointed as an independent assessor to conduct an independent investigation that led to the appointment of Professor Theo Shippey as the administrator.[174] In 2006, the Council appointed a three-member Judicial Commission of Inquiry to address the allegations of corruption, maladministration and mismanagement against the VC.[175] Even though the conclusion of the enquiry led to the Council's summary dismissal of the VC, that was not to be the end of VUT's challenges. In 2012, the challenges escalated which in turn led to the intervention of the Minister who appointed independent assessors to investigate the governance, management and administrative problems facing VUT.[176]

Upon the conclusion of the investigation by the independent assessor, as the Act dictates, a report was submitted to the Minister. The investigation revealed several critical issues within the University's governance structure. It found that the Council was plagued by chronic dysfunction, leading to divisions and the formation of factions. Additionally, it was determined that the Council acted in bad faith by not renewing the VC's term for an additional five years. A significant breakdown in the relationship between the VC and one of the Deputy Vice-Chancellors was also identified as negatively impacting the University. Moreover, management was found to have failed to address allegations of mismanagement of funds, corruption, and non-compliance with the University's supply chain processes. The investigation

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[172] M Cross & T Kulati The regulatory environment for Public Higher Education. In Council on Higher Education Review of Higher Education in South Africa twenty-five years into Democracy July 2022. Available at https://www.che.ac.za/sites/default/files/flipbooks/2023/che_review/index.html.
[173]Ibid.
[174]Ibid.
[175]Ministry of Higher Education and Training *Government Gazette Number 35029 Appointment of the independent assessor to investigate the Affairs of the Vaal University of Technology* (10 February 2012).
[176]Ibid.

also uncovered a practice of discrimination based on race, where white employees were favoured over black job applicants.[177]

The independent assessor recommended the dissolution of the council and its committees as a measure of restoring good governance. Additionally, it was further recommended that an administrator be appointed to take over the functions of the Council and review the University's statute to address governance challenges that were uncovered.

The independent assessor also recommended Council be reconstituted in terms of the reviewed statute and ensure that the new Council members declare business interests that they have with the University as well as personal interests whilst serving in the Council. Crucially, the independent assessor recommended overturning the Council's resolution that led to the VC's contract not being renewed, indicating that the VC's contract should be renewed. Additionally, it was recommended that members selected for the finance committee of the Council should be individuals of integrity, possessing the requisite financial skills. It was also recommended that the administrator work on restoring working relations between the VC and the Deputy Vice-Chancellor.[178]

Professor Patrick Fitzgerald was then appointed as the administrator of the University to carry out the recommendations identified by the independent assessor.[179] Seven years later, the University found itself in a similar position where the Minister had to intervene in its affairs. On 15 May 2019, the Minister published the notice in terms of section 44(1)(a) that he would be appointing an independent assessor to conduct an independent investigation on the governance, financial management, human resources as well as administration challenges that the University was facing.[180] Upon the conclusion of the investigation by the independent assessor, the report was submitted to the Minister as the Act dictates. Among other findings, the investigation identified significant governance challenges.[181]

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[177]Ibid.
[178]Ibid.
[179]Department of Higher Education and Training *Government Gazette number 35524 Appointment of an Administrator to the Vaal University of Technology* (17 July 2012).
[180] Department of Higher Education and Training *Government Gazette number 35524 Appointment of an Administrator to the Vaal University of Technology* (15 May 2019).
[181]Department of Higher Education and Training *Government Gazette Number 43015 Report of the independent assessors into the affairs of the Vaal University of Technology* (14 February 2020). The report among others found that: *"Governance, Leadership and Management in the institution have failed to uphold good governance and institutional cohesion, and that Management has been unable to guide the institution to assure effective management of human and financial resources, as well as adherence to the mission of the university".*

Considering the above, the independent assessors recommended the appointment of an administrator to take over the affairs of the University, specifically the functions of the Council. Furthermore, it was recommended that members of the Council be vetted and subjected to background checks before they are appointed to their positions and the size of the number of council members be reduced by removing members who represent certain bodies and reducing the number of internal-staff members. There was also a recommendation that the institutional statute be drafted to ensure that there is the codification of accountability measures and that the office of the Ombudsman is established independently from the council and management.[182]

The investigation concluded that the VC was incapable of fulfilling the responsibilities associated with the position he was occupying, necessitating a review of his future with the university. It was recommended that senior executive management at levels 1-3 should either retire or be redeployed, and new appointments should be made. Additionally, it was suggested that the Special Investigative Unit be approached to investigate those implicated in corrupt activities, including the VC and Deputy Vice Chancellors.[183]

3.3 EVALUATION OF THE ASSESSORS' REPORTS AT VUT

There is a striking similarity in challenges that VUT faced that prompted the Minister's intervention by exercising the discretionary powers to appoint both the independent assessor as well as the administrator both in 2012 and 2019. The challenges faced by VUT are no exception as they are challenges faced by other universities within and outside the borders of South Africa.[184]

In both 2012 and 2019, the university Council was found to be dysfunctional and unable to execute its core duties as a custodian of good governance because it became entangled in internal squabbles. This on its own meant that the Council lost sight of the oversight role that it ought to have been playing over management. As a result of this, a review of the institutional statute was the most suitable course of action, both in 2012 and again in 2019. Without a comprehensive statute of the university, the university is likely to endure challenges. It is advisable for universities facing challenges, such as the VUT, to have their statutes reviewed

[182]Ibid.
[183]Ibid.
[184]H Sibiya 'Governance of the institutional leadership and student organisation interfaces in South Africa's Higher Education Institutions' (2017) 9(5) *African Journal of Public Affairs* 190 -199 para 193.

every five years. This periodic review would allow the institutions to adapt to any changes they are experiencing at that specific time, without necessitating intervention from the Minister.[185]

It is undisputed that both the Act and the institutional statute entrust the council with governance responsibilities, while the VC is tasked with management, and the council assumes an oversight role.[186] Given this framework, it is essential that the governance structure be sufficiently equipped to fulfil its governance duties effectively. A university that persistently faces crises does not justify a situation whereby the Minister should usurp the university's governance, transferring it to the minister's domain. As it was argued, universities are "part of a wider network of social and educational institutions and this network will constantly be changing in recognition of or in response to changing economic and social factors."[187]

To this end, how the Minister handles complaints that are referred to the Minister's office should be codified. The procedure detailing how and under what circumstances concerned members of the university community may raise a complaint directly with the Minister's office should be clearly outlined.

Secondly, there appears to be no evidence, at least since the appointment of the independent administrator in 2019, that the Minister has undertaken an exercise to determine whether the appointment of an administrator was in the best interest of the university. This assessment is mandated by Section 49B(2), which states:

> *"The Minister may only act in terms of subsection (1) (a) or (b) if he or she has reason to believe that the appointment of an administrator is in the best interests of the public higher education institution concerned and of higher education in an open and democratic society."*[188]

This is evident in the publication of the gazette decision to appoint the administrator as there is no mention of the interrogation of section 49B (2).[189] Even though the Act does not define what the Minister must produce to be considered to have made a decision that is in the best interests of the university, as a stand-alone jurisdictional point[190], the Minister must at the very

[185]https://www.justice.gov.za/commissions/feeshet/docs/2015-HESummit-Annexure15.pdf>.
[186] https://www.justice.gov.za/commissions/feeshet/docs/2015-HESummit-Annexure15.pdf>.
[187]R Pring 'The Changing Nature of Universities: economic relevance, social inclusion or personal excellence?' (2001) *Institute for the Advancement of University Learning 1-13* at 1.
[188]See section 49(B)(2) of the Higher Education Act.
[189] (note 184).
[190]Section 49B (2) of the Higher Education Act.

least, provide his or her independent analysis outside of the investigation that was done by the independent assessor to substantiate why the administrator must be appointed.

Furthermore, the Minister's consideration is not only limited to a specific university but to higher education in its totality. Thirdly, it must be noted that both the independent assessments had something to say about the position of the VC. For example, the 2012 recommendation suggested revisiting the decision not to extend the contract for another 5-year term, while the 2019 recommendation stated that the VC's future with the university should be reviewed. The broad powers wielded by the Minister, through the deployment of independent assessors as well as administrators, have contributed to the perception that decisions regarding who may or may not serve as the VC should not be within the Minister's purview.[191]

When the Minister gives the terms of reference to the effect that the administrator must revisit the council's decision not to extend the VC contract, the exercise of such powers does not only exist, but it is also foreign in our law. The doctrine of *functus officio* as dealt with in the case of *Osterloh v Civil Commissioner of Caledon*[192] is instructive in cases of this nature.[193] Given the fact that the appointment of the VC can only be concluded by the Council and the Council decided not to extend the term of office of the VC by a further 5 years, the Council had, under this circumstance, performed its functions to the fullest. Therefore, a council in the form of the administrator may not have further powers in respect of deciding the term of office of the VC and would therefore be acting unlawfully by dealing with the decision again without approaching the court of law to first set aside its initial decision.[194] The significance of this principle, as articulated, lies in ensuring confidence that once a public body has reached a final decision, it cannot be revoked capriciously or without just cause, unless there is explicit legislative empowerment allowing for such an action.[195] This principle safeguards the integrity

[191](note 195) para 47 the court held that:
"... Minister's complaint in respect of the re-appointment of the Vice-Chancellor has nothing to do with him as a suitable person, but the process followed. His reliance on Prof Smith's so-called finding is misplaced. A proper approach in line with the CUT statute was followed and the professor merely mentioned that he would have expected the Council to refer the issue to inter alia the Senate before a decision was taken."
[192]1855 at 240.
[193]Ibid para 243-244 the court held that:
"Having done these things, and given the notification, he has exhausted all the powers ... given him by the Act, and entirely functions as to the election ... Osterloh was the member of the Council, and the Civil Commissioner's judicial (original emphasis) functions were at an end, and his ministerial (original emphasis) functions also ended, on the publication of the notifications in the Gazette."
[194]D M Pretorius 'The Origins of the Functus Officio Doctrine with Specific Reference to its Application in Administrative Law' (2005) *South African Law Journal* 832, 842 at 843.
[195] C Hoexter '*Administrative Law* in South Africa' 3ed (2021) at 280.

of decision-making processes, ensuring they are not subject to arbitrary change without valid reasons.[196]

Thus, certainty, finality, and lawfulness where administrative justice is applicable are interwoven and integral parts of the rule of law.[197] In the case of *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others*,[198] the Constitutional Court, as per Khampepe J, emphasised the importance of finality.[199] Furthermore, in the case of *President of the Republic of South Africa & Others v South African Rugby Football Union & Others*,[200] the court reaffirmed the undisputed fact that section 33 is there to regulate the conduct of the public administration[201]which in the case of VUT it is submitted that such conduct was not observed as dictated. Having dealt with such, I will now focus on the conclusion, findings as well as recommendations emerging from the study.

4. CONCLUSION, FINDINGS AND RECOMMENDATIONS EMERGING FROM THE STUDY

The main focus of this study was to evaluate the legal framework governing public Universities in South Africa in order to determine the adequacy of such a framework. In that regard, the study examined the legal architect that governs public universities in the Republic and evaluated whether the governance reforms proposed by the assessor's reports and implemented by the administrators were adequate to address the governance challenges uncovered by the assessors during the investigation. Additionally, the study sought to investigate whether the past interventions by the Minister have been sufficient to deal with the governance issues facing the sector. The study further examined whether the current legal framework is sufficient to

[196]H Martin, A Symes &T Luescher Governance in South African Higher Education (Research Report of the CHE Task Team on "Governance in Higher Education") 2002. In this report the researcher considering the cooperative governance argued that a decision *"Taken within the context of a commitment to co-operative governance and institutional autonomy, this means that the Minister cannot intervene on a whim; intervention can only be justified on fiduciary grounds, or if a public higher education institution is not pursuing the policies for tertiary education which form part of the government's mandate".*

[197]*Mulaudzi v The State* [2015] ZACC 20 para 37.

[198] *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* 2021 (11) BCLR 1263 (CC).

[199]Ibid in paragraph 1, the court's comments about unending litigation were that: "*Like all things in life, like the best of times and the worst of times, litigation must, at some point, come to an end. The Constitutional Court, as the highest court in the Republic, is constitutionally enjoined to act as the final arbiter in litigation. This role must not be misunderstood, mischaracterised, nor taken lightly, for the principles of legal certainty and finality of judgments are the oxygen without which the rule of law languishes, suffocates and perishes."*

[200]*2000(1) SA (1*) para 136.

[201]Ibid.

ensure proper governance of public universities and assessed whether the said legal framework has been implemented as per the provisions of the Act.

The study's findings indicate that universities previously experiencing governance issues, leading to ministerial interventions through the appointment of assessors and administrators, are likely to face further ministerial actions. This pattern creates an impression that the initial interventions by the Minister were insufficient in addressing the underlying governance challenges. The current governance framework that governs the universities is representative, transformative, and sufficient to aid the universities but those appointed to university councils need further training in governance. The implemented governance frameworks as proposed by the assessor and implemented by the administrator, have proven to be timebound and unable to withstand future challenges that public universities may endure. Governance structures in the universities have surrendered their responsibilities and given in to improper conduct that undermines the effective running of the universities. Squabbles within the Senior Management Team (SMT) of universities have led to the collapse of many universities.

The Minister intends to intervene in governance challenges of public universities even though they are well founded, the indication is that it has been done so without full consideration of the Act. Further proposed measures as articulated by the Minister in parliament may be met with resistance by the universities as there is a view that the Minister’s powers are sufficient and do not require to be supplemented further.

A further study should be conducted to compare the governance of public universities vis-à-vis the governance of private higher education institutions to learn and supposedly strengthen the governance of public higher institutions that the private universities have been able to manage.

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