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GOOD CORPORATE GOVERNANCE IN STATE-OWNED ENTITIES: CHALLENGES AND COMPLIANCE

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ACKNOWLEDGEMENTS

Thanks to my children Tate, Tumie, Tiisetso and Tukie and my beloved grandsons Kgosietsile and Lusanda. I know I appropriated time for myself because of this research when you wanted my attention. Sometimes you understood other times you didn't. Henceforth you will get my undivided attention. A special thanks goes to my husband for understanding and being there for me when I was frustrated with my progress. However, he was brutally frank with me something I didn't appreciate. When I complained about my Professor's comments regarding my recommendations he said, "I would have also rejected your recommendations if, I was your Professor because they are indeed thin." I was disappointed but not surprised that he said it like it is. The journey was tough, and I thought I would not make it with the passing of my two brothers in May and August 2021, my mother Sophie Buyelwa Modimogale and my mother-in law Eva Mokuena in January 2022 a week apart.

I also want to take this opportunity to communicate my appreciation to my supervisor Professor Herbert Kawadza for his guidance and support. At first, your comments were unappreciated because I thought you were impossible. You were demanding. I forgive you because you meant well. You helped me help myself.

Mesdames Judith Mafika and Ms Cynthia Smith thank you for having my back. Last but not least Lerato Madeira thanks for providing me technological support. You were patient and understanding thank you.

DECLARATION AND ACCEPTANCE

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I declare that this Doctor of Philosophy research paper with the title "Good Corporate Governance in State-Owned Entities: Challenges and Compliance" is my original work and to the best of my knowledge, it has not been previously submitted for degree purposes at any institution of higher learning; all the sources cited have been duly acknowledged by complete reference.



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TABLE OF CONTENTS

CHAPTER ONE 1

GOOD CORPORATE GOVERNANCE DEFINITIONS 1

1. INTRODUCTION 1

1.1. Definition of good corporate governance 1

1.1.1. Definitions of concepts 3

1.2. The history and background of good corporate governance in SOEs 4

1.3. The importance of good corporate governance and SOEs 9

1.3.1. Bad corporate governance 10

1.4. Theoretical framework 16

1.4.1. Agency theory 18

1.4.2. Stewardship theory 20

1.4.3. Stakeholder theory 21

1.5. Objectives 21

1.6. Problem statement 22

1.7. Research questions 24

1.8. Relevance of the study 24

1.9. Research methodology 25

1.9.1. Limitations 25

1.10. The structure of the chapters 26

CHAPTER TWO 28

LEGISLATIVE AND REGULATORY FRAMEWORKS FOR GOVERNANCE OF STATE-OWNED ENTITIES IN SOUTH AFRICA 28

2. INTRODUCTION 28

2.1. Governance structure of SOEs 28

2.2. Constitution of the Republic of South Africa, 1996 30

2.3. The Public Finance Management Act 32

2.4. The Companies Act 71 of 2008 36

2.4.1. Qualification and eligibility for appointment as directors 37

2.4.2. Liability of directors and indemnity....40
2.4.3. Corporate Governance Surveillance and Enforcement and its Role....41
2.5. Public Audit Act 25 of 2004 as amended....43
2.6. King IV....45
2.7. The Protocol on Corporate Governance in the Public Sector....45
2.8. Conclusion....47
CHAPTER THREE....48
GOOD CORPORATE GOVERNANCE MEASURES ADOPTED BY BOTSWANA, NAMIBIA AND SOUTH AFRICA....48
3. Introduction....48
3.1. Botswana....49
3.1.1. The basis of corporate governance in state-owned enterprises....51
3.1.2. The structure of the state of corporate governance in Botswana....51
3.1.3. Anti-Corruption instruments....55
3.1.4. Penalties for corruption and other corruption legislation....57
3.1.5. Botswana's Ranking on the list of corrupt countries in Africa and the world....59
3.2. Namibia....60
3.2.1. The basis of corporate governance in state-owned enterprises....62
3.2.2. The structure of the state of corporate governance in Namibia....65
3.2.3. Anti-Corruption instruments....67
3.2.4. Penalties for corruption and other corruption legislation....70
3.2.5. Namibia's ranking on the list of corrupt countries in Africa and the world....73
3.3. South Africa....74
3.3.1. The basis of corporate governance in state-owned enterprises....75
3.3.2. The structure of the state of corporate governance in South Africa....78
3.3.3. Anti-Corruption instruments....79
3.3.4. Penalties for corruption and other corruption legislation....86
3.3.5. South Africa's ranking on the list of corrupt countries in Africa and the world....86
3.4. Persistent problems in the trio's state-owned enterprises....87
3.5. Conclusion....88

CHAPTER 4 90

SOES GOVERNANCE CHALLENGES AND PRIVATE SECTOR ENABLERS 90

4. INTRODUCTION 90

4.1. Historical background of corruption in SOEs 92

4.2. The genesis of the lack of good corporate governance in state-owned entities 99

4.3. Good corporate governance undermined 100

4.4. The conduct of the African National Congress 105

4.5. Failure of management to manage state-owned entities with repercussions 106

4.5.1. Denel 106

4.5.2. South African Airways 108

4.5.3. Transnet 109

4.6. The effects, implications and repercussions of non-compliance with good corporate governance by SOEs 111

4.7. SOEs compliance and non-compliance with good corporate governance 113

4.7.1. Compliance with good corporate governance 113

4.7.2. Compliance and non-compliance with Supply Chain Management (SCM) 114

4.7.3. Various decisions and roles of other players 120

4.7.4. The Role of the African National Congress in State-Owned Entities 120

4.7.5. Hitachi and Chancellor House deal with Eskom 125

4.8. The role of the executive authority and the President of the country 127

4.8.1. The appointment of and the role of the Board of Directors - the accounting authority 127

4.8.2. Appointments of executive managers 130

4.8.3. The role of the executive management 132

4.8.4. Challenges SOEs face due to cadre deployment and rent-seeking 132

4.9. Collaboration between the SOEs and enablers from the private sector and their role 136

4.9.1. Accountants and auditors 138

4.10. The Bankers 143

4.11. Advisory Services Consultants 146

4.11.1. Bain & Company 149

4.11.2. McKinsey and Company 154

4.11.3. KPMG Services (Pty) Ltd 157
4.11.4. Trillian Financial Advisory, Trillian Capital Partners and Trillian Asset Management 159
4.11.5. Regiments Capital 160
4.12. Lawyers 160
4.12.1. Baker McKenzie 161
4.12.2. Hogan Lovells 162
4.12.3. Stein Scop Attorneys 162
4.12.4. Cliffe Dekker Hofmeyr 163
4.12.5. ENS 163
4.12.6. Webber Wentzel 164
4.12.7. Werksmans 164
4.12.8. Advocate Sikhakhane and KPMG 165
4.13. Lessons for the private and public sector 165
4.14. A modicum of success in South African SOEs 166
4.15. Conclusion 169

CHAPTER 5 172

CASE STUDY ESKOM LIMITED, PASSENGER RAIL AGENCY SOUTH AFRICA AND SOUTH AFRICAN BROADCASTING CORPORATION 172

5. INTRODUCTION 172

5.1. Eskom 173
5.1.1. Historical overview of Eskom 173
5.1.2. Corporatisation of Eskom post-1994 179
5.1.3. Good corporate governance at Eskom 182
5.2. Passenger Rail Agency of South Africa (PRASA) 221
5.2.1. Introduction 221
5.2.2. History of Passenger and goods rail prior to and during PRASA 224
5.2.3. Good Corporate Governance in PRASA 226
5.3. The South African Broadcasting Corporation 244
5.3.1. Introduction 244
5.3.2. South African Broadcasting Corporation history NP and the ANC governments 245

5.3.3. The Legislative Framework 248
5.3.4. Good corporate governance in the South African Broadcasting Corporation 250
5.3.5. Conclusion....257
5.4. Overall Conclusion....258

CHAPTER 6....259

CONCLUSION AND RECOMMENDATIONS....259

6. Conclusion....259

6.1. Introduction 259
6.2. Discussion of conclusions from the preceding chapters....259
6.3. Recommendations 260
6.3.1. Appointment and duties of the executive authority 260
6.3.2. Appointment and duties of the accounting authority 261
6.3.3. Appointment of the executive managers and their duties 262
6.3.4. Interviews, recommendation and vetting 263
6.3.5. Ownership of the SOES 263
6.3.6. Performance bonus....263
6.3.7. Malfeasance, maladministration, and consequences....264
6.3.8. The private sector participants and or enablers....264
6.3.9. The powers of the Auditor General South Africa (AGSA)....265
6.3.10. Governance surveillance and compliance enforcement 265
6.3.11. Listing of perpetrators 265
6.3.12. Other jurisdictions 265
6.3.13. Harmonisation of appointments of executive managers and accounting authorities 266
6.3.14. Adequate legislative foundation:....267
6.3.15. Policy Ownership of SOEs by the government....268
6.3.16. Equality of all shareholders, including outside investors....272
6.3.17. Principles and rules regulating the interaction of SOEs with shareholders and stakeholders.274
6.3.18. Requisite principles of openness, transparency and disclosure....276
6.3.19. Board of directors....278

ACCRONYMS

ACSA - Airport Company of South Africa

ACTT - Anti-Corruption Task Team

AFS - annual financial statements

AG - Auditor-General

ANC – African National Congress

APRM - African Peer Review Mechanism

AR - Annual Report

ARC - Audit and Risk Committee

AU – African Union

AUCPCC - African Union Convention on Preventing and Combating Corruption

BAC - Bid Adjudication Committee

BADC - Board Adjudication and Disposals Committee

BEE - Black Economic Empowerment

BHC - Botswana Housing Corporation

BMC - Botswana Meat Commission

BPS - Botswana Police Services

BSAC - British South Africa Company

BTC - Bid Tender Committee

BTC - Board Tender Committee

CAPEX - Capital Expenditure

CECA - Corruption and Economic Crimes Act

CEO - Chief Executive Officer

CFO - Chief Financial Officer

CGSE - Corporate Governance Surveillance and Enforcement

CIPC - Commissioner for Intellectual Property and Companies

CSA - Coal Supply Agreement

CSIR - Council of Science Industrial Research

DA - Democratic Alliance

DBSA – Development Bank of Southern Africa

DCEC - Directorate in Corruption and Economic Crime

DCEO - Directorate on Corruption and Economic Offences

DMRE - Department of Minerals Resources and Energy

DOT - Department of Transport

DPCI - Directorate of Criminal Investigations

DPE – Department of Public Enterprises

DSO - Directorate of Special Operations

EC - Electricity Council

ECASAO - Economic Commission for Africa Southern Africa Office

ECB- Electricity Control Board

EFF – Economic Freedom Fighters

FIA - Financial Intelligence Agency

FIC - Financial Intelligence Centre

GAAP - Generally Accepted Accounting Practice

GDP – Gross Domestic Product

GRAP - Generally Recognised Accounting Practice

HRIU - High-Risk Investigation Unit

IFRS - International Finance Reporting Standards

IMF -International Monetary Fund

IPP - Independent Power Producer

JSE – Johannesburg Stock Exchange

JV - Joint Venture

MACC - Minimum Anti-Corruption Capacity Requirements

MOI - Memorandum of Incorporation

MTCPM - Medium Term Coal Procurement Mandate

MTEF - Medium-Term Expenditure Framework

NCCFI - National Coordinating Committee on Financial Intelligence

NDPP - National Director of Public Prosecutions

NEC - National Executive Committee

NECSA - South African Nuclear Energy Corporation

NEPAD – New Partnership for Africa Development

NP – National Party

NPA- National Prosecuting Authority

NPAA – National Prosecuting Authority Act

NPF - National Petroleum Fund

NRG - National Research Group

NTM - National Transport Movement

OCH - Optimum Coal Holdings

OECD - Organisation of Economic Co-operation Development

OUTA - Organisation Undoing Tax Abuse

PAC - Pan African Congress

PEEPA - Public Enterprises Evaluation and Privatisation Agency

PIC - Public Investment Corporation

PPP - Public Private Partnership

PRASA - Passenger Rail Agency of South Africa

RET - Radical Economic Transformation

RFI - Request for Information

SAA - South African Airways

SAAT - South African Airline Technical

SABC - South African Broadcasting Corporation

SADC - Southern African Development Community

SAPO - South African Post Office

SARCC - South African Rail Commuter Corporation

SARS – South African Revenue Service

SATAWU - South African Transport Allied Workers Union

SCM – Supply Chain Management

SCOPA - Standing Committee on Public Accounts

SIU - Special Investigating Unit

SOE - State-Owned Entities

STB - State Tender Board

TNA - The New Age

UNCAC - United Nations Convention Against Corruption

UNCATOC – United Nations Convention Against Transnational Organised Crime

US SEC - United States Security Exchange Commission

VBS - VBS Mutual Bank

ABSTRACT

This research explores the state of good corporate governance in state-owned entities. It does so by locating good corporate governance in the state-owned entities' operating environment. This research raises the failure of the executive managers, the non-executive directors, and the executive authorities to appreciate this powerful tool as a key to the success of the state-owned entities. The state-owned entities are significant participants in South Africa's economy. The number of state-owned entities, the size of some, and their role in the country's economy make good corporate governance imperative. The nonchalant approach of the state-owned entities management to this phenomenon is concerning because its effect on the economy and the delivery of services to the people has far-reaching negative consequences. In most instances, unethical executive managers and non-executive directors consider it inconvenient and a nuisance. The competitiveness of the economy, success and sustainability of the state-owned entities is unachievable without good corporate governance.

The accounting authorities must know and understand the purpose of state-owned entities and the relevance of good corporate governance. They must own it, embrace it and oversee its effectuation throughout the organisation without fail. Once adopted, good corporate governance binds the accounting authorities, the executive managers, and all the employees in the state-owned entities, including the executive officers. There are laws and other guidelines in place to modulate good corporate governance. The overarching law is the Constitution of the Republic of South Africa, 1996. These could be better. However, if properly implemented and not manipulated for nefarious reasons to the detriment of the state-owned entities, the government will realise its goals, and the public will benefit.

Bad corporate governance opens the door for corruption, bribery, fraud, financial mismanagement, and money laundering. This problem is common in Southern Africa. For instance, Botswana and Namibia also have good corporate governance challenges in their state-owned entities. Their good corporate governance is premised on the King Codes and international instruments. Hence, good corporate governance must be applied in the management of state-owned entities. The quality of management and execution in state-owned entities determine their failure or success. With the help of the private sector enablers, their prospect of success is limited.

CHAPTER ONE

GOOD CORPORATE GOVERNANCE DEFINITIONS

1. INTRODUCTION

1.1. Definition of good corporate governance

Ibarguen et al. postulate, 'Good corporate governance implies an SOE with better, more open management, and therefore, more accountability to its closest shareholders and stakeholders (employees, customers, suppliers, and citizens).'[1] Good corporate governance refers to the effective running of an organisation. Strategically implemented policies and practices provide companies with several benefits that drive their profitability, reputation, and success. [2] Stephen Conmy defines good corporate governance as a set of rules, practices, and processes to direct and control an organisation. The board of directors is the leading group that decides these rules. There are four main principles of corporate governance: accounting, transparency, fairness, and responsibility. [3] Batuli claims, 'Good corporate governance refers to the systems and processes by which a company is directed and controlled. It involves balancing the interest of a company's many stakeholders, such as shareholders, management, customers, suppliers, financiers, government, and the community.'[4]

There is no ubiquitous definition of corporate governance. Scholars define corporate governance based on their perspectives, varying from financial, company interest, shareholders, stakeholders and political interest.[5] Blair describes corporate governance as '…

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[1] Ibarguen et al 'Guidelines for Good Corporate Governance of State-Owned Enterprises' Public Policy and Productive Transformation Series (2021) 37 *Development Bank of Latin America* 1-114.

[2] Stephen Conmy 'What is corporate governance?' available at *https://www.thecorporategovernanceinstitute.com/insights/lexicon/what-is-corporate-governance/* accessed on 20 February 2024.

[3] Ibid.

[4] Batuli Majid 'Good Corporate Governance' LinkedIn 16 December 2022, available at *https://www.linkedin.com/pulse/good-corporate-governance-batuli-majid/*,accessed on 21 February 2024.

[5] James McRitchie 'Corporate Governance: Defined Not Easily' *CorpGovnet: Corporations Are Not Democratic Free-Zone* available at *http://www.corpgov.net//library/corporate-governance-defined/* accessed on 3 February 2017. In the same article, McRitchie espouses the critical role the board of directors plays in corporate governance and its dependence on the laws, regulations, ethics and company background. Other scholars, practitioners and academics' definition of corporate governance such as that of Bruce Weber Dean of the Business School at the University of Delaware, Leblanc Richard from Harvard University, Kristie Jim, editor and associate publisher of *Directors & Boards*, Teslik Sarah, former executive director of the Council of Institutional Investors is referred to in McRitchie's article.

the whole set of legal, cultural, and institutional arrangements that determine what public corporations can do, who controls them, how that control is exercised, and how the risks and return from the activities they undertake are allocated'.[6] Ritchie states, 'corporate governance is mostly viewed as both the structure and the relationships, which determine corporate direction and performance'.[7]

According to the Cadbury Report, 'corporate governance is the system by which companies are directed and controlled…[it is] concerned with holding the balance between economic and social goals and individual and communal goals.'[8] King IV sees corporate governance as 'the exercise of ethical and effective leadership by the governing body towards achieving the following governance outcomes, ethical culture, good performance, effective control and legitimacy.'[9] The Organisation of Economic Co-operation Development's (OECD) perspective of good corporate governance emphasises the rule of law, openness, transparency, and accountability to democratic institutions. This includes fairness and equity in dealing with citizens, including mechanisms for consultation and participation, efficient and effective services, clear, transparent and applicable laws and regulations, consistency and coherence in policy formation, and high standards of ethical behaviour.[10] Moreover, the World Bank Group refers to '[c]corporate governance as the structures and processes for the direction and control of companies.'[11] Besides, Thomson posits that 'corporate governance refers to the set of systems, principles and processes by which a company is governed.'[12] Thompson postulates that managers of the company acquire the position of trustees at all material times. Therefore, managers must always comply with the basic principles of corporate governance -

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[6] Blair Margaret *Ownership and Control: Rethinking Corporate Governance for the Twenty-First Century* Washington D.C. (1995) 3.

[7] McRitchie op cit note 5. Lisa Mary Thomson 'What is corporate governance?' available at *https://economictimes.indiatimes.com/money-you/what-is-corporate-governance/articleshow/3995278.cms?from=mdr* accessed on 7 March 2018; Thomsons Reuters 'Corporate Governance' available at *https://risk.thomsonsreuters.com* accessed on 30 January 2018; Tebello Thabane and E Snyman-Van Deventer 'Pathological corporate governance deficiencies in South Africa's state-owned companies: A critical reflection' (2018) 21 *Potchefstroom Elektroniese Regsblad* 3.

[8] Adrian Cadbury Report (December 1992) *Committee on the Financial Aspect of Corporate Governance: Final Report and Code of Best Practices* para 2.5.

[9].Institute of Directors Southern Africa (2016) *King IV Report on Corporate Governance for South Africa: Report on corporate governance* 20;

[10] OECD (2016) *Guidelines on Corporate Governance of State-Owned Enterprises* 1.

[11] World Bank Group (2014) *Corporate Governance of State-Owned Enterprises: A Toolkit* 12.

[12] Thomson op cit note 7. Thomson indicates that these systems, principles and processes guide management of the company about the direction and control which culminates in the fulfilment of its aims and objects adding value in the process, for the benefit of the board, clientele, managers, shareholders and workers.

accountability, fairness, responsibility, transparency and risk management. This necessitates directors disclosing personal interest in decisions the company makes and not appropriating the company's benefit. For example, the respondent, a director used information he became privy to in his capacity as director to his advantage contrary to section 76(2) of the Companies Act 71 of 2008 (the Companies Act). Furthermore, he failed to act in good faith and appropriately in terms of his fiduciary duties against the interest of the company contravening section 76(3). Kukama a fellow director successfully applied to court to have him declared a delinquent director.[13] This director was found to have contravened section 77(3) by signing for the company, acted on its behalf recklessly and was grossly negligent.[14] The conduct was not the focal point of governance and compromised the company's duty of an ethical citizen by defrauding the South African Revenue Service (SARS) contrary to corporate governance.[15] He also contravened the duties of the directors embodied in King III. It is also incumbent upon management to be accountable to the board, responsible to stakeholders, and committed to running the business ethically.[16]

1.1.1. Definitions of concepts

1.1.1.1. Broederbond is an Afrikaner-Broederbond, South African secret society composed of Afrikaans-speaking Protestants, white men over 25.[17] It was established in 1918, and membership was by invitation only (the Broederbond). The Broederbond controlled and directed the National Party policies;

1.1.1.2. Corruption is dishonesty and or criminal conduct committed by a person in a position of authority or trust who personally or through a third-party benefit illicitly at the expense of an organisation. It includes influencing another person to act illegally, dishonestly and in an unauthorised way for the benefit of the influencer. Corruption includes bribery;

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[13] *Kukama v Lobelo* (2013) ZAGPJHC 137; Professor Piet Delport and Professor Quintos Vorster Henoschberg on the Companies Act 71 of 2008 vol 1 (2011).
[14] Ibid. Contravened section 22(1) of the Companies Act.
[15] King Code III.
[16] *Mthimunye-Bakoro v Petroleum and Oil Corporation of SA (SOC) Ltd & Another* 2015 (6) SA 338 (W) at 344. '…It should exercise leadership, enterprise, integrity, and judgment directing the affairs of the company.' It was acknowledged that the board is the focal point of good governance. King.
[17] Britannica 'Afrikaner-Broederbond' available at *https://www.britannica.com/topic/Afrikaner-Broederbond* accessed on 20 February 2024.

1.1.1.3. Money laundering means concealing the origins of illegally obtained money, typically using transfers involving foreign banks or legitimate businesses. There is a nexus between bad corporate governance, corruption, fraud and money laundering;

1.1.1.4. State-owned company means an enterprise that is registered in terms of this Act as a company and either-(a) as listed public entity in schedule 2 or 3 of the Public Finance Management Act of 1999 (Act 1 of 1999) (PFMA); or (b) is owned by municipality, as contemplated in the local government: Municipal Systems Act of 2000 (Act 32 of 2000) and or is otherwise similar to an enterprise referred to in paragraph (a);

1.1.1.5. According to the Organization of Economic Corporation and Development defines a state- owned enterprise is any corporate entity recognised as such by national as an enterprise, and which the state exercises ownership;

1.1.1.6. State-owned entity is not defined in any legislation but in the context of South Africa is commonly used to refer to a public entity defined to in the PFMA. The Dullah Omar Institute in the legal framework of SOEs boards in 2018 defined state-owned entities as legal entities created by government to partake in commercial activities on its behalf; and

1.1.1.7. State-owned entities and state-owned enterprises are used interchangeably with state-owned enterprise.[18]

Good corporate governance and corruption have a causal relationship. If sound corporate governance principles and structure are not in place, the opportunity for corruption is more significant.[19] Corruption occurred from time immemorial. Bad corporate governance, corruption, fraud and money laundering are linked.

1.2. The history and background of good corporate governance in SOEs

SOEs are strategic for South Africa's economic development.[20] SOEs are neither new nor created by the democratic government of 1994 (the new government). The government before 1994 always had SOEs. The new government theoretically supported good corporate governance and endorsed King Codes, which evolved since the first King Report of 1994. The

[18] United Nations Commission for Africa 'The Governance of State-Owned Enterprises in South Africa Enhancing Performance efficiency and service delivery' 2021 *Economic Commission for Africa Addis Ababa*.

[19] United Nations Office on Drugs and Crime 'Corruption and good governance - Module 2: Corruption and Good Governance' G*lobal Resource for Anti-Corruption, Education and Youth Empowerment*.

[20] International Monetary Fund African Department 'The Role of SOEs in South Africa: Issues and Policy Options' International Monetary Fund 11 February 2022 available at *https://doi.org/10.5089/9798400201318.002* 19-30; OECD (July 2015) *South Africa Policy Brief: Corporate Governance State Owned Entities.*

National Treasury of South Africa directed SOEs to adopt and implement the King Code IV.[21] Legislation was also developed to buttress good corporate governance, for instance, the Constitution of the Republic of South Africa, 1996 (the Constitution), the Companies Act, the Public Audit Act 4 of 1996 as amended (the PAA), the PFMA and the Public Service Act 103 of 1994 (the PSA). Furthermore, governance of SOEs resides in The Protocol on Corporate Governance in the Public Sector (the Protocol) and legislation establishing SOEs if they do not contradict the PFMA. Where legislation is not in line with the PFMA, except for the Constitution, then the PFMA takes precedence. Furthermore, PFMA and the Companies Act exemptions can be applied in specific instances.

Historically, South Africa never had good corporate governance in place, coded or uncoded. The apartheid government governed SOEs throughout its existence contrary to principles of good corporate governance - accountability, transparency, ethics, fairness and responsibility. SOEs were there for the apartheid government's advancement, convenience and protection. It used SOEs to create employment for the poor Afrikaners, gain political support, and win votes from the Afrikaner farming community.[22] SOEs were blunt instruments employed by the apartheid government for its continued survival when sanctions were visited upon the country.[23] This proved costly and financially unsustainable. When the new government came to power in 1994, it inherited some cash-strapped SOEs that were dependent and reliant on it to capitalise on them.[24]

According to Clark, the country had some of the largest companies on the continent. She argued that SOEs such as the Armaments Corporation of South Africa SOC Ltd (Armscor) provided the government with weapons to thwart the unrest in the country. The Suid Afrikaanse Steenkool, Olie en Gaskorporasie (Sasol) a state-owned entity was conceptualised in 1927 and

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[21] Higgo Du Toit 'Governance Oversight Role Over State Owned Entities (SOES)' 2005 available at *https://www.treasury.gov.za/* accessed on 21 February 2024. The King Code II was adopted and specifically referred to in the Governance Oversight Role Over State Owned Entities. It was succeeded by the King Code III and IV.

[22] Johann Kirsten and Wandile Sihlobo. 'South Africa's Landbank can be fixed: change the funding model and narrow the focus.' 4 December 2013 available at *https://theconversation.com/southafricas-land-bank-can-be-fixed-change-the_funding-model-and-narrow-the-focus-20924* accessed on 17 November 2023. According to these authors, the Land Bank executed mandate was to avail loans to white farmers only to buy farmland. Also provided wholesale finance to agricultural cooperatives and marketing boards to on-lend production finance to individual farmers. The loans were below market rates. The government funded the Land Bank through initial endowment, annual parliamentary appropriation and state guaranteed long-term debentures and bonds availed in capital market.

[23] Hennie Van Vuuren *Apartheid Guns and Money: A tale of profit.* (2018) 8-10.

[24] Ibid; Nancy L Clark *Manufacturing Apartheid: State Corporations in South Africa* (1994).

incorporated in 1950. Sasol cushioned the crude oil demands of the country when the Islamic Republic of Iran was forced to halt the supply of crude oil and other oil-related products.[25] Van Vuuren argued that SOEs did not subscribe to accountability, fairness, integrity, transparency, and stewardship.[26] Friedman concluded that DF Malan empowered the white Afrikaans-speaking community.[27] The erstwhile National Party was committed to making their own rich to break the wealth monopoly of the English.[28] The upper echelons of power and their cohorts considered the state as a source of self-enrichment and corruption reached new heights under Apartheid.[29]

Good corporate governance was neither existent nor the policy of the apartheid government. This conduct was typified by the highest office sharing information about the latest bankruptcies, farms for sale, planned government acquisitions and places where Harbours and universities would develop.[30] This was sanctioned corruption because the government operated clandestinely, which did not engender good corporate governance. Blackman and Dall postulate that parastatals were dominated and headed by the members of the Broederbond, which declined to account for their actions.[31] Moreover, Clark and Van Vuuren argue that this practice grew in the 1970s, 1980s and early 1990s, just before the new dispensation took root. The new government inherited a poisoned chalice. Friedman suggests that corruption and the law were in tandem. During that time '… economic crimes not only festered but became state policy. Corruption, money laundering, sanctions busting and

[25] Van Vuuren op cit note at 23 at 8-10; F Wallis 'Nuusdagboek: feite and fratse oor 1000 jare, Kaapstad' (2000).
[26] Ibid; Matthew Blackman and Nick Dall *Rogues' Gallery, an irreverent history of corruption in South Africa, from the VOC to the ANC* (2021) at 149-153. Following the Anglo-Boer War Afrikaner nationalism grew resulting in the success of the National Party in 1948. Its success ushered in racial discrimination, state capture and corruption. According to these authors every arm of the state - civil service, judiciary, police, army and parastatal were managed and vacancies occupied by Afrikaners. Senior managers were untrained and lacked expertise and junior employees did not have qualifications for their positions in the public sector.
[27] Steven Friedman *Prisoners of the Past South African Democracy and the Legacy of Minority Rule* (2021) 54-57.
[28] Ibid.
[29] Ibid at 56.
[30] Ibid at 54. Prime Minister Vorster was the highest office of government; Blackman and Dall op cit note 26 at 159-160 Malan's cabinet were members of the Broederbond. This is not different from cadre deployment. It is interesting that AfriForum, Helen Suzman Foundation, Democratic Alliance and other organisation pretend that it's a new phenomenon. *Leon Amos Schreiber & Democratic Alliance v The African National Congress* [2023] ZAGPJHC 819 [24 July 2023].
[31] Blackman and Dall op cit note 26 at 163 – 165.

organised crime, the elements of such economic crime, had become necessary for the state's survival.'[32]

Although the new government introduced corporate governance into law and policy to manage SOEs, it was doomed to fail. For instance, Van Vuuren contends that the new government lost the battle for clean management of SOEs from the beginning. Corruption was entrenched. Private sector companies and persons previously involved in bribery with the apartheid government endeared themselves to the new government, thwarting its aspirations and endeavours to effect good corporate governance.[33] For example, some banks, before and post-good corporate governance, laundered money. The new government's battle for clean governance failed even before it started. However, that should not be an excuse. The new government should honestly recommit to good corporate governance, stay the course, learn from history and lead by example. It should have infused good corporate governance into the day-to-day management of state-owned entities. This would have been achievable by appointing boards of directors with integrity and beyond reproach. That would have benefited the government and put it on the correct path towards success. The democratic government is responsible to the people, the country and its economy.

Although the new government legislated for and adopted corporate governance to regulate SOEs, it needed more commitment to follow through. Corruption and money laundering festered and became the norm. The researcher argues that the new government continued where the apartheid government left off. Commitment to good corporate governance was and still is a pipe dream. The attitude of those entrusted to manage SOEs did not change after the near catastrophe of the second state capture. Failed good corporate governance remains a burning issue. The route South Africa followed is disappointing, considering that except for the United Kingdom, it was among the first to adopt corporate governance.[34] The adoption of the King Codes in the private and the public sectors did not enthuse both sectors

[32] International Monetary Fund op cit note at 20. Banks laundered tens of billions of rands which is estimated at R500 billion rands in the 21st Century. It is interesting that most banks implicated in this era were not called to book as they should have been in the Zondo Commission on State Capture. Their contribution to the state capture cannot be understated.

[33] Clark op cit note 24. Many comrades previously involved in the liberation of the people chose to change their lifestyle and engaged in rent-seeking. They forgot the purpose of fighting apartheid and seeking freedom for all.

[34] European Corporate Governance Institute 'Corporate Governance in South Africa' available at *https://www.ecgi.global/content/corporate-governance-south-africa* accessed on 24 February 2024.

to effectuate good corporate governance. Instead, corruption continued in both sectors. More will be said about this in the fourth chapter.

According to Blackman and Dall, the first state capture (state capture 1) occurred during the Apartheid government contrary to what South Africans and others believe. The current government followed suit with the second state capture (state capture 2).[35] A costly but necessary commission of inquiry was established to investigate state capture and corruption in SOEs.[36] It was expected that its findings would encourage good corporate governance in SOEs. President Cyril Ramaphosa's failure to implement the recommendations of the Judicial Commission of Inquiry into State Capture (the Zondo Commission) did not deter non-compliance with good corporate governance. Corruption persists, due to his inaction. He referred the recommendation to the Parliament of the Republic of South Africa.

State-owned entities' executive managers and non-executive directors collaborated with the private sector to manipulate good corporate governance in the supply chain sphere. The board of directors and the executive employees of Transnet increased the cost of trains ordered from Chinese Railway Rolling Stock Corporation (CRRC) by R16 billion. The beneficiary of this largesse were the Gupta's related companies, and this money was never recovered.[37] This was a clear violation of King III principles because the board failed to ensure that it acts in the best interest of Transnet in line with principle 2.14. In addition, it also failed to ensure that Transnet is, and is seen to be a responsible corporate citizen contrary to principle 3. Transnet board and executive managers ignored internal controls. This was done at the expense of an SOEs and the country's economy.[38] The modus operandi of SOEs executive managers and non-executive directors to cover up dishonesty and unjustifiable decisions was and still is carried out with the assistance of the private sector. to conduct investigations post-poor governance to justify and excuse inexcusable decisions taken. Such private sector players continued to

[35] Blackman and Dall op cit note 26 at 159. State Capture 1.0 happened during the apartheid government's time.
[36] Republic of South Africa 'State Capture Commission of Inquiry frequently asked questions' available at *https://www.stateofthenation.gov.za/state-capture-commission-recommendations/faqs* accessed on 20 February 2024.
[37] Hlohi Ndlovu 'Unaccountable 00022: The Chinese Railways Rolling Stock Corporation: China Inc boards the State Capture train' available at *https://www.opensecrets.org.za/the-chinese-railway-rolling-stock-corporation-china-inc-boards-the-state-capture-train/* Accessed on 1 February 2024.
[38] John Steenhuisen 'Treasury reports once again find Malusi Gigaba at the heart of State Capture' Democratic Alliance 16 November 2018 available at *https://www.da.org.za/2018/11/treasury-reports-once-again-find-malusi-gigaba-at-the-heart-of-state-capture/* accessed on 21 February 2024 - The National Treasury Forensic Report (Fundudzi Report 2018) named Malusi Gigaba 115 times for his role in the Transnet deceitful deal with China South Rail.

actively involve themselves in the collapse of good corporate governance in SOEs. Unashamedly, they point fingers at SOEs, complaining about their inefficiencies, corruption, inadequate corporate governance, and how their businesses are negatively affected. They disregard the reality that there are corruptors and corruptees. For example, electricity,[39] export and import of goods and commodities,[40] including transportation of goods and people.[41] The private sector's role can neither be ignored nor understated. It was an enabler. More will be said about that in chapter four of this research. It would be remiss to disregard the role of the private sector, which contributed to the failure of SOEs.

1.3. The importance of good corporate governance and SOEs

Even though good corporate governance dates to the sixteenth and seventeenth centuries,[42] it remains a live topic in the twenty-first century.[43] Probabilities are that good corporate governance issues will persist into the future because of human nature. Human beings fail and not good corporate governance, irrespective of whether they are from developed or emerging economies. Corporate governance wheels came off in the private sector in developed economies after the 1990s and 2000s due to the self-serving behaviours of social and political elites in the United Kingdom and the United States of America.[44] Unsurprisingly, the same is the case in developing countries' SOEs. Bad corporate governance occurs in the private and public sectors. Interestingly, the private sector is punted as the answer to SOEs. Leaders in both sectors have been implicated in failed businesses with catastrophic outcomes due to non-compliance with good corporate governance. Erturk et al. posit that this unsavoury conduct is real in the private sector. The difference between these two sectors is that SOEs do not have

[39] Eskom is struggling to provide reliable electricity supply.
[40] Transnet, and Transnet Freight are experiencing difficulties delivering services as expected. The congestion at the ports, the que of trucks to ports, the ability to guard and maintain the rail infrastructure ports is affecting the economy of the country.
[41] PRASA's inability to provide transport for workers to and from work efficiently and reliably. Also, lack of reliable and efficient transport for people's travel across the country.
[42] BR Cheffins 'The History of Corporate Governance' (2012) *University of Cambridge and ECGI* 1-32.
[43] Guhan Subramanian *Corporate Governance 2.0,* available at https://www/hbr.org/2015/03/corporate-governance-2.0 accessed on 3 March 2017; Modimowabarwa Kanyane 'Reviewing state owned entities governance landscape in South Africa' (2015) 9 *African Journal of Business Ethics* 29; R Roos and S de la Harpe 'Good governance in public procurement: A South African case study' (2008) *Per Potchefstroomse Electroniese Regsblad* 4.
[44] Ismail Erturk et al 'Corporate Governance and disappointment' (2004) 11 *Review of International Political Economy* 677-713.

stock to incentivise their executive managers and non-executive directors unlike in the private sector.

Corruption and self-interest in SOEs are a threat to good corporate governance. These are heightened and commonplace. Historically, good corporate governance was manipulated at every opportunity to the detriment of SOEs by corrupt executive managers, non-executive managers and ministers without a conscience. Floundering state-owned entities are undesirable because they negatively impact public access to electricity, housing, healthcare, people's participation in economic activities, transportation, water, and sanitation. These failures give rise to constitutional challenges in this country.[45] Furthermore, these do auger well for the country's economy. Kanyane and Sambo believe that SOEs are the foremost drivers of countries' economies through their Gross Domestic Products (GDP).[46] The repercussions for failed SOEs were that the government had to divert its budget to recapitalise some SOEs with money it did not have. In other instances, the government took over the debts of SOEs and or provided guarantees at taxpayers' expense.

1.3.1. Bad corporate governance

Bad corporate governance is the state of affairs where the board of directors and executive managers of a company or an SOE conduct business contrary to accountability, fairness, honesty and transparency. Managing business in this manner can damage its image or financial health. Bad corporate governance was the cause of failed private sector companies. For instance, - Barings Bank failed in 1995, Waste Management in 1998, Alpha Communications in 2001, Enron in 2002, WorldCom in 2002, Parmalat in 2003, Bayou Hedge Fund Group in 2005 and Resolution Funding Corporation in 2005. In 2008 the wheels came off in financial institutions such as commercial banks, investment banks, mortgage companies and insurance corporations. This caused the most significant economic crisis in the world and magnified the need for recommitment to good corporate governance.[47] Erkens, Hung and Matos posit that

[45] Bill of Rights Chapter 2 of the Constitution of the Republic, 1996.

[46] M H Kanyane & V T Sambo 'State of the State-Owned Enterprises in BRICS Countries – Issues for Consideration' (2021) 10 *African Journal of Governance and Development* 199-215.

[47] Srivastav Ashish Kumar & Vaidya Dheeraj *The Ten Worst Corporate Accounting Scandal of All Time* available at *http://www.accounting-degree.org/scandals/* accessed on 21 February 2023; Kirkpatrick Grant 'The Corporate Governance Lessons from the Financial Crisis' (2009) *OECD* 1-30. For example, the government of America bailed out JP Morgan, Goldman Sachs, Bank of America and Morgan Stanley. It also extended assistance to mortgage companies such as Freddie Mae and Freddie Mac. The American International Group an insurance corporation also received assistance from the government.

lack of accountability, deregulations, and transparency were at the heart of the collapse of financial institutions in 2008.[48] The cause of the downfall of financial institutions was a failure to comply fully with the applicable general principles of corporate governance. Improper accounting, lack of transparency, incompetence, conflict of interest, fraud, greed, politics and substantive regulations were to blame.[49] The United States Senate concluded that failure to implement corporate governance was one of the leading causes of the most significant economic crisis. United States Congress's chartered entities, such as Fannie Mae and Freddie Mae, failed and were financially rescued by the government.[50] Greenspan admitted before Congress, 'I made a mistake in presuming that the self-interest of organisations, specifically banks and others, were such that they were best capable of protecting their shareholders and equity of the firm.'[51] The US government stepped in and recapitalised these failing financial institutions.

The weaknesses and inadequacy of accounting measures and regulatory prerequisites were magnified. They underlined the need to bolster the adoption of robust guidelines for and

[48] David Erkens, Mingyi Hung and Pedro Matos 'Corporate Governance in the 2007-2008 Financial Crisis: Evidence from Financial Institutions Worldwide' (2009) 18 *Journal of Corporate Finance* 1; Nikhil Sonnad 'The most memorable phrase of the financial crisis taught us the wrong lesson' available at *https://qz.com/1387808/the-financial-crisis-in-2018-the-lessons-of-too-big-to-fail-and-moral-hazard/* accessed on 21 February 2023 - Sonnad questions the idea of the phrase 'too big to fail' at the expense of the phrase 'moral hazard'; Martin Daunton, Scott Newton & Linda Yueh 'The 2008 financial crisis explained' 1 August 2019 available at https://www.historyextra.com/period/modern/financial-crisis-crash-explained-facts-causes/ accessed on 21 February 2023, Hussein Tarraf *Literature Review on Corporate Governance and the Recent Financial Crisis* (Literature Review, Lawrence Technological Univrsity 2010) – According to Tarraf, the financial crisis of 2007-2008 was the biggest since the Great Depression in 1929 to 1939 which affected the world.

[49] John Maxfield '25 Major Factors That Caused or Contributed To The Financial Crisis' *The Motley Fool* 2 October 2018 available at *https://www.fool.com/investing/general/2015/02/28/25-major-factors-that-caused-or-contributed-to-the.aspx*, accessed on 21 February 2023.

[50] Amadeo Kimberly 'What was the Fannie Mae and Freddie Mac Bailout?' *The Balance* 31 March 2021 available at *https://www.thebalancemoney.com/what-was-the-fannie-mae-and-freddie-mac-bailout-3305658* accessed on 21 February 2023. The Federal National Mortgage Association and Federal Home Loan Mortgage Corp were bailed out by US Treasury in 2008 in an amount of $116 billion and $71 billion respectively. These are housing agencies in the United States of America.

[51] Ibid. OECD (June 2009) *Corporate Governance and the Financial Crisis: Key Findings and Main Messages* - Alan Greenspan, the Governor of the Reserve Bank of the USA, quoted testifying before the US Congress. According to the OECD, regulations and legislation are required for better implementation. It suggests that the jury is still out to determine whether this would be effective. Furthermore, compulsory provision is one way of dealing with enforcing corporate governance. However, voluntary benchmarking and corporate ingenuity should play its part.

implementation of good corporate governance.[52] In 2017, Carillion Plc collapsed due to governance issues.[53] The causes of these companies' failures ranged from lack of accountability and transparency, failed internal controls, corruption, failure to disclose losses, fraudulent accounting, overstating profits, and hiding information, which all go against the tenet of good corporate governance.[54]

The same holds in SOEs, which failed to uphold the principles of good corporate governance in this country. SOEs involved in the unlawful procurement process, suspect administration and mismanagement were provided financial bailouts due to state capture 2,[55] guarantees[56] and debt takeover.[57] Others were placed under business rescue[58] to save them because of their strategic importance for service delivery. These SOEs are discussed briefly in chapters four and five of this research. The need for financial bailouts has become more

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[52] Markus Stiglbauer, Thomas Fischer and Patrick Velte 'Financial crisis and corporate governance in the financial sector regulatory changes and financial assistance in Germany and Europe' (2012) 9 *International Journal of Disclosure and Governance* 331-347. The quality of corporate governance was called into question. The necessity to improve corporate governance reporting was highlighted by the authors of the article; Guhan op cit note 43 at 12.

[53] These failures were not limited to the United States companies only but also occurred in Europe, for instance Royal Bank of Scotland, Bradford & Bingley, and Fortis, and in companies across different industries such as energy, finance, food and communication. One of the biggest investment banks in the United States of America established by the Lehman Brothers in 1850 also crashed. The fall of Lehman Brothers resulted in many people being left jobless, and financial losses that affected their lives in a very significant way. Banks E suggests that accounting and corporate governance issues were causes of the meltdown that occurred at Lehman Brothers. Banks does not exonerate European financial institutions from contributing to the crisis. Erik Banks *See No Evil: Uncovering the Truth Behind the Financial Crisis* (2010). Christine A Mallin *Corporate Governance* 6th ed, (2019) 2-8; B Motshegwa, K Mooketsane & K Bodilenyane (2017) 'The Slip-Ups of Corporate Governance in Botswana Public Enterprises' *2nd Annual International Conference on Public Administration and Development alternatives 26-28 July* 29.

[54] Corporate Finance Institute 'Accounting Scandal List and Overview' *Corporate Finance Institute* (2015-2019) available at *http://corporatefinanceInstitute.com/resources/lknowledge/other/top-accounting-scandals/* accessed on 10 September 2019.

[55] Minister Enoch Godongwana '2023 Budget Speech' *Republic of South Africa* 22 February 2023 available at *https://www.gov.za/news/speeches/minister-enoch-godongwana-2023-budget-speech-22-feb-2023* accessed on 28 February 2024. The government took over R254 billion debt of Eskom. This represented more than 50% of its debt. An attempt to exempt Eskom from submitting Annual Financial Statements was thwarted by public outrage.

[56] Ibid. Transnet was provided with a guarantee of R47 billion to support the recovery plan. It ran at a loss. This was not picked up quickly because it was exempt from submitting Annual Financial Statement. The public learnt of this exemption after the fact.

[57] Ibid. SABC was provided R1,437 billion guarantees in 2009 and an additional one R200 million from the medium-term budget. In 2020 it received R1,1 billion of the R3,26 billions of bailouts from government. It requested a guarantee of R1,5 billion guarantee which government refused to provide.

[58] Standing Committee on Public Accounts (SCOPA) 'SAA Business Rescue Plan: Engagement with Minister, DPE & Business Rescue Practitioners' *Parliamentary monitoring group* 4 November 2020 available at *https://pmg.org.za/committee-meeting/31392/* accessed on 28 February 2024. Minister Gordhan briefed the Portfolio Committee on Public Enterprises and SCOPA about the SAA going under business rescue. Eventually SAA entered a strategic relationship with Takatso. A deal which is still under investigation by the SIU. Minister Gordhan continues to resist giving the Parliament Committee the documents of the deal contrary to section.

pronounced due to the mismanagement of non-financial SOEs. the Standing Committee on Public Accounts (SCOPA) in March 2023 discussed bailouts and guarantees availed to ACSA, SABC, SAA, PRASA, Denel, Eskom, NECSA, SAPO, SANRAL, Transnet and its subsidiaries. The National Treasury took over more than 50% of Eskom's debt. The underlying problem was the failure of good corporate governance, consequent to deception, non-disclosure, lack of integrity, influence, and the ministers' role, as discussed in chapter five. The performance of these SOEs was debated in Parliament Committees of the National Assembly and was the subject of the Public Protector's investigations. The Public Protector's reports confirmed that poor governance was the leading cause of these SOEs' challenges. None of the principles of good corporate governance was complied with.

The Auditor-General's audit reports on the performance of SOEs were not complimentary and highlighted the level of financial mismanagement in SOEs.[59] At the root of the adverse audit reports were lapses in good corporate governance wherein SOEs could not account for irregular, fruitless and wasteful expenditures.[60] The financial constraint in SOEs was exacerbated by economic mismanagement, lack of transparency, and conflict of interest. The private and public sector companies were bailed out in one form or another in the twenty-first century. The magnitude of funding varied and was influenced by affordability in various jurisdictions. Dishonesty exaggerated financial performance, bribery, and corruption were the cause and order of the day.[61] The narrative that SOEs were the biggest culprits for non-

[59] Auditor-General of South Africa Report (2016/2017) *Consolidated: General report on the local government audit outcomes* - The AGSA report indicated that clean audits declined in the past four years.
[60] Ibid.
[61] U.S. Securities and Exchange Committee 'SEC Charges Satyam Computer Services with Financial Fraud' 2011 available at *https://www.sec.gov/news/press/2011/2011-81.htm* accessed on 21 February 2024. In the private sector financial performances were overstated. For example, Satyam Computer Services in India in 2009 was found to have overstated its financial performance in its annual financial statements for several years. Richard Baker & Nick McKenzie 'Seven years and millions of dollars later, Australia's biggest bribery prosecution finally revealed' The Sydney Morning Herald 28 November 2018 available at *https://www.smh.com.au/business/companies/seven-years-and-millions-of-dollars-later-australia-s-biggest-bribery-prosecution-finally-revealed-20181108-p50eut.html* accessed on 21 February 2024. Australia's Reserve Bank in 2012 paid commission to foreign middlemen with the purpose to bribe officials of reserve banks in Africa, Asia and Latin America to replace their banknotes with polymer banknotes. Reuters 'China Forestry CEO's assets frozen by regulator' *Reuters* 10 February 2011 available at *https://www.reuters.com/article/china-forestry-idUSTOE71806S20110209/* accessed on 21 February 2024. In 2010 China Forestry's auditors found irregularities leading to suspending trading their shares. Chico Harlan 'Olympus admits to cover-up on decades of losses' *The*

compliance with good corporate governance was proven otherwise when financial companies failed in 2008.[62] The impact of the economic crisis galvanised and reawakened reasonable corporate governance discourse in the private and public sectors.[63] This, however, did not eradicate bad corporate governance. However, it did not improve good corporate governance much, as evidenced by the muted success of some SOEs in SADC.[64] Botswana and Namibia are the subjects of comparison in this research. Botswana and Namibia relied on the King's Code II and III before developing good corporate governance instruments. The researcher does not suggest that the corporate governance issues were resolved entirely but that they achieved some success. Can South Africa learn from them? There is no simple answer.

The common thread of underperforming SOEs is corruption, self-enrichment, unethical managers and boards of directors working in cahoots with certain executive authorities at the core of bad corporate governance in SOEs.[65] Nevondwe et al. assert that the importance of

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Washington Post 8 November 2011 available at *https://www.washingtonpost.com/world/asia_pacific/olympus-admits-to-cover-up-on-decades-of-losses/2011/11/08/gIQA6XTgzM_story.html* accessed on 21 February 2024. Olympus Corporation a Japanese company unlawfully paid money to middlemen in mergers and acquisition transactions, the money was used to coverup losses. WZB 'Germany's Landesbanken and the Financial Crisis: How Path-Dependency Led Germany's State-Owned Banks Off the Cliff' available at *https://www.wzb.eu/en/events/germanys-landesbanken-and-the-financial-crisis-how-path-dependency-led-germanys-state-owned-banks* accessed on 21 February 2024. In Germany a state-owned bank Landesbanken was also affected by the financial crisis and had to write down $21b. Andile Lungisa 'The Steinhoff Debacle – the biggest fraud in SA history' *The Daily Maverick* 13 December 2017 available at *https://www.dailymaverick.co.za/opinionista/2017-12-13-the-steinhoff-debacle-the-biggest-fraud-in-sa-history/* accessed on 21 February 2024. Locally Steinhoff which operated in more than 30 countries in household goods and general merchandise, committed audit fraud resulting in share prices collapse.

[62] PWC 'Public Sector Working Group: Position Paper 3: State-owned enterprises: Governance responsibility and accountability' 2011 available at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://cdn.ymaws.com/www.iodsa.co.za/resource/collection/879CAE6C-7B90-49F5-A983-28AECBCE196F/PSWG_Position_Paper_3_Governance_in_SOEs.pdf accessed on 21 February 2023; Andrew Canter Comment 'SA Costs of governance' *Mail & Guardian* 2 March 2018 *https://mg.co.za/article/2018-03-02-00-sa-counts-cost-of-poor-governance/* accessed on 26 February 2024.

[63] Guhan op cit note 43.

[64] Colleta Dewa 'A glance at the state of SOEs in SADC' *The Southern Times* November (2018) 3; Public Protector Report (No 6 of 2016/2017) *State of Capture.* The Public Protector found that Eskom engaged in suspicious transactions contrary to corporate governance. Eskom used its financial resources for nefarious purposes that cost the economy a lot not only in money but sabotaged its economic development.

[65] Ramani Naidoo *Corporate Governance: An Essential Guide for South African Companies* 3 ed (2021) 353-355; Max du Preez 'Corruption has become the new normal' *News24* 21 June 2016 available at *https://www.news24.com,* accessed on 21 July 2018; ANA 'WATCH ANC divided, racked by corruption and self-enrichment' *The Citizen* 28 October 2017 available at *https://www.citizen.co.za,* accessed on 21 July 2018; See Reports of the Public Protector of the Republic of South Africa *Derailed: PRASA* (No. 3 of 2015/2016) and *When Governance and Ethics Fail: SABC* (No. 23 of 2013/2014). Professor Haroon Bhorat et al 'The Betrayal of a

good corporate governance led South Africa to develop a policy framework entitled Accelerated Agenda Towards Restructuring of State-Owned Enterprises.[66] At the time of putting pen to paper, South Africa was overexposed with guarantees for SOEs facing financial challenges. Some SOEs could not pay salaries to their employees, service providers for services rendered and fulfil their loan obligations to their lenders.[67] Unsurprisingly, the government is revising the size of guarantees that SOEs can get and restricting the purpose.[68] There is a common understanding among several scholars that SOEs are essential mechanisms with which countries deliver services to the community.[69] Well-run SOEs with good corporate governance in place and well-executed are more likely than not to be sustainable and, in the process, positively impact the development of countries.[70] Adopting good corporate governance presupposes efficient, effective and transparent management of SOEs.[71] Khoza and Adams point out that, governance is a powerful tool which, if used correctly, can be

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Promise: How South Africa is being stolen' 2016 *PARI*. South African Council of Churches Report (18 May 2017) *Unburdening Panel Process*. Parliament of the Republic of SA Interim Report (27 January 2017) *Ad Hoc Committee on the SABC Board Inquiry into the Fitness of the SABC Board*; Charles Goredema et al. 'Tackling money laundering in East and Southern Africa an overview of capacity' 2004 *Institute of Security Studies Monograph Series* 1-119. Botswana, Namibia and South Africa are plagued problems of creative accounting, conflict of interest, corruption, money laundering and many other factors that necessitate adopting and implementing good corporate governance across the private and public sectors to mitigate the mismanagement of companies including SOEs. The difference is the acute need in developing countries to attract investors which will not happen as long as there is a lack of good corporate governance.

[66] Lufuno Nevondwe, Odeka Kola O & Raligilia Komanani 'Ethics in state-owned companies in the public sector: A thin line between corporate governance and ethical leadership' (2014) 5 *Mediterranean Journal of Social Sciences* 661- 668.

[67] Linda Ensor 'How government guarantees to SOEs come with a stick' *Business Day* 30 November 2017 available at www.*businesslive.co.za* accessed on 21 February 2023; Khulekani Ngubane 'We won't be able to pay salaries at SABC Parliament hears' *Fin24* 13 November 2018 available at *https://www.fin24.co.za* accessed on 21 November 2018; Siyabonga Mkhwanazi 'SABC admits it may not be able to pay workers' *IOL News* 13 October 2018 available at *https://www.iolnews.co.za* accessed on 21 November 2018; Bekezela Phakathi 'SABC has no choice but to cut jobs' *Fin24* 2 August 2018, available at *https://www.fin24.com* accessed on 21 November 2018; Nic Andersen 'SABC financial woes: Broadcaster unable to pay service providers for July' *The Citizen* 2 August 2018 available at *https://www.citizen.co.za* accessed on 21 November 2018; Lindi Masinga 'We may not be able to pay salaries says Prasa' *IOL News* 11 April 2017 available at *https://www.iol.co.za* accessed on 21 November 2018.

[68] Ibid; Omarjee Lameez 'SOEs must reduce their reliance on government guarantees–Treasury' *Fin24* 08 May 2018 available at *https://www.fin24.com* accessed on 21 November 2018; Lindsay Dentlinger 'Struggling SOES have used 70% of guarantees to them by Government' *EWN* September 2018 available at https://www.ewn.co.za/ accessed on 21 November 2018.

[69] Reuel J Khoza and Adam Mohammed *The Power of Governance Enhancing The Performance of State-Owned Enterprise* (2007) 15-16; Naidoo op cit note 65 at 353; K Barac and P Radasi 'Internal audit in state-owned enterprises: Perception, expectations and challenges' (2015) 17 *South African Journal of Accountability and Auditing Research* 95; Dorasamy Nirmala 'The impact of the global crisis on ethical leadership: A case study of the South African public sector' (2010) 4 *African Journal of Business management* 2087-2096.

[70] Ibid. Lynn McGregor 'Can South African State-Owned Companies Succeed?' *The Thinker* available at *https://ujcontent.uj.ac.za/esploro/outputs/9913505307691* accessed on 22 June 2017.

[71] PWC op cit note 62.

instrumental in curbing corruption and improving SOE's prospects of success.[72] Managing an SOE responsibly in line with good corporate governance in an accountable, ethical, responsible and transparent manner contributes to better performance.[73]

1.4. Theoretical framework

Having dealt with the importance of good corporate governance, it is appropriate to consider the applicability of theories related thereto in SOEs. These theories will be briefly dealt with because they are discussed at length in other works. Keremidchiev and Nedelchev argue that the current theories of corporate governance grew and were applied exclusively in the private sector.[74] These authors argue that the theories and terms of corporate governance in SOEs are in political science and public administration. In addition, SOEs have multiple goals and objectives because of who they serve and what they need to achieve. These are informed by the type of services required by the public. The private sector's goals and ownership are uncomplicated. Shareholders are identifiable in that individuals or institutions acquire shares in a company as an investment to make and maximise profit. In the public sector, profit is not the primary driver; however, the delivery of services is responsibly alluded to in this paragraph.

In SOEs, the primary shareholder is the public and the secondary shareholder is the government,[75] represented by the relevant Ministers. However, the primary shareholder cannot participate directly in SOEs. In most instances, SOEs are incorporated in terms of the Act of Parliament and their management and structure embodied therein.[76] The theories of corporate governance - the agency, stewardship, stakeholders, transactions, resources, and political, are unsuitable for SOEs. SOEs belong to the public. Their character and reasons for existence are different from the private sector. They are incorporated in terms of special legislation for specific purposes for the government to deliver to the public. This distinguishes them from profit-driven private sector companies. The researcher will focus attention on the agency, stewardship and stakeholders' theories.

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[72] Ibid.
[73] Ibid.
[74] Spartak Keremdvhiev and Miroslave Nedelchev 'Theories of Corporate Governance at State-Owned Enterprises' (2020) 17 *Economics and Management* 61-71.
[75] Ibid; OECD (2018) *Ownership and Governance of State-Owned Enterprises: A Compendium of National Practices*.
[76] For example, the Broadcasting Act 4 of 1999; the National Roads Act 7 of 1998.

The OECD affirms that corporate governance should be uniform for all companies, This suggests that private sector theories of corporate governance should apply to both the private and public sector. However, this is not practical because of the peculiar nature of SOEs compared to companies in the private sector. It is not one size fits all. Peng et al. argue that although SOEs influence the world economy, none of the theories of corporate governance have been explored to address them.[77] It is interesting that with all these theories of corporate governance propounded in the private sector corruption still occurs. The public sector is not an exception. The researcher agrees with Prachi that -

> 'Fighting corruption has become more urgent than ever…Corruption impoverishes national economies, undermines democratic institutions and the rule of law, and facilitates the emergence of other threats to human security such as organized crime…Corruption creates economic chaos, depriving citizens of education, health services, basic infrastructure and functioning public services. Even when good governance is restored or attained, officials can spend years or even decades attempting to retrieve funds that are often critically needed to repair the social and economic damage done by their corrupt predecessors.'[78]

It is essential to appreciate that governments do not have endless resources. They also need the capacity to raise money with the speed with which the private sector companies can. Depending on whether the government approached the International Monetary Fund or the World Bank, it would have to adjust its economic policies to overcome the cause of its financial problems. The biggest losers are always people with low incomes. The corruptor and corruptee always win. Therefore, the board of directors, executive managers and politicians must put SOEs first and avoid conflicts of interest.

The researcher agrees with the OECD that SOE managers and political leaders must respect good corporate governance and the people. Albrecht is of the view that good corporate governance is essential for directors and companies. Managing risk and capital contributes positively to the continued existence of companies. The same holds for SOEs. Sustainability

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[77] Mike. W. Phttps://www.linkedin.com/pulse/good-corporate-governance-batuli-majid/https://www.linkedin.com/pulse/good-corporate-governance-batuli-majid/eng, Garry. D. Bruton and Yuanyuan Huang 'Theories of the (state-owned) firm' May 2016 *https://ideas.repec.org/a/kap/asiapa/v33y2016i2d10.1007_s10490-016-9462-3.html* accessed on 21 December 2023.

[78] Lynn McGregor 'Improving Corporate Governance in South Africa' in Christine A. Mallin (ed) *Handbook on International Corporate Governance* (2011).

entails having a decision-making system that considers operating procedures and the effect of corporate behaviour on its stakeholders.[79] Good corporate governance indeed improves the long-term feasibility of companies[80] provided it is affected. It is quintessential to the success of SOEs because South Africa is enjoined by the Constitution to deliver on its obligations and because SOEs use taxpayers' money.[81]

The OECD emphasised that if the performance of SOEs is buttressed with enhanced good corporate governance, they have the potential to perform better economically, grow jobs and improve social outcomes in Southern Africa.[82] The common understanding is that 'state-owned entities are a significant element in Africa's economies, and as such, their participation in the corporate governance regime is important if they are to come into their own.'[83] The researcher disagrees with the OECD that all companies should follow the same corporate governance theories irrespective of their nature and purpose. Context matters.

1.4.1. Agency theory

The agency theory is premised on the separation of powers between the shareholder and the agent. Ciolomic et al. put forward that the agency theory bases its thesis on human conduct. Human beings cherish their independence, expediency, optimising their own benefit and susceptible decision-making practices and this is problematic.[84] The agent manages the company or SOEs on behalf of the shareholders. Shafuda et al., propound that the nature of SOEs make corporate governance distinctive and complex.[85] The financial investment in the

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[79] Cheffins op Cit note 42 at 2; Naidoo op cit note 65 at 33.

[80] Tobie Wiese *Corporate Governance in South Africa with International Comparisons* 2 ed (2017) para1.4.1, 5; Albrecht W Steve 'Why Good Corporate Governance is so Important' (2016) *Wheatley Institute* 1-7; Rakolobe M 'Politicised Public Service and Corruption in Lesotho' Strategic Review for Southern Africa (2019) 41 *Strategic Review for Southern Africa* 5-6.

[81] B2B Editor 'Why good governance is important to the public sector' *B2B Magazine* 18 July 2017 available at *https://www.b2bmagazine.com.au/good-governance-important-public-sector/* accessed 21 February 2023; Rami Wadie 'Corporate Governance in the Public Sector: It's Time!' *Forbes Middle East* November 2013 available at *https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Risk/gx-me-ccg-corporate-governance-in-the-public-sector.pdf* accessed on 23 March 2018. According to Wadie, effective governance in the public sector strengthens accountability and the efficient use of financial resources.

[82] OECD (2015) *Guideline on Corporate Governance of State-Owned Enterprises*; OECD (2014) *The Guideline on The Governance Of State-Owned Enterprises For Southern Africa*; Department of Public Enterprises (2002) *Protocol on Corporate Governance in the Public Sector*; Andrew Chilenga, *State-Owned Enterprises: A Policy Analysis of South African Airways*, (Unpublished Master's thesis, University of KwaZulu-Natal 2016) 1-77.

[83] Ibid at 5.

[84] Ioana Andreea Ciolomic et al 'Theories Of Corporate Governance Applied To State-Owned Enterprises' (2022) 16 *International Management Conference*.

[85] Christopher P.P Shafuda et.al 'Corporate Governance of SOEs and Compliance with the SOE governance Act in Namibia: A Survey Analysis' (2020) 10 *Journal of Public Administration and Governance* 219 -249.

company is made by the shareholder, commonly referred to as the principal. Nevertheless, the principal does not have direct control over SOEs except for owning shares. Control resides with the agent - the board of directors. The agency theory is problematic because SOE ownership and control are ambiguous. It gives rise to a conflict of interest between the shareholder and the board of directors, which manages an SOE through another agent – the executive managers. Often, the agent's interest is at variance with that of the shareholders. Furthermore, the agent that manages the SOE daily may have a different interest from that of the shareholder or the board of directors. Executive leaders may engage in discretionary actions that prioritise their interests, potentially to the detriment of shareholders.

Corporate governance is compulsory in South Africa to successfully implement the SOEs' strategy and mission. The SOEs' success is sometimes hampered by greedy human beings who exploit their position of power as directors to the detriment of SOE and at its expense and its shareholders.[86] After all, the directors of a company are expected to act in the interest of the company and not shareholders.[87] This is indicative of the unsuitability of the agency theory in SOEs because they are under the control of professional managers and owned by outside shareholders. [88] Thabane puts forward that the agency theory is pronounced in SOCs.[89] The researcher agrees with Thabane that SOCs are not owned by boards of directors or by ministers who are shareholder representatives; they are agents of the principal, in this case, the public.[90] Thabane's work discusses various governance theories in detail, and readers will benefit from reading his thesis in chapter two.[91]

In some instances, the control of an SOE is multifaceted. Four ministers are responsible for one SOE, for example - appointment of directors and control of the board;[92] policy development and implementation;[93] delivery of services;[94] and financial control and support residing with another minister.[95] This theory is impractical and unrealistic for an SOE like

[86] Erturk op cit note 44.
[87] Tebello Thabane *The Ownership and Control Architecture of South Africa's State-Owned Companies and its Impact on Corporate Governance* (Doctoral Thesis, University of Cape Town, 2020) at 26.
[88] Kanyane and Sambo op cit note 46; Section 76(2) of the Companies Act.
[89] Ibid.
[90] Ibid.
[91] Thabane op cit note 87 at 21-45.
[92] Eskom Holdings SOC Limited. Minister Department of Public Enterprises - Gordhan.
[93] Eskom Holdings SOC Limited. Minister of Minerals Resources and Energy -Mantashe.
[94] Eskom Holdings SOC Limited.Minister in the Presidency - Ramokgopa.
[95] Eskom Holdings SOC Limited Minister of Finance- Godongwana.

Eskom, even if it reports to one Minister. The researcher agrees with Som that SOEs' governance problems encompass the 'principal-agent problem, lack of proper oversight, political interference, weak and disorganized boards, and a confused mix of commercial and social objectives SOEs must achieve.'[96] However, some SOEs cannot eliminate bad corporate governance even if they have one mandate. Shafuda et al. assert that government retains control of SOEs because of strategic nature and their potential to provide employment.[97] Exercising control over an SOE has proven challenging because the board of directors, not the shareholder minister, is responsible for its management.[98] Another contentious issue with the principal-agent theory is that the board of directors owe their fiduciary duties to SOEs, not the shareholder owner. This gives rise to tensions between the shareholder and the board. In South Africa, the SOEs are SOCs and subject to the Companies Act. The provision of section 66(1) of the Companies Act puts the management of the company exclusively in the hands of the board of directors with the necessary authority to exercise all such powers and perform its duties in the interest of the company unless constrained by the Memorandum of Incorporation.

1.4.2. Stewardship theory

The stewardship theory is premised on one person performing the dual role of the Chief Executive Officer and Chairperson of the board of directors of a company. Donaldson and Davis support the stewardship theory. They believe a single person holding both positions are best qualified to protect the shareholders' interests. In this position, the person will achieve excellent results for the shareholder.[99] Erturk et al., with whom the researcher agrees, argue that this model does not necessarily achieve '…shareholders value for the masses but was effectively more about the enrichment of management elites. Companies in the United States of America favour this approach. Congress-promoted companies Fannie Mae and Freddie Mac follow the same principle.[100] The researcher disagrees with Donaldson and Davis that the stewardship theory suits SOEs. Concentrating too much power in one person is not conducive

[96] L Som 'Corporate Governance of Public Sector Enterprises in India. Money and Finance' (2013) *ICRA Bulletin: Memory & Finance* at 2.
[97] Shafuda op cit note 85.
[98] Spartak and Nedelchev op cit note 74.
[99] L Donaldson and J McConnell, Stewardship Theory of Agency Theory: CEO Governance and Shareholders Returns (1991) 16 *Australian Journal of Management* 49-64; Wan Fauziah Wan Jusoff and Idris Adamu Alhaji Insight of Corporate governance (2012) 1 Theories *journal of Business & Management* 52-63.
[100] My note. Fannie Mae and Freddie Mac are home mortgage companies. They are agencies of Congress of the USA.

to good corporate governance. There are no checks and balances, which are crucial for good corporate governance. Therefore, this theory would not benefit SOEs. SOE managers must espouse the principles of good corporate governance - ethics, transparency, integrity and responsibility. The chairperson is not the board's boss but in leadership without a casting vote unless empowered. Directors have fiduciary duties as a collective and in their individual capacity. They must strive to implement policies to support the company's strategy.[101] Therefore, the researcher argues that one person serving a dual leadership position is unfavourable and anti-good corporate governance.

1.4.3. Stakeholder theory

The stakeholder theory serves the interest of all stakeholders. In the context of SOEs, this theory concerns the interest of the customers, the public, suppliers of goods and services, employees, financiers, and voters. Availing information punctually to stakeholders about the achievement or failure of an SOE engenders trust among all stakeholders. Governments must acknowledge and respect stakeholders' rights embodied for in the law or mutual contracts. The OECD is a proponent of the stakeholder theory. Providing comprehensive information to stakeholders is believed to put an SOE in a good light. The problem would be how to do it when the public stakeholder is inclusive of the whole populace in the country. Considering the circumstances of people of South Africa how would that be achieved. Because of the history of exclusion, some people in the country do not have an education and cannot read, while others do not have access to the media. They are not exposed to the work of SOEs operating in this country.

1.5. Objectives

The primary objective of this study is to investigate the level of good corporate governance compliance in SOEs in South Africa. The study seeks to demonstrate the importance of good corporate governance in SOEs. Without good corporate governance, the government will not achieve its goal of growing the economy and delivering to the majority of South Africans who were historically left out.[102] The secondary objectives of this thesis are:

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[101] Tom Wixley and Geoff Everingham *Corporate Governance* 4 ed (2015) 31*;* Terence Corrigan 'Corporate Governance in Africa's State-Owned Enterprises: Perspective on an Evolving System' (2014) *SAIIA* 1-4.

[102] Open Society Initiative for Southern Africa 'Effectiveness of Anti-Corruption Agencies in Southern Africa Angola, Botswana, DRC, Lesotho, Malawi, Mozambique, Namibia, South Africa, Swaziland, Zambia, Zimbabwe' (2017) *OSISA* 1-369 at 4-5 and 12.

(i) To investigate the existence of good corporate governance in SOEs and the extent of compliance.

(ii) To suggest effective and ethical mechanisms of implementing a clean and corruption-free business environment that would facilitate the delivery of services in a financially sustainable and transparent way.

(iii) To examine applicable laws that regulate good corporate governance and measures in place in case of non-compliance.

(iv) To consider the approach of some of South Africa's neighbours' approach to good corporate governance of SOEs and lessons if any it could learn from them.

(v) To recommend possible solutions for governance of SOEs.

1.6. Problem statement

The political appointments of compromised, incompetent, inexperienced cadre directors to boards of SOEs impinge the basic tenet of the independence of accounting authorities.[103] Some directors could believe that their fiduciary duties as a collective and in their individual capacity is not intrinsic to SOEs but to the executive authority who appointed them.[104] The common problems in SOEs was and still is- conflict of interest, corruption, fraud, incompetence, inefficiency, lack of ethical leadership, abuse of power, unethical conduct, self-interest and misappropriation of funds.[105] For example, Eskom, PRASA and the SABC amongst which were the subject of the Public Protector's investigations, and she found them wanting. Her findings are in the public domain. The conclusions of the Public Protector brought into sharp focus the need for these SOEs to effectively comply with the basic principles of good corporate governance. These entities will be discussed in detail in chapter 5. The Public Protector recommended judicial commission of inquiry into state capture in Eskom.[106] However, some argue that there is justification not to comply effectively or at all with good governance to avoid stunting service delivery.[107] The use of SOEs to deliver services and be a catalyst for economic

[103] Ralph Mathekga 'Chapter 9: South Africa' in OSISA *Effectiveness of Anti-Corruption Agencies in Southern Africa: Angola, Botswana, DRC, Lesotho, Malawi, Mozambique, Namibia, South Africa, Swaziland, Zambia and Zimbabwe* 2017 *OSISA* 221-261; Naidoo op cit note 65 at 354 and 362. Qualification and skills are immaterial for the appointment of directors to SOEs. The criteria are loyalty and political affiliation.
[104] Section 76(3)(b) and (c); 76(4)(iii) of the Companies Act.
[105] Findings of the Public Protector's Reports on Eskom, PRASA, SABC.
[106] Modimowabarwa Kanyane 'Reviewing State-Owned Entities' Governance Landscape in South Africa' (2015) 9 *Journal of Business Ethics* 28-4; The Public Protector did not have sufficient time investigate state capture.
[107] Ibid.

development is neither new nor unique to South Africa.[108] This matter is perhaps made more complex by the history of the deliberate, legal and structured exclusion of the majority from benefitting and being effectively economically active. Some people in the leadership in SOEs and the executive authorities in government have succumbed to corruption, personal job preservation, populism, unethical conduct and self-enrichment at the expense of good corporate governance in SOEs.[109]

The Commission for Intellectual Property and Companies (CIPC) is the regulator and compliance enforcer of corporate governance of the private and public sector companies in South Africa.[110] The Corporate Governance Surveillance and Enforcement (CGSE), a unit within the CIPC, monitors corporate governance compliance in the context of the Companies Act. To be effective, the CGSE requires sufficient capacity to implement legislation, if not good corporate governance, in companies, including SOEs, will continue to be challenging. The CGSE is a noble platform for monitoring compliance. However, for monitoring to be effective, the process should be swift and timely. The researcher agrees with the CIPC that if section 187(2) is effectuated, participants could change their behaviour.

It is concerning that some executive authorities do not have the necessary capacity to:

- ✓ distinguish between their position as a shareholder and the duties of the board of directors of the SOEs.
- ✓ give a mandate from the beginning and stick to the Shareholders' Compact and Corporate Plan where applicable.
- ✓ appreciate that the legal personality of SOEs is not a private property to deal with any way the shareholder wants to, in total disregard of its legal personality.

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[108] P Radasi & Karin Barac, 'Internal Audit in state-owned enterprises: perceptions, expectations and challenges' (2015) 17 *Journal of Accountability and Auditing Research,* 95; The Conversation 'SA parastatals are losing billions while being used for personal ends' 12 September 2016 available at *https://businesstech.co.za/news/trending/136311/sa-parastatals-are-losing-billions-while-being-used-for-personal-ends/* accessed on 21 February 2023.

[109] Niselow Tehillah 'Minister of Water Affairs: Mokonyane's address to the public that when the rand falls the ANC will pick it up' *News24* 6 June 2017 available at *https://www.news24.com/Fin24/its-the-economy-stupid-7-times-business-politicians-shocked-us-in-2017-20171228* accessed on 21 February 2023; Areff Ahmed and Spies Derrick 'President Zuma announced free education on the eve of the election of the ANC President' *News24* SABC December 2017 available at *https://www.news24.com/news24/zuma-announces-free-higher-education-for-poor-and-working-class-students-20171216* accessed on 21 February 2023.

[110] Sections 187(2)(b) and 187(2(g) of the Companies Act monitor enforcement and compliance respectively The Company Secretary is responsible to respond to the CGSE questions of compliance.

- ✓ accept that the SOE is obligated to comply with good corporate governance, which cannot be considered outside the ambits of the law and ethical and moral conduct; and
- ✓ use the SOE which is effectively managed and is sustainable to deliver services and contribute to developing the country's economy.

This environment directly leads to SOEs failing to comply with good corporate governance. Thus, failing the boards of SOEs to grow them. Micklethwait and Dimond agree that "companies do not fail, but boards do."[111] These scholars do not only place the blame on the board but also blame the executive managers of the company,[112] a view the researcher shares with them. They also emphasise the importance of corporate governance in companies.[113] The researcher submits that the executive managers are the coal face of managing SOEs daily. They have the means and opportunity to manage SOEs in accordance with good corporate governance. Still, they, in most instances, fail due to personal interest and other external factors that will be discussed in chapter four.

1.7. Research questions

About the objectives of this research, the following fundamental questions are addressed:

- ✓ Does good corporate governance exist in SOEs, and if so, what is the extent of compliance with it?
- ✓ How to advance effective and implement ethical mechanisms of good corporate governance?
- ✓ What role does poor leadership play in derailing good corporate governance?
- ✓ Is there a necessity for further regulations of good corporate governance, or should enforcement be improved?
- ✓ Can South Africa benefit from considering the approaches in other jurisdictions in relation to good corporate governance practices?

1.8. Relevance of the study

Good corporate governance in SOEs is a burning issue in South Africa. This is evident from the media and in Parliament debates about the conduct of the executive and non-executive

[111] Alicia Micklethwait and Patricia Dimond *Driven to the Brink* (2017) 3.
[112] Ibid 1.
[113] Ibid 4-12.

management of certain SOEs.[114] Reports of the Adhoc Parliamentary Committees, Public Protectors, the South African Council of Churches, Civil Society and many cases heard in both the High Court and the Constitutional Court about failed governance in SOEs is an indictment on executive managers, boards of directors, ministers and government. The necessity to address historical imbalances of access to housing, services and job opportunities for the historically and still disadvantaged cannot be overcome for as long as good corporate governance is undermined in SOEs. The consequences were that money which would have been invested to address these imbalances was diverted to fund some of the failing SOEs.[115]

1.9. Research methodology

A qualitative research method was used for this research. This method was adopted because the subject of the study required analysis, which was achieved by reading and interpreting existing material.[116] Creswell, a proponent of the qualitative research method, advance the view that qualitative inquiry represents a lawful or valid way of exploring the social and human sciences.[117] In this thesis, the researcher mainly focuses on a desktop literature review of secondary data, including case studies. Scholarly articles, books, legislation, policies, reports prepared by various institutions, newspaper articles, and many other publications were read to broaden the requisite knowledge to support the conclusions reached in this study. Various relevant legislation was analysed and incorporated into the research to support the views espoused in the thesis, for example, the Companies Act, the Constitution, the PFMA, the PPAA, the King IV, and the Protocol.

1.9.1. Limitations

An enquiry was made to SOEs to access documents during the research, but the researcher was advised to visit websites. The SOE websites were visited to access records in the public domain.

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[114] Parliament Press Release 'Committee Starts An Inquiry Into State-Owned Enterprises' Parliament of Republic of South Africa 17 October 2017 available at *https://www.parliament.gov.za/press-releases/committee-starts-inquiry-state-owned-enterprises* accessed in 1 January 2022. The focus was on the Department of Public Enterprises SOEs.

[115] State of the Nation Address 'President Ramaphosa in his state of the nation address on 09 February 2023 acknowledged the effect of failed governance, the state of capture and skills shortage' *Parliament of the Republic of South Africa* 9 February 2023 available at *https://www.stateofthenation.gov.za/speeches* accessed on 21 February 2024.

[116] Haradhan Kumar Mohajan *'*Qualitative research methodology in social Sciences and related subjects*'* (2018) 7 *Journal of Economic Development, Environmental and People* 23-48.

[117] John W Creswell *Research Design: Qualitative, Quantitative and Mixed Method Approaches* 3 ed (2009); Felicia A. Kalu and Jack C. Bwalya 'What makes qualitative research good research? An exploratory analysis of critical element' (2017) 5 *International Journal of Social Science Research* 45.

Other documents in compliance with the Protected Disclosure Act 26 of 2022 were not readily available on the websites. Every endeavour was made to access, read and analyse the following documents: annual corporate plans; annual financial statements and reports; audit plans; audit committee charters; board charters; codes of conduct of employees; good corporate governance policies for the relevant period; human resources and recruitment policies; internal audit charters; list of the tenders awarded during the relevant period; performance contracts applicable to executives; quarterly reports where applicable; shareholders compact; and supply chain policies.

1.10. The structure of the chapters

The first chapter introduced the concept of good corporate governance in state-owned entities. The importance of good corporate governance and failures in SOEs were addressed. The contribution and role of the private sector in the failure of good corporate governance in state-owned entities was highlighted. Failures of corporate governance in the private sector were for comparative purposes only. The theories of good corporate governance are dealt with within this chapter. The research objectives, research questions, research methodology and the study's relevance, include general discussions and debates around good corporate governance with a specific focus on SOEs. In this chapter, the theoretical aspects of good governance are evaluated.

The second chapter focuses on the domestic legal framework - Protocol on Good Governance of State-Owned Entities, King Code IV and various legislation such as the Companies Act, the PFMA, the Constitution, the PAA and the Public Audit Amendment Act 5 of 2018 (the PAAA).

The third chapter compares Botswana's, Namibia's, and South Africa's approaches to good corporate governance in their SOEs. The effects of non-compliance with good corporate governance by SOEs are addressed in these jurisdictions. The researcher explores lessons, if any, that the trio can learn from each other. The suitability of the OECD recommendation for SOEs of Southern Africa is briefly weighed.

The fourth chapter deals with the effect of non-compliance with good corporate governance on SOEs' finances and the impact on South Africans. In addition, the chapter deals with the private sector's role in undermining sound corporate governance principles. Bad corporate governance financially impacts stakeholders, particularly employees, service providers, and the country's economy. It is argued in this chapter that the effect of SOEs' disregard for good corporate governance increased unemployment and put a strain on the

Unemployment Insurance Fund (the UIF). The factors that prevented SOEs from implementing good corporate governance, such as the involvement of private sector companies and the justification proffered by SOEs post-non-compliance, cannot be ignored. Furthermore, the role of the first citizen and some executive authorities during the state capture 2 period are explored.
The fifth chapter discusses the challenges and successes, if any, that Eskom, PRASA, and SABC experienced. How these SOEs failed to deliver on their mandates as expected is considered. Their involvement in manipulating good corporate governance proved to be a disservice to South Africa. The conduct and role of the executive authorities undermined good corporate governance. The effects and implications on the fiscus of the government are addressed.
The sixth chapter focuses on the conclusion and recommendations.

CHAPTER TWO

LEGISLATIVE AND REGULATORY FRAMEWORKS FOR GOVERNANCE OF STATE-OWNED ENTITIES IN SOUTH AFRICA

2. INTRODUCTION

This chapter aims to highlight the current tools at management's disposal to manage SOEs in line with good corporate governance. SOEs are integral to – contributing to the country's economic growth, delivering services, creating a conducive environment to include members of the society previously excluded in the economy of the country, and continuing endeavours to reduce persistent poverty. The shortcoming of SOE's capacity to contribute to the government's goals is how they are managed. Currently, they are managed contrary to good corporate governance. Thus, they continue to be unsustainable. Several pieces of legislation regulate the governance of SOEs. These are burdensome legislation and soft legislation. Complex legislation refers to the Constitution, the Companies Act, the PFMA and the PAA. It is important to note there is additional legislation applicable to SOEs referred to herein as enabling acts. Discussing them in this research will be a mammoth task because there are approximately 715 SOEs in South Africa.[118] Soft legislation refers to King IV and the Protocol. The connection between the management of SOEs and the legislation regulating corporate governance is explored. Furthermore, reference will be made to court decisions highlighting non-compliance with good corporate governance in SOEs. Key areas and sections of legislation relevant to good corporate governance are discussed.

2.1. Governance structure of SOEs

SOEs are creatures of enabling statutes in their sphere of operation.[119] The Minister in charge of the department to which an SOE belongs is the shareholder representative of the government. However, the ultimate shareholders of SOEs are the people of South Africa. The shareholder representative of an SOE recommends persons identified for appointment as members of the board of directors to the Cabinet for approval. According to the Dullah Omar

[118] Sunita Kikeri 'Corporate givernance in South African state-owned enterprises: background note for the South Africa systematic country diagnostic (English)' (2018) 1 *The World Bank Group*.
[119] For example, most of SOEs are incorporated through their enabling Acts. Others were incorporated in terms of the repealed Companies Act 61 of 1973 replaced by the Companies Act of 2008.

Institute (the Institute) such appointments are not transparent and lack integrity.[120] Furthermore, there is no transparency in the appointment process. The Institute advanced the view that the appointment and dismissal of SOE directors must be changed. The view shared by the President Review Committee (the PRC). The researcher agrees with the Institute and the PRC. The selection criteria must be based on skills, expertise, experience, integrity, qualified to be a director, and training as a director. The dismissal of the board or an individual member thereof must be fair and in line with section 71 of the Companies Act. The Institute further expressed concern that the dismissal of boards and executives will stop corruption. The Presidential Review Committee (the PRC) in its report on SOEs is also of the same view as the Institute. There is no guarantee that changing how the boards and executives are appointed alone will rid SOEs of bribery. The quality of appointments is fundamental. Corruption continues to be a problem even in the private sector, although directors are elected and not appointed by Ministers.[121] Self-interest and greed rule human beings. The Institute of Directors South Africa (the IODSA) acknowledged that the tribulations in both the private and public sector requires of the IOD to build a pool of trained professional directors from which both sectors can appoint to facilitate the capacity ability of the country's economy to grow.[122]

Once appointed, the board of directors manages the SOE on behalf of the shareholder for a specified period. This implies that the board of directors supervises a State-Owned Enterprise (SOE). It delegates its authority to executive managers for the day-to-day operation of the business. The executive managers are led by the chief executive officer (CEO) to oversee the day-to-day management of the SOE. In most instances, the appointment of the CEO is controversial, whether the right to do so rests with the board of directors or the Minister. Or the board interviews and makes recommendations to the Minister. This issue came to the fore recently at Eskom. There was controversy when Minister Gordhan of the Department of Public Enterprises (DPE) did not appoint the candidate the board of directors recommended.[123] The power of the Minister to appoint the CEO stemmed from the amended Memorandum of

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[120] Dullah Omar Institute for Constitutional Law, Governance and Human Rights (2018) `Legal Framework for SOE Boards' *Dullah Omar Institute* 1-50.
[121] IOD Press Statement 'SOE Boards: It matters who gets appointed and how they get appointed' *Institute of Directors South Africa* 16 July 2019 available at *https://www.iodsa.co.za* accessed on 18 February 2024.
[122] Ibid.
[123] Carol Paton 'Gordhan rejected the Eskom CEO recommendation – months after the board named frontrunner' *News24* 20 September 2023 *www.news24.com/fin24/economy/Gordhan-rejected-the-eskom-ceo-recommendation-months-after-the-board-named-a-frontrunner* He claimed that he was not given three names to choose from.

Incorporation (MOI) of Eskom.[124] Generally, SOEs are managed within the confines of their enabling laws, but in this instance, the MOI enabled such a decision. The rationale for the Minister's decision to have someone else appointed elevated the speculation of interference, and eventually, the Chairperson resigned from the board of Eskom.[125] More will be said about Eskom in Chapter 5.

The Companies Act, Constitution, PFMA, Public Audit Act of 2004 as amended, King IV and Protocol regulate corporate governance of SOEs.[126] These are discussed hereunder.

2.2. Constitution of the Republic of South Africa, 1996

The Constitution contributes to good corporate governance of national and provincial government, local and municipal government, and state organs, including SOEs. Some of the principles of good corporate governance, such as accountability, fairness, efficiency, economical and practical use of resources, transparency and access to information, are values applicable to good corporate governance.[127] One area that SOEs of the country fail to do is to manage with integrity is in procurement. Procuring goods and services contrary to the Constitution is a big challenge in SOEs. The constitutional principles of governance for procurement of goods and services reside in sections 217(1) and 217(2) of the Constitution. The Minister is enjoined by section 217(3) to prescribe the procurement framework. Although the Constitution became law in 1996, former Ministers of the Department of Finance failed to pass legislation compliant with sections 217(3). Instead, the Minister through Parliament passed the Preferential Procurement Policy Framework 5 Act of 2000 (PPPFA), which gave the government, its institutions and SOEs the latitude to frame their procurement policies. There is no uniformity, and this open the door for manipulation. The Public Procurement draft Bill was tabled before the Parliament on 23 May 2023 and passed on 2 December 2023. This Bill consolidates all legislation regulating procurement.[128]

[124] Former Minister of the Department of Public Enterprises, Lynne Brown amended the MOI reserving the right to appoint and remove the CEO of Eskom and the board.

[125] Natasha Marrian 'Why Mpho Makwana really quit Eskom' *Financial Mail* 12 October 2023 available at https://www.businesslive.co.za accessed on 7 February 2024.

[126] My notes – These Acts and the Constitution apply to SOEs.

[127] Section 195 of the Constitution.

[128] Preferential Procurement Policy Framework Act 5 of 2000 as well as the procurement related provisions in the Public Finance Management Act 1 of 1999, the Local Government Municipal Finance Management Act 56 of 2003, the Broad Based Black Economic Empower Act 53 of 2003 and the Prevention and Combating of Corrupt Activities Act 12 of 2004.

Ministers are accountable to the National Assembly for the portfolio they oversee.[129] The same is true for the SOEs' board of directors and executives.[130] This is intended to hold national executive organs accountable. Ministers and the state organs must implement the law. The Parliamentary Committees established occasionally can be Ad Hoc or Standing Committees. This is the mechanism with which the National Assembly exercises oversight over Ministers and SOEs. Depending on the circumstances, these functions are executed through Parliamentary Ad Hoc Committees or Parliamentary Standing Committees. This provision enhances accountability and transparency. The first five pages of the Governance Oversight of SOEs pay special attention to the role that Parliament, Parliamentary Committees, SCOPA, the board of directors, and executive managers play in the governance of SOEs. Section 55(2) of the Constitution authorises the National Assembly to have systems in place to hold executive organs of state in national government accountable.[131] The section further states the oversight over the national executive authority and organ of the state, including enforcing statutory provisions.[132] The National Assembly is empowered by section 55(3) of the Constitution to probe and supervise executive action. The National Assembly is empowered to oversee and scrutinize executive action inclusive of boards of directors and executive managers by section 42(3).

Ministers are required to provide Parliament comprehensive reports about matters under their control, including SOEs for which they are accountable.[133] Exercising this supervisory and oversight function requires strong leadership by the Portfolio Committees, avoidance of partisan scrutiny, and an emphasis on performance. Parliament is fraught with political party interests rather than concerned with compliance with good corporate governance and ensuring allegiance to the Constitution.[134] This failure is a clear indication that the fish rots from the head. Disregarding constitutional obligations, members of Parliament of the African

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[129] Section 55(2)(a)
[130] Section 55(2)(b)(i) and 55(2)(b)(ii).
[131] Ibid 2.
[132] Ibid.
[133] Section 92(3)(b) 'Members of the Cabinet must–act in accordance with the Constitution; (b) provide Parliament with full and regular reports concerning matters under their control.'
[134] *Economic Freedom Front v The Speaker of the National Assembly and 2 others and Democratic Alliance & 4 others v The Speaker of the National Assembly & 4 others* 2016 (3) SA 580 (CC); *Economic Freedom Fighters & others v the Speaker of the National Assembly and others* 2018 (2) All SA 116 (WCC). This case was also about refusal by the National Assembly to hold the executive accountable in terms of section 55(2) of the Constitution.

National Congress (the ANC) came into sharp focus consequent to the report of the Public Protector about Nkandla. This controversy was about procurement and money spent on the President's compound. The resolution passed by the majority of the National Assembly absolving the President from complying with the remedial action taken by the Public Protector in terms of section 182(1)(a) of the Constitution was found to be at variance with sections 42(3)[135], 55(2)(a) and (b)[136] as well as 181(3)[137] of the Constitution and was deemed invalid and set aside. These sections are fundamental to good corporate governance.

2.3. The Public Finance Management Act

Chapter 6 of the PFMA deals with applying the Act to SOEs and their classification. In the same chapter, sections 49 to 55 focus on compliance with good corporate governance by the governing body of all SOEs and their subsidiaries listed in Schedules 2 and 3. The governing body of an unlisted SOE must notify the National Treasury (Treasury) in writing that the entity is not listed in the listing schedules.[138] Financial misconduct of the governing bodies, executive managers, and all SOE officer employees can be found in Chapter 9 of the PFMA. It is incumbent upon the board of directors to bring to the attention of the Treasury if an SOE is inadvertently not listed in the schedules of the PFMA. The principles embodied in the PFMA are quintessential for good corporate governance. SOEs must have a board of directors in place, referred to as the governing body in the King Codes. The PFMA neither prescribes the criteria for such an appointment nor their dismissal. However, the Companies Act complements the PFMA, and both Acts apply concurrently. Sections 69 and 71 of the Companies Act closed the lacuna. The applicability of section 71 was settled in instances where directors of the board members were dismissed[139] or boards were dissolved in toto by ministers.[140]

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[135] Section 42(3) 'The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing national forum for public consideration of issues, by passing legislation and by scrutinizing and overseeing executive action.'
[136] Section 55(2)(a) and (b) 'National Assembly must provide for mechanisms–(a) to ensure that all executive organs of state in the national sphere of government are accountable to it; and (b) to maintain oversight of–(i) the exercise of national executive authority, including the implementation of legislation; and (ii) any organ of state.'
[137] Section 181(1)(a) 'The following state institutions strengthen constitutional democracy in the Republic; (a) The Public Protector. Section 181(3) 'Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions.'
[138] Section 47(2).
[139] *Minister of Defence and Military Veterans v Motau & others* [2014] ZACC 18.
[140] *Steenkamp and Another v Central Energy Fund SOC Ltd and Others* 2018(1) SA 311(WCC)

These are manifested in the disclosure and management of conflict of interest and the administration of the financial affairs of SOEs with fidelity, honesty, and integrity by the board.[141] The board's fiduciary duties compel it to act with the utmost care to protect the assets and records of SOEs.[142] When the Minister requests, the board must provide material information regarding section 50(1)(c). Furthermore, members of the board are required to disclose any direct or indirect personal or business interest they may have and of their spouses, partners or close families in SOEs to the board[143] and not participate in consideration of matters of interest unless the board decide that the interest is inconsequential or impertinent.[144]

The board has general responsibilities to ensure that SOEs have efficient, effective and transparent financial and risk management systems and internal controls in place.[145] Internal audit system must be maintained under the Audit Committee by section 51(1)(a)(ii). Proper procurement and provisioning must be fair, equitable, transparent, competitive and cost-effective.[146] Systems must be in place that evaluate major capital project decisions.[147] Moreover, the board must collect money due to SOEs, averting irregular and unauthorised expenses, fruitless and wasteful expenditures, and losses due to criminal conduct.[148] Spending must be in line with the operational policies of public entities.[149] The board is responsible for keeping assets safe and managing revenue, expenditure, and liabilities in check.[150] The board must take adequate and appropriate disciplinary actions against officials who transgress the PFMA provisions and undermine financial management and internal controls.[151]

The board is responsible for submitting all reports, returns, notices, and other information to the National Assembly Parliament, provincial legislatures, relevant ministers, or treasury.[152] Before an SOE company is incorporated or established, the accounting authority must seek permission from the Treasury to do so.[153] Any incapacity of the board to comply with the

[141] Section 50 which is broken down hereunder.
[142] Section 50(1)(a).
[143] Section 50(3)(a).
[144] Section 50(3)(b).
[145] Section 51(1)(a)(i).
[146] Section 51(1)(a)(iii)
[147] Section 51(1)(a)(iv).
[148] Section 51(b)(i).
[149] Ibid.
[150] Section 51(1)(c).
[151] Section 51(1)(e)(i)-(iii).
[152] Section 51(1)(f).
[153] Section 51(1)(g) and (h).

PFMA must be immediately reported, and the reasons given for such inability to the Executive Minister and Treasury.[154] Section 52 compels the board of an SOE listed in Schedule 2 or Schedule 3 to submit a budget, a Corporate Plan and a Shareholders Compact to the relevant Minister and Treasury a month before the financial year end or the time agreed with the Minister and Treasury.[155] SOEs must provide information, documents, returns, explanations and motivations to the National or Provincial Treasury and the Auditor-General.[156]

There are specific transactions that cannot be undertaken by SOEs without the Treasury sanctioning them, for example, the establishment of and participation in the company in significant partnership, trust, unincorporated joint ventures, purchase or selling of significant shareholding, acquisition or sale of ample assets, starting or ending of momentous business activity, and material change in the nature and extent of its interest in a noteworthy partnership, trust, unincorporated venture or similar arrangement.[157] SOEs listed in Schedules 2 and 3 can apply for exemption from the application of section 54(2) to Treasury. However, subsection 54(3) permits the accounting authorities of SOEs to assume that permission was granted after the expiration of 30 days after submission or any length of time agreed between the Treasury and the SOE.[158] Although the section permits the applicant for exemption to assume that Permission was given if a response is not received, in practice, Treasury insists that permission after the expired 30 days must still be in writing.

Accounting for and disclosing the financial performance of SOEs is intrinsic to good corporate governance. Keeping comprehensive and appropriate records of the financial affairs of an SOE is a requirement.[159] Annual financial statements (AFS) of SOEs must be in accord with the generally recognised accounting practice (GRAP).[160] These AFS must adequately represent the economic situation of the business of the SOE achievements predicated on pre-set objectives and submitted for auditing two months after the end of the financial year.[161] Once audited, the AFS must be handed over to the Treasury and the Minister.[162] What stands out in this section is that any significant losses due to criminality, irregular expenditure, or fruitless

[154] Section 51(2). The requirement of this section is similar to the principle in King III 'comply or explain.'
[155] Section 52.
[156] Section 54(1).
[157] Section 54(2).
[158] Section 54(3).
[159] Section 55(1)(a).
[160] Section 55(1)(b).
[161] Section 55(1)(c).
[162] Section 55(1)(d).

and wasteful expenses must be disclosed.[163] The board must initiate and report criminal action taken or disciplinary processes against the perpetrator consequent to losses occasioned by irregular expenditure and fruitless and wasteful expenditure.[164] Any recovered and written-off losses must be reported.[165] The disclosure must include financial assistance from and commitments by the government,[166] including the AFS of subsidiaries.[167] The audited AFS of an SOE, including Schedule 3, forms part of the relevant department's annual report (AR).[168]

Part 3 of Chapter 6 regulates the delegation of power to officials of SOEs by the board[169] and the performance of specified duties, which may be subject to limitations on their behalf.[170] The mandates could be specific to an individual.[171] However, giving its mandate to executive employees does not preclude accounting authorities from exercising such delegated power because they remain responsible for managing SOEs.[172] Decisions taken by an official with the written mandate may be varied or revoked by the board subject to vested rights to a third party.[173] However, such variation must not be against the interest of the SOE. The PFMA is the axis of good corporate governance in SOEs.[174] The responsibility placed on SOEs in the PFMA is unequivocal. The primary purpose of the rules is to foster and compel transparency and effective management of SOEs' income, expenditure, gains and losses to ease accountability and governance. Except for the synopsis given they are not being discussed

[163] Section 55(2)(b)(i).
[164] Section 55(2)(b)(ii).
[165] Section 55(2)(b)(iii).
[166] Section 55(2)(b)(iv).
[167] Section 55(2)(b) (v).
[168] Section 55(3).
[169] Section 56(1)(a).
[170] Section 56(2)(a). ‘
[171] Section 56(2)(b).’
[172] Section 56(2)(c).
[173] Section 56(3).
[174] Municipalities have in place the Municipal Fiscal Power and Functions Act of 12 of 2007 which supersedes the Municipal Finance Management Act 56 of 2003.

2.4. The Companies Act 71 of 2008

The Companies Act regulates SOEs if they do not secure an exemption from its application.[175] If there is an inconsistency between the PFMA and the Companies Act or any national legislation, section 5(4)(a) of the Companies Act provides that both Acts apply simultaneously. If it is possible, to apply and comply with one of the incompatible provisos without infringing the second one. Section 5(4)(b) provides that where it is impossible to apply or comply with one of the inconsistent provisions without contravening the second one, any applicable provisions in the PFMA prevails. The researcher confined her assertion to the PFMA because that the legislation which deals with corporate governance of SOEs. Effectively, this confirms that in case of inconsistencies between the Companies Act and the PFMA, the latter prevails as provided in section 3(3) of the PFMA. Nevertheless, the Companies Act and the PFMA can operate concurrently to the extent possible.

The contribution of the Companies Act to good corporate governance cannot be understated. The board of directors manages the business of the SOEs appointed by the shareholders.[176] Sufficient appointees to the board are required to facilitate the appointment of the audit or social and ethics committees.[177] Appointments of other directors can be made in terms of the MOI. In SOEs, there is one shareholder; therefore, directors are not elected but appointed. The PRC recommended that SOEs must have one umbrella legislation that could work. The umbrella SOE law must be carefully and comprehensively drafted to avoid room for alternative interpretation. Humans have conveniently opted for an interpretation that supports their motives to engage in corruption, especially in the procurement space in SOEs. They also use the private sector advisory services, including lawyers, to justify bad corporate governance.

This is evidenced by provisos 15 and 69 which will be briefly discussed below. SOEs incorporated in terms of the Companies Act have a Memorandum of Incorporation (the MOI),

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[175] Supra note 53; Sec 9(1) and (2) of the Companies Act provides that 'Subject to section 5(4) and (5), any provision of this Act that applies to a public company applies also to a state-owned company, except to the extent that the Minister has granted an exemption in terms of subsection (3). 9(2) The member of the Cabinet responsible for–(a) state-owned companies may request the Minister to grant a total, partial or conditional exemption from one or more provisions of this Act, applicable to all state-owned companies, any class of state-owned companies, or to one or more particular state-owned companies; or 9(b) local government matters may request the Minister to grant a total, partial or conditional exemption from one or more provisions of this Act, applicable to all state-owned companies owned by a municipality, any class of such enterprises or to one or more particular such enterprises, on the grounds that those provisions overlap or duplicate an applicable regulatory scheme established in terms of any other national legislation.'

[176] Section 66(1).

[177] Section 66(2)(a)-(b).

which the shareholder representative, the Minister, can change as and when he deems it necessary, provided that the amendment does not undermine the interest of the SOE.[178] Minister Mutambi was found to have abused her powers by reserving the power to appoint a Group Chief Executive Officer, Chief Financial Officer and a Chief Operating Officer. The board conducts interviews of candidates for the positions, and the Minister neither sits in the interview nor has insight into the decision by the board to recommend the interviewee appointable candidates. She also reserved for herself the right to veto future changes the board may have about the corporate governance code.[179] This was contrary to principle 6 of King IV, which advocates that the board is the focal point and custodian of corporate governance of the SOE. Sub-paragraphs 5.1.1.1 to 5.1.1.3 of the Protocol were undermined.[180]

This power is exclusive to the governing body, the board of directors. Reserving powers outside her purview would undermine the board's independence and integrity, which is not in accord with good corporate governance. Some Ministers think that the rights embodied in the MOI are theirs to do as they wish, disregarding good corporate governance. The court decided that the Minister could not reserve such powers for herself. Unfortunately, some Ministers believe that the power to amend the MOI as shareholder representative is carte blanche in disregarding good corporate governance. That is impermissible. The Minister was the direct cause of the wheels coming off the SOE.[181]

2.4.1. Qualification and eligibility for appointment as directors

The Companies Act compliments the PFMA by legislating directors' legibility, ineligibility and disqualification. Persons ineligible to be directors are those disqualified by the court or found to be delinquent in terms of section 162 or 47 of the Companies Act.[182] Unrehabilitated insolvents are prohibited to be directors due to public regulation; or having been removed from the position of trust on the basis of misconduct.[183] Likewise, a person is disqualified if such as a person has been convicted of a crime in the court of law or elsewhere without an option of a fine for perjury, fraud, forgery, dishonesty, misrepresentation under the Insolvency Act of

[178] *SOS Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation SOC Limited* 2017 ZAGPJHC 289. Para 127.
[179] Ibid.
[180] Department of Public Enterprises op cit note 82.
[181] Supra note 178.
[182] Section 69(8)(a).
[183] Section 69(8)(b)(i)-(iii) ‘

1936. In some instances, shareholders appointed persons ineligible for directorship to the boards of directors of SOEs. The rationale for doing so remains a mystery. For example, Mdwaba was appointed the chairperson of the University of the Western Cape (UWC) after he was declared a delinquent director.[184] He was subsequently removed from the Chairperson of UWC per court order because he was an unrehabilitated delinquent.[185] The irrationality of the shareholder representative decision and the Cabinet to which the appointment was referred for endorsement are inexplicable. This was a blatant disregard of good corporate governance by the minister and the cabinet. Mdwaba resurfaced as the chairperson of Productivity South Africa, an SOE, in 2015, until he was removed by Minister Nxesi as the chairperson in September 2023, shareholder representatives of SOEs.[186] Ineligible and disqualified persons cannot be appointed to the board of directors of the SOEs. Ineligibility could arise from the following circumstances – declared a delinquent director, a person placed under probation by the court, an unemancipated minor, does not qualify based on the MOI, unrehabilitated insolvent, removed from a position of trust, convicted in South Africa or elsewhere for either fraud or forgery or perjury or theft without an option of a fine.[187] If the board or shareholder wishes to remove a board member from his/her position, a 30-day and 30-day written notice is required in terms of section 71, and the audi alteram partem rule applies.

Unfilled vacancies on the board can adversely affect the capacity of the board of an SOE to function effectively.[188] This could lead to a shortage of persons to appoint to board committees. However, nothing precludes the appointment of non-board members on the strength of their expertise in board committees.[189] Nevertheless, non-members of an SOE board of directors may be appointed to a board committee if they are not disqualified and ineligible for appointment as directors in terms of section 69. Furthermore, the Companies Act provides

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[184] *Brian Patrick Williams and Another v University of the Western Cape and Others* 24357/2015
[185] *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd, Telkom SA SOC Ltd and Another v Blue Lable Telcoms and others* (2013) 4 All SA 346 (JNP) and *Msimang N.O and Another v Katiliiba and Others* 2013 (1) All SA 580 GSJ.
[186] Times Live 'Anneline Chetty appointed acting Chair of Productivity SA after Mdwaba's ousting' *Times Live* 06 October 2023 available at *https://www.timeslive.co.za/news/south-africa/2023-10-06-anneline-chetty-appointed-acting-chair-of-productivity-sa-after-mdwabas-ousting/#google_vignette* accessed on 21 February 2024.
[186] Section 69(8)(iv).
[187] Section 69(8)(iv).
[188] King Code IV Principle 7. Unfilled vacancies affect the composition of the board and its ability to have an appropriate balance of skills, experience and diversity.
[189] Section 72(2(a)

for removing directors from office, whether by the board of directors or by the shareholders.[190] These provisos have come in handy when shareholders' representatives needed the mechanism to dismiss the whole board or some directors. For example, in *Steenkamp and Another v The Central Energy Fund SOC Limited and Others*,[191] the board of directors of the Central Energy Fund (CEF) as the shareholders' representative of the CEF successfully removed the board of PetroSA. The CEF relied on section 71(1) and (2)[192] to address the parlous financial and corporate governance state.[193] The Companies Act also fills the gap concerning eligibility, disqualification, appointment and removal of a director.

The fiduciary duties embodied in section 76 augment the general duties of directors embodied in the PFMA in prohibiting conduct that will benefit the director at the company's expense.[194] It is mandatory for directors to always exercise and perform their functions in good faith, for a proper purpose in the company's best interests, with the degree of care, skill and diligence that such a person can expect.[195] It is incumbent on directors to avoid any conflict of interest. Should any arise, it must be declared immediately, and the interested director must be recused from participating in decision-making in which he or she has a personal interest.[196]

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[190] Section 71(1) read with 71(2). Section 71(1) 'Despite anything to the contrary in a company's Memorandum of Incorporation or rules, or any agreements between the company and a director, or between any shareholders and a director, a director may be removed by an ordinary resolution adopted at a shareholders' meeting by the persons entitled to exercise voting rights in an election of that director, subject to subsection (2).' Section 71(2) 'Before the shareholders of a company may consider a resolution contemplated in subsection (1)–(a) the director concerned must be given notice of the meeting and the resolution, at least equivalent to that which a shareholder is entitled to receive, irrespective of whether or not the director is a shareholder of the company; and (b) the director must be afforded a reasonable opportunity to make a presentation, in person or through a representative, to the meeting, before the resolution is put to a vote.'

[191] Supra note 178.

[192] Ibid at 317.

[193] Ibid at 320.

[194] Section 76(2)(a).

[195] Section 76(3)(a)-(c). 'Subject to subsections (4) and (5), a director of a company, when acting in that capacity, must exercise the powers and perform the function of a director–(a) in good faith and for a proper purpose; (b) in the best interests of the company; and (iii) 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.'

[196] Section 76(4) ' In respect of any particular matter arising in the exercise of the powers or the 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

2.4.2. Liability of directors and indemnity

The liability of directors extends to appointed officers and board committee members, irrespective of whether they are members of the company's board.[197] The same holds for liability under common law. However, the director must have breached his fiduciary duty as a board director.[198] The indemnity of directors is conditional upon them not contravening sections 75, 76 and 77 or countermanding legal consequences that follow a commission or omission which comprises an intentional breach of trust.[199] Directors may be indemnified by the company acquiring an indemnity insurance where any liability is allowed in and protected by the Memorandum of Incorporation (the MOI) for legitimate services to the company and for a lawful purpose.[200] McGregor maintains that, notwithstanding South Africa's SOCs and SOE's progress since 1994, the requisite capacity in SOCs and SOEs has not reached the required level, and many directors are overstretched.[201] If applied consistently and effectively, the above principles are an antidote to corruption and are intricately interwoven with good corporate governance in SOEs. Reliance on cadre deployment is the breeding ground for corruption unless such cadres are skilled, have experience, integrity, and are qualified. In *Democratic Alliance v African National Congress and Others* (31418/2022) [2024] ZAGPPHC

(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 interest 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 authority or duty to perform one or more of the board's functions that are delegable under applicable law; and (ii) 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.'

[197] Ibid.

[198] Section 77(1)(a)(b) 'In this section, 'director' includes an alternate director, and–(a) a prescribed officer; or (b) a person who is a member of a committee of a board of a company, or of the audit committee of a company, irrespective of whether or not the person is also a member of the company's board.'

[199] Section 78(2) 'Subject to subsections (4) to (6), any provision of an agreement, the Memorandum of Incorporation or rules of a company, or a resolution adopted by a company, whether express of implied, is void to the extent that it directly or indirectly purports to–(a) relieve a director of –(i) a duty contemplated in section 75 or 76; or (ii) liability contemplated in section 77; or (b) negate, limit or restrict any legal; consequences arising from an act or omission that constitutes wilful; misconduct or wilful breach of trust on the part of the director.'

[200] Section 78(2) 'Subject to subsection (4) and (6), any provision of an agreement, the Memorandum of Incorporation or rules of a company, or a resolution adopted by a company, whether express or implied, is void to the extent that it directly or indirectly purports to–(a) relieve a director of–(i) a duty contemplated in section 75 or 76; or (ii) liability contemplated in section 77; or (b) negate, limit or restrict any legal consequences arising from an act or omission that constituted wilful misconduct or wilful breach of trust on the part of the director.' Reference to director in this section encompasses a former director or alternate director, appointed officer as well as persons serving on committees of the board even though they are not members of that board. In other words, a person appointed for their expertise to the committee and who are not necessarily directors of the company.

[201] Lynn McGregor 'Improving Corporate Governance of South African State-Owned Companies (SOCs)' 2014 *CC Convivium* 10.

114 the full bench of the Gauteng High Court Provincial Division, Pretoria dismissed the DA's application to declare cadre deployment unconstitutional on 21 February 2024. The jury is still out because the DA expressed its intention to approach the Constitutional Court. Naidoo argues that the accomplishment of SOEs is contingent on the capabilities and achievements of the boards of directors, and their appointment must be premised on their competencies and suitability.[202] This the researcher agrees with. Naidoo argues that-

> 'Unlike companies in the private sector, where shareholders can sell their shares if they are not happy with the quality of a company's governance, the real shareholders of state-owned entities, the South African public, don't have that luxury. Given their more onerous burden, it is proper and expected of the governors of state-owned entities that they will aspire to greater standards of transparency, accountability and integrity than their private sector counterparts.'[203]

The other distinguishing factor between private companies and SOEs is that in the former directors are not criminally liable for failing to fulfil their director's fiduciary duties embodied in sections 76 and 75 for not declaring their interest under the Companies Act. However, they are liable for loss, damages and costs sustained in terms of 77. Whereas SOEs and SOC are criminally liable for wilful conduct, negligence and gross negligence in section 86 of the PFMA. This indicates that the NDPP should function as proscribed by the law. However, the prosecution of transgressors cannot be initiated by the NDPP before the transgressions are reported to the police by the board of directors or the shareholder. The government has been tardy in referring severe crimes to the Special Investigating Unit, established under the Special Investigating Unit Acts and Special Tribunal Act 74 of 1996 (SIU Act). The President must publish a Proclamation to kickstart the SIU investigations. Some boards of directors do not report criminal action to the police, contrary to principle 13 of King IV.

2.4.3. Corporate Governance Surveillance and Enforcement and its Role

The CGSE is a new unit within the Commissioner for Intellectual Property and Companies (CIPC), which was not existent in the repealed Companies Act of 1973. The CGSE is mandated to monitor the proper observance of the Companies Act and issue notices for non-conformity to the function as provided by section 187. The CGSE is a compliance unit within the CIPC.

[202] Naidoo op cit note 65.
[203] Ibid.

The CGSE is commanded to exercise its duties in the most cost-efficient and effective manner,[204] and its actions must accord with the values and principles of section 195 of the Constitution.[205] The CGSE registered its first major success by sanctioning Sipho Maseko, the former Chief Executive Officer of Telkom, an SOE, for availing a loan of $ 538,000 to Jacques Schindehutte without the board of directors' resolution.[206] Maseko was instructed to attend 'a corporate governance and a director's duties course.'[207] Maseko failed to follow a recommended corporate governance course attached to an R1 million penalty or referral to prosecution.[208] If section 187(2)(b) is used to its maximum, it can alter how the management of companies conducts themselves.

The kinds of complaints under the jurisdiction of the GSCE are–(a) failure to prepare and submit financial statements; (b) not holding annual general meetings; (c) not establishing a social and ethics committee; (d) trading whilst insolvent, and financially distressed; (e) oppressing minority shareholders; (f) disregard of the Companies Act by directors; (g) allegation of fraudulent or unlawful removal of directors and shareholder's interest; (h) refusal to amend the CIPC documents when directors have resigned; (i) refusal of providing information to shareholders, directors and journalists; (j) and failure by the Home Owners Association to comply with the Memorandum of Incorporation and the 2008 Act.[209] The CGSE have the power to investigate or refer the complaint to the Investigative Unit or the Companies Tribunal or an Accredited Agency or other recognised regulatory authority to do so.

Furthermore, the CGSE could direct the inspectors or investigators to investigate.[210] Failure by any company requested to provide information may be subjected to a search and seizure warrant.[211] This procedure was, for instance, used by the CGSE in the past against

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[204] Section 185(2)(d)(i) 'The Commission–must exercise the function assigned to it in terms of this Act or any other law, or by the Minister, in–(i) the most cost-effective and effective manner;'
[205] Section 185(2)(d)(ii) 'The Commission–must exercise the function assigned to it in terms of this Act or any other law, or by the Minister, in– accordance with the values and principles mentioned in section 195 of the Constitution.'
[206] Staff Writer 'Public reprimand for Telkom: report' *BusinessTech* 14 April 2014 available at *https://businesstech.co.za/news/telecommunications/55689/public-reprimand-for-telkom-ceo-report/* accessed on 21 February 2024; Chris Spillane 'Telkom boss ordered to attend corporate governance courses' *Mail & Guardian* 14 April 2014 available at *https://mg.co.za/article/2014-04-14-telkom-boss-ordered-to-attend-corporate-governance-course/* accessed on 21 February 2024. Telkom is a SOEs listed on the Johannesburg Stock Exchange. At the time of the sanction Telkom was listed on the New York Stock Exchange.
[207] Ibid.
[208] Ibid.
[209] OECD (2013) *Corporate Governance and Surveillance Enforcement* 1-14.
[210] Ibid.
[211] Ibid.

Radovan Krejicr's company when the company resisted the request to provide the required information.[212]

2.5. Public Audit Act 25 of 2004 as amended

The office of the Auditor General is provided for in section 188 of the Constitution. The Auditor General is enjoined to audit all government departments, state organs and SOEs, including the local government and municipalities. Although the PAA does not regulate SOEs in the same manner as the Companies Act and the PFMA, it does so retrospectively. The Auditor General picks up non-compliance during the audit. Audits are undertaken at the event. However, the Auditor General, during audits prepares management letters which encapsulate all lapses and instructs the board of directors and the executive managers on which areas of governance were ignored. This non-compliance must be attended to, and an explanation must be provided. The audit identifies problem areas where the auditee failed to comply with the requirements of and perform his/her duties in line with the PAA. The office of the Auditor General can acquire the service of independent auditors in the private sector to fulfil its mandate.

The PAA was amended by the PAAA, which commenced on 1st April 2019. The PAAA empowers the Auditor General's office to request the management to investigate irregularities where there were audit findings which compromised the financial position of the auditee.[213] After the investigations the Auditor General's office must calculate the amount payable. Instruct the accounting officer or the board of directors to take the necessary steps to recoup monetary losses that constitute unauthorised expenditure, irregular expenditure, and wasteful and fruitless expenditure. These losses are recouped from the offender who caused the losses, whether the board executive managers or officials' shareholders. The Auditor General must issue a certificate of debt, which represents the amount owing.[214] Should the manager fail to recoup the amount due, he or she will be liable.[215] Furthermore, the Auditor General may open a criminal case against someone unable to reimburse the auditee.

The new powers the Auditor General has are the much-needed ammunition to conduct make auditees such as SOEs, institutions, government departments state organs and others to comply

[212] Ibid.
[213] Section 5(A)(3) of the Amended PAA.
[214] Section 5(B)
[215] Ibid.

with good corporate governance. This authority the office of the Auditor General wields could be a deterrent to the boards of directors, executive managers, the ministers to comply. The Auditor General or his delegated officials sit in audit committees of SOEs. Depending on the quality of work generated by the Internal Audit of an SOE and the level of the engagement with the Audit Committee, the Auditor General could rely on the Internal Audit's reports during the audit of the auditee. It is the researcher's well-considered view that when and where systems are in place, robust and applied good corporate governance could prevent corruption.

The Auditor General must act in the interest of South Africa's economy and the people. The PAA gives the Auditor General power to bring criminal actions against auditee officials. The Auditor General is also enjoined to instruct the board of the auditee and executive management to recoup money wasted or stolen due to non-compliance with good corporate governance. The Auditor General lamented in November 2022 that the delays in the SAPS, Hawks, SIU, State Attorney, and the Competition Commission investigating and bringing to book transgressors of good corporate governance embodied in the PAA are not good.[216] Over R12 billion was lost in the 2021/2022 fiscal year. This kind of money could not have been lost inadvertently. The losses were deliberately motivated by corruption. Irregular expenditure and fruitless and wasteful expenditure do not happen by mistake. They are grounded in procurement, which is one of the weakest areas of spending in SOEs, state organs and government departments. Procurement policies and procedures are fragmented due to section 2(1) of the PPPFA.

The delay institutions entrusted with the investigations of transgression by Auditees constrains the office of the Auditor General to effectuate its findings. The delays affect the effectiveness of the Auditor General. Transgressors of the corporate governance in the legal framework with criminal implications are not deterred to disregard good corporate governance. The government should invest more on qualified investigating task forces in these institutions to empower the Auditor General. Furthermore, the President must act with speed when Proclamation applications are referred to him to authorise the SIU to investigate. The Competition Commission, SAPS, and Hawks do not need proclamations to investigate the rot. The Auditor General must also issue certificates of debt and liquidate or sequestrate the

[216] Haniff Hoosen 'The Auditor General's new power 'dead on arrival' due to non-conclusion of investigations' *Politics Web* 22 November 2022 available at *https://www.politicsweb.co.za/politics/auditor-generals-new-powers-dead-on-arrival--hanif* accessed on 21 February 2024.

offenders to recoup the money owing to the SOEs, state organs, and departments. Disciplinary processes must be executed quickly with precision without compromising rogue employees' constitutional rights.

The Pensions or Provident Funds of offenders must be forfeited to the affected SOEs. If the Auditor General does not make examples of some transgressors of the PFMA, the infractions will continue with impunity. Good corporate governance will be the beneficiary should the Auditor General be decisive and unmerciful. Treasury must also not take long to blacklist offenders. The message will be loud and clear and will most probably auger well for good corporate governance.

2.6. King IV

The King Report on Corporate Governance came into force in 1994 and was revised and updated in 2002, 2009 and 2016 - King II, King III and King IV, respectively. As such, King IV is the corporate governance instruments that National Treasury directed SOEs, the state organs, and government departments (provincial and local) to adhere to. Although the King Codes were initially meant for the private sector the private sector companies are not obliged to comply therewith unless listed with the Johannesburg Stock Exchange. King IV is amongst the best international corporate governance practice according to Magang and Magang.[217]

Kossov states that the effectiveness and success of good corporate governance are contingent upon it being implemented.[218] Adherence to the seventeen principles of King IV is the key to the success of SOEs. The boards of directors must not theorise about these principles but must implement them diligently. These principles give SOEs the necessary impetus. Thus, legislation was enacted, and policies were developed and adopted to pursue corporate governance.[219]

2.7. The Protocol on Corporate Governance in the Public Sector

[217] Tebogo Israel Magang and Veronica Goitsemang Magang 'Corporate Governance and Compliance in Botswana: Issues and Challenges' (2016) 7 *JRBEM* 1041- 1061.

[218] Héctor Lehuedé and Anastasia Kossov 'Corporate Governance of Russia's State-Owned Enterprises' 2014 *SSRN*.

[219] Post the King Report on Corporate Governance of 1994, government embraced and incorporated principles of the King Code II into King Code IV. These Codes are enforceable where they complement legislation and policies. In addition, the Companies Act 71 of 2008 was passed and came into law in 2011, the PFMA, Protocol on Corporate Governance in the Public Sector (2002).

The Protocol was developed by the Department of Public Enterprises for SOEs and published in 2002. The government adopted the Protocol with the view to implement corporate governance in SOEs. Electricity, telecommunications and transportation dominated SOEs in the early twenty-first century.[220] The Department of Public Enterprise posits that without adequate resources, tourism, information technology, and manufacturing sectors would not operate optimally.[221] The government has a personal stake in SOEs and their performance.

As outlined in the Protocol, the government representatives for State-Owned Enterprises (SOEs) consist of the Minister of the relevant department under which the SOE operates and the Minister of Finance. The common theme across the Companies Act, the PFM, the PAA, the common law, King Codes, and the Protocol is that the board of directors governs SOEs. In paragraphs 5.1.1.1 to 5.1.1.13 the board of directors of SOEs briefly – i) have total responsibility for SOEs; ii) must retain complete and productive control of SOEs; iii) SOEs must comply with all the applicable laws; iv) develop effective control; v) take charge of corporate strategy; vi) achieve the shareholder's objectives; vii) conflict of interest must be managed and maintained; viii) apply delegation of authority; ix) attend general meetings; x) prepare and submit annual financial statements; xi) assess the performance of the chairman; xii) induct directors; and xiii) keep the highest standard of integrity and accountability and conform to corporate governance principles and the SOE performance.

Twenty-two years after the implementation of the Protocol, it remains intriguing that the boards of State-Owned Enterprises (SOEs) refrain from internally electing their chairperson. Instead, the prerogative lies with the Minister to designate the individual who will assume the chair of the board of directors. The non-executive directors can delegate their power for the daily management of the SOEs to the executive managers. Audit Committee, remunerations committee, and nominations committee, but the nominations committee intended to nominate directors, which has not come to fruition. The Minister still appoints directors' sans the input of the nominations committee. Finally, the PFMA, which was extensively discussed in sub-paragraph 2.3 is adopted in the Protocol.

[220] Director of Public Entities op cit note 82.
[221] Ibid.

2.8. Conclusion

Although the legislative and regulatory framework is allegedly fragmented and is blamed for SOEs not complying with good corporate governance, the researcher maintains the view that the real cause for bad corporate governance stems from human behaviour and or conduct. The government is burdened with a big bill to bail out nonperforming SOEs. The financial constraints on the government consequent failure of good corporate governance in SOEs is an indictment on the shareholders, boards of directors, executive managers, the private sector and the government for having adopted corporate governance and failing to execute it. Consideration of the context is important. Imperfect legislation is not an excuse for executive authorities, boards of directors, executive directors, and employees to disregard good corporate governance under the pretext that fragmented laws are solely to blame for corruption in SOEs. Interpretation of any statute is dependent on the interpreter's approach and objective. Historically, confusion was feigned in SOE procurement units to realise ill-gotten gains at the expense of South African taxpayers by the private sector conspiring with management, boards, and shareholders.

CHAPTER THREE

GOOD CORPORATE GOVERNANCE MEASURES ADOPTED BY BOTSWANA, NAMIBIA AND SOUTH AFRICA

3. Introduction

Like other emerging economies, South Africa uses SOEs to deliver affordable services to its populace. The history of South Africa leaves the government no option but to be deliberate about providing services to all to alleviate poverty and grow its economy without compromising good corporate governance. In this chapter, a comparison of Botswana, Namibia, and South Africa's approach to good corporate governance in SOEs is undertaken. Botswana and Namibia also use SOEs for the same reasons South Africa, does. SOEs played and continue to play a crucial part in their economy. Their SOEs have a considerable influence on productivity and competitiveness. Furthermore, they are considered instruments for economic development. Non-compliance with good corporate governance in SOEs has financial implications that are too dire to contemplate.

The comparison of promising corporate governance approaches by Botswana, Namibia and South Africa (the trio) of their SOEs is preferred because they have similar challenges. Furthermore, they are members of the Southern African Development Community (SADC) and the Southern African Customs Union (SACU). In SADC, they share the same objectives: to achieve economic development, peace and security, growth, alleviate poverty, enhance the standard and quality of life of their people, and support the socially disadvantaged through Regional Integration.[222] SACU members came together to i) amalgamate the members into an international economy by increasing trade, ii) share revenue generated from customs with ease somewhat, and additional duties levied by Member States, and iii) develop standard policies and strategies.[223] They also promote conditions for fair competition in the Customs area, enhance the Members' economic development and promote Member States' integration into the global economy through trade and investment initiatives.[224] Against this background, the

[222] Southern African Development Community 'SADC Objectives' available at *https://www.sadc.int/pages/sadc-objectives* accessed on11 February 2024.
[223] Southern African Customs Union '2002 Southern African Customs Union (SACU) Agreement' available at *https://www.sacu.int/* accessed on 11 February 2024.
[224] Ibid.

approach of the trio to good corporate governance is discussed individually under the following headings: i) the basis of good corporate governance in SOEs; ii) the state of good corporate governance in SOEs; iii) the implementation of anti-corruption instruments in SOEs; iv) the penalties for corruption and other corruption fighting legislation; and v) the ranking of the list of corrupt countries in Africa and the world.

Historically, the trio did not have corporate governance in place. They all rely on SOEs and or parastatals to deliver the much-needed services to their people. All three subscribe to sound corporate governance principles in line with international best corporate governance practices, but the nature of the parastatals and SOEs mandate requires them to temper it. For example, they are expected to provide services to their people at a reasonable price and invest in infrastructure that the private sector would not venture into, even if they cannot make profits.

Botswana and Namibia employ the terms "parastatals" and "state-owned enterprises" interchangeably. In this research, for convenience and consistency, the abbreviation "SOE" and its plural form "SOEs" are used.

3.1. Botswana

Botswana became independent in 1966, 80 years after becoming a British Protectorate. At independence, Botswana had two SOEs, the Commonwealth Development Corporation (CDC) motivated by the Bechuanaland Protectorate Abattoir Limited (BPAL) and the National Development Bank (NDB) created in 1954 and 1963, respectively.[225] Botswana's SOEs grew from 2 to 62.[226] The government completely finances 42 parastatals and 20 are revenue generating SOEs. Of the 20 SOEs, 16 are non-financial, and 4 are financial corporations.[227] Botswana's government holds 76% of the Botswana Stock Exchange, 51% of Botswana Telecommunications Corporation and is in a joint venture in which it holds 14%, named Banyana Ltd.[228] The IMF report from August 2023 indicates that Botswana's financial exposure surpasses that of other emerging markets to a significant extent.[229] In 2021, SOEs accounted for 5% of formal jobs in the country.[230] The assets of SOEs in 2021 constituted 32%

[225] R Mukandala 'Small Is Not Always Beautiful: The State Public Sector in Botswana' (1992) 19 *African Review: Journal of Politica, Development and International Relations*.
[226] IMF 'Botswana: Selected Issues' 31 August (2023) 318 *IMF eLibrary*
[227] Ibid.
[228] Ibid.
[229] Ibid.
[230] Ibid.

of the gross domestic product (GDP) of Botswana.[231] 14% of the total assets represented the financial sector, which consisted of BDC, National Development Bank (NDB), Botswana Stock Exchange (BSE), and the Botswana Building Society (BSB). Financial services SOEs of Botswana participate in retail banking and development finance.[232] The board of directors (the board) is responsible for the corporate governance of SOEs.

Magang and Magang are of the view that SOE boards cannot execute their oversight efficaciously.[233] They are constrained by laws that incorporate SOEs. The Minister of the department in which the SOE resides through the incorporating laws determines who appoints the board chair, CEO, and CFO. These appointments are made mainly by the officials working in the department the Minister oversees. The Minister also appoints other directors to the board of an SOE. This compromises the independence of the board. Good corporate governance is negated because the board does not effectively control the CEO. It cannot dismiss the CEO. The appointment and dismissal contradict the Botswana Code of Corporate Governance (the BCCG). Notably, the Institute of Directors Botswana (IOD Botswana), as articulated in the Practice Note to the Botswana Code of Corporate Governance (BCCG), contends that in instances of conflict between the founding laws of SOEs and the Organization of Economic Cooperation and Development Principles of Corporate Governance of 2004 revised in 2015 (OECD 2015), precedence is accorded to the latter.

The researcher submits that theoretically, the OECD 2015 apply, but practically that cannot be the case. Ministers are obligated to comply with the statute until it is repealed and or amended. The rule of law must be adhered to. Policy considerations cannot amend the law without Parliament. This is the correct approach until the statute is amended. How an SOE is managed determines its prospects of success. If bad corporate governance continues unchecked, SOEs' performance will deteriorate, they will continue to fail, the cost to taxpayers will go up and the economy of the country will be the loser.

[231] Ibid.
[232] Ibid.
[233] Magang & Magang op cit note 217 at 1041- 1061.

3.1.1. The basis of corporate governance in state-owned enterprises

Generally, the corporate governance of Botswana is based on international and regional best corporate governance practices such as the King Reports,[234] UK Combined Code of 2003,[235] the OECD 2015,[236] the Commonwealth Association of Corporate Governance of 1999 (CACG).[237] It was mentioned in the preceding paragraphs that BCCG was adopted in 2013.[238] It was applicable to the private sector companies.[239] SOEs were exempted from the tenets of the BCCG unless incorporated in terms of the Companies Act 32 of 2004 as amended (Botswana's Companies Act).[240] Post the BCCG coming into operation it was extended to SOEs. The IOD Botswana released a Practice Note, which required SOEs to comply with the BCCG.[241] Where the BCCG and the OECD Principles are contradictory the latter takes precedence.[242] These four instruments place the board of directors at the centre of corporate governance.

The board of directors is obligated to adopt and put in place corporate governance. Furthermore, it manages the SOE on behalf of the shareholder through delegated authority to executive managers for its day-to-day management. The delegated authority can be terminated at any time by the board if the executive manager is not delivering in terms of their mandate. The Botswana Stock Exchange (BSE) created its own corporate governance code, Botswana Stock Exchange Best Practices On Corporate Governance (the BSE's Best Practice), distinct from the BCCG. Companies listed on the BSE follow the BSE Best Practice which is based on King III. Companies listed on the BSE follow the apply or explain the rule.

3.1.2. The structure of the state of corporate governance in Botswana

Botswana's corporate governance structure for SOEs is, to a limited extent, based on the international best corporate governance practice instruments. SOEs are incorporated and

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[234] King I of 1994, King II of 2002.
[235] UK Combined Code of 2003.
[236] Ibid at 30-31
[237] Ibid.
[238] Jairos Josias et al 'Corporate Governance in Botswana: Exploring Development and Compliance' (2016) 9 *Botswana Journal of Business* 1-20.
[239]B Motshegwa et al op cit note 53 at 29-38; Tebogo Israel Magang and Koketso Bafana Kube 'Compliance with Best Governance Principles by State Owned Enterprises in Botswana' (2018) 13 *International Journal of Business and Management* 149-166.
[240] Companies Amendment Act of 2022 effective February 2022.
[241] The Practice Code conclude that the Botswana SOEs are in tandem with the governance framework of the state-owned enterprises jurisdiction in the world.
[242] Ibid.

regulated in terms of the respective Acts of Parliament under which they fall.[243] The enabling legislation deals with the appointment of - the chief executive officer (CEO), the chairperson of the board of directors, and the board of directors by the Minister in charge of the portfolio.[244] The board of directors primarily comprises senior government officials selected from the department which established an SOE. In addition, the appointees to this board include persons from the public, but the criteria are unclear.[245] The criteria used to appoint the board do not accord with international best corporate governance practices because qualifications, experience, integrity and skill are not required. The Minister can nominate whomever they want on the board. The board of directors is answerable to the Minister in charge of that portfolio.[246]

Following Chapter III of the Botswana Code of Corporate Governance (BCCG), the responsibility for governing State-Owned Enterprises (SOEs) rests with the board, particularly in managing risks. The board must appoint a proficient and efficient Board Audit Committee and, when deemed essential, a Board Risk Committee. The capacity to establish a qualified Board does not happen because of the quality of board appointments by the Minister. However, the board is expected to be intellectually honest when making appointments.[247] This is impossible to realise when the board does not appoint the board members. It is not in control of the quality of appointments the Minister make. Therefore, the requirements of the BCCG are unrealisable. Chapter 2 Internal auditor requires the board to appoint an audit executive to head the internal audit. This depends on the capacity, qualification and officials appointed from the Minister's department. When the CEO does not perform as expected, it would be difficult for the board to dismiss the CEO. The CEO is appointed by the Minister and not the board. This is disempowering to the board. The board may be intimidated by the proximity of the CEO to the Minister.

There is an incongruency between the Minister's power and the board's responsibility. The CEO owes allegiance to the Minister and can defy or disregard the board's instruction. The board's independence is compromised by its composition, the quality of appointees, and the proximity of the CEO, chairperson, and government department employees. The politician has

[243] Companies Amendment Act op cit note 240.
[244] Ibid.
[245] King I and King II op cit note 234.
[246] Ibid.
[247] Botswana Code of Corporate Governance of 2013 Chapter I.

a grip over it. The researcher agrees with Magang and Magang that directors' capacity to exercise independence when they discharge their duty to SOEs is severely constrained. The Acts of Parliament that establish SOEs do not give boards of directors the necessary power they should have in compliance with the international best corporate governance practice. Although SOEs are expected to comply with the principles embodied in the BCCG based on King III, that does not happen.

Malema laments that because of politicians' control over the appointment of boards of directors of Botswana, SOEs fail to meet accepted international standards.[248] Accountability, independence, integrity, responsibility, and transparency were compromised. The proximity of the board chair and the chief executive officer to the Minister can potentially emasculate other board members. The confidence of these officials in their support from the politician, whether perceived or actual, makes them susceptible to corruption[249] and compromises their independence.

The King III regulates directors' appointment, remuneration, reports, internal and external audits, risk management, leadership, management, IT governance, sustainability, leadership ethics, liability of non-executive directors, stakeholders' relationships and disclosure of governance relationships.[250] However, this is not mirrored in managing SOEs regulated by the enabling act. CACG and the OECD 2015 share similar sentiments.
Nevertheless, they are cognisant that one size does not fit all. The OECD is resolute that the same governance codes must govern the public sector SOEs and private sector companies.[251]

Magang and Magang expressed scepticism regarding the Botswana Unified Revenue Services Act of 2004 (BURS) compliance with international best governance practices. They contended that BURS, enacted after the release of King Code II, should have embraced the principles advocated by this Code. They suggest that the legislature could have been deliberate and sent a message that good corporate governance is intrinsic to and underpins the management of SOEs. To Magang and Magang these SOEs do not embrace best corporate practices. However, BURS is not representative of all SOEs. Magang and Magang blame the

[248] Professor Malema 'Botswana's corporate governance standards below international standards' *Sunday Standard* 24 April 2023 available at https://www.sundaystandard.info/botswanas-corporate-governance-standards-below-international-standards/ accessed on 23 February 2024.
[249] Ibid; OECD (2015) *Corporate Governance and Business Integrity: Stocktaking of Anti-Corruption and Business Integrity Mergers for Southern Africa for SOEs*.
[250] Ibid.
[251] OECD (2015) *OECD Guidelines on Corporate Governance of State-Owned Enterprise*

legislative framework incorporating parastatals for not including sound corporate governance principles.[252] They wondered if the legislature slipped or was deliberately upholding poor governance practices. The researcher submits that if the statutes establishing SOEs do not address governance issues, these entities are confined to what the law provides.

Magang and Kube considered Botswana's corporate governance performance level. Their base period was four years, from 2009 to 2012.[253] Magang and Kube investigated SOE compliance with corporate governance. Their research demonstrated that although there were challenges with compliance with good corporate governance, 51% of SOEs complied with corporate governance. The base period was three years, from 2009 to 2012.[254] They concluded that 68.7% scored 51% for compliance with corporate governance. 31.3% scored less than 50% for compliance with the best international corporate governance practices. This augured well for Botswana.

Poor corporate governance manifests itself in the failure record of Botswana SOEs. The blame is placed on different governance rules embodied in the enabling legislation applicable to the SOEs. However, that cannot be the sole cause of the problem. Some authors lament that SOEs are not the law. Others have insufficient funds. Human factors cannot be discounted. Magang and Magang posit that the capacity of boards of SOEs and parastatals to perform their supervisory duties is severely constrained. Motshegwa et al share the same view.[255] They suggest that independence, transparency, accountability and responsibility are compromised. They lament "cronyism in management of SOEs, weak monitoring systems, prevalent in many SOEs payment of facilitation fees, [bribes] and external influence by politicians prevalent in many SOEs in the African continent. " However, they did not highlight the private sector's contribution (local and international) in bribery and corruption." [256]

There will always be someone who initiates bribery or corruption. Bribery and corruption are international malaises that are anti-good corporate governance, whether in the private or public sectors. Kiggundu and Havenga assert that private-sector corporate misconduct manifests in the enrichment of the board of directors at the company's expense, for example, golden handshakes, golden parachutes, golden halos, insider trading, directors' loans

[252] King I and King II op cit note 234. Its total conformity index demonstrates 15.9%.
[253] Companies Amendment Act op cit note 240.
[254] King I and King II op cit note 234.
[255] Companies Amendment Act op cit note 240.
[256] Ibid.

or to their connected people, property transactions, resignation pay-out, share options, and doubtful pension schemes.[257]

Politicians are not the only corruptors. They should not be allowed to employ their subjective view when appointing directors for SOEs. This would be realisable only if the enabling legislation is amended and replaced with the universal law for SOEs. The researcher contends that robust competition is required when candidates are considered for appointment to directorships in SOEs. Candidature must be advertised for competitors to be nominated. Only candidates with qualifications, experience, integrity (no previous criminal record or disqualification from the position for non-performance), and fit and proper should be nominated. A politically connected appointment should disclose their relationship, whether professional or otherwise. Finally, the board of directors must develop, together with management, a corporate governance policy in line with international best practices on good corporate governance in the interest of parastatals and the SOEs. The executive managers must implement the policy accordingly.

3.1.3. Anti-Corruption instruments

Poor corporate governance gives rise to bribery, corruption, money laundering, and contraventions of the Public Procurement and Assets Disposal Act 10 of 2001.[258] The overarching corruption legislation is the Corruption and Economic Crimes Act of 1994 as amended (CECA). Part IV of CECA addresses crimes. Section 24 of CECA prohibits public officials from offering or accepting gifts or payment to do their work. 24(2) criminalises an offer if the public officer accepts it or solicits a gift or money or property as payments constitutes corruption of an official.

It, however, needs the support found in the Extradition Act 18 of 1990 and the Mutual Assistance in Criminal Matters Act 20 of 1990. These acts aim to facilitate the extradition of corrupt nationals and foreign collaborators. Botswana SOEs do not have an excellent corporate governance code for their SOEs or parastatals. It can still sanction or punish corruptors, bribers and money launderers. However, the researcher submits that this is not the ideal way to address

[257] John Kiggundu and Michele Havenga 'The regulation of directors' self-serving conduct: perspectives from Botswana and South Africa' (2004) 37 *The Comparative and International Law Journal of Southern Africa* 272-293

[258] Gape Kaboyakgosi 'Chapter 3: Botswana' in OSISA *Effectiveness of Anti-Corruption Agencies in Southern Africa Angola, Botswana, DRC, Lesotho, Malawi, Mozambique, Namibia, South Africa, Swaziland, Zambia, Zimbabwe* 2017 *OSISA*; JM Kaunda 'The Progress of Good Governance in Botswana' 2008 *Africa Portal*.

good corporate governance. She favours prevention measures rather than sanctions post-non-compliance because SOEs would have lost money, and some may be irrecoverable. In most instances, the company or person who benefits from such criminal conduct could voluntarily sequestrate himself/herself or liquidate the company. In most instances, the recovered money would be insufficient to cover the losses of an SOE.

Despite declining good corporate governance and an increase in incidents of corruption, Botswana was number 3 in the least corrupt countries on the continent.[259] Financial Intelligence Act 2 of 2022 (FIA) and Public Service Act 30 of 2008 (PSA) are legal instruments relied on by Botswana to address anti-corruption. It also depends on the Directorate on Corruption and Economic Crime (DCEC) housed in the presidency. The DCEC's constrained resources, the perception that the independence of the judiciary is compromised due to specific appointments of judges,[260] and the outcomes of cases of elites involved in corruption do not auger well for Botswana. The Financial Intelligence Agency, the Auditor-General, the Director of Public Prosecution, the Ombudsman, the media, print, visual, and civil society suggest that all is not well in Botswana.[261]

Although Botswana neither signed nor ratified the African Union Convention Preventing and Combating Corruption (AUCPCC)[262], it nevertheless adopted some of its aims and objectives in its endeavour to curb corruption. Botswana also follows a multi-pronged approach through the DCEC, which recognises that its resources are limited. It deemed it necessary to collaborate with educators through the education department to include corruption issues in the syllabus.[263] This will make high and secondary school students aware of

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[259] Trading Economics 'Corruption Rank by Country: Africa' 31 January 2024 available at *www.tradingeconomics.com/country-list/corruption-rank?cpntinent=africa* accessed on 18 January 2024 A decline from 85.85% to 79.43% in 2003 and 2013 respectively.

[260] Michael Badham-Jones (November 2014) *Overview of Corruption and Anti-Corruption in Botswana* 1.Badham-Jones referred to the appointment of the Attorney General to the bench in Botswana. The fact that the former AG would preside over matters that his office investigated was questionable. See also D Sebudubudu 'The Evolving State of Corruption and Anti-Corruption Debates in Botswana: Issues in Good Governance' 2014 available at *http://anticorruption.eu/wp-content/uploads/2014/03/Botswana-Background*

[261] Ibid. Monageng Mogalakwe & Francis Nyamnjoh 'Botswana at 50: democratic deficit, elit corruption and poverty in the midst of plenty' (2017) 35 *Journal of Contemporary African* Studies 1-14 - According to Mogalakwe, the separation of powers is compromised by the power of the President to appoint the Director of the embodied in section 3(4) of the Corruption And Economic Crime Act No. 13 of 1994. The President is entitled to appoint the Director of the Directorate of Corruption and Economic Crime on terms and conditions that he deems fit. According to Mogalakwe this means that the Director owes allegiance to the President.

[262] African Union Convention Preventing and Combating Corruption.

[263] David Seth Jones 'Combating corruption in Botswana: lessons for policy makers' (2017) 6 *Asian Education and Development Studies* 213-226; Keynote Address by DCEC Director General Mrs Rose N Seretse 15 May 2015 BW Government Facebook.

corruption and its pitfalls. This is an appropriate strategy to make the youth appreciate corruption early on. This could prove to be an anti-corruption prevention mechanism. This strategy should not be underestimated and should be copied by other jurisdictions in the SADC region. Another crucial point is that Botswana established a special court to deal with corruption cases in Lobatse to facilitate expeditious prosecution of corruption matters.[264]

3.1.4. Penalties for corruption and other corruption legislation

Part IV, sections 23 to 38 of the CECA 29 of 2018, outlines corruption, bribery and economic conduct. Section 23(a) Any gift, benefit, loan, fee, reward or commission sounding in money, any valuable property or interest in property or of any description; (b) any office, position, employment or contract; (c) any payment, release of loan, discharge of an obligation or other liability whole or in part; (d) any other service, of favour or protection from disability, or apprehended, or disciplinary actions, or civil or criminal nature whether or already instituted; (e) exercise or forbearance from any right or power or exercise action or duty; and (f) any offer or undertaking whether conditional or unconditional of any valuable consideration within the meaning of the provisions of any of the preceding paragraphs.

Section 24 Corruption by or of a public officer; Section 25 Corruption in respect of official transaction; Section 26 Acceptance of a bribe by a public officer after doing an act; Section 27 Promise of a bribe to public officer after doing an act; Section 28 Corrupt transaction by or with agents; Section 29 Bribery for giving assistance in regards to contract; Section 30 Bribery for withdrawing a tender; Section 31 Conflict of interest; Section 32 Bribery about auction; Section 33 Cheating of public revenue; Section 34 Possession of unexplained property; Section35 certain matters not to constitute a defence; Section 36 penalty; Section 37 application for confiscation order; and Section 38 application of restraining order. The prosecution for these offences resides with the DPP. The sentence for infringement of these crimes is up to 10 years imprisonment or P500 000.00 or both.

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[264] Shapi Benjamin 'Corruption court completes two cases' *Daily News* 4 February 2015 available at *https://allafrica.com/stories/201502050592.html* accessed on 21 February 2024. Although the court had 21 cases of corruption, it completed only two cases. According to Justice Dibotelo, his court which had been existent for two years was faced with postponements by the prosecution and an acute shortage of prosecutors. The court was therefore not able to focus on prosecuting the type of cases strictly and expeditiously the court was established. The prosecutors were constantly inexplicable absent. This absenteeism of the prosecutors also hampered the court in its work.

The Directorate of Corruption and Economic Crimes (the DCEC), an agency established in terms of the CECA, was tasked to focus on corruption and economic crimes.[265] The DCEC was given comprehensive power, independence and support from the government. It is constituted of six divisions.[266] The investigations, legal service, anti-money laundering unit, public education, corruption prevention, and corporate services.[267] For instance, arrests, tracking down and freezing assets, searching and seizing, impounding travel documents, and referring the completed investigation to the Director of Public Prosecution.[268] It took over the investigation of these crimes from the Botswana Police Department.[269]

In its execution of its mandate, it took a multipronged approach. The DCEC promoted ethical conduct, established codes of good conduct, maintained good governance, transparency, advocated the rule of law and participated in corruption prevention.[270] Its strategy was investigation, prevention and public education.[271] The DCEC rolled out the prevention and education strategy in government departments and agencies. Its process included auditing procedures and structures which could assist in identifying circumstances that could result in corruption. It is evident from the approach of the DCEC that its motto and strategy was prevention. The DCEC emphasised prevention and advocated education about corruption. Consequently, corruption and its prevention are a priority. The government incorporated it into the curricula of schools and colleges. The civil servants were conscientised about corruption.

[265] Part II of the CECA sections 3 to 5.
[266] Republic of Botswana 'Directorate of Corruption and Economic Crime' *https://www.gov.bw/ministries/directorate-corruption-and-economic-crime#:~:text=The%20responsibility%20of%20the%20DCEC,of%20corruption%20and%20prevent%20corruption.&text=The%20Division%20investigates%20allegations%20of,crimes%20reported%20to%20the%20DCEC* accessed on 20 February 2024.
[267] Part III of the CECA section 6.
[268] Ibid. Sections Part IV section 7 to 17.
[269] Centre for Public Impact 'Fighting Corruption in Botswana' 2018 *https://www.centreforpublicimpact.org/case-study/fighting-corruption-botswana* accessed on 20 February 2024.
[270] Ibid.
[271] Ibid.

3.1.5. Botswana's Ranking on the list of corrupt countries in Africa and the world

Botswana, which is ranked the least corrupt country in Africa,[272] is also grappling with corruption, despite the general view that its governance performance is impressive.[273] The World Bank Governance Indicators and Transparency International rank Botswana as reasonably good in terms of many governance indicators.[274] However, Gasennelwe holds a different view. He agrees with Gaolatlhe's perspective shared at a public lecture that 'there are no independent and trustworthy institutions that can take on the public confidence in dealing with such corruption taking place in the country. That is why we are suspicious of each other now; we no longer trust each other.'[275] Brigadier Mathambo, the Director General of the DCEC, adds that 'this country was in a situation called state capture where certain institutions were systematically weakened and squeezed to a position where they could not perform their mandate.'[276]

Despite praises heaped on Botswana there are many instances of allegations of corruption that took place in the early 1990s and right into 2019. Corruption, bribery, conflict of interest, money laundering, claims for payment under false pretences were made, obtaining payments through false pretences in SOEs and public services were the order of the day.[277] The

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[272] Transparency International 2015 Corruption Perception Index available at https://www.transparency.org/en/cpi/2015 accessed on 20 February 2024; James A Knuckles 'A Study of Corruption's Causes in Botswana and Nigeria' *WordPress* 2006 available at *https://unpublishedworks.files.wordpress.com/2013/03/a-study-of-corruptions-causes-in-botswana-and-nigeria.pdf* accessed on 20 February 2024 1; GAN (April 2016) *Botswana Corruption Report*; Transparency International (January 2024) accessed at *https://www.transparency.org/en/cpi/2023* on 1 February 2024. Botswana is ranked the 39th least corrupt out of 180 in the world.

[273] Badham-Jones op cit note 261.

[274] Ibid; Trading Economics op cit note 260.

[275] Utlwanang Gasennelwe 'Botswana is a paradise of corruption – Gaolatlhe' *Weekend Post* 10 April 2018 available at *https://www.weekendpost.co.bw* accessed on 1 September 2018.

[276] Ryder Gabuthuse 'DIS face-face-with corruption' *Mmegionline* 12 July 2019 available at *https://www.mmegi.bw/features/dis-face-to-face-with-corruption/news* accessed on 21 February 2024. In the same article, Brigadier Peter Magosi intimated that Botswana will lose its ranking as corruption is up. Magosi expressed concern that Botswana continues to lose billions of pula to corruption.

[277] Gabriel Kuris 'Managing Corruption Risks: Botswana Builds An Anti-Corruption Agency 1994-2012' 2013 *Innovations for successful societies* 163; Mbongani Nguni and Innocent Selatlhwa 'Morupisi was charged with 3 counts in CMB Saga' *Mmegionline* 30 August 2019 available at *https://www.mmegi.bw/news/morupisi-charged-with-3-counts-in-cmb-saga/news* accessed on 21 February 2024.

Botswana Housing Corporation,[278] the Botswana Public Officers Pension Fund (BPOPF)[279] and the National Petroleum Fund[280] lost money for failed compliance with good corporate governance.

3.2. Namibia

Namibia, previously South-West Africa was a mandate of South Africa from 1919 until its independence in 1990.[281] Namibia inherited the laws of its occupier when it got its independence in 1990. The number of its SOEs grew from 12 to 97 in 2017.[282] These SOEs were used to provide services in the spheres of development, education, culture and media, and regulatory entities.[283] Similarly, Namibia's SOEs continue to play a key role in delivering services and goods to its people cost-effectively.[284] These SOEs are currently referred to as

[278] Ibid. Kuris referred to Daisy Loo (Pty) Limited involving a P24 million contract with Gaborone City Council, and Tourism Consortium (Pty) Limited which falsely held itself out during its presentation to the President and his cabinet that it had capacity to contribute to diversify the economy of Botswana if it was allocated land. This company was granted a large tract of land. In 1992 Joseph Letsholo, a general manager of Botswana Housing Corporation, died in a car accident. The police found P8530 in his glove compartment during the investigation and a further $100 000.00 and information in his personal safe which led to 12 persons being charged with corruption.

[279] Kuris op cit note 277. In another corruption case Morupisi faced three charges of money laundering, bribery and abuse of power in the CMB case. In addition, two directors of CMB, Okaile Rapula and Tim Marsland, were charged with obtaining P80.5 million through false pretences. CMB managed P500 million between 2014 and 2017.

[280] Staff Writer 'P329 million: the biggest financial scandal in Botswana' *Mmegionline* 8 December 2017 available at *https://www.mmegi.bw/news/p326-million-biggest-financial-scandal-in-botswana/news* accessed on 21 February 2024. The National Petroleum Fund (NPF) contracted Kgori Capital led by Bakang Seretse to administer the NPF for an amount of P326million. The NPF was mandated to build oil storage facilities by the Department of Energy and Botswana Oil. Bakang Seretse was charged with money laundering for trying to use a third party to transfer money to Israel. Basis Points Capital, a company providing specialist financial services was a transaction advisor led by Botho Leburu. Botho Leburu worked with Kenneth Kerekang, an executive director of Basis Points Capital and a former employee of the Department of Energy. The Financial Intelligence Authority (FIA) was alerted to the transaction and no plausible explanation was given for several transactions to Israel. The DCEC was called in and Bakang Seretse was charged with money laundering.

[281] P Musawaka-Zinatsa and A Chilunjika Corporate Governance and Sustainable Economic Development in Namibia's Public Sector (2020) 5 *Journal of Public Administration and Development Alternatives* 122-132.

[282] Max Weylandt 'SOE Governance in Namibia: Will a Hybrid System work?' 2016 *Institute for Public Policy Research* 5; Charmaine Ngatjiheue 'The future of public enterprises' *The Namibian* 31 May 2017 available at *https://www.thenamibian.com* accessed on 6 March 2018.

[283]Tjiuai Kangueehi *The Performance of State-Owned Enterprises (SOE) in Namibia* (unpublished LLM thesis, University of Namibia, 2007) 2-3. Air Namibia, NamPower, and National Petroleum Corporation of Namibia are incorporated in terms of the Companies Act of 1973. These three companies are regulated by the Civil Aviation Act of 2016, the Electricity Act of 2007 and the Petroleum Act of 1991 respectively.

[284] Weylandt op cit note 282 1; Charmaine Ngatjiheue, 'State-owned enterprises not operating in the interest of the taxpayers', *The Namibian* 31 May 2017 available at *https://www.thenamibian.com* accessed on 6 March 2018. Hennie Melber, a political analyst, noted that the duty of SOEs is to provide the basic services that people need such as electricity, transport, water and other social services.

public enterprises.[285] The government identified priority areas and mandated the public enterprises to include those in their plans. Some also have to increase their profitability sufficiently to pay the government dividends contributing to the country's economy.[286] Although most SOEs do not pay government dividends, some do so, such as Lüderitz Waterfront, Namibia Airports Company, Namibia Ports Authority and Namcor.[287] Melheber, a political analyst, expressed concern that profitable public enterprises in Namibia generate profits at the cost of ordinary people who are unable to pay for basic services. Public goods and services like electricity and water are cut off when ordinary people cannot pay their bills.[288] He concluded that when executing their duties to serve citizens SOEs must adhere to a code of ethical conduct to justify their continued existence. Furthermore, it contributes to the welfare of society.[289]

Shafuda et al., maintain that the government of Namibia spends about 50% of its development budget funding SOEs. It is therefore inconceivable that the government does not monitor its investment. This investment is the taxpayers' money. The reality that the government is not monitoring the money by ensuring that it appoints the governing body that has the necessary expertise, that is committed to good corporate governance and espouses principles that demonstrate – accountability, ethical conduct, manages with integrity, is responsible and transparent is telling. The government must care sufficiently to enjoin the shareholder representative to act with who, him or her has integrity. The Minister who will serve the interest of the country by holding the governing body accountable. Corporate Plans must be adhered to and executed effectively. If they are not and the SOE governing body cannot account for the money spent, then the Minister in charge is failing in his duty and should not

[285] Public Enterprises Governance Amendment Act, 2015. The amended Section 1 of the State-owned Enterprises Governance Act of 2006 provides that 'public enterprise' means a state-owned enterprise or state-owned company or any other entity established under any law or in terms of any other instrument, and the purpose of which is to advance the interest of the public. However, the Public Enterprises Governance Act 1 of 2019 repealed the Public Enterprises Governance Amendment Act of 2015. The 'public enterprises' means a body declared under section 2(1) to be the public enterprise; Max Weylandt 'Public Enterprise Governance in Namibia: Anti-Corruption Research Programme' 2017 *Institute for Public Policy Research* 2.

[286] Kangueehi op cit note 283. Kangueehi, assert that some SOEs play a developmental role and commercial ones are expected to pay dividends to the government. 53; Weylandt op cit note 282 at 2.

[287] Weylandt op cit note 282 at 7. Namdeb, Post and Telecommunications Holdings and Namibia Diamond Trading Company have also paid good dividends to the government.

[288] Charmaine Ngatjiheue 'The future of public enterprises' *The Namibian* 31 May 2017 available at *https://www.namibian.com* accessed on 6 March 2018.

[289] Ibid 1. According to Purvance Heuer, the yardstick measuring performance of SOEs must not be solely financial but their contribution to the society they serve must be considered. The value-add to the society is fundamental.

oversee that portfolio. The Shareholders Compact must be complied with if not, the governing body must be dismissed. The researcher submits that good corporate governance should not be theorised about but, must be seen to be realisable and measurable. This is demonstrable through the results. Shafuda et al., agrees with the view expressed by Forfas that SOEs must uphold the highest standard of accountability.[290] A view that the researcher aligns herself with. Furthermore, Shafuda et al., argues that the governing of the country should be gauged against the performance of its SOEs. That does not suggest that the governing body should be dismissed when it upheld its responsibility to the SOE by exercising control as it should. The problems in SOEs are that they are not effectively and efficiently managed and are more likely than not to fail.

3.2.1. The basis of corporate governance in state-owned enterprises

It is uncontroverted that Namibia, after its independence, began following the international best corporate governance to regulate the private sector companies. In 2014 the Namibia Stock Exchange developed its own corporate governance code applicable to listed companies' entities incorporated in terms of the Companies Act and other laws applicable in Namibia.[291] The Namibia Corporate Governance Code of 2014 (the NamCode) borrowed from King Code III extensively. However, compliance is not compulsory unlike at the Johannesburg Stock Exchange. Muswaka-Ninatsa and Chilunjika are of the view that voluntary compliance is not good for Namibia.[292] In the public sector, SOEs are incorporated in terms of Acts of Parliament of Namibia. Although some SOEs contribute to the fiscus of Namibia, most of them have failed to achieve their intended purpose despite the establishment of the Central Governance Agency which the State-Owned Enterprises Governance Council oversaw.[293] The Central Governance Agency was meant to monitor good corporate governance in SOEs.[294] These measures proved unsuccessful. In 2015 Namibia passed the Public Enterprise Governance Amendment Act, which was succeeded by the Public Enterprise Governance Act 1 of 2019 (PEGA) to improve SOE governance.[295]

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[290] Shafuda et al op cit note 85.
[291] Musawaka-Zinatsa and Chilunjika op cit note 281.
[292] Ibid.
[293] Weylandt op cit note 282 at 6.
[294] Ibid. The Central Governance Agency, the Agency under the Prime Minister's office had a short lifespan of three years: 2003 to 2006. This Agency was not a creature of statute. The Agency was to be overseen by State-Owned Enterprises Governance Council at ministerial level.
[295] Ibid 6 and 9-10.

Minister Jooste announced the hybrid governance system which did away with the State-Owned Enterprises Governance Council. The effect of this change was that the State-Owned Enterprises Governance Council was no longer in charge of public enterprises, however, the Minister in the relevant department became the authority.[296] The purpose of the hybrid system was to improve and tighten good corporate governance in SOEs by eradicating mismanagement, corruption, outright theft and misappropriation of funds in SOEs.[297] Namibia was conscious that dysfunctional, incompetent, irrational deployment of comrades and unethical boards of SOEs also contributed to poor corporate governance. In response to a question in parliament about the many boards that people were appointed to, Minister Jooste indicated that a review would be initiated to ensure that the directors of SOEs could not serve on more than two boards.[298]

Whether one person served on more than two boards of directors is not per se indicative of poor corporate governance in SOEs. Important questions to consider should be - are persons appointed to these boards experienced, qualified, not political appointees, not compromised, have the capacity to be independent, do not have criminal records, have not been removed from positions of trust in the past, ability to lead and capable of understanding the business and purpose of the SOEs. Above all, the appointees to the board must be selected from a pool of applicants nominated by the public, and their names should be published in newspapers. Transparency is imperative for good corporate governance to prevail. The researcher's proposed criteria, to a limited extent, accords with the PEGA appointment of SOEs (public enterprises). However, political appointees are not prohibited from becoming members of boards of SOEs. The reliance of the Minister on the public servants designated by him or her to make recommendations for appointment of board members is in line with the P E Weylandt highlighted examples of boards such as the Social Security Commission (the SSC)c, the

[296] Weylandt op cit note 282 at 9. Public Enterprises Act 1 of 2019.
[297] Ibid 6-8.
[298] The Minister of Public Enterprises 'Serving on three boards not a practice anymore' *The Namibian* 31 May 2017 available at *https://www.namibian.com* accessed on 6 March 2018.

Namibia Training Authority, the Namibia Student Financial Assistance Fund and many others in which good corporate governance was undermined. [299]

At this juncture it is appropriate to contextualise the challenges Namibia faced before independence. When Namibia realised its independence from South Africa in 1990 good corporate governance was non-existent. Namibia's common law and court decisions were based on South African law.[300] The legacy of South Africa to Namibia was that it also did not have proper anti-corruption legislation in place.[301] The practice and observation of good corporate governance were unknown. Corruption was already endemic in Namibia.[302] Both countries had to start from scratch to develop and strengthen anti-corruption instruments and adopt good corporate governance principles. Blaauw posits that the apartheid government was not concerned about corruption and limited it to constituted bribery.[303] Horn and Skeffers also contend that the Prevention of Corruption Amendment Act No. 21 of 1985 (PCAA) was not meant to criminalise corruption but to protect public servants who were mostly white.[304] The protection of white public servants and political aristocracy was the primary object. This influenced the resultant energy with which Namibia fought corruption.[305]

Corruption was already entrenched at the time of the independence of Namibia. The PCAA did not address corruption issues but favoured and protected an exclusive class of persons.[306] Corruption was neither talked about nor criminalised before independence and took place in a murky environment.[307] Instead, an Ombudsman was appointed in terms of the PCAA. The Ombudsman was tasked to consider and investigate corruption issues brought to its attention but did not have any necessary robust legislative powers.[308] The corporate governance

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[299] Ibid. The SSC Board suspended the Chief Executive Officer for refusing to buy them iPads one year at the cost of N$30 million; Namibia Training Authority suspended the Chief Executive Officer for two years tolling the balance of her contract with pay; the Namibia Student Financial Assistance Fund Board harassed and victimised its Chief Executive Officer to force her out of her job; golden handshakes were given to chief executive officers of Air Namibia, Namibia Airports Company, and the Managing Director of Wildlife Resorts; Kangueehi on page 4 of her thesis points out the poor leadership of the board and executive management as a contributing factor to the high cost to the government fiscus due to SOEs and parastatals.

[300] Musawaka-Zinatsa and Chilunjika op cit note 281.

[301] Lesley Blaauw 'Chapter 8: The Effectiveness of Anti-Corruption Agencies in Southern Africa' in OSISA *Effectiveness of Anti-Corruption Agencies in Southern Africa: Angola, Botswana, DRC, Lesotho, Malawi, Mozambique, Namibia, South Africa, Swaziland, Zambia and Zimbabwe OSISA* (2017) 191-220.

[302] Ibid.

[303] Ibid.

[304] Ibid.

[305] Ibid.

[306] Ibid. It is unsurprising that Namibia was riddled with corruption and bad corporate governance.

[307] Ibid.

[308] Section 18 of the Ombudsman Act of 1989. This Act preceded the independence of Namibia in 1990.

of Namibia evolved over time. Namibia repealed the State-Owned Enterprises Act of 1985 and the PCAA of 1985. The new government passed the Public Enterprises Governance Act of 2006 amended by the Public Enterprises Governance Amendment Act of 2015 (the Amendment Act of 2015). The said Amendment Act of 2015 was subsequently repealed by the Public Enterprises Governance Act 1 of 2019 (PEGA of 2019). This Act brought an end to the State-Owned Enterprises Governance Council. PEGA 2019 is the overarching law for corporate governance of public enterprises.

3.2.2. The structure of the state of corporate governance in Namibia

Namibia's intention to regulate state-owned enterprises or public enterprises in line with the international best corporate governance practices is indisputable. [309] The practical application was somehow wanting. Namibia tried to regulate good corporate governance of SOEs by passing legislation however, these laws were not sufficiently robust. For example, the Public Enterprise Act of 2006 was subsequently amended by the Public Enterprise Amendment Act of 2015 (the PEAA) which was also repealed. This Amendment did not change the response to good corporate governance positively. Instead, the amendment brought a cloud of secrecy and gave the power to the Minister to appoint public servants' special investigators, compromising the independence of such functionaries. This approach did not promote good corporate governance; instead, it limited the power to investigate wrongdoing in SOEs. Silence was enforced at the expense of transparency which was one of the principles of good corporate governance. Reliance was placed on public servants which contradicts and blurs the line between independence, integrity and accountability. The State-Owned Enterprises Governance Council was discontinued however, that also did not improve good corporate governance. The PEAA of 2015 was repealed by the Public Enterprise Governance Act of 2019 (PEGA). Again, PEGA created an expectation.

There was an expectation that PEGA was sufficiently robust for the purpose it was intended. It would enhance and facilitate adherence by every public enterprise and or SOE to comply with good corporate governance. The Minister has oversight over the boards of directors which have delegated authority to manage the SOEs.[310] The boards have the right to devolve their authority and power to executive managers who, in turn, enter into performance

[309] These practices are inclusive of CACG, King Codes, Cadbury Report and OECD Principles.
[310] Article 11.

agreements with their subordinates.[311] Delegation of authority and performance agreements resonate with good corporate governance. Putting efforts into the success of SOEs, which cannot be realised without following the prescripts of good corporations, can never be overemphasised. Namibia spends almost half of its annual development budget on public enterprises.[312] The weakness of PEGA, particularly article 9(1)(b), is the power residing with public servants to recommend suitable board members and executive managers positions, especially chief executive officer's appointments. The Public Enterprise Minister to manage the Department and appointment of the Ministers in charge of different public enterprises did not yield anticipated results.[313] Namibia's public enterprises are still faced with non-compliance with corporate governance issues. Its dual governance and decentralised model did not work. Namibia replaced the dual governance and decentralisation models with the hybrid model to streamline the governance of SOEs. [314]

Although PEGA sufficiently follows the best international corporate governance principles, it does not go far enough in that there are no repercussions when the Minister fails to conclude performance agreements with the board as a collective and with directors in their individual capacity within the prescribed period. [315] The contract must be clear and unequivocal about the expectations of the board of directors and the Minister. Consequences must be attached for failure to comply with sections 11(1) and 11(4). Although the language of 11(1) is peremptory, section 11(4) suggests that it is the duty of the board of directors to sign the governance agreement, failure to do so attracts removal. Performance agreements would assist the government in assessing, identifying and monitoring the performance of the board of directors and individuals.[316] The SOEs must be governed in accordance with the good corporate governance. The CEO and other executive employees responsible for managing an SOEs must do so in conformity with the requisite good corporate governing principles in line with the agreement in place.

The quality of the appointees to the board, the CEO and the support staff could put the public enterprise on track for success and or failure. For example, decent quality appointments

[311] Article 17.
[312] Shafuda et al op cit note 85.
[313] Ibid.
[314] Ibid.
[315] Section 11(1) and 11(4) of PEGA.
[316] Shafuda et al op cit note 85.

must include expertise, integrity, accountability, responsibility and transparency. The challenge to realise this ideal could arise if the Minister does not endorse the CEO recommended by the board of directors and opts to appoint his preferred candidate. If the appointed CEO is a political appointee, this could cause a chasm between the board of directors, the CEO and the Minister. The realisation of compliance with good corporate governance could be threatened. Muswaka-Zinantsa and Chilunjika are critical of the domination of the management of SOEs by political appointees who contribute to inefficiencies. Efficiencies, success and sustainability of SOEs could be unrealisable as proven after five years of PEGA. SOEs continued to fail to deliver contrary to despite PEGA. However, the board of directors and the executive managers committed to the success of an SOE would execute on their mandate, the objectives, take effective and proper control of its finances, developed suitable strategic and management plans, and be accountable. That is a recipe for success, but the board of directors must be deliberate comply fully with good corporate governance. To realise positive results, shareholder representative must deliberately embrace and support the board of directors in its endeavour. The history of non-performance of SOEs should not dictate their future.

Weylandt contends that public enterprise boards are characterized by mismanagement and corruption.[317] The need to inculcate a culture of good corporate governance practices cannot be understated.[318] Despite PEGA Namibia is still fraught with good corporate governance problems and persistent corruption.

3.2.3. Anti-Corruption instruments

Historically Namibia relied on the PCAA to fight corruption. This legislation was inadequate because it was not geared to prevent corruption. It protected corrupt white government officials and SOE employees.[319] The Amendment Act placed reliance on section 52 of the ACAA which permitted the conduct of a trial in camera and the protection of the identity of the informant, unless the information was given for ulterior purposes and was untruthful. In addition, the informant was protected from disciplinary processes as well as from civil and criminal

[317] Weylandt op cit note 282; Musawaka-Zinatsa and Chilunjika op cit note 281.
[318] Ibid.
[319] Democracy Works Foundation 'Policy Brief 14: Combating Corruption In South Africa' available at *https://www.democracyworks.org.za/policy-brief-12-combating-corruption-in-south-africa/* accessed on 21 February 2024.

proceedings. The Prosecutor-General was empowered by the Criminal Procedure Act (CPA) and obliged to request a judge to authorise and sanction a whistle-blower's testimony withholding the name and identity of a witness to corruption. Moreover, if the Prosecutor-General believed that the witness's life was in danger and that there could be delays in acquiring the order of the judge, he/she could protect that witness. If the Prosecutor-General took the initiative to place the witness under protection without the judge's order, he is obligated within 72 hours to approach a judge to confirm the decision taken to continue protecting the witness.[320]

In 2003 Namibia passed the Anti-Corruption Act 8 of 2003 (the ACA). The ACA established the Anti-Corruption Commission headed by the National Director General and a Deputy National Director General. Namibia was one of the SADC members who subscribed to international, continental and regional anti-corruption instruments such as the United Nations Convention Against Corruption (UNCAC), the African Union Convention on Preventing and Combating Corruption (AUCPCC) and the Southern African Development Community Promoting Anti-Corruption (SADCPAC).[321] Article 33 of the UNCAC encourages states to include in their national legislation the protection of whistle-blowers.[322]

Unlike Article 33 of the UNCAC, Article 5 of the AUCPCC obligates states to pass laws that protect whistle-blowers, to institute mechanisms for reporting corrupt activities and punish those who act maliciously by reporting innocent persons.[323] The SADCPAC Article 4, also compels member states to pass protective measures for whistle-blowers and to deal with malicious reporting of innocent persons.[324] Namibia signed the Whistleblower Protection Act of 2017.[325] Corruption is an offspring of bad corporate governance. So, to combat it, countries need whistleblowing to help law enforcement and the leadership of state-owned enterprises. Whistleblowing is crucial to combat corruption.[326]

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[320] Section 208 (1)(b) read with section 208(1)(c) of the Criminal Procedures Act 25 of 2004.
[321] Frederico Links & Clement Daniels 'Protected Disclosure: Informing the Whistleblowing Debate in Namibia Paper 10' (2012) 10 *Namibia Institute for Public Policy Researc*h 1-24 at 5 -7.
[322] United Nations General Assembly Resolution (58/4 of 31 October 2003) *United Nations Convention against Corruption* (UNCAC). Namibia signed the UNCAC on 9 December 2003 and Parliament ratified it on 27 April 2004.
[323] Adopted in Mozambique on 11 July 2003.
[324] Adopted in Malawi on 14 August 2001.
[325] Namibia relied also on the Anti-Corruption Act 8 of 2003, Labour Act 11 of 2007, Criminal Procedure Amendment Act 13 of 2010, Diamond Act 13 of 1999 and the Public Service Act 13 of 1995.
[326] My notes. Accountability, integrity, responsibility, transparency- some of the principles of corporate governance.

Namibia, in its endeavour to combat and prevent corruption, passed several pieces of legislation - Prevention of Organised Crime Act 29 of 2004, the Financial Intelligence Act 13 of 2012, the Companies Act 28 of 2004, and the Electoral Act 5 of 2014. Although the researcher mentions these laws and does not discuss them in detail, this does not minimise their importance for fighting corruption, bribery, fraud and money laundering. They remain crucial to support the attainment of good corporate governance. By not discussing them and just mentioning them in passing does not minimise their importance as punitive measures for corruption, bribery, fraud and money laundering. The greatest support to combat and prevent corruption came in the form of the amendment to the Constitution Act in 2010, in particular article 94A of the Act.[327] Precautionary measures were taken by the government of Namibia by putting in place administrative and legislative mechanisms necessary to combat and prevent corruption.[328] The said legislative measures established an independent and impartial ACC led by a Director-General,[329] with the help of a Deputy Director-General[330] and support staff.[331]

The President nominates the Director-General and his deputy[332] whom the national assembly appoint[333] for a period of five years[334] and their conditions of employment are determined by the President.[335] The ACC, a government agency, is empowered to execute its functions embodied in the ACA.[336] These functions are multitudinal and a few are mentioned hereunder. They include receiving, initiating, and gathering evidence; determining which body investigates corruption; conferring work to and sharing information with other organisations or authorities that investigate corrupt practices; referring investigated cases to the prosecuting authority to prosecute; and preventing corruption in the private and public sector. Moreover, another function of the ACC is to educate the public about what constitutes corrupt practices and the effects thereof on the economy and in the political and social spheres. These effects

[327] The Namibian Constitution Third Amendment Act 8 of 2010.
[328] Constitution Act of 1990, Article 94A(1); Article 94A(2). Supra note 489 7.
[329] ACA sections 2(1); Article 94A(5) of the Constitution Act.
[330] ACA section 2(2)(a); Article 94A(4) of the Constitution Act.
[331] ACA section 2(2)(c); Article 94A(4) of the Constitution Act.
[332] ACA section 4(1); Article 94A(6) of the Constitution Act.
[333] ACA section 4(2)(a) and (b). No educational qualifications are required except that the appointees must be of good character and possess knowledge or experience relevant to the functions of the Commission.
[334] ACA section 7(1).
[335] ACA section 7(2).
[336] ACA section 3(a) to (h); Section 94A(3) of the Constitution Act. Supra note 484 205-206.

predicate the destruction of ill-gotten wealth, the erosion of the efficacy of government and the negative impact on the poor and vulnerable in society.[337]

3.2.4. Penalties for corruption and other corruption legislation

The ACC relies on the Prevention of Organised Crime Act which prohibits racketeering, money laundering, criminal gang activities, trafficking and smuggling of migrants. It attaches penalties to these offences varying from three years imprisonment to 100 years imprisonment and/or N$250 000.00 or N$ 1 billion, depending on the crime committed. Moreover, the proceeds and properties relating to these crimes can be forfeited[338] to the state, and a person or company restrained[339] upon successful application of the Prosecutor General through civil processes to the High Court and obtaining an order.[340]

In Namibia, money laundering has the second-highest penalty applicable. Money laundering involves the acquiring or receiving of property or money which is the proceeds of a crime or ill-gotten gains. The prohibition is applicable to natural persons and legal entities or enterprises as well as unincorporated companies.[341] Directors, shareholders, and officials of legal entities, whether SOEs or public enterprises, are liable if they are engaged in money laundering.[342] This section covers instances where the conduct is continued in Namibia or across the border if a Namibian is involved. The penalty for money laundering is N$100 million- or 30 years imprisonment or both. Depending on whether there is an extradition agreement between Namibia and the country the offenders escaped to, these offenders can be brought back to Namibia. However, it is crucial that the extradition agreements and the adopted international, regional, and continental conventions be concluded by ratification, failing which the affected convention will not be effectuated.[343]

According to Blaauw, Namibia, being a signatory to the UNCATOC, is obligated to provide mutual legal assistance to other signatories.[344] The anti-corruption campaign and

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[337] Namibia Institute for Democracy 'Namibia's Zero Tolerance For Corruption Campaign' available at *https://www.nid.org.na/projects-activities/zero-tolerance-for-corruption-campaign* accessed 1 January 2019.
[338] Section 17 to 23.
[339] Section 24 to 31.
[340] Section 32 to 42.
[341] Section 4 to 11 of ACA.
[342] Ibid.
[343] Hans Juergen Koch was a German citizen who became a Namibian in 2002 and could not be extradited because Namibia had not domesticated the law, see *S v Koch* (1) (SA 13 of 2005) [2006] NASC 6 (29 November 2006).
[343] Blaauw op cit note 301. Namibia signed the United Nations Convention Against Transnational Organised Crime on 13 December 2000 and ratified it on 16 August 2002.
[344] Ibid at 204 & 218.

efforts of the ACC found support in the Companies Act. Incorporated companies that engage in corrupt practices run afoul of the ACA when their directors and officials fail to follow its prescripts, which go to the heart of good corporate governance.[345] Compliance includes the obligation of the board and officials to declare a conflict of interests in contracts.[346] Efforts of the ACC to combat and prevent corruption must be backed by the necessary resources which include financial and human resources, as well as government commitment. The Windhoek Observer reported that the Anti-Corruption Commission's (ACC) capacity to conduct investigations remains a significant challenge.[347]

The ACC depended on the insourcing of resources to investigate intricate cases due to the resignations of experienced investigators.[348] Considering that at independence in 1990, Namibian corruption laws were ineffective if not non-existent, Namibia has made commendable progress in this field.[349] Between 2017 and 2019, the ACC investigated 455 cases for alleged corruption and maladministration, of which 278 were reported between April 2018 and February 2019.[350] 32 investigated corruption cases were referred to the Prosecutor General to prosecute. The Prosecutor General warned that corruptors and corruptees would be investigated and, if culpable, referred to relevant authorities to take appropriate authorities to take actions. He was aware that corruption could destroy the country's economy and that future generations would not have a country.[351]

Amongst countries which are the subject of this research, POCA sanctions are the harshest sanctions.[352] For instance, the penalty for racketeering, which is tantamount to corrupt

[345] Directors of SOEs or public entities incorporated in terms of the Companies Act are required to comply with their duties contained in it. However, their duties are found throughout the Companies Act and penalties that attach to their non-compliance.
[346] Contravention of section 242(5) which regulates the declaration of interest attracts a penalty of N$4000 or imprisonment not exceeding two years.
[347] The Editor *Windhoek Observer* 26 April 2019 available at https://www.observer24.com.na/ accessed on 21 February 2024.
[348] Ibid at 2.
[349] Albertina Ngakale 'Anti-corruption Commission investigating 455 cases' *NewsAlive* 20 February 2019 at 1; passing the ACA, FIA, Prevention of Organized Crime Act of 2004 (Act 29 of 2004), Whistleblower Protection Act 10 of 2017.
[350] Ibid.
[351] Ibid.
[352] In addition, section 3(2)(a) to (3)2)(b) of POCA provides that where a court has limited jurisdiction to impose N$100 million - or 30-years' imprisonment and the determined sentence is above its jurisdiction, it must refer the matter to a court with the appropriate powers.

activities[353] is N$1 billion or up to 100 years imprisonment or both.[354] Serving this sentence cannot be postponed or suspended in terms of section 322 of the CPA. The intention is laudable and augers well for good corporate governance. Countries must root out corruption, bribery and other crimes which undermine good corporate governance effectively. Laws must not be academic but worth the paper they are written on. Namibia weakens and inhibits good corporate governance by indirectly exempting certain companies from compliance with requirements of procurement laws on the basis that they are Black Economic Empowerment (BEE) beneficiaries. This is done through overlooking requirements such as capacity and experience.[355] This is open to abuse. Blaauw submits that the special privileges and the circumstance resulted in tenders worth N$13.9 billion allocated to Black Economic Empowerment (BEE) entities. This according to Blaauw constituted looting contrived through administrative policies and decision making.[356]

In its endeavour to stop corruption, the ACC embarked on a public awareness program which included educating the public about the folly of corruption, the negative impact it had on their lives in the short and long term and on the economic development of the country.[357] Paulus Noa argues that corruption impedes delivery of essential services to the public. Money that was used for different purposes for which it was not budgeted. This is contemptuous of the fundamental human rights embodied in the country's Constitution.[358] The people lose out to corruption and their right to human dignity is compromised and infringed. Eradication of corruption is achievable if, the top administrators, managers, politicians of the government of the day and the private sector refrain from corrupt activities and support institutions tasked to combat and prevent corruption. This support can be given by passing the requisite legislation, providing sufficient funding to these institutions,[359] appointing capable and qualified persons to the boards of SOEs and public entities, as well as leading by example. It is incumbent upon

[353] Section 1 of POCA defines 'unlawful activities' as 'any conduct …whether that act occurred in Namibia or elsewhere as long as that conduct constitutes an offence in Namibia or contravenes any law of Namibia.'
[354] POCA section 2(1) (a) and 2(2) crimes such racketeering, money laundering and gang related activities could attract such penalties.
[355] Blaauw op cit note 301 at 199.
[356] Ibid.
[357] Ibid at 215.
[358] Ngakale op cit note 349.
[359] Angela Gail Stevens *Enforceable accountability: a corporate governance mirage for South African state-owned companies* (Doctoral Thesis, University of Cape Town, 2021).

administrators, civil society organisations, the private sector[360] and the public to come together to fight corruption.

There is much that can be done to reduce actual corruption in Namibia. This is achievable by tightening the laws particularly the PEGA and the ACA, investigating corruption and convicting the guilty. The solution is for SOEs or public enterprises to comply with good corporate governance effectively to inhibit criminality. The outcome of tightening the law was glaringly illustrated by the decision of the court in Goabab & another [361] where the first and second accused were not found guilty of contravening certain sections of crimes in line with ACA. However, the accused were found guilty of count 2 where they used their office to receive gratification, which was a lesser charge. This means they escaped the highest penalty provided for in the ACA.[362]

3.2.5. Namibia's ranking on the list of corrupt countries in Africa and the world

Namibia is ranked 59 as the least corrupt country out of 180 in the world.[363] It is the sixth least corrupt country in Africa.[364] Its ranking would improve provided good corporate governance was realised and taken seriously by person entrusted with SOEs in Namibia. The SOE management must isolate private sector participants whose conduct is likely to negatively impact government fiscus. SOEs must also treat government money as its own and spend it for purposes for which it was meant. This approach signals accountability, ethical behaviour, responsibility, risk management and transparency. The private sector's main goal is to see its share prices soar. Consequently, it should refrain from and avoid enticing SOEs officials to commit corrupt acts. The public sector must also refrain from using the private sector to cover up their failures to uphold the law and compliance with the tenets of good corporate governance.

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[360] The survey of Namibians indicated that the private sector is more corrupt that the public sector. This view stems from the fact that the private sector does business with the SOEs, public entities and government and in the process extend bribes to officials.
[361] *The State v Simon Goabab & another* (CC 44/2008) [2013] NAHCMD 3 [11 January 2013].
[362] Section 49 of the ACA of Namibia.
[363] Transparency International January 2024 available at *https://www.transparency.org/en/cpi/2023/index* accessed on 1 February 2024.
[364] Trading Economics December 2023 available at *https://tradingeconomics.com/country-list/corruption-rank?continent=africa* accessed on 1 February 2024.

3.3. South Africa

When the ANC government came into power in 1994, it continued where the National Party had left off by relying on SOEs to deliver much needed infrastructure to support the economy of the country. The SOEs deliver services, do public good, confine private and foreign control of the national economy, generate public funds for the fiscus, and stimulate the growth of the economy.[365]

During the 1920s, the government established Escom, Foskor, Iscor, and Sasol with the aim of stimulating the country's economy and generating wealth and employment opportunities, albeit primarily benefiting the select few, namely the White population, at the expense of the African majority. Consequently, State-Owned Enterprises (SOEs) assumed considerable dominance and significance, particularly in the sectors of energy, telecommunications, and transportation.[366] The control of SOEs escalated in 1960 in the areas of rail transport, steel, telecommunication, postal services, airline and air cargo, ports, pipelines, oil and gas exploration, oil from coal extraction and the manufacturing of armaments.[367] These SOEs were protected from competition by the government.[368] Appointments of leadership positions in SOEs were made by the National Party government.[369] For instance, senior management appointees in SOEs were not necessarily qualified but were appointed to such positions to realise the agenda of empowering minority whites in the country.[370] This meant that good corporate governance was unknown and inapplicable in the management of SOEs.[371]

The Apartheid government was not the first architect of poor corporate governance and corruption in South Africa. The British and the Dutch before them are to blame.[372]

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[365] Thabane & Snyman-Van Deventer op cit note 7.
[366] Stephen Malherbe & Nicky Segal 'Corporate Governance in South Africa' *Trade and Industrial Strategies* 2-97.
[367] United Nations 'Governance of State-owned enterprises in South Africa: enhancing performance, efficiency and service delivery' 2021 *Economic Commission for Africa.* Transnet, Iscor, Telkom, Post Office, SAA and SA Freight, Transnet Ports Authority, Soekor, Sasol, Armscor and Denel.
[368] Malherbe & Segal op cit note 367. According to Malherbe & Segal, SOEs were accorded monopolies by law.
[369] L.P Mekwe 'A Critical Review of Corporate Governance Reforms Relating to South African State-Owned Enterprises' (unpublished LLM thesis, University of the Western Cape, 2015) 2.
[370] Mekwe op cit note 369 and Malherbe and Segal op cit note 366.
[371] Ibid. Malherbe & Segal posit that condition precedent to getting government tenders was for the hiring of only white workers and paying them high wages. The exclusion of Africans from voting and participating in the government contributed to the weakness in democracy in South Africa. During the apartheid period good corporate governance did not exist.
[372] Blackman and Dall op cit note 26.

Nevertheless, over time, the old and new governments should have done better and managed SOEs as they should have been for posterity and to attract strategic investment. With the advent of democracy in 1994, the introduction of the King Code I marked a change to the governance of companies. Malherbe and Segal assert that, 36 months after the King Code I was adopted, corporate governance changed from ethical issues to hard issues. The King Codes I and II did not apply to the public sector and SOEs.[373] Changes came about after King Code III which was extended to the public sector SOEs.[374] The SOEs registered in terms of the repealed Companies Act of 1973 were also bound by the prescripts of corporate and financial governance.[375] This meant that SOEs had to comply with the Companies Act, the PFMA, their incorporating statutes and King Code III. The relevant King IV of 2016 principles were undermined.[376]

During its existence South Africa experienced major good corporate governance challenges historically evidenced by State Capture 1 in the 20th century and by the recent State Capture 2 in the 21st century.[377] The researcher in this chapter compared the trio's approach to corporate governance. This is confirmed by numerous scandals which arose from bad corporate governance by managers of the parastatals and or SOEs at times the politicians and Ministers in charge of the relevant portfolios.[378] The role of the private sector cannot be underestimate in the failure of good corporate governance in SOEs and or parastatals. The cost to government parastatals and SOEs pauses is astronomical to the taxpayers.

3.3.1. The basis of corporate governance in state-owned enterprises

The South African corporate governance in SOEs was influenced by international best corporate governance practice post 1994. There are legislative and informal guidelines for good corporate governance in this country. For example, King Codes, CAGC, OECD and Protocol of Governance of SOEs, the SADC SOEs Guidelines. In addition, in South Africa, good corporate governance is regulated by the PFMA, Companies Act and sections 42, 55, 195, 217 of the Constitution of the Republic regulate good corporate governance in South Africa. Decided cases also guide the country on compliance with corporate governance. In addition,

[373] Ibid at 7.
[374] The King Code IV Part 6.6 extends the application of the code to state-owned companies referred to as SOC.
[375] Sections 84(1)(b) of the SA Companies Act.
[376] Section 3 of the PFMA.
[377]Blackman and Dall op cit note 27at 149. Stephan Hofstatter *Licence to Loot* (2018).
[378] Ibid.

SOEs adopted good corporate governance policies.[379] However, these policies were neither fully implemented nor supported by management, boards and politicians, contrary to good corporate governance.[380] They were acting in their own interests.[381] This culminated in the failure of service delivery by some of the SOEs.[382] Eskom is not the only example of an SOE that has been a financial failure in South Africa.[383] Non-compliance with good corporate governance and the resultant corruption increased the government's financial exposure because of the guarantees provided to the creditors of SOEs.[384] This impedes the development of the economy of the country[385] due to adverse credit ratings of the SOEs and the country by the various Ratings Agencies such as Fitch, Moody's and Standard and Poor. The outcomes by the Ratings Agencies can either make borrowing expensive and or affordable in the country or the SOE is an investment grade.[386] In some instances the cause of these rating issues could be the performance of government, SOEs, political uncertainty. Currently, the country is faced with bad corporate governance issues which traverse SOEs and the public sector.

The failure to implement good corporate governance increases the risk of corruption, bribery and money laundering. This is not a closed list. The offences referred to herein existed prior April 1994,[387] but were concealed from the public because during apartheid freedom of the press and expression were prohibited. Today, this is no longer the case; information is freely accessible to people and in turn , people are free to express their opinions in private and in

[379] Treasury put in place regulations applicable to SOEs, government departments and institutions which must be complied with depending on their classification. The Protocol guides SOEs on good corporate governance.
[380] The Public Protector Reports that have been published between 2009 and 2016 speak volumes. Advocate Madonsela's Report on State Capture which culminated in the Commission of Inquiry by Deputy Chief Justice is indicative of the extent of corruption.
[381] Examples: Denel, Eskom, NECSA, PIC, PRASA, SAA, SABC, Transnet. These SOEs have been in the news for the wrong reasons as management and the board failed the SOEs.
[382] Eskom is tasked to provide uninterrupted electricity to the people and companies thereby supporting the economic development as well as the people's quality of life. Mandate found in the Electricity Conversion Act 11 of 2001.
[383] For example, Denel, Eskom, and SABC have been unable to pay salaries and creditors at times.
[384] Guarantees exposure provided by national government to creditors of Eskom, SAA, SABC.
[385] Eskom's load shedding and the cost to the country every time electricity fails. Government guarantees given.
[386] The downgrading of the country to junk status by rating agencies. For example, Moody and S&P downgraded South Africa's borrowing status to junk status.
[387] Van Vuuren op cit note 23 at 2; Section 16(1)(a) of the Constitution which protects the freedom of the press. Prior to the independence of South Africa and the interim Constitution Act of 1993, the press and other media did not have the freedom to publish information about corruption. Parliament was supreme and therefore did not provide for the right to access information found in PAIA.

public.[388] The fact that corruption could not be freely discussed and brought into the public domain in the past creates the impression that during apartheid there was no corruption in the public sector nor in SOEs or in the private sector.[389] Of course, this impression is far from the truth; however, it is correct that there is the perception that currently corruption has spiked upwards. South Africa's anti-corruption standards are comprehensive and reside in key institutions that are tasked to deal with corruption from different vantage points.[390] Several different pieces of national legislation have been passed which are geared to deal with corruption.[391]

In addition, South Africa is bound by continental, regional and international measures.[392] Although South Africa has a comprehensive architecture to address corruption, Pereira et al. argue that a lack of clarity and overlap in the duties of institutions tasked with fighting corruption opens the window for duplication and minimises their efficacy.[393] According to them, the government does not have a cohesive policy plan in place. As early as 2002, the government had set up the Minimum Anti-Corruption Capacity Requirements (MACC). The compliance level within the MACC was low[394] and meant that the notion of preventing corruption in the first place did not take root and which could have brought about a general awareness of corruption and could have educated people about corruption. This proved to be a disservice to South Africa because the fight against corruption was weakened, resulting in the stunting of economic development and growth.[395] The entire country is thus affected and

[388] Malhaerbe and Segal op cit note 366 at 18. According to section 16(1), 'Everyone has the right to freedom of expression, which includes–freedom to receive or impart information or ideas.' The freedom to receive information is protected by PAIA.
[389] Ibid.
[390] For example, the Auditor General, Directorate of Serious Offences, Independent Police Directorate, South African Police Service, Special Investigating Unit, Public Protector, National Directorate of Public Prosecution, Public Service Commission, South African Revenue Services, Treasury and Competition Commission. The courts act as arbiter of the last instance; Pedro Gomes Pereira et al 'South Africa Anti-Corruption Architecture Governance Basil Institute' (2012) *Basel Institute of Governance* 9.
[391] PRECCA, NPAA, PFMA, PRECCA, POCA, FCIA, PDA, PAA.
[392] SADC, AUCPCC and UNCAC.
[393] Pereira et al op cit note 391.
[394] Ibid.
[395] GCIS (2006/2007) *Pocket Guide to South Africa: Economy*. According to GCIS, the South Africa economic growth stood at 5% in 2005. Between 2005 and 2009 it averaged 4.5%. 'South Africa's economy is stronger than at any time in the past 20 years. It expanded at about 5% in 2005, and continued growth of about 5% a year over the period ahead is anticipated.' In fact, projections were that between 2010 and 2014 the economy would continue to grow and average 6.5%; however, the Stats SA Report posted in March 2018 put the SA economic growth at 1.3%.

endures most of the effects of wide-spread corruption practices. The effects are evident from the extent to which corruption has immobilised the country.[396]

3.3.2. The structure of the state of corporate governance in South Africa

SOEs are mechanism which South Africa use to achieve economic growth and poverty reduction.[397] They are tools to provide infrastructure for energy, transport and water.[398] Prior to 1994, SOEs were used by the white government to provide industrial jobs for unskilled whites especially Afrikaners in rural areas to alleviate their poverty.[399] According to Clark this was deliberate. During this time policy of the National Party and the Broedebond was to have job reservation for whites, particularly the Afrikaners. Eskom and the South African Iron and Steel Corporation (Iscor) were buckling under the pressure of high labour costs. To reduce their labour costs, Iscor and Eskom employed Africans at a fraction of the white workers.[400] It is uncontroverted that historically SOEs never adhered to good corporate governance because it was non-existent in their management. South Africa did not have good corporate governance in place for the private and public sector. SOEs were unaccountable, some were not even audited. Bribery, corruption and money laundering were the order of the day in SOEs. [401]

After the first King Report in 1994, South Africa woke up to the reality that change was inevitable and good corporate governance was a reality. The King Report however was not compulsory, but voluntary until the new government in 1999 passed the PFMA. This was the first deliberate legislation addressing the operations of SOEs. It came into operation that year. Compliance with the PFMA was not an option but compulsory in the public sector. SOEs whether incorporated in terms of the Companies Act of 1973 or in line with their enabling legislation were and still are compelled to comply with the PFMA, its regulations and Treasury Directives. The PFMA is an embodiment of good corporate governance for SOEs. The Company's Act is applicable to all SOEs listed in the schedules of the PFMA. The said

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[396] Michael Kruger 'Eskom the largest threat to the stability of the South African economy' *Business Report* 9 September 2019 available at *https://www.iol.co.za/business-report/economy/eskom-the-largest-threat-to-the-stability-of-the-south-african-economy-32650489* accessed on 21 February 2024. The South African government is faced with a debt burden of about R440 billion for Eskom. 62% of this debt is guaranteed by the government.
[397] Kikeri op cit note 118.
[398] Ibid.
[399] Nancy L Clark "South Africa's state-owned companies: a complex history that's seldom told" *Mail & Guardian* 9 December 2019 available at *https://mg.co.za/article/2019-12-09-00-south-africas-state-owned-companies-a-complex-history-thats-seldom-told/* accessed on 21 February 2024.
[400] Ibid.
[401] Blackman and Dall op cit note 26.

Companies Act came into operation 9 years after the PFMA. These SOEs are referred to as SOCs in the Companies Act. At the introduction of the research, the researcher submitted that the Constitution regulates good corporate governance in particular sections 195 and 217. These will be discussed in more detail in Chapter 3. King Codes and the Protocol of Good Corporate Governance are soft governance regulations. Notwithstanding, the King IV is appliable to SOEs consequent to National Treasury endorsing its application.

Although it is voluntary in the private sector, King IV is compulsory in the public sector. This means that it regulates good corporate governance. The 16 governance principles embodied in the King IV for SOEs are similar to provisions of good corporate governance in PFMA in various sections and regulations. The PFMA provisions have the authority of law. King IV is soft law. The PFMA is one of the three legislated good corporate governance provisions. Without doubt, the PFMA is an important governance law for the SOEs.

3.3.3. Anti-Corruption instruments

Prior to and post the adoption of continental, regional and international anti-corruption instruments, South Africa put measures in place to combat and prevent corrupt activities.[402] Most of these measures were put in place post the apartheid era, prior to the adoption of the AUCPCC, the SADC Protocol and the UNCAC.[403] Moreso, South Africa had the requisite accounting institutions in place that could assist in the fight against corruption but the country's leadership was hobbled by greed and the desire to ingratiate themselves to the politicians.[404] The other contributory and debilitating factor in the fight against corruption is the contestation among the institutions themselves as to which of them is best qualified and supreme to deal with corruption. [405]Although the government is cognisant that corruption is a threat to democracy and good corporate governance, it failed or neglected to keep tight control over

[402] South African Government (15 August 2012) *The National Development Plan 2030: Our future – make it work* 401-410.
[403] Ralph op cit 103 and 101
[404] OSISA op cit note 102 at 222.
[405] Ibid at 230. These tensions existed prior to the ratification of continental, regional and international measures and continued post. For example, the Scorpions and the South African Police Service as the foot soldiers to support the NDPA in its prosecutorial capacity had major contestation and disagreements which resulted in the disbandment of the Scorpions. The Scorpions were replaced with the Hawks. Another instance of contestation is Nkandla, which saw parliament being found to have failed to uphold their duty in the Constitution and the President having contravened his oath of office.

governance.[406] Consequently, corruption also weakened institutions of governance and their systems, for instance, the DPCI, which is crucial in the prevention and the combating of corruption. The continued mismanagement and non-compliance with good corporate governance in institutions and SOEs undermine their capacity and capability to combat and prevent corruption.[407] The former Public Protector, Advocate Thuli Madonsela, concluded that corruption has become 'aggressive.'[408] However, she believed that corruption could be overcome if there was co-operation between the public, institutions, state organs and politicians. Chapters 8, 9, 10, 13 and 14 of the Constitution of the Republic support the prevention of corruption.[409] In addition, to the chapters of the Constitution mentioned here, the national legislation was enacted to strengthen the fight against corruption.[410] For example, a

Special Investigating Unit (the SIU) and the Directorate of Special Operations (the DSO), known as the Scorpions, was launched to fight corruption they soon became known as the disrupters of corruption and gained a reputation for raiding houses of senior politicians in the governing party and its partners in crime.[411] The institutions of government which were

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[406] Public Protector's Report (2013/2014) op cit note 65 at 2. This report is demonstrative of the government failing and neglecting to enforce good corporate governance; Public Protector's Report (No. 25 of 2013/2014) *Secure in Comfort*. This is also demonstrated by the failure and/or refusal of the Speaker of the national assembly and the ANC's refusal to support the Public Protector's recommendation for remedial action compelling the former President Zuma to comply with the remedial action recommendations of the Public Protector. The Constitutional Court in the *Economic Freedom Front v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* (2016) ZACC 11

[407] Institutions and state organs that do not have integrity affect the confidence that the public has in them. The public thus do not approach them to report corruption, and the lack of confidence in these institutions does not augur well for the defeat of corruption. Thus, South Africa is today dealing with the State Capture and the inquiry into that. However, corruption is not exclusive to the public sector but is in fact more alive in the private sector. Although corruption is endemic in the private sector, it is referred to as collusion, abuse of dominance and a cartel in terms of the Competition Act of 1998. In other instances, accounting irregularities or misstatements. For example, Steinhoff, EOH, Tongaat, etc. Its effect is just as bad as it is in the public sector.

[408] Interview with Mathekga refers which took place between him and Advocate Thuli Madonsela.

[409] Chapter 9 of the Constitution establishes institutions such as the Public Protector, Auditor-General, South African Human Right Commission, Commission for Gender Equality, Electoral Commission. Chapter 10 covers the basic values and principles that govern the public service administration under the control of the Public Service Commission. Chapter 13 is concerned with the finances of the country. It entails the division of revenue amongst different government structures such as the national, provincial and municipal budget. It puts the control of the fiscus in Treasury which includes procurement, government guarantees, loans to municipalities, Financial and Fiscal Commission, and the Central Bank. Chapter 14 mentions international agreements which become law when enacted as such by Parliament. It further deals with customary law, international law, transitional arrangements and which version of the Constitution prevails. Even if these chapters do not specifically refer to anti-corruption, they are instrumental in the fight against corruption.

[410] NPAA, PFMA, PRECCA, POCA, FCIA, PDA, PAA as amended, PPPFA, PAIA, PAJA, BBBEE, CA and CPA.

[411] Joey Berning and Moses Montesh 'The rise and fall of the Scorpions and Hawks' (2014) 39 *African Journals Online* 2. For example, the then Deputy President Zuma of the country and the ANC, Mac Maharaj, the former Minister of Transport, and Shabir Shaik a businessman from Durban.

well suited to fight corruption were repurposed and disempowered during the Presidency of Jacob Zuma. The enforcement powers of most of the crime fighting institutions were curtailed.

According to Berning and Montesh, the raids gave rise to a fight-back strategy from within the governing party which resulted in the Scorpions being replaced with the Hawks. The DSO was established in terms of the NPAA. It had a broad mandate to criminally investigate any crime including but not limited to organised crimes independently.[412] However, the DSO's endeavour to fight corruption was interfered with and rendered ineffective by politicians and frustrated by other institutions which were uncooperative.[413] The DSO's work was impressive and public confidence was boosted in its capabilities and capacity to fight organised crime.[414] The DSO had a conviction rate of between 82% and 94%.[415] Into its second year of operation, it made 66 arrests and the number went up to 614 by 2006. The DSO's finalised investigations ready for prosecution grew from 180 to 214 between 2002 and 2006.[416]

The failure of institutions to co-operate failed the country to prevent and reduce corruption.[417] Cooperation among institutions, enabling legislation, independent boards, the integrity of officers of institutions and the implementation of anti-corruption and money laundering measures could be the answer to combating and eradicating corruption. There is a nexus between bad corporate governance and corruption as well as bribery. Where SOEs are managed in a haphazard, reckless and unprofessional manner, it is not surprising that they continue to face many challenges. Some provisions of laws may be contradictory, and human

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[412] Section 7(1)(a) of the National Prosecuting Authority Act 32 of 1998. The DSO was located as a special unit in the NPA.

[413] Khampepe Commission of Inquiry into the Mandate and Location of the Directorate of Special Operations (The DSO) (Final report 2006) 106. There has been no sound relationship between the DSO and SAPS. The evidence of the NDPP confirms that the relationship between the DSO and the SAPS was an unhappy one. The head of the DSO attributed the tension to institutional jealousy and personality difference. Cabinet approved the amendment of the NPAA which was then named the NPA Amendment Bill of 2008, and it also approved the General Amendment Bill of 2008 which was subsequently named the South African Police Service Amendment Bill of 2008 (the SAPSA Bill). The SASPA Bill of 2008 was opposed by opposition parties.

[414] Dlamini Kwazi 'Scorpions' Downfall Due To Political Interference' *Corruption Watch* 18 October 2018 available at *https://www.corruptionwatch.org.za/political-interference-in-south-africas-elite-anti-corruption-unit-leads-to-impunity/* accessed on 21 February 2024.

[415] Ibid Ajam Kashiefa 'Hawks success rate at only 11 percent' *IOL* 16 October 2010 available at *https://www.iol.co.za/news/hawks-success-rate-at-only-11-percent-686623 accessed* on 21 February 2024. In the article Ajam puts the success rate of the Scorpions at 90% and that of the Hawks at 11%.

[416] *Glenister v The President of the Republic of South Africa and Others* 2009 (1) SA 287.

[417] Mathekga op cit note 103 at 236. According to Mathekga, the South African Police Service (SAPS) used to work with the specialised crime unit in the NPA. This changed and the SAPS created 'projects' for corruption cases. Corruption cases were no longer handled by the specialised crime unit within the NPA but by detectives in the SAPS. Guided investigations were jettisoned.

nature may be inclined to take advantage of the situation. Chaos must be avoided. The positive effect and critical role that good corporate governance can play in SOEs if properly implemented, should not be undervalued and or underestimated. It must be appreciated.

Although not actively and directly involved in the fight against corruption, the judiciary continued to be relied upon to rescue the country from the scourge of corruption, together with the institutions referred to in Chapter 9.[418] The judiciary, in its consideration of cases brought before it which pertain to corruption, is obligated to take into account national and international measures which would affirm the country's commitment to anti-corruption.[419] In other words, the courts are enjoined when deciding cases to ensure that the executives, legislature and state institutions all comply with anti-corruption measures in instances of corruption.

The ability of the NPA to prosecute corruption cases will more likely than not be constrained and negatively impacted upon as long as the appointment of its head remains the sole prerogative of the President.[420] The prerogative is subject to abuse and the office will always be fraught with conflict of interest which will compromise the fight against corruption.[421] The current President's new approach, when he appointed Abrahams's

[418] For example, Auditor General, the Public Protector and the Human Rights Commission; The court in heard two cases against the RAF from the same law firm, de Broglio Incorporated where the attorneys and the RAF officials settled the matters. The settlement, amount was disproportionate to the injuries of the two plaintiffs. The court is bulwark against corruption. *Taylor, Maylin Doris v RAF* 37986/2018 and *Mathonsi, Hlengani Victor v RAF* 13783/2019. The court concluded that the settlements were not in line with the PFMA and therefore, unconstitutional.

[419] Advocate Hoffman argued that national and international instruments must be taken into consideration when the legislature make law. This argument was triggered by the decision to amend the NDPP Act and the SAPS Act. In this case the Chapter 6A of the SAPS was struck down. The Constitutional Court agreed that international instruments must be considered particularly those adopted and ratified by South Africa in *Glenister v The President of the Republic of South Africa and Others* 2009 (1) SA 287. He specifically referred to the UNCAC article 36, AUCPCC article 5(3) and Constitution of the Republic section 179(2); Mathekga op cit note 103 at 255 makes reference to the SADC OECD (2008) Specialised Anti-corruption Institutions: Review of Models.

[420] Advocate Shaun Abrahams's appointment as the head of NDPP was declared unlawful and unconstitutional by the Constitutional Court. Corruption Watch NPC, Freedom Under Law NPC, the Council for the Advancement of the South African Constitution. See *Corruption Watch NPC & 2 others v President of The Republic of South Africa & 8 others* CCT333/17 and *Mxolisi Nxasana v Corruption Watch NPC &10 others* CCT13/18.

[421]Advocate Abrahams was handpicked and identified by the Guptas, and appointed by President Zuma even though he was not qualified to lead the NDPP. The appointment of Abrahams led to the breakdown in the fight against corruption because there was no willingness on his part to prosecute perpetrators. Civil society did not take kindly to this. This resulted in many court challenges. See *Corruption Watch NPC & 2 others v President Of The Republic of South Africa & 8 others* CCT333/17 and *Mxolisi Nxasana v Corruption Watch NPC &10 others* CCT13/18. Justice Madlanga held that the dismissal of Nxasana was unlawful and must be set aside, however, Nxasana should not apply for the NDPP position. Nxasana was instructed to pay back the R10 million he received from government paid per agreement with him and former President Zuma.

successor, Ms Batohi, may be a more pre-emptive and responsible approach under the circumstances.[422]

The Anti-Corruption Task Team (ACTT), the disbanded Scorpions and Advocate Abrahams did not follow through as was done in the past. The central approach to fighting corruption was initially located in the ACTT, a successor to the NACF.[423] The ACTT was constituted in the AFU, DPCI, NPA, SARS and the SIU. The ACTT had committees operating which included lawyers from civil societies, for example including Corruption Watch. However, the ACTT could not succeed because it was hampered by the interference by ministers.[424] Effectively, the ACTT was contingent on the government's goodwill. The DPCI, under the control of the SAPS and was regulated in accordance with the SAPS Amendment Act. It was succeeded by the DSO.[425] The effect of the amendment of the independence of the DPCI was anticipated by the *Glenister and Others* case that the DPCI, commonly referred to as the Hawks, would become the lapdog of the executive and politicians. This proved to be true because corruption investigations and prosecutions dropped dramatically after the Hawks took over from the DSO.

The SIU's instability continued unabated. The short stay of Advocate Soni, the successor of Judge Heath was telling. The subsequent appointment of Advocate Visagie in an acting capacity as head of the SIU, did not strengthen the SIU, instead it continued where Advocate Soni left off by not investigating corruption.[426] Considering the power of the sitting President

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[422] Announcement of President Ramaphosa when he was looking for a Head of the NDPP. An independent committee was appointed to shortlist candidates and the interviews were conducted by a team selected by the President which made a recommendation to him; such an approach will do much to restore the independence of the NDPP.

[423] Mr T Godi 'Anti-Corruption Task Team (ACTT) on pending cases' Parliamentary Monitoring Group available at https://pmg.org.za/committee-meeting/24437/ accessed on 22 February 2024. The fight against corruption was considered important and thus the NACF was established formally to get the public, business and civil society to work together in a coordinated manner. ACTT succeeded NACF in 2011.

[424] Mathekga op cit note 103. According to Mathekga, a centrally coordinated anti-corruption structure is found within government and it is thus dependent on the fancy of the executives.

[425] The anticipated weakening of the corruption fighting ability of South Africa in the *Glenister* case of 2009.

[426] Paul Hoffman 'Smoke and mirrors–and no one is tackling grand corruption' *Daily Maverick* 25 February 2019 available at https://www-dailymaverick-co-za.webpkgcache.com/doc/-/s/www.dailymaverick.co.za/opinionista/2019-02-25-smoke-and-mirrors-and-no-one-is-tackling-grand-corruption/ accessed on 21 February 2024. In conclusion Hoffman said, 'All votes should insist on the best practice solution to the ingoing and unaddressed impunity of grand corruption.' According to Professor de Vos,

to appoint the head of the SIU, the insecurity pertaining to an acting head position and what triggered the investigation of corruption, was unsurprising that the SIU did not carry out its obligation under the SIUST Act. The SIU is dependent on the decision of the incumbent president to proclaim an investigation which could be requested by the Public Protector or the Minister or the AG. However, whether to refer the matter to the SIU or not lie squarely in the hands of the incumbent president. The president may order an investigation but from experience the conduct of former President Zuma did not influence him to do the right thing. Again, it was his prerogative as President to appoint the NDPP.[427] This situation was contrary to regional, continental and international anti-corruption measures.

It is therefore, unsurprising that South Africa is fraught with corruption which is considered to have grown exponentially after the DSO was disbanded and Advocate Abrahams was appointed the NDPP.[428] Effectively, corruption investigations and prosecutions during his tenure were frozen and unattended.[429] The fact that the lives of corrupters continued as usual sent a message that corruption and crime pay.[430] What has come out of the testimonies in the Zondo Commission so far, was that under the watch of Advocate Abrahams and President Zuma corrupters and the corrupted were confident that they were untouchable. All was not lost though because the courts have single-handedly protected their independence and made decisions that have reassured South Africans that no one was untouchable and that the rule of law will prevail. The Constitutional Court declared the appointment of Advocate Abrahams

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the NPA cannot prosecute cases that are not properly investigated, and the SAPS and the DCPI (Hawks) should collect evidence and forward it to the NPA so that the NPA can endeavour to secure a conviction by the courts. It is interesting that the SIU, which was established in terms of the SIUST Act, was not disbanded. However, in line with the President's prerogative in terms of section 3 of the SIUST Act, its head was replaced in 2011 with Judge Willem Heath, an ardent supporter of former President Zuma, who resigned under pressure after he made an inappropriate statement that suggested his bias about former President Mbeki having been behind the rape case against the then President Zuma.

[427] Section of 179(1)(a) of the Constitution gives the President the power to appoint NDPP read with section 9(1)(b) of the NPA Act. Section 12(6)(a) of the NPA gives the President the power to suspend the NDPP and dismiss the NDPP with the resolution of both Houses of Parliament.

[428] ACJR Fact Sheet 'The appointment and dismissal of the NDPP: Instability since 1998' *Africa Criminal Justice Reform* October 2018 available at *https://dullahomarinstitute.org.za/acjr/resource-centre/appoint-and-dismiss-of-ndpp-fs-7-fin.pdf* accessed on 21 February 2024 1-2 Advocate S Abrahams was appointed the NDPP.

[429] The Staff Reporter 'Shaun's new job: Murder in Lesotho' *Mail & Guardian* 23 November 2018 available at *https://mg.co.za/article/2018-11-23-00-shauns-new-job-murder-in-lesotho/* accessed on 21 February 2024.

[430] Ibid. Shaun Abrahams failed to prosecute former President Zuma and the Guptas. The NPA was involved in guiding the investigations; Jenna Etheridge 'NPA boss Shaun Abrahams dodges Gupta prosecution questions' *News24* 17 August 2017 available at *https://www.news24.com/news24/npa-boss-shaun-abrahams-dodges-gupta-prosecution-questions-20170817* accessed on 21 February 2024.

invalid.[431] In its judgment the court instructed Nxasana to return the settlement payment made to him.[432] Also former President Zuma's application for permanent stay of his prosecution was dismissed with costs.[433] Furthermore, the former chairperson of SAA was declared a delinquent director for life.[434] This decision was a warning to directors to comply with good corporate governance and to exercise their fiduciary duties ethically.

Although South Africa has anti-corruption legislation in place (which came into operation before and post the regional, continental and international measures) as well as clear good corporate governance requirements, corruption increased exponentially between 2009 and 2019.[435] The corruptors and corruptees were undeterred in both the public sector and the private sector.[436] The Corruption Commission which came into being on the recommendation of the former Public Protector, Advocate Thuli Madonsela, unearthed corrupt activities in other SOEs in South Africa.[437] Opposition parties and CSOs have continued to support each other in bringing the extent of corruption to the fore. Their actions resulted in the Mpati Commission of the PIC and the investigation into the conduct of the PIC management in the fall of the VBS, an old building society created during the homeland systems.

Corruption was aided and abetted as well as facilitated by professionals such as accountants, auditors, lawyers which include advocates, and other consultants in SOEs and in the private sector.[438] For example, legal opinion of lawyers were sought by SOEs; international

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[431] *Corruption Watch NPC and others v The President of the Republic of South Africa and others; Nxasana v Corruption Watch NPC and others* 2018(2) SACR 442 (CC).
[432] Ibid.
[433] *S v Zuma and another, Thales South Africa (Pty) Ltd v Kwa-Zulu Natal Directorate of Public Prosecution Authority and Other* 2019 4 ALL SA 245; 2020 (2) BCLR 153 KZN.
[434] *Organization Undoing Tax Abuse and Another v Myeni and Others* 2020 ZAGPPHC 169.
[435] PRASA, SAA, SABC, ESKOM, Transnet.
[436]For example, Tegeta, Oakbay, EOH, KPMG, PwC, Murray & Roberts, Avenge, WHBO, LTA. This is not a closed list.
[437] Public Protectors Report (6 of 2016/2017) op cit note 64.
[438] Kyle Cowan 'SARS and the 'rouge unit': the ultimate guide' *News24* 5 July 2019 available at *https://www.news24.com/fin24/sars-and-the-rogue-unit-the-ultimate-guide-20190705* accessed on 21 February 2024. According to Cowan these professionals constituted in the Kanyane panel, Advocate Sikhakhane SC investigation, the Judge Frank Kroon and KPMG. The findings of Sikhakhane SC culminated in disciplinary action against Mr Johann van Loggerenberg. In addition, Van Loggerenberg, Piet Richer, Ivan Pillay were appointed by Gordhan when he was a Commissioner of the SARS. These trio faced criminal charges for acting unlawfully. The Public Protector, Advocate Mkhwebane found that the three were a 'rouge unit' established by Gordhan. Gordhan was also faced criminal charges. Rorisang Kgosana 'Batohi withdraw charges against Sars

and national consultants were requested to provide advice; external accountants and internal auditors were also requested to help cover up corrupt activities; the banks and the private sector companies were also involved.[439] The private sector is the chief contributor to bad corporate governance in the public sector. It dominates the procurement budget of SOEs and plays a key role in corruption. The irony of the situation was that the private sector turns around and criticises SOEs of corruption. Although South Africa was lauded as being ahead of its counterparts in Africa as far as legislation and regulations in place to combat corruption, this did not yield results. The country reeled from one corruption scandal to another especially between 2009 and 2019.[440]

3.3.4. Penalties for corruption and other corruption legislation

The penalties for corruption and bribery varies depending on the seriousness of the offence. In this section a synopsis of the penalties for corruption is discussed hereunder. The minimum punishment for corruption is a fine determined by the courts or imprisonment for a period depending on number of times the offender committed the same crime. If found guilty the corruptor or corruptee could be sentenced to life imprisonment. There are no fixed rules on the number of years. Courts have a final say. Sentences are determined by the courts in South Africa which have discretion.

3.3.5. South Africa's ranking on the list of corrupt countries in Africa and the world

Corruption is an indicator of bad corporate governance. If it occurs in SOEs it negatively impacts the economic growth of the country and delivery of services to its populace. In most instances corruption occurs in procurement either of goods or services. This was magnified in testimony of witnesses in the Zondo Commission about State Capture. The behaviour of the boards of directors, the executive directors, the executive managers, the executive authorities

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'rouge unit' trio' *The Citizen* 7 Feb 2020 available at *https://www.citizen.co.za/news/south-africa/politics/batohi-could-face-court-action-for-withdrawing-charges-against-rogue-unit-trio/* accessed on 21 February 2024. Whistle blowers blew whistles of wrongdoing at the SAA, SABC and SARS but boards of directors and executive management of these SOEs disregarded the information from the whistle-blowers. e.g. SAA, SABC, SARS. Internal auditors and external audit of SOEs covered up maladministration such as in the case of Denel, Eskom, Prasa, Transnet, and Denel. Private sector companies such as ABSA, FNB, Nedbank and Standard Bank allowed questionable transfers by Gupta companies. After years of complicity these four banks stopped availing banking facilities to Gupta companies and individuals connected with the Guptas

[439] KPMG, PwC, Deloitte, Sizwe Ntsaluba Gobodo VSP and Gobodo Incorporated, KPMG, VBS provided financial services to the Gupta companies when the four major banks withdrew banking facilities. Sizwe Ntsaluba Gobodo VSP and Gobodo Incorporated provided auditing services to OakBay Resources Energy which was threatened with deregistration from the Johannesburg Stock Exchange.

[440] Public Protector's Reports op cit note 64 and op cit note 65.

and other employees was contrary to good corporate governance. Lack of accountability, ethics, integrity, responsibility, sound management of the fiscus and transparency were a clear failure of good corporate governance in SOEs. This is an indictment on human beings' behaviour because there are clear governance instruments in place for SOEs. South Africa's corruption ranking was at 83 out 180 countries in the world in 2023.[441] This is not a good reflection on the country commitment to good corporate governance. In 2010 it was ranked 53.

In 2023 in Africa its ranked number 12. It is on a downward slope, and this should raise a red flag to all South Africans.

3.4. Persistent problems in the trio's state-owned enterprises

Botswana, Namibia and South Africa have persistent good corporate governance challenges. Botswana and South Africa do not have the overarching legislation for SOEs or public enterprises like Namibia. Directors are still appointed by the Ministers because of enabling legislation which, constrains their effectiveness because politicians appoint them. The Ministers of portfolios still have the power to appoint and dismiss the board and the CEO. The board's authority to dismiss the CEO is constrained although it is the board and not the Minister who work with the CEO. The quality of appointments of the boards of directors disempowers them. Their SOEs are not run as they should consider that they have a mammoth task to provide the much-needed services – energy, communication, transport, water and sanitation for their people. Their SOEs continue to underperform because their boards of directors are not sufficiently independent to govern their SOEs with the requisite confidence as they should.

With the advent necessity to have audit committees, internal audit functions in SOEs, social and ethics committees, remuneration committees an unenlightened board member is more likely than not to appreciate the task before him/her. Others are overwhelmed by the task facing them but do not request training to empower themselves. The trio are plagued by problems of creative accounting, conflict of interest, corruption, money laundering and many other factors that necessitate adopting and implementing good corporate governance across the private and public sectors to mitigate the mismanagement of companies including SOEs. The costs of SOEs to the government fiscus continue to be a problem. Procurement is a major

[441] Transparency International 'Corruption Perceptions Index' January 2024 available at *https://www.transparency.org/en/cpi/2023* accessed on 1 February 2024.

problem. Corruption, corruptors, corruptees and private sector enablers are cause for concern in SOEs. The trio continue to be plagued by governance issues.

3.5. Conclusion

Good corporate governance is essential for the effective and proper management of SOEs and public entities. Good corporate governance has in the past been disregarded by most SOEs and public entities which resulted in elevated expenditure and financial exposure of government. Failure to adopt and implement good corporate governance in the daily management of SOEs heightens the risk of financial mismanagement and the sustainability of SOEs. In such instances, the internal controls are compromised, disclosure is disregard, and accountability and responsibility are jettisoned. It is incumbent upon the boards of SOEs to ensure that good corporate governance is in place and implemented. When good corporate governance is weakened, corruption sets in. The chances of combating, curbing and preventing corruption are slim if not non-existent when boards and executive management that run SOEs are not committed to the principles of good corporate governance. Corruption constrains the development of the economies of the quad and the net effect is a high unemployment rate, a substantial poverty rate, and insignificant delivery of services. Moreover, non-performance of SOEs and corruption cause governments to divert funding that could have been used to improve the lives of the populace to prop up these SOEs.

Botswana did not have national anti-corruption measures in place prior to ratifying the international anti-corruption instruments. Effectively Botswana relied on international and regional instruments to address issues of corruption such as the PARLEMO Convention, UNCAC, the SADC Anti-Corruption Protocol but not the AUCPCC. It followed the AUCPCC anti-corruption principles. Nevertheless, Botswana is ranked third on the list of least corrupt countries in Africa. It subsequently ratified the abovementioned international and regional instruments.

At Namibia's independence, the country did not have corruption legislation in place to combat and prevent corruption. It had the ACAA which did not provide for anti-corruption activities at all. Namibia relied on the SADC Anti-Corruption Protocol and continental and international conventions which the other three countries also relied upon. South Africa, however, had national legislation in place for corruption. It augmented its legislation in the same way other countries did. It is interesting that despite its enviable provision for anti-corruption it is ranked lower than Botswana, and Namibia. The trio continues to be plagued by corruption.

Botswana, Namibia and South Africa are plagued by problems of creative accounting, conflict of interest, corruption, money laundering and many other factors that necessitate adopting and implementing good corporate governance across the private and public sectors to mitigate the mismanagement of companies including SOEs. The difference is the acute need in developing countries to attract investors which will not happen if there is a lack of good corporate governance.

CHAPTER 4

SOES GOVERNANCE CHALLENGES AND PRIVATE SECTOR ENABLERS

4. INTRODUCTION

In the preceding chapter, a comparative analysis was conducted on corporate governance in SOEs across Botswana, Namibia, and South Africa. The findings revealed that these jurisdictions continue to face similar governance challenges. Notably, Namibia stands out as the only jurisdiction with a comprehensive legislative framework dedicated to SOE governance, manifested in the Public Enterprises Act 1 of 2019. Despite the implementation of legislative reforms, the persistent challenges faced by SOEs remain unabated. Namibia four years after the enactment of the Public Enterprises Act is still struggling to realise good corporate governance. An umbrella legislation for SOEs on its own will not realise positive results unless underpinned by competent, scrupulous and strong boards, dedicated and honest board members, executive managers committed to the success of SOEs, and politicians focused and interested in the delivery of services and economic development of the country.

Thabane expressed concern about the quantity, complexity, split and contradictory nature of legislation thus corporate governance is a challenge.[442] The researcher acknowledges that there are areas of concern, however, is of the view that legislation can be harmonised. It is a matter of interpretation. For example, the Companies Act and the PFMA. Sections 5(4)(a) and Section 5(4)(b) of the Companies Act provides for inconsistencies. The researcher contends that interpretation is the issue.

The issue of interpretation was brought into sharp focus in the 'rouge unit' investigation and litigation. The court found that there is no such thing as a 'rouge unit.' The establishment of the investigating unit at SARS was not contrary to the law. The SARS compensated the so called 'rouge unit' and apologised to it. Even the Zondo Commission was of the view that there was no such a thing.[443]

Insufficient funding of SOEs is an issue that has been raised and considered an obstacle to the SOEs capacity to be run effectively. Stevens suggests that the challenges faced by SOEs stem

[442] Thabane op cit note 87.

[443] Public Protector's Report (36 of 2019/20) *Report on an investigation into allegations of violation of executive ethics code by Mr Pravin Gordhan, MP as well as allegations of maladministration, corruption and improper conduct by the South African Revenues Services*.

from inadequate funding.[444] This view is shared by Presidents Review Commission. The researcher agrees that funding of SOEs at times is inadequate. However, it is difficult to reconcile SOEs spending money which is a scarce resource to them for purposes it was not budgeted for.

South Africa is on the brink of passing an umbrella legislation for SOEs, the National State Enterprises Bill of 2023 (the Bill). The Bill is available in the government gazette no. 49312 of 15 September 2023. The Bill establishes a state asset management SOC limited which will consolidate the shareholding of state enterprises. The researcher asserts that there is no guarantee that an overarching legislation will change the problems SOEs face unless attitudes change. Commitment to good corporate governance by SOE governing bodies, executive managers and politicians and the respect for the rule of law could be the answer. However, if anything is to go by the history of deliberate disregard of good corporate governance in SOEs, by some executive managers, the boards of directors, politicians for reasons best known to them and enablers South Africa is on a downward slope.[445] There was hope that the Zondo Commission would bring corruption and bad governance to a stop or slow it down, that does appear to be happening. It is not surprising but disappointing. Enablers, SOEs management, board and politicians do not give good corporate governance a chance. The private sector enablers' cooperation in upholding good corporate governance when they work with the public sector is critical. The question is, will the enablers change their modus operandi when they do business with SOEs at the expense of profit? Or will both the private sector and the SOEs continue with business as usual regardless of the legislative changes?

The challenges SOEs face are manifold encompassing elements of incompetence, greed, poor judgment, political manoeuvring, self-enrichment, and short-sightedness. This list is not exhaustive. The complexity of poor governance issues within SOEs defies simplistic categorisation. To conveniently disregard the role of the private sector in failed good corporate

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[444] Stevens op cit note 359.

[445] Williams Athol *Deep Collusion* (2021) 13, 81-88; Cynthia Stimpel 'Hijackers on Board' Tafelberg (2021) 59-60, 77, 149-153. The chairpersonship of the SAA Ms Duduzile Myeni (Myeni); Mothepu Mosilo *Uncaptured: The true account of the Nenegate/Trillian whistleblower* (2021) 30 and 95. Liezel Hill and John Bowker 'SAA names Musa Zwane as the new CEO' *Business Times* 18 November 2015 available at *https://www.timeslive.co.za* accessed on 30 November 2022.An urgent interdict was brought against SAA and its board after a whistleblower approached OUTA to challenge enforcement of the contract; Jessica Bezuidenhout 'SAA Lost Key Executive' *Daily Maverick*, 19 October 2017 available at *https://www.dailymaverick.co.za/article/2017-10-19-saa-yes-dudu-myeni-is-out/* accessed on 30 November 2022. The resignation of Nico Bezuidenhout, the former acting Chief Executive Officer of SAA in 2015.

governance in SOEs would be dishonest, hypocritical, pretentious and unrealistic if a solution was to be found. Against this context, the role of the private sector enablers in the failed good corporate governance in SOEs is discussed. The presence and role of the private sector in the crimes committed in SOEs is also discussed, as it endeavours to assuage its role by refunding payments received from SOEs or making symbolic payments.[446] But for the Foreign Corrupt Practices Act of 1977 as amended in 1998 (the FCPA).[447]

The FCPA is of application to the anti-bribery section of the FCPA and extends to persons or foreign companies that engage in bribery whether directly or through their agent who pay or facilitate payment for corruption within the territory of the United State America (USA). Most if not all these international suppliers of goods and services providers prefer to settle with the Department of justice (DOJ) Fraud Section, Criminal Justice. The actual monetary, reputational and economic costs to South Africa Incorporated are considered. The researcher's humble submission is that the real problems will not be overcome without addressing the fundamentals. Good corporate governance failures will continue as long as SOEs and the private sector exist and collaborate with each other. The casualty will remain the people and the economy of the country.

The historical background of corruption, the genesis of the lack of good corporate governance in SOEs, the conduct of the African National Congress (the ANC), the collaboration between SOEs and enablers, as well as its total disregard are addressed through examples in this research.

4.1. Historical background of corruption in SOEs

Corruption and state capture in South Africa preceded the African National Congress (ANC) government.[448] Plaut and Holden posit that this country never accomplished a 'golden age' of

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[446] For example, ABB South Africa, Bain, EOH, Hitachi, KPMG, McKinsey, SAP. Cases are still unravelling as companies engage with SIU and other reacted consequent to the Zondo Commission. *Competition Commission v Murray & Roberts Ltd (017277)* [2013] ZACT 75 (22 July 2013). After the 2010 World cup in South Africa collusion and providing cover pricing for building the stadiums. Grinaker, Murray & Roberts, Wilson Bayly Homes Ovcon, Stefanutti Stocks, Basil Read, Group Five.

[447] Criminal Division: US Department of Justice *Foreign Corrupt Practice* justice.gov/criminal/criminal-fraud/foreign-corrupt-practices-act

[448] Steven Friedman 'How corruption in South Africa is deeply rooted in the country's past and that matters' *the economist* 28 August 2020 available at *https://theconversation.com* accessed on 1 December 2022; Friedman op cit note 27 at 52; Mamdani Mahmood *Citizen and Subject: Contemporary Africa and the Politics of Late Colonialism* (2018); Van Vuuren op cit note 23 at 2-3. The inauguration of the late President Mandela did not usher in corruption and economic crimes. In fact the adoption of the Constitution of the Republic of South Africa in 1996 was seen as having heralded the new order of integrity.

virtuous, fair and efficient government.[449] During the Dutch and English colonial eras, the Cape Colony governments were fraught with corruption and mismanagement, which will become more apparent in this chapter. The researcher argues that the insidious nature of corruption and state capture should not be looked at through the prism of the ANC. Steven Friedman hypothesises that not many people know that corruption in South Africa is the oldest tradition.[450] Many believe that when the ANC loses power, corruption will disappear. That is wishful thinking because corruption and state capture go back 350 years to when Jan Van Riebeck arrived in the Cape Colony.[451] The researcher agrees with Friedman, Blackman and Dall, Van Vuuren, and Hofstatter that corruption is old and there is a causal link between it and bad corporate governance. According to Friedman, it is old and will not be easy to fix. Blackman and Dall believe that the alleged conduct of Van Riebeck could be considered to have brought 'the pandemic of corruption' when others refer to it as 'our national sport.'[452]

He was closely followed by Simon Van der Stel and his son Willem Andrian Van der Stel, who stepped into his father's shoes.[453] Perhaps the ANC was emboldened to emulate corruption, nepotism and rapacious greed of leadership and cadres after the Mandela and Mbeki time. The researcher is not suggesting that they did not face good corporate governance issues during their time but did not compromise by accepting gifts for self-enrichment.[454] The ANC government continued where the Apartheid government left off. It conceivably blinded South Africans and others when it introduced the Constitution, good corporate governance laws, regulations, and policies for the private and public sectors. However, Judge King's King Code opened the door to corporate governance in the private sector, which was voluntarily adopted by the ANC government, making it compulsory for the public service, SOEs and other state organs, including the government. The ANC government should have respected and stood firm in implementing good corporate governance rather than perpetuating corruption and state capture at a considerable cost to the economy, the government's reputation, and South Africans.

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[449] Martin Plaut and Paul Holden *Who Rules South Africa? (*2012) 266.
[450] Ibid. Blackman and Dall op cit note 26. It is, however, not clear if corruption preceded Jan Van Riebeck's arrival or he brought it with as the governor; Jan Van Riebeck had been denied a position in Vietnam because of the suspicion that he was corrupt.
[451] Ibid. Friedman op cit note 27 at 60.
[452] Ibid. Van Riebeck arrived in the Cape Colony after being accused of embezzlement at the Dutch East India Company. The Cape Colony was intended to be a pitstop for replenishment.
[453] Blackman and Dall op cit note 26 at 37.
[454] Friedman op cit note 27 at 60.

Corruption and state capture were real issues when Britain took over the Cape Colony from the Dutch in 1795.[455] Earl Macartney was the first British governor of the Cape Colony and retired after 18 months without being implicated in corruption and state capture. Governor Macartney's successor, Sir George Yonge's management, was different and a law unto himself.[456] Upon arriving in the Cape Colony, Yonge converted the Company Garden into his private garden. He also refurbished living quarters at De Tynhuys to fit his status.[457] He gave his family member Richard Blake a job to set up a winetaster's office.[458] Blake proposed that a merchant obtain a monopoly for selling wine of any quality whose application fell within his jurisdiction. In return, they would share the profit. Yonge gave Walker and Robertson an exclusive right to print and publish weekly newspapers, Cape Town Gazette and African Advertiser, in Dutch and English for the government for 22 years.[459] The government also paid them well for the equipment and the press. In other instances, he signed government contracts to repair public buildings, supply meat to the troops, and supply articles to the barracks at inflated prices.[460] According to Blackman and Dall, Yonge drew an unauthorised £70 000 from the treasury above the usual expenses in the Cape Colony at the end of 1800.

The Groote Post, a government-managed farm, was identified to be used to improve farming operations in the Colony.[461] Somerset took direct control of the 25,000-acre farm, dismissed the governing board, and diverted government money for his use on the farm for a purpose divergent from its intended purpose.[462] He entertained his visitors on the farm and used it as a hunting spot. The inspector of lands, D'Escury, submitted a report that the farm was unprofitable and advocated for it to be divided and given to competent farmers to make it profitable.[463] Somerset saw the opportunity to sell his horses to Groote Post to "make it profitable". He acted as a private seller and a buyer on behalf of the government.[464] His conduct did not attract any sanctions, although it was corrupt and failed to disclose interest. Like his

[455] Blackmand and Dall op cit note 26 at 37.
[456] Ibid 39. Prime Minister William Pitt appointed Yonge with a salary of £4000.00 per year. Henry Addington considered Sir George Young an inappropriate person for the governor position.
[457] Blackman and Dall op cit note 26 at 41.
[458] Ibid at 42.
[459] Ibid at 43.
[460] Ibid.
[461] Ibid at 60.
[462] Ibid.
[463] Ibid.
[464] Ibid. Somerset did not recuse himself from selling his horse to the Groote Post when he was in. His was conflicted but was allowed to get away with that.

predecessor, Somerset abused his power to no end, granting people free land provided they bought horses from him at an exorbitant amount.[465] Capable, honest and conscientious officials who refused to toe the line were persecuted, and in some instances, their livelihoods were ruined.[466]

Before independence, corruption and state capture were arguably already entrenched in the country.[467] Companies involved in money laundering were incorporated clandestinely in discreet jurisdictions such as Liberia and Panama, where bank accounts at Kreditbank Luxembourg and Belgium Kreditbank.[468] Corruption and state capture were not limited to private and public companies but extended to public sector employees. Government officials and their friends bought and sold lands in mining areas. A person connected at the high echelons in government bought thirty pieces of land priced at £20.00 but paid £15.00 and saw nothing wrong with that.[469] Scandals were rife; concessions were issued, inferior maise grain was purchased, and donkeys were imported from Ireland and South America.[470] However, not all the donkeys were delivered despite payment being made in full. According to Blackman and Dall, '[a]s it turned out, only 10 per cent of the donkeys the farmers profited from actually existed, the remainder braying only on paper.'[471]

During Kruger's presidency in the Transvaal, nepotism and corruption were the order of the day.[472] Kruger appointed his grandson, Master of the Supreme Court, the other a chief inspector for roads, his nephew, an assistant state secretary, and his son-in-law, Frikkie Eloff, who was paid £ 20,000.00 to supply Johannesburg water.[473] These former premiers and presidents, such as Paul Kruger, Nico Diederichs, DF Malan, and BJ Voster, were involved in corruption and have much in common with Jacob Zuma because he facilitated corruption and

[465] Ibid at 59.
[466] Ibid at 45.
[467] Open Secrets Report (2020) *The Enablers: The Bankers, Accountants And Lawyers* at 12 – 15. This report was submitted to the Zondo Commission to assist it in its investigation into state of capture and corruption. Corruption, state capture and money laundering were the order of the day. The private sector companies and public sector collaborated to prop up the government. Private companies such as Reunert controlled by Old Mutual, Altech by Anglo American and Grintek by Anglovaal benefited from contracts procured without open tender process which employed 3000 workers who worked exclusively on the projects of Armscor a state-owned entity.
[468] Ibid at 12 – 13.
[469] Ibid at 115. The transactions during State President Nico Diederichs.
[470] Ibid.
[471] Ibid at 116.
[472] Friedman op cit note 27 at 53.
[473] Ibid. According to Friedman CF Eloff got concessions, business monopolies; Op cit note 443 at 114.

state capture.[474] He repurposed institutions of government, SOEs, violated the law, abused his power and deployed amenable cadres into positions of executive authority.[475] The Afrikaner Broederbond was the key source of corruption. For example, BJ Vorster, the Prime Minister from 1966, sent his ministers detailed information about land bankruptcies and available farms in the market.[476] Diederichs agreed to relocate the base for the sale of the country's gold from London to Zurich for a fee for each ounce sold deposited into a private bank account.[477] A retired judge found him to have an amount of R28 million in Switzerland. DF Malan, in 1948, looked out for Afrikaners without fail.[478] Economic empowerment of Afrikaners was pursued during his time as the country's first President. It was justifiable for NP political leaders to be wealthy because they were breaking the English dominance of the economy.[479]

Blackman and Dall assert that before BJ Vorster's ascendance to political position as the Prime Minister, he was favoured with the Selati Concession, which he sold to Eugene Oppenheim. He secured Louis Warnant's service to build a 308-kilometre railway line at a total cost of £2 million.[480] Warnant availed the contract to another company and made Oppenheim £519 600.00 within three days.[481] Oppenheim hid money generated from the concession through creative accounting.[482] He subsequently admitted to having paid £ 30,000.00 worth of bribes. President Kruger of the Transvaal was not bothered by the revelation of this type of conduct. Corruption and state capture were and still are pervasive in this country. It is not surprising that former minister of state security Bongani Bongo, during his tenure as senior

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[474] Blackman and Dall op cit note 26; Op cit note 449 at 284 – 285. Zuma's family and his friends were overtly involved in business with the state; Mpumelelo Mkhabela 'Mistake of the Nation: The lost decade of Zuma Rule' *News24* 15 February 2018 available at *https://www.news24.com* accessed on 1 December 2022.

[475] Bhorat et al op cit note 65 at 5 and 17. According to Bhorat et.al. state institutions were repurposed to benefit and endowed a few people who controlled power, wealth and privilege and politically connected. Zuma and his supporters were of the view that the purpose of the change was to bring about radical economic transformation. They were critical of the Mbeki government because they were of the view that transformation during his tenure was not radical. It was not disruptive like Manyi repeatedly said.

[476] Friedman op cit note 27 at 55.

[477] Ibid.

[478] Ibid.

[479] Ibid at 56.

[480] Ibid at 117.

[481] Ibid at 116 - 117; Isaac Mahlangu 'Bongo on trial over R25m fast buck' *Sunday Times* 6 November 2022 available at *https://www.timeslive.co.za* accessed on 1 December 2022.

[482] Ibid. Creative accounting was not foreign in the country. Markus Jooste through inventive accounting cheated the public servants billions of rands after being financed by the PIC. Mahlaka Ray 'Steinhoff shares plunge after the CEO Markus Jooste quits' *moneyweb* 6 December 2017available at *https://www.moneyweb.co.za* accessed on 1 December 2022; Staff Writer 'Reserve Bank seizes the former Steinhoff CEO Markus Jooste's assets – this is what they took' *BusinessTech* 19 October 2022 available at *https://businesstech.co.za* accessed on 1 December 2022.

legal advisor in the Mpumalanga provincial government, facilitated a sale of land to a third party for R10.4 million and resold the exact property to the Human Settlement department for R36 million within a few minutes.[483]A similar deal was concluded in Emalahleni when a farm was acquired for R15 million from the provincial government and sold to the Human Settlement Department for R37.5 million.[484] These deals would not have been realised had good corporate governance been put first and policies of procurement and the PFMA not been undermined.

The Broederbond's path to the country's helm was strewn with corruption.[485] They worked collectively in secret as a team to capture the government successfully [486]. They were encouraged by Malan's ascension as Prime Minister in 1948. Their deeds, like Zuma's, came to the fore later.[487] Diederichs purchased land for R2 000.00 and later sold it for R125 000.00 for the government to develop a township.[488] Subsequently, he bought a farm in 1972, which the government later paid for to build the Air Force. Arguably, the fortune Diederichs made from the farm was not lucky but well planned and thought out. It cannot be coincidental that Diederichs got this opportunity to benefit from the acquired farm. He ought to have known that the government planned to develop the land at some point and thus positioned himself accordingly to benefit from that place.[489] According to Blackman and Dall, during the presidency of Malan, the cabinet was occupied by Broederbond members. The National Party, in which the Broeders were embedded, took control of all state apparatuses, including civil service, judiciary, and procurement.[490] Broeders' companies were given profitable government institutions contracts.[491] The nationalised railways and SOEs such as Iscor, Sasol, Amcor and Eskom were used to enable Broeders-connected companies to amass control of the extensive section of the country's economy.

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[483] Mahlangu op cit note 481.
[484] Ibid. Bongo and other role players in this scheme have been charged by the NPP.
[485] Ibid at 152; Ibid at 176-177. Diederichs is reported to have taken secrets to the grave including the Swiss account in which $3billion was deposited. This money belonged to the South African government. When Mr Dullah Omar brought to the attention of Nelson Mandela the Swiss account, he discouraged Omar form pursuing it in the interest of harmonious race relations.
[486] Blackman and Dall op cit note 26 at 152 & 159. Their cooperation led to the Broederbond capturing the state.
[487] Ibid at 174.
[488] Ibid.
[489] Ibid at 174.
[490] Ibid at 160. By 1962 forty two Broeders were top civil servants, only three English males from three hundred and thirteen were and the rest Super Afrikaners and the Appeal Court was occupied by the Broeders and only two were not Afrikaners.
[491] Ibid at 162.

Federal Mynbou (a Broeder) company was awarded a contract to supply coal to Eskom.[492] This was one of the coal mining companies Eskom strategically built next. Mynbou was a form of state capture and corruption. Preference for Broeders was not limited to appointing cadres or Broeders into critical positions in SOEs for their benefit and financial gain, which was done unashamedly.[493] Diederichs facilitated the appointment of Dr JG van der Merwe, the chairperson of Iscor, an SOE.[494] Van der Merwe chaired the board of Iscor and supplied it with sand for its foundries. Undisclosed conflict of interest was rampant because Broeders could do so with impunity. Furthermore, Diederichs solicited a bribe of R200 000.00 for the dam project tender, promising to intervene on the company's behalf with the State Tender Board (STB).[495] The STB was open to manipulation. The National Party (NP) successor inherited the STB. During the NP government, good corporate governance was not in place, was unheard of, and, therefore, was non-existent.

According to the Open Secrets submission to the Zondo Commission, Afrikaner companies benefitted from the NP government. They flourished because business was channelled to them.[496] Van der Westhuisen contends that tenders were redirected to Afrikaner companies, giving them financial muscle to grow their businesses. The generosity of the NP made Sanlam the second largest company in the country after Anglo-American.[497] SOEs such as Iscor, Sasol, Eskom, Armscor, Soekor and Nufkop were only developed and managed by Afrikaner men.[498] The exclusive appointments in high positions of Broeders extended to universities. Du Preez explicitly references the University of South Africa, the Rand Afrikaans Universiteit. Today, the University of Johannesburg, the University of Pretoria and Stellenbosch University are staffed with most by Afrikaner men. So, the concept of deployment and nepotism are not unknown, but long-standing features in the country and precede 1998 when the ANC deploy cadre.[499] The deployment was not the only route the NP government and the Broeders followed. The Broeders gave Volkskas Bank a grant to shore it up without apologising.[500] The NP government banked with Volkskas Bank, which grew slowly. An open

[492] Max Du Preez *The Super Afrikaner Inside the Afrikaner BroederBond* 2012 427.
[493] United Nation Economic Commission for Africa.
[494] Ibid.
[495] Ibid.
[496] Christi Van der Westhuizen *White Power & the Rise and Fall of the National Party* Zebra Press (2007).
[497] Ibid.
[498] Ibid at 38; Plaut and Holden op cit note 449 at 294 – 295;
[499] *Democratic Alliance v African National Congress & Others* (31418/2022) [2024] ZAGPPHC 114.
[500] Blackman and Dall op cit note 26 at 424 – 428.

tender was not sought to bank with Volkskas Bank. The Reserve Bank of South Africa used Volkskas Bank to pay and launder money for Armscor's purchases internationally.[501] The Reserve Bank was complicit.

Plaut and Holden argue that when the NP days were nearing the end, the white elites realised that time was up, and corruption spiked. This view finds support from Friedman, who contends that the end of apartheid saw an increase in the scramble for self-enrichment.[502] According to him, the international sanctions forced the government to respond, which saw a spike in corruption. The NP spent R339.19 billion between 1978 and 1994, and part of that was used to bribe individuals and companies worldwide for various reasons, including securing crude oil to fend off the sanctions.[503] It is clear from the above examples that corruption is deep and is the norm in the country. History tells us of this practice going back more than three centuries. It is disappointing, irresponsible and uncaring for the economy and the people that the ANC continued with corruption despite adopting legislation and policies regulating good corporate governance.

4.2.The genesis of the lack of good corporate governance in state-owned entities

Thabane and Snyman-Van Deventer acknowledged that the new government inherited nonperforming SOEs when it came to power.[504] What they did not say was that non-performance of SOEs was linked to historical appointment of inexperienced, unqualified boards and executive managers which the ANC mimicked. Van Vuuren asserts that poor corporate governance was entrenched long before the ANC government emerged.[505] He agrees with Blackman and Dall that corruption and state capture in SOEs preceded the ANC government.[506] The current problems SOEs are faced with are the legacy of Apartheid

[501] Van Vuuren op cit note 23 at 173 – 176. Armscor had 844 accounts in 196 banks across 27 countries. The majority were in Europe with 349 in Luxombourg, 186 Switzerland, France 80, United Kingdom 43, Germany 26 and the United States 16. Countries such as Zimbabwe, Iraq, South Korea and Colombia. 487 were for Armscor and 357 for in held in individuals' names who were receiving payment from Armscor.
[502] Friedman op cit note 27 at 56.
[503] Ibid at 271. Huge sums of money were transferred into homelands, 100 000 Angolan elephants and large numbers of rhinos were poached by the SA army in Namibia and in Angola.
[504] Thabane and Snyman-Van Deventer op cit note 7.
[505]Van Vuuren op cit note 23 at 38. The National Party used the Broederbond connected auditors from private audit firms to audit clandestine projects. The corruption and procurement irregularities are in the open because the legislation enjoins divulgence and openness, something that was not practiced during the Apartheid government.
[506] Ibid at 39-40. One of the SOEs, Armaments Corporation of South Africa SOC Limited (Armscor). Armscor's acquisition of goods was paid for clandestinely off the record. According to van Vuuren, they identified 500 projects. The projects names were not connected to acquired goods.

corruption practices.[507] The constitutional protection of the free press contributed to bringing the failures of good corporate governance and corruption in SOEs into the public domain; thus, the perception that governance collapsed and corruption was unprecedented, unlike during Apartheid.[508] The changed terrain in the advent of social media also placed corruption, fraud and state capture in the spotlight, all fruits of the failed good corporate governance in SOEs. Notwithstanding, SOE leadership cannot and should not be excused for managing SOEs contrary to accountability, integrity, and transparency. They must be held to account because non-compliance with good corporate governance is a severe dereliction of duty, which, in most, if not all, instances, negatively affects the finances and the reputation of the SOEs. It is also simple criminality and must be seen for what it is.

Most SOEs have failed and continue to fail because good corporate governance is not fully applied in the management of these entities by the board as a governing body. In his book, Van Vuuren avers that most of the problems SOEs face today go back to the Apartheid time.[509] To him, transformation does not change the culture of the SOEs. The culture he referred to 'is lack of control and management, and a fair amount of freedom around the rules, and not too much concern around what we would nowadays call corruption'.[510] This contradicts principle 1, which requires the board to lead ethically and effectively, and principle 2, which governs the SOE that supports and establishes ethical culture.[511] According to Hofstatter, accountability and transparency were unheard of in SOEs.[512] However, information has become more accessible with the advent of constitutional democracy, and the playing field has changed in SOEs, but corporate cultural change takes longer.

4.3.Good corporate governance undermined

Good corporate governance in SOEs was and continues to be ignored deliberately by the executive and non-executive managers supported by unscrupulous political leaders, including some executive authorities. These managers enthusiastically ignore good corporate governance because they want to ingratiate themselves to the executive authority for selfish interest to be

[507] Ibid.
[508] Ibid. This is despite Zuptas' endeavour to control the media through the New Age newspaper, ANN7 the television news channel and the SABC through the appointment of Motsoeneng by Minister Muthambi.
[509] Ibid.
[510] Ibid.
[511] King IV Code Part 6.
[512] Hofstatter op cit note 377.

appointed or promoted to higher positions. For example, at SAA, the Chairperson, Ms Duduzile Myeni (Myeni), the successor to Ms Cheryl Carolus, stamped her authority with confidence after the en-masse resignation of the board of directors. She deliberately ignored good corporate governance and actively supported non-compliance.[513] Myeni would not have successfully achieved her goal without the cooperation of executive managers at SAA.[514] Furthermore, Myeni ensured that SAA's employees knew she had Zuma in the vanguard. The support that Zuma gave Myeni was there for all and sundry to see during his visit to the SAA offices, where he addressed the employees.[515] The visit was intended to send an unmistakable message to employees to cooperate and work with Ms Myeni.

Nhantsi heard this message; after being appointed an interim Chief Financial Officer, she ignored SAA's procurement governance processes and financial capacity.[516] Nhantsi informed the acting Group Treasurer that the board wanted the company to appoint a transaction advisor to assist SAA in raising an R15 billion loan to consolidate its debts.[517] SAA had an in-house internal treasury department that could deal with a transaction already commenced. The acting Group Treasurer believed SAA was in a monumental cash flow crisis.[518] According to the acting Group Treasurer, 'Everyone was expected to keep the costs to a minimum and to cut down wasteful expenditure. SAA already had a fully-fledged treasury and finance division, so there was no need for outsourcing.'[519] Notwithstanding this information about SAA's capacity, Myeni and her executives proceeded with their plan, disregarding good corporate governance. Contrary to principle 4 of the King IV, in particular, being alert to the organisation's general viability, reliance and effect of its capitals, solvency and liquidity and its going concern.

Contrary to principle IV, the acting CEO, the acting CFO, and the board, which was not quorating, agreed to proceed with a contract to finalise the deal and sign the contract to

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[513] Jan Cronje 'Former SAA executive says Myeni asked staff to 'do illegal things' *News24Wire* 19 June 2019 available at *https://allafrica.com*. Accessed on 20 June 2022; Op cit note at 443 at 81-84.
[514] Stimpel op cit note 445 at 81. The board that took this resolution constituted three non-executive directors – Myeni, Kwinana and Tambi and two executive directors – Acting CEO Zwane and interim CFO Nhatsi. Both Nhantsi and Zwane were rewarded with the position of CFO and CEO respectively later.
[515] Ibid at 117. Stimpel assured SAA workers that he would not let the SOE fail.
[516] Ibid.
[517] Ibid at 92.
[518] Ibid.
[519] Ibid.

raise an R15 billion loan with the Free State Development Corporation SOC Ltd (FDC).[520] The acting Group Treasurer contacted Avril Halstead, the Chief Director at the National Treasury because governance requirements were not being followed. Halstead emphasised that SAA should follow its policies and governance processes when sourcing a funder.[521] This was a clear signal that the National Treasury expected SAA to follow good corporate governance when procuring funding. The deal was eventually brought to a standstill by Minister Gordhan in a letter to Myeni specifically prohibiting the SAA FDC R15 billion loans because it was flawed.[522] When Gordhan brought the FDC shenanigans to a halt, an alternative in the form of BNP Capital was appointed contrary to procurement procedures to achieve the goal contemplated by Myeni, her board and the two executives. Unsurprisingly, the CFO supported the board because Myeni handpicked her.[523]

The acting CEO, Zwane, told the human resources committee to include Nhantsi, although she was neither an applicant nor on the shortlist.[524] Her appointment was controversial.[525] Nhantsi admitted during her evidence at the Zondo Commission that she did not have sufficient experience for the position, although she accepted it and disregarded and trampled good corporate governance.[526] Effectively, the governance and procurement policies were thrown out of the window. This is contrary to principle 10, which requires the board to make appointments and delegate to management, which is competent, qualified and appropriately authorised individuals with adequate resources. This conduct also runs contrary to principle 11 about risk governance.

During the absence of the acting Group Treasurer, Nhantsi bullied Kleyn into signing a recommendation to the bid adjudication committee with a price tag worth R300 million, even

[520] Ibid at 81.
[521] Ibid at 83.
[522] Ibid at 134; Judicial Commission of Commission of Inquiry into Inquiry into State Capture State Capture Report (Zondo Report Part 1 Vol. 1) *South African Airways and its Associated Companies Associated Companies*.
[523] Ibid I. Stimpel op cit note 445.
[524] Ibid at 114.
[525] Ibid at 115. Nhantsi was appointed the CFO of SAA in May 2017. Based on the conduct of Nhantsi even during her tenure as the acting CFO, she was actively involved in dismantling the good corporate governance at SAA by sourcing services without following the procurement processes. Her appointment seemed to give her the impetus.
[526] Ibid at 156. It is important to note that Nhantsi was an employee of a former service provider for SAA.

though SAA could not afford the fee because of its dire financial circumstances. [527] Neither Nhantsi nor Zwane put their employer first when they appointed BNP Capital. They were driven by self-interest and self-preservation and enthusiastically ingratiated themselves to the Chairperson. The acting Group Treasurer refused to ratify the board's decision in writing and copied the financial risk subcommittee.[528] It came to the attention of SAA that BNP was not a licensed financial transaction advisor by the Financial Service Board. However, that was a requirement in the tender document, contrary to principle 11.

Realising that procurement procedures and requirements were ignored, the acting Group Treasurer roped in the assistance of the Organisation Undoing Tax Abuse (OUTA) team, with its lawyers, Webber Wentzel, served an urgent application on SAA's lawyers. SAA made a media statement claiming it had terminated its contract with BNP.[529] Had the acting Group Treasurer not blown the whistle, SAA would have faced an unaffordable and unjustifiable cancellation fee of R300 million. Zwane reduced the cancellation amount to R49,5 million to bring the amount within his delegated authority. SAA could not afford the additional debt. This is contrary to principle 13 compliance governance.

Some executives took risks in disregarding good corporate governance, encouraged, although the SAA was on the verge of closing down.[530] They did not care. The contributing factors to the dire situation at SAA were SAA's chairpersons and the South African Airline Technical (SAAT) Chair, Ms Kwinana. Procurement governance at SOEs was not to be executed incongruent with the SCM procedures, which must always be aligned with good corporate governance.[531]

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[527] Stimpel op cit note 445 at 122. BNP Capital was going to charge SAA that amount for sourcing a long-term loan. The loan was preceded by the decision of the board to appoint the Free State Development Corporation SOC Ltd (the FDC) to fund SAA's consolidated loans for R15 billion. The FDC is an SOE. This preposterous decision was rejected in writing by Minister Gordhan of National Treasury in a letter to the Chairperson of SAA. This did not deter the Chairperson, the Acting CFO and the CEO. The refusal of the Acting Group Treasurer did not deter the board from proceeding with its plans. The board substituted the FDC with BNP Capital (Pty) Ltd (BNP), which was appointed although it had not submitted a bid. When it did, it was late and was considered high risk. BNP had a relationship with a former employee of Nedbank who was dismissed. Its bid was submitted after the closing date, and it did not have the necessary expertise and scored 98% for BEE and the lowest estimated cost although that was not correct; Zondo Report Part 1 Vol 1 op cit note 522.

[528] Ibid at 115.

[529] Ibid at 153.

[530] Sam Sole 'How Myeni broke SAA' *Mail & Guardian: Amabhungane* 27 November 2015 available at *https://mg.co.za* Accessed on 20 June 2022; Zondo Report op cit note 522 at 344 concluded that governance went downhill with Myeni at the helm of the board.

[531] Stimpel op cit note 445.

The National Treasury was pressured to provide SAA with financial assistance irrespective of whether it was affordable, ethical, prudent, responsible and the right thing to do. Minister Nene could neither write a blank cheque for SAA nor replace the board's Chairperson. He was in a catch-22 situation. Zuma wanted Myeni to stay at the helm of SAA.[532] Even Minister Gordhan, the successor of weekend special Minister van Rooyen, could not fire the board's Chairperson despite mounting evidence of a lack of integrity, accountability, transparency and compromised leadership. There was sufficient evidence that she was not making decisions in the interest of SAA but in her personal and others' interests.[533] Both Nene and Gordhan's hands were tied. They were serving in their respective portfolios at the pleasure of the President. They were not the only ones who did nothing about the board's Chairperson. The two former ministers of the DPE did nothing about Myeni even though board members had complained about her to them. Instead, Brown asked the complainants to explain why they should not be fired. Brown subsequently dismissed them from their position as directors.[534] Contrary to principle 7, the composition of the governing body comprises the appropriate balance of knowledge, skills, experience, diversity and independence to govern responsibly and effectively.

Not all executive managers capitulated under Myeni's pressure. Some executive managers refused or were unwilling to do Ms Myeni's dirty work. Those who did not kowtow to Ms Myeni lost their jobs, while others were forced to resign because of the unbearable circumstances.[535] Nhantsi succeeded Mr Meyer, who resigned from his position as CFO.[536] According to Stimpel, Meyer's continued employment at SAA had become untenable. He was under pressure.[537] This was the modus operandi at SAA. Meyer resigned and publicly explained his rationale.[538] The effect of the attrition of experienced and skilled employees in

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[532] Ibid.
[533] Ibid.
[534] Zondo Report Part 1 Vol 1 op cit note 522 at 8. They were fired despite the fact that their compliant about Myeni were justified and substantive. Brown did everything she had to do to retain her portfolio at the expense of the SAA and South Africa.
[535] Stimpel op cit note 445 at 79. Dr Masimba Dahwa the Chief Procurement Officer of the SAA was suspended for failing to follow formal instructions (resolutions) of the board of directors; Mr Meyer resigned as a Chief Financial Officer rather than do Ms Myeni's bidding. Mr Kona, the acting CEO of SAA, was suspended and faced disciplinary inquiry. He finally settled and quit in October 2013.
[536] Ibid at 81; Zondo Report Part 1 Vol 1 op cit note 522 at 8; Meyer was investigated four times within two and half years for no good reason but to force him to resign or face a disciplinary inquiry.
[537] Ibid at 71.
[538] Ibid at 72. "I resigned because I could no longer associate myself with the conduct of the board and the direction the board was steering the company in."

SAA was immeasurable and had far-reaching and undesirable outcomes. This opened opportunities for ambitious, selfish and self-serving individuals to undermine good corporate governance for ulterior motives.

4.4.The conduct of the African National Congress

Zuma misused his party's ideological focal point - the radical economic transformation to repurpose the institutions of the state and organs to centralise power in him and the privileged few.[539] Remodelling the state institutions would not have been wrong if, indeed, it was used to transform the economy. However, that did happen and was never the intention; instead, state capture took root.[540] Rooting out poverty and reducing inequality and unemployment was and still is necessary for South Africa. There is no argument that Apartheid excluded the majority from benefitting from the economy. Nevertheless, good corporate governance should not have been compromised in the public sector. This proved counterproductive and caused immeasurable harm to firm South Africa.[541] In one of the critical state institutions and state organs, the South African Revenue Service's (SARS) ability to collect tax was affected and compromised by the appointment of Mr Dan Moyane (Moyane).[542] Commissioner Justice Nugent said, 'What has become clear is that what occurred at SARS was inevitable the moment Mr Moyane set foot in SARS. He arrived without integrity and then dismantled the elements of governance one by one.

This was more than mere mismanagement. It was seizing control of SARS as if it was his to have.'[543] It is important to note that Moyane's appointment was engineered by Bain & Company, who prepared him for the position. The effect of the collapse of good corporate governance extends beyond state organs and institutions such as SARS. The current

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[539] Ibid; Blackman and Dall op cit note 26 at 294. Zuma systematically captured the Directorate for Priority Crimes Investigation (Hawks), Eskom, the NPA, the SABC and SARS.

[540] Ibid at 286 and 290; Lumkile Nkuhlu 'Wiseman Enabler or Victim? KPMG SA and State Capture' 2020 *KMM Review Publishing* 8. Nkuhlu, reflecting on the conduct of his former employer, KPMG could not understand what made it disregard reports suggesting that there were concerted efforts to weaken SARS's ability to investigate criminal activities and collect tax effectively. The investigation arm of SARS was specifically referred to as the rouge unit; Stimpel op cit note 445.

[541] Judge R Nugent Report (18 December 2018) *Commission of Inquiry into Tax Administration and Governance of SARS* 3-4, 196; The Report recommended that the Commissioner of SARS initiate the restoration of the genial relationship with other state institutions – the Auditor-General, the Financial Intelligence Centre, the NPA and National Treasury. Over the years, Moyane was at loggerhead with Minister Gordhan.

[542] Nugent op cit note 541. According to Justice Nugent, legislation renders SARS an institution outside the public service. Justice Nugent pointed out that legislation makes SARS a state organ within the public administration.

[543] Ibid. Moyane was a Zuma appointee.

Commissioner of SARS, Edward Kieswetter, took the recommendation of the Nugent Commission to heart to compensate the victims of the Moyane, Sikhakhane, Zuma and their associates. The Constitutional Court denied the Public Protector's appeal of the rogue unit in SARS.[544] Zuma's capture of state institutions and some SOEs was accompanied by total dysfunctionality in certain areas due to his cohorts' ignorance and simple irresponsibility.[545] His brigades were brave, just like their sponsor.[546]

4.5.Failure of management to manage state-owned entities with repercussions

In most instances, the management of SOEs is unaccountable, irresponsible, unethical, and transparent and does not maintain internal controls, which were and are at the heart of good corporate governance. When good corporate governance does not permeate SOEs, delivery to the people and contribution to the country's economy will fail. The consequences of good corporate governance failure are corruption, fraud, and the collapse of the finances of some SOEs, which negatively affect and continue to follow the government's financial capability, which is debilitated by state capture.

4.5.1. Denel

Denel's governance wheels started wobbling soon after Gigaba was appointed the Minister of the DPE in 2011. Before this appointment, Denel had been profitable for four consecutive years under the stewardship of the CEO, Mr Riaz Saloojee.[547] Denel had an unqualified audit and was a going concern. A sterling achievement that many SOEs were not realising. Its book orders soared and stood at more than R32 billion.[548] The size of this book order was unprecedented. It suggested that it had potential. Hence, it became of interest to connected

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[544] Franny Rabkin 'Top court denies leave to appeal the 'rogue unit' ruling to Busisiwe Mkhwebane' *Business Day* 10 November 2022 available at *https://www.businesslive.co.za* accessed on 9 December 2022; O'Reagan Victoria 'Constitutional Court slams the door on SARS 'rogue unit' saga' *Dailymaverick* 10 November 2022 available at *https://www.dailymaverick.co.za* accessed on 9 December 2022.

[545] Blackman and Dall op cit note 27 at 296.

[546] Themba Maseko *For my country: Why I blew the whistle on Zuma and the Guptas* Jonathan Ball Publishers (2021) at 135. Atul Gupta knew that the budget is R600 million.

[547] Parliamentary Monitoring Group (20 October 2014) *Denel on its 2013/2014 Annual Report* 1-6. Denel produced tenable good results and had delivered in accordance with the government's objectives embodied in the Industrial Policy Action Plan. Furthermore, it contributed to the community of the country, who benefited through educational initiatives and the creation of jobs in the downstream manufacturing industry; Judicial Commission of Inquiry into allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State Report (Zondo Report Part 2 Vol. 2) *Denel* 504 - 506.

[548] Ibid. Denel grew its revenue, unprecedented book order since its incorporation and Leadership Development and Transformation. This feat would not have been achieved if Denel was not managed in a manner that accord with good corporate governance.

persons backed by the powerful.[549] Gigaba paved the way for connected persons to do business with Denel outside its procurement policies.[550] Saloojee met Gigaba at the Guptas' Saxonwold compound. Gigaba told him that the Guptas were his friends and they should work together in future.[551] Saloojee acquiesced to the Guptas because he witnessed Gigaba being shown up to be a mere stooge.[552] Tenders were channelled to the Guptas' connected companies' contrary to good corporate governance. Two contracts worth hundreds of millions were awarded to VR Laser between 2014 and 2015.[553] The same company was awarded three more contracts contrary to procurement governance. A criminal investigation into these contracts was recommended to law enforcement.[554] This was the beginning of Denel's downward spiral.

Brown, Gigaba's successor, was not interested in how Denel was managed. Good corporate governance was not a priority to her at Denel. Her appointment also eroded the public good that Denel had achieved over the years during Salojee's leadership.[555] The accountable, ethical, and transparent management was further undermined.[556] Brown disregarded the achievement of the Serobe board and appointed a new board led by Daniel Mantshantsha. For obscure reasons, Saloojee, Fikile Mhlonto, the CFO, and Elizabeth Afrika, the Company Secretary, were suspended six weeks into the newly appointed board.[557] These three were not disciplined but were adequately paid to walk away from their disputed suspension.[558] Contrary to King Code IV Part 6 principles 1 and 2.

Compromised appointees Daniel Mantshantsha and Zwelakhe Ntshepe, the Chairperson and acting CEO, precipitated Denel's rapid downward spiral. The background and calibre of these two appointees clearly explain why good corporate governance was completely eroded at Denel.[559] Salojee had been pressured to get Denel involved in arms deals and to make

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[549] Ibid at 504-506
[550] Ibid at 506.
[551] Zintle Mahlati '#State Capture Inquiry: Former Denel CEO says Guptas introduced him to Malusi Gigaba' *IOL* 20 March 2019 available at *https://www.iol.co.za/news/politics/statecaptureinquiry-former-denel-ceo-says-guptas-introduced-him-malusi-gigaba-19988516* accessed 15 July 2022.
[552] Ibid.
[553] Supra note 84.
[554] Ibid.
[555] Parliamentary Monitoring Group (2014/2015) *Denel on its 2014/2015 Annual Report; Denel Suspensions* at 1-4.
[556] Ibid; Erika Gibson 'Axing at Denel has Gupta links' *City Press* 18 April 2016 available at *https://www.citypress.co.za* Accessed 22 July 2022.
[557] Ibid.
[558] Ibid. The reluctance of Saloojee to enter the arms market was the catalyst for him and his two colleagues.
[559] Ibid. Mantshantsha was struck off the roll of attorneys from 2001 to 2007 for unprofessional conduct, and Ntshepe was a close friend of the Guptas and .

unprocedural appointments in subsidiaries of the SOE but had resisted.[560] Denel Asia was registered in Hong Kong, partnering with VR Laser to pursue arms opportunities from Salim Essa.[561] This investment resulted in an irregular expenditure of R500 million for the 2017 year-end.[562]

The refusal to pursue arms opportunities in the Middle East, Africa and South America was Saloojee's cardinal mistake. Saloojee's departure was the last nail in the resistance to undermine good corporate governance at Denel. Denel suffered losses and could neither deliver on its book orders nor pay the salaries of its workers. According to Mahlaka, 3,000 workers did not get their wages.[563] Key employees left, and Denel became a shadow of itself. The rot at Denel was very costly. During Saloojee's tenure, several programmes were alive at Denel, such as bursaries and school outreach for grades 8 to 12. The development of math and science and the annual enrolment of 300 apprentices ended with Saloojee.[564] The suspect board led by Mantshantsha contributed to the downfall of Denel and must be called to account, prosecuted, and made good the SOE's financial losses. The losses were not only economic but also affected Denel's reputation.

4.5.2. South African Airways

Specifically, the SOEs' executive and non-executive management continued to sideline good corporate governance, engaged in corrupt procurement activities and put a financial strain on the government. These officials must pay the price for such conduct. A few examples of the transgression of good corporate governance at SAA follow. The new board led by Myeni scuppered the Emirates SAA code sharing, which would have had spinoffs, (i) brought extra income of $100 million per year; (ii) enabled the cancellation of the loss-making Abu Dhabi route; (iii) the secondment of the pilots to Emirates; and (iv) possible employment of employees facing retrenchment.[565] Myeni claimed Zuma instructed her not to sign the Emirates lucrative deal.[566] If she had been an astute and competent director, she would have put the interest of SAA first. She failed to appreciate her fiduciary duties.

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[560] Ibid; Zondo Report Part 2 Vol 2 op cit note 547.
[561] Ibid. Salim Essa was one of the Gupta's business connections.
[562] Parliamentary Monitoring Group (30 October 2012) *Denel 2012 Annual Report*.
[563] Ibid.
[564] Ibid.
[565] Stimpel op cit note 445 at 192.
[566] Ibid at 194.

The interference of Myeni and her board knew no bounds. Myeni reversed transactions that were concluded in line with SAA's procurement processes. For example, in 2009, the board of Ms Carolus, in its endeavour to manage the finances of SAA, revised the number of the A330-200 Airbus ordered from 15 and increased the number to 20 to ward off the pre-delivery payments due in 2013 and improved SAA's balance sheet.[567] Contrary to King Code IV Part 6 principle 11. Ten of the aircraft were scheduled to be delivered in 2013. Both the ministers of the Department of Public Enterprise and of Finance endorsed the board's resolution. Myeni was a member of the board when the deal was approved; nevertheless, when she ascended the chair, she cancelled the contract.[568] The necessity to improve SAA's balance sheet did not matter to the Myeni board or escaped her entirely because of her incompetence and dishonesty. Myeni was declared a delinquent director for life, and her appeal to the full bench of the Gauteng Provincial Division failed.[569] The services required by SAA were extra because it had the internal capacity and expertise to source funding to restructure the debt. Still, this fact was ignored by the Acting Chief Financial Officer, Chief Executive Officer and the board.[570]

4.5.3. Transnet

Transnet's good corporate governance suffered a significant blow when Molefe was appointed GCEO in 2011.[571] This was the beginning of the end, posing enormous challenges due to the management change after 2011. Molefe brought about sweeping changes to Transnet, especially around procurement.[572] Contrary to principle 11, management of risk, assessment of opportunities about the triple context, and use of six capitals to achieve objectives depend on resources, risk response, and business continuity. Molefe's Transnet appointment heralded the establishment of the Board Adjudication and Disposals Committee (the BADC) in 2011, led by Iqbal Sharma. This was the beginning of the end for good corporate governance.

[567] Ibid at 58-59.
[568] Ibid.
[569] *Myeni v Organisation Undoing Tax Abuse and Another* 15996/2021 [2021] ZAGPPHC 56.
[570] Ibid at 81.
[571] Judicial Commission of Inquiry into allegations Of State Capture, Corruption and Fraud in the Public Sector Including Organs of State Report (Zondo Report Part 2 Vol) *Transnet* 18-27.
[572] Ibid. The approval authority was centralised to the board and executive managers. Before Molefe's tenure, the board of Transnet did not participate in procurement of goods and services. Another interesting aspect of the changes in Transnet procurement was that the Group Governance was side lined and did not have the authority to review RFPs, confinements, condonations and variations orders.

Procurement powers were concentrated in the BADC, Molefe and Singh at Transnet.[573] This reversal of sound reasonable governance procedures Molefe found at Transnet was contrived and deliberate, and the accounting authority was complicit.[574] Contrary to principle 11 about risk governance. What transpired was the catalyst for the downward spiral in internal controls. The accounting authority abdicated its responsibility and failed to fulfil its fiduciary and general duties to Transnet in line with section 76(3) of the Companies Act, sections 50(1) to 50(2), and 51(1) to 51(2) of the PFMA.[575] When the GCEO and the GCFO worked in tandem, as they did, to eviscerate good corporate governance in Transnet with the full support of the executive authority and the President of the country, nothing could stop them. The GCEO and the improperly procured goods and services at inflated prices became the norm.[576]

Furthermore, paying for goods and services not delivered was not an issue. Transnet engaged in an expansive and manipulated SCM process that proved costly to that SOE.[577] The brazen manner in which the BADC appropriated projects and acquired goods and services for the benefit of associated and connected companies compromised Transnet's finances.[578] In some instances, Transnet acquired services even though it had in-house capacity in Treasury, consisting of '40 staff members with multi-disciplinary skills, competencies and experience. The staff included mathematicians, accountants, investment bankers, commercial lawyers, traders, financiers, and economists who were highly experienced with an average of 10-30 years in respective fields.'[579]

This did not occur at Transnet only but in most DPE SOEs. SOEs' management had a particular modus operandi to appoint third parties to provide services for work their employees

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[573] Ibid at19. The BADC approved high valued tenders to the amount of R500m, which was later increased to R2 billion. Amounts above R2 billion were approved by the board. Molefe and Singh were empowered to approve tenders of R1 billion and R750 million, respectively.

[574] National Treasury (Fundudzi report) (November 2018) *Final Report: Forensic Investigation into Various Allegations at Transnet and Eskom: Tender Number 022-2016 RFQ 026-2017*.

[575] Ibid.

[576] Ibid.

[577] Ibid. Prior to Molefe's appointment to Transnet, the procurement governance process at Transnet did not have a BADC. The BADC was a creature of Molefe to wrest control from the Group Governance. The governance process and procurement at Transnet was turned on its head. Iqbal Sharma was appointed the chair of the BADC from 2012. This appointment was sanctioned by Gigaba. In contrast to Barbara Hogan's refusal to reinstate Gama to the Transnet Freight Gigaba reinstated him. Gigaba appointed Molefe and Singh to Transnet as Group Chief Executive Officer and Group Chief Financial Officer.

[578] Bhorat et al op cit note 65. The companies with links to the Guptas gets contracts at Transnet, such as ZPMC, Lieberr a Swiss company acquires contracts, McKinsey, China South Rail, NeoTel, Regiments, Bombadier, China North Rails, Trillion, SAP got a contract for R100 million; Zondo Report Part 2 Vol 1 op cit note 571.

[579] Zondo Report Part 2 Vol op cit note 571 at 1 26.

could do internally.[580] This was a deliberate act intended to enable third parties to benefit inappropriately financially from the SOEs. Furthermore, competent SOE officials were always sidelined for ulterior purposes while procuring goods or services. For example, the acting group treasurer of SAA learned of the board's decision to invite bidders for a Request for Information (RFI) from interested bidders.[581]

4.6.The effects, implications and repercussions of non-compliance with good corporate governance by SOEs

Agencies downgraded South Africa and some SOEs, such as the Development Bank of Southern Africa, Eskom, the Industrial Development Corporation, the Landbank of Southern Africa and SANRAL.[582] Denel, Airports Company, the SABC, Eskom, PRASA and Transnet were the great contributors to irregular, fruitless and wasteful expenditure of SOEs:[583] To this, Eskom contributed R33 billion, PRASA R28.6 billion, Transnet R56 billion, Denel R3.1 billion. In the 2020/2021 financial year, the irregular expenditure of Eskom and Transnet was R11.6 billion and R14 billion, respectively.[584]

Evidence from the Portfolio Committee's reports, commissions of inquiry, and forensic investigation by Fundudzi and SCOPA paint pictures of well-calculated and orchestrated disregard of good corporate governance, culminating in corruption.[585] Most, if not all, DPE SOEs were gravely affected by the state capture.[586] 'The companies have similar challenges that include the breakdown of established controls and systems, loss of experienced and critical

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[580] Ibid at 265 - Transnet appointed financial service providers McKinsey, Regiments Capital, Trillian Capital and JP Morgan. The McKinsey and Regiments was R2.2 billion and were not open for tender authorised by Molefe in tranches between 2014 and 2015.

[581] Bhorat et al op cit note 65 at 83. The advertisement was in the Sunday Times of 7 February 2016 closing on 16 February 2016. The Acting Group Treasurer requested a copy of the advertisement from the procurement office after she received a call from a potential bidder. This caller was complaining that the tender document was not opening. The crux of the matter is that another bidding process was initiated for a Request for Proposal (RFP). In the interim, the CEO and the Acting CFO were mandated to negotiate with the Free State Development Corporation SOC Ltd (FDC) to provide funding to SAA.

[581] The FDC neither had ability nor capacity to fund SAA R15 billion.

[582] Moody's 25 June 2020; Moody's July 2020; Moody's April 2020.

[583] Lulama Matya 'Audit outcomes of some SOEs paint a bleak picture' *SABC News* 3 Feb 2021; Thando Mayeko 'Auditor- General concerned that offenders at SOEs are not brought to book' *BusinessDay* 10 November 2021 available at *https://www.businessday.co.za*. accessed 10 December 2022

[584] Ibid.

[585] Portfolio Committee Report (24 February 2017) *SABC*, Portfolio Committee Report (20 November 2019) *SAA*, Mpati Commission Report (13 March 2020) *PIC* Fundudzi Report (November 2018) and Zondo Reports between January 2022 - October 2022.

[586] Public Enterprises Report (20 November 2019) *Oversight visit to the Department of Public Enterprises and State-Owned Companies*.

skills in state-owned companies, corruption, malfeasance, liquidity and financial sustainability challenges.'[587] These problems are the repercussions of non-compliance with good corporate governance. SOEs' mismanagement cannot be excused due to incompetence and complexities arising from the plethora of good corporate governance regulatory guidelines and legislation.[588] These SOEs' managers dropped the ball because they were blinded by greed. They acted criminally, so they should be answerable collectively and individually. The conduct of SOEs' executive management, non-executives, prescribed officers, and officials' indifference to good corporate government constitutes dereliction of duty and is unconscionable. Their behaviour is the direct cause of corruption in SOEs. There is a nexus between their conduct and the continued sustainability of SOEs.

The causes of SOEs' failure to comply with good corporate governance are multifarious. This goes back to the researcher's earlier contention that meddling in the management of SOEs by the executive authorities in charge of the SOEs spectacularly derailed good corporate governance and at a considerable cost to the country. Furthermore, crooked, planned, and questionable appointments of non-executive directors to the board and executive employees in SOEs for ulterior motives are a factor.[589] Calculated and unethical conduct by executive management, plus the failure of the accounting authority to robustly oversee conformity with good corporate governance, cannot be overlooked.[590] To do so is too ghastly to contemplate.

This demonstrates SOE's management's unwillingness to do things right. Maybe the impetus of their conduct comes from their support from Zuma.[591] The adverse effects of the role executive authorities that Zuma played during his term of office will be felt in the country for decades. The damage is unimaginably massive. Zuma and his minister's endorsement, if not involvement, in the mismanagement of SOEs caused chaos, financial losses, job losses, the

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[587] Ibid.
[588] United Behind Metrorail Monitoring Project (December 2017) *Rig, Conceal, Destroy and Falsify: How State Captured Happened at PRASA*; Public Protector Report (3 of 2015/2016) op cit note 65.
[589] Lubalalo Ngcukana 'Molefe's CEO appointment predictions by the New Age was a 'coincidence'' *City Press* 8 March 2021 available at *https://www.news24.com*. accessed on 10 December 2022. The Chairperson of the Board submitted three names of candidates for the position without the approval of the board. Zondo Report Part 2 Vol 1 op cit note 571 at 10. The appointment of Gama's appointment to Transnet Group Chief Executive Officer after he was dismissed from Transnet Freight speaks volumes.
[590] Zondo Report Part 2 Vol 1 op cit note at 187-195 CSR and CNR were favoured during the tender evaluation. Transnet paid more for the locomotives than the bid price; Zondo Report Part 2 Vol 1 op cit note at 196-229. Mr Wood, a Gupta connected person, negotiated the advance payment higher, which was suggestive of bias in favour of bidders and not Transnet. Transnet awarded Bombadier, CSR and CNR the contract although they did not comply with the local production requirement.
[591] The questionable appointment of Molefe. Zuma's persistence that he wants Gama for the position.

breakdown of the rule of law and impairment of the country's reputation. The livelihoods of SOE employees were significantly affected. Some lost their houses because they could not repay their mortgage bonds, and their medical aid and children's school fees were not paid. Whereas beneficiaries of the largesse enjoyed the short-term benefits of dismantling good corporate governance in SOEs, they seemed oblivious that the day of reckoning is inevitable during the annual audits. That's the time for every auditee to submit information, returns, documents, explanations and motivations to the AG and produce AFSs for audit.[592]

4.7.SOEs compliance and non-compliance with good corporate governance

Compliance and non-compliance with good corporate governance became more pronounced soon after there was a change of guard in the African National Congress (ANC) when Zuma ascended to the highest office in the country. The researcher is not in any way suggesting this was the beginning of the problems for the country, but that it was taken to a higher level with brevity. Legislative frameworks, guidelines, policies and Protocol that were in place were weakened on purpose through disuse or neglect. Compliance with good corporate governance was considered an irritation and a nuisance. Thus, non-compliance was the easiest option. Some, if not most, executive and non-executive managers, executive authorities and politicians were contemptuous of good corporate governance with far-reaching consequences. The message was that you will be instantly rewarded if you ignore good corporate governance. The external and internal audit, the Parliamentary Committee, the SCOPA, the Hawks and the NDPP were not disincentives.

4.7.1. Compliance with good corporate governance

The financial stability of the SOEs was the precursor to the delivery of the mandate of SOEs to the people of South Africa. It is indicative of effective management when SOEs are financially stable. Such achievement would be realisable if the SOE managers appreciated and

[592] Section 54 read with section 55 of the PFMA. The accounting authority do so with the assistance of the accounting officer to whom powers are delegated to in terms of section 56 of the PFMA. This delegation of power is not different from the delegation to executive managers in terms of section of the Companies Act. Effectively, accounting authorities or the board of directors manage the SOEs through the executive managers.

understood the importance of good corporate governance and practised it.[593] The accomplishment of SOEs is intrinsically linked to accountable, ethical and transparent management. Moreover, to engender good corporate governance, the SOE boards are the "framework's centrepiece." SOE boards must ensure that the executive management adheres to good corporate governance without fail.

The Development Bank of Southern Africa SOC Ltd (DBSA) is one of the few shining examples of a well-run SOE. It is appropriately managed because principles of good corporate governance are applied. The DBSA consistently achieved an unqualified financial audit without material findings on legislative compliance for 2018/2019[594] and 2019/2020 financials.[595] It achieved its predetermined objectives and complied with legislative requirements.[596] In December 2021, the Auditor General reported that the DBSA was the only SOE amongst 15 auditees that achieved and continued to maintain a clean record.[597] The Auditor General, however, expressed concern that the audit performance of SOEs was degenerating. That was disappointing and did not bode well for the future of the SOEs, considering that the Public Protector had repeatedly found that SOEs did not comply with good corporate governance in many of her investigations. Post the 'state capture' findings of the Public Protector in 2016, it would have been expected that SOE management would learn some lessons, but that did not happen.

4.7.2. Compliance and non-compliance with Supply Chain Management (SCM)

In its SOE audit reports, the AG always flagged non-compliance with the SCM policies. The procurement of goods or services in SOEs is proper if it is in line with a provisioning system that is fair, equitable, competitive, transparent and cost-effective.[598] Clean and compliant

[593] Accountability, transparency, financial success, risk management, prevention of corruption and delivery on the mandate of SOEs are indicators of good corporate governance and value in SOEs. If SOEs do not repeatedly request financial assistance from government then, they have the right tools in place. It is reasonable to assume that they have strong good corporate governance, which if practiced daily, the necessity to bail out SOEs would not have arisen. The number of state-owned entities that are doubtful to continue in operation increased; Denel, Eskom, Landbank, NECSA, PRASA, SAA, SABC bailouts required.
[594] Auditor General Report (2016/2017) *Status of state-owned enterprises*.
[595] South African Committee 'Public Accounts SOE audit outcome 2019/2020: engagement with Auditor-General' (2021) *Parliamentary Monitoring Group* 1.
[596] Ibid.
[597] Khuleka Ngubane 'DBSA is the only SOE with a clean audit, the AG tells Parliament' News24 8 December 2021 available at *https://www.news24.com* accessed on 30 November 2022. Out of 15 SOEs, the DBSA led the pack with a clean audit; Standing Committee on Public Accounts.
[598] Section 217 of the Constitution; Section 51(1)(a)(iii) of the PFMA. The PFMA borrowed directly from the Constitution of the Republic, which was passed in 1996.

procurement encapsulates compliance with internal controls, which resonates with good corporate governance. Over the years, the AG reported that SOEs' audit performance was regressing.[599] The cause of the failing procurement is directly linked to failed good corporate governance. Ignoring, undermining and putting good corporate governance on the back burner is the central malaise plaguing procurement. Incompetence could also be a contributory factor, as suggested by the AG; however, the more pervasive factors are dishonesty, greed and manipulation of the SCMs.

Manipulated SCM processes, whether deliberate or accidental, gave rise to fruitless, wasteful and irregular expenditure in SOEs.[600] According to the AG, if all auditees systematically followed basic internal control principles, the public sector could realise comprehensive good governance quickly and sustain it for the future. These are (i) executive and non-executive managers and senior managers should be persistent about being involved in ensuring that internal controls are enhanced and recommendations of the auditors are affected; (ii) upgrade internal controls including preventative controls; (iii) the board of directors, accounting officers and executive authorities, internal auditors and audit committees exercise oversight, monitors and maintains assurances.[601]

The AG's findings were that SOEs have SCM policies in place, but employees do not know the process they should follow when procuring goods and services.[602] This begs the question: How have they circumvented the processes if they did not understand what was happening or did not appreciate what they were doing? The researcher argues that SOEs' employees, including the executive and non-executives, knew what they were doing and feigned ignorance or lack of understanding. It is impossible to circumvent the process if someone does not understand what they are doing. Their conduct was calculated and premeditated. Such behaviour must not go unpunished because it comes with a hefty price to SOEs. It is not only about the monetary cost but the rule of law. Their conduct is criminal, egregious and reprehensible and should not go unpunished. If their conduct goes uncorrected,

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[599] Auditor General's Report (2020/2021) *Audit period of national, provincial and SOEs*.
[600] Zondo Report Part 2 Vol 1 op cit note 571 at 255- 263. The variation order relating to the relocation proposed by CNRRSSA exaggerated the cost. Transnet failed to do the necessary due diligence and that cost Transnet an unjustifiable R1.2 billion for no value to BT and CNR. Gama authorised the payment without establishing if cost/benefit analysis was conducted. Ms Mdletshe did not invite the Transnet Internal Audit to negotiation meetings although she was instructed to. This could not have been the case of not knowing what to do.
[601] Auditor General's Report op cit note 599.
[602] Auditor General's Report op cit note 595 at 47.

that will confirm that good corporate governance is inconvenient and not fundamental to managing SOEs.

If the transgressors of good corporate governance did not manipulate the SCM processes, supporting evidence of decisions taken when tenders were awarded to certain suppliers should not be conveniently unavailable for audit.[603] This is axiomatic of how good corporate governance was disregarded in SOEs. Thus, corruption surged exponentially in the past decade, resulting in a spike in irregular, fruitless and wasteful expenditures.[604] Positive performance in SOEs is reflected by having stringent and well-supported implemented internal controls, which guarantees compliance with good corporate governance and sustainable success.

Responsible and robust SCM procedures and processes in SOEs are fundamental to properly using the country's resources efficiently and economically. SOEs' SCM procedures were compromised when the state institutions were repurposed. Their executive, non-executive and senior management disregarded the importance of strong ethical leadership, accountability and transparency at the helm of SOEs. These principles can curb and reduce the uncontrollable and deliberate mismanagement of the SCM processes. If internal controls were followed and strengthened, SOEs would have diligently procured goods and services, ensuring delivery and saving the SOEs money.[605] The management of SOEs was never interested in doing so because that would not have served their primary interests.

The SCM processes were rendered vulnerable through inappropriate appointments, criminality, circumvention of internal control and interference from the top, including politicians, resulting in the partial or total collapse of SOEs.[606] For example, Denel lost key employees, which affected its ability to perform effectively. Mashaba's well-considered opinion is that 'The hollowing-out and bankrupting of the SA arms industry, under the leaky

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[603] Ibid.
[604] For example, Denel, Eskom, PRASA, SABC, Transnet.
[605] Zondo Report Part 2 Vol 1-2 op cit note 547 and 571. At Transnet, SAA, PRASA, Telkom and Denel, payments were made for undelivered or substandard goods or services. In other instances, double payments were made, and prices were inflated for kickbacks to collaborators, including employees of the SOEs.
[606] Levy Brian et. al. 'South Africa: When Strong Institutions and Massive Inequalities Collide' 2021 *Endowment for International Peace* 1- 62. Institutions were effective and strong in the first 15 years of South Africa's democracy with growth accelerating 5% between 2003 - 2008. After 2009, there was a scramble for control over positions and resources in SOEs. SOEs were identified and used for moneymaking by well-connected persons and divisions, which engaged in stealing from the people with devastating effects.; Williams and Stimpel op cit note 445; Marelise van der Merwe 'Government and PRASA working on a plan, say Autopax on partial salaries' *fin24* 26 Jan 2020 available at *https://www.news24.com/fin24* accessed on 23 February 2024; SAA could not pay its employees, shed jobs and went into business rescue; SA Post Office.

umbrella of Denel, was a strategic disaster we could ill afford.'[607] According to Mashaba, due to incompetence, mismanagement, failed leadership, and corruption, Denel contorted into a famished shade of what it used to be and could not even pay its employees. Employees did not get their total salaries going back to August 2020.[608] This forced the United Association of South Africa to urgently approach the Labour Court to compel Denel to pay employees until April 2022 and make the necessary statutory contributions, such as pensions and provident funds, medical aid, pay-as-you-earn and the unemployment insurance fund.[609]

This indicts some of the critical SOEs; their failure to carry out their mandate is now out in the open. Denel's non-fulfilment of its obligation to the government, the people of South Africa and the workers in particular badly affected their livelihood.[610] Denel staff compliments were reduced by 15% in the 2020/2021 financial year.[611] The 15% comprised '73 managers, 99 engineers/project managers, and 248 technicians/artisans/operators'.[612] Many factors contributed to Denel's financial woes, including the COVID-19 pandemic, executive authority's interference in its management, and non-compliant procurement practices.[613] The calibre of the executive authorities appointed to the DPE and its SOEs after Barbara Hogan was instructed to vacate her position were compromised, an embarrassment and had no

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[607] Isaac Mashaba 'Government and Denel miss the boat Arms: SOE moves from a trusted supplier to a rotting carcass' *The Citizen* 22 June 2022 available at *https://www.citizen.co.za* accessed on 10 December 2022.

[608] Kim Herfrich 'Union in Labour Court for claim on Denel money' *defenceweb* 5 April 2022 available at *https://www.defenceweb.co.za* accessed on 10 December 2022; Jan Cronje 'Denel employees win an urgent bid for unpaid R13.2m in unpaid wages' *fin24* 17 May 2022 available at *https://news24.com* accessed 10 December 2022. The high court ordered Denel to pay 42 unionised employees their outstanding salaries. The decision of the high court comes in the heels of the Labour Court order against Denel to pay employees R90 million outstanding salaries; Press Release Solidariteit 9 March 2022 'Denel fails to pay R90million of salaries'.

[609] Ibid. The result of Denel's non-observance of its statutory duties caused employees to lose-out on their investment return because their pension and provident funds' contribution were not paid timeously. Medical aids were not paid, causing employees who could afford it, to pay from their pockets.

[610] Ibid.

[611] Martin Guy 'Denel's employees number shrink 15% in the last year' *defenceWeb* 24 February 2021 available at *https://www.defenceWeb.co.za* accessed 10 December 2022.

[612] Ibid.

[613] Zondo Report Part 2 Vol 2 op cit note 547 at 16; Ray Mahlaka 'State Capture Report puts Malusi Gigaba and Lynne Brown at the centre of capturing and weakening Denel' *Daily Maverick* 2 February 2022 available at *https://www.dailymaverick.co.za/article/2022-02-02-state-capture-report-puts-malusi-gigaba-and-lynne-brown-at-the-centre-of-capturing-and-weakening-denel/* available at *https://www.dailymaverick.co.za* accessed on 10 December 2022. Jason Felix 'Denel lose critical skills due to cash shortages, but Gordhan pins hope on new operating model' *news24* 02 August 2021 available at *https://www.news24.com* accessed on 10 December 2022. Denel last achieved an unqualified in its 2015/2016 financial year end audit. This achievement belongs to Saloojee and his team. Salojee, the Chief Financial officer and Company Secretary were suspended. After their suspension and and subsequent negotiated separation in 2016, Denel's performance went downhill. Procurement was done contrary to Denel policies and the Constitution of the Republic. Zondo Report Part 2 Vol 2 op cit note 547 25-30.

integrity.[614] They did not comply with their constitutional obligation. The SOEs such as Transnet, SAA, Denel, Eskom, PRASA, and their subsidiaries were compromised. Their accounting authorities were weakened and rendered impotent. Internal controls were abandoned.

Failure to comply with legislation, poor financial statements and weakness in supply chain management resulted in qualified opinions with findings.[615] Irregular expenditure and fruitless and wasteful expenses were identified, which had increased from 89% to 94%.[616] SOEs acted contrary to sound corporate governance principles embodied in the PFMA, Treasury Regulations, King IV Code, the Constitution, and many other instruments, which are unequivocal. Schedule 2 SOEs are expected to develop and approve SCM policies with solid and sufficient internal controls.[617] In his audit report, the AG indicated that the International Finance Reporting Standards (IFRS) apply to SOEs' financial statements.[618] The auditees with qualified audit outcomes qualification were attributable to irregular expenses and complicated transactions entered into by SOEs.[619] Disclaimers' opinion was due to ongoing concerns issues.[620] The procurement issues would not be an issue had the minister of finance complied with section 217(3) of the Constitution, which urged the minister of finance to pass legislation which explicitly addresses procurement. However, the minister passed the PPPFA, which was inadequate and not compliant with section 217(3) because it gave state organs, government departs and SOEs the discretion to determine procurement.

The AG's critical role cannot be understated, even if it comes at the end of the financial year. The AG's oversight in assessing accountability, ethical conduct, responsibility and transparency of executive and non-executive management of SOEs is crucial for their continued operation and success. The failure of all SOEs of the DPE must be a clarion call for the management of these companies to infuse good corporate governance in every step of their

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[614] Zondo Report Part 2 Vol 1 op cit note 571 at 1 - 3. Malusi Gigaba appointed Brian Molefe GCEO, Anoj Singh GCFO and reinstates Siyabonga Gama at Transnet Freight. Gigaba was succeeded by Brown in 2014. The trend continued and Gama was appointed the acting GCEO of Transnet after Molefe was transferred to Eskom. Looting at Transnet continued unabated. The SCM policies were gutted to facilitate looting. Irregular expenditure at Transnet grew exponentially to before the appointment of Gigaba and Brown.
[615] Ibid 3-4.
[616] Auditor General's Report (2020/2021) op cit note 599.
[617] Zondo Report Part 2 Vol 1op cit note 614 3-4.
[618] Ibid.
[619] Ibid.
[620] Ibid.

duties. Otherwise, SOEs' continued failure is more likely to collapse the government because it could be called upon to make good guarantees. Well-run SOEs are bound to yield optimal performance, benefitting the economy and the people, when the opposite will bring about disaster.

The repercussion of the failure of the SOEs' managers due to non-compliance with reasonable corporate governance requirements triggers section 77 of the Companies Act. This means that the protection that directors could have been afforded by section 78 of the Companies Act falls away. The affected director becomes personally liable for any losses or expenses the SOE incurred due to his non-compliance with his fiduciary duties. This also means that if the SOE's management conducted business contrary to section 22(1), they take personal responsibility for relevant losses that occurred due to their conduct. Section 22(1) provides: 'A company must not carry on business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose.'[621] Ignoring, undermining and putting good corporate governance on the back burner in SOEs is equivalent to the SOEs contravening section 22(1). This conduct of the SOEs' management also attracts criminal or financial punishment by the AG issuing a certificate of debt if remedial action is not implemented.[622]

The AG's new power enhanced the office's oversight and improved accountability where material irregularities occurred. The amended PAA encouraged the AG's office to exercise its power, which could curb non-adherence to good corporate governance. Material irregularities are defined as 'Any non-compliance with, or contravention of, legislation, fraud, theft or a breach of a fiduciary duty identified during an audit performed under this Act that resulted in or is likely to result in a material financial loss, the misuse or loss of a material public resource or substantial harm to a public sector institution or the general public.'[623] The contraventions contained in this definition occurred in SOEs repeatedly in the past and continue as reflected in the audit outcomes annually. The researcher posits that the AG should be intolerant of material irregularities, which results in financial losses. Suppose the AG's recommendations are ignored by either the accounting officer or the accounting authority despite the directive to

[621] Section 22(1) of the Companies Act of 2008 (Act 71 of 2008). This section can be invoked for SOEs in addition to their criminal culpability referred to in the PFMA, particularly section 86.
[622] Gasela Moses Mongezi 'The impact of material irregularity provisions of the Public Audit Act on accountability, oversight and governance in the Northern Cape province of South Africa' *(*2022) 10 *Africa's Public Service Delivery and Performance Review* 1-10; Auditor-General South Africa (20 August 2019) *PAA amendments – in the key expansion to our mandate 1-29*.
[623] Section 1 of the Public Audit Amendment Act 5 of 2018.

calculate the extent of economic loss to be recovered from the responsible person(s). In that case, the accounting officer or authority must be presented with a certificate of debt reflecting the amount payable.[624] This message must be sent out to everyone knows that remedial actions are ignored at one's peril.

4.7.3. Various decisions and roles of other players

Irrational decisions were taken by accounting authorities and sometimes executive managers of SOEs.[625] Such decisions were unreasonable and contrary to the accounting authorities' fiduciary duties.[626] The quality of appointees determined whether good corporate governance was implemented. How do the boards of SOEs contribute to the decisions taken? Generally, boards of SOEs, like their private-sector counterparts, would normally appoint executive managers such as the CEO and CFO. In the public sector, the authority to make such appointment is reserved for the Minister in charge of the department in which the SOE is housed. This is provided for in the incorporating SOE legislation. Arguably, the fundamental cause of the failure of good corporate governance and the high level of corruption is that the boards of directors and executive managers of SOEs defy the principles of good corporate governance. Thereafter, justify their decisions with an advisory opinion from consultants.

4.7.4. The Role of the African National Congress in State-Owned Entities

The ANC-led government is arguably to blame for the breakdown of good corporate governance, which contributed to the high levels of corruption and the state capture of SOEs.[627] This happened thanks to the ANC giving Zuma total control. The repurposing of state institutions by Zuma contributed many folds to the corruption and state capture, which was revised and is still revibrating throughout the country. The new phenomenon negatively touched all aspects of most South African's lives, especially people with low incomes. The poor and previously disadvantaged did not benefit from the repurposed state institutions because service delivery did not materialise, the money was misused, and some of it was lost

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[624] Ibid section 5A read with 5B.
[625] Open Secrets: *The* Enablers op cit note 467.
[626] Ibid. The decision of the board of SAA to interfere with the deal that Kona had concluded with Lufthansa to provide a service at the fraction of the company preferred by Myeni and Kwinana.
[627] William Gumede. 'ANC corruption is major cause of South Africa's failure – and the polls will show it' *The Guardian* 8 May 2019 available at *https://www.theguardian.com* accessed on 10 December 2022; The Conversation 'What could have set the ANC on a path to corruption' *BusinessTech* 7 September 2016 available at *https://www.businesstech.co.za.* Accessed on 10 December 2022.

and taken by the Guptas and some international consultancies.[628] The SOEs failed to abide by and effectuate good corporate governance as the law and policies required.

The ANC was complicit in remodelling state institutions, and some of the organisation's upper leadership competed for control and influence.[629] The SOEs became a profitable source for connected and influential people to steal from the taxpayers and enrich themselves.[630] Levy et al. posit that the first 15 years of democracy saw the country enjoy the high ground of working institutions and stakeholders' cooperation. Economic growth accelerated, reaching five per cent between 2005 and 2008.[631] The eight years of Zuma's presidency saw a quick downward decline in economic development.[632] The repurposed state institutions' internal controls were weakened. The culture of unduly benefiting from the increased budget for procuring goods and services became rampant.[633] Questionable tenders for goods and services were awarded contrary to SCM procedures covered by the ANC in Parliament.[634]

Questionable directors and executive management appointments paved the way to compromise the DPE's SOEs. Ms Barbara Hogan, the former Minister of the DPE, resisted SOE repositioning spearheaded by then Zuma. She disapproved and capitulated to unmitigated appointments.[635] She testified that Gwede Mantashe, Minister of Minerals Resources and Energy and Zuma, advised her that she was being deployed as ambassador in Finland. She refused the deployment.[636] This resulted in her dismissal from her ministerial position at the DPE.[637] The President replaced her with Gigaba, who implemented the DPE SOEs' remodelling.[638] Gigaba's tenure in the DPE's undesirable directors and executive management

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[628] Williams and Mosilo op cit note 445; Op cit note 546; Zondo Report Part 2 Vol 1op cit note 571.
[629] Op cit note 464 at 1-2.
[630] Ibid 2-3; Bhorat et al op cit note 66.
[631] Ibid 2 & 40.
[632] Ibid 2, 3 & 40.
[633] Open Secrets: *The Enablers* op cit note 467.
[634] Ibid 36; Compromised persons such as former Minister Muthambi and Joemat-Petterson who were found to have acted unethically at SOEs where they were executive authorities, appointed as Chairpersons of Portfolio Committees.
[635] Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State Report (Zondo Report Part 4 Vol 3) *The Capture of Eskom* and Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State Report (Zondo Reprt Part 4 Vol 4) *The Capture of Eskom*. Barbara Hogan's signed statement to the Zondo Commission dated 8th October 2018. Zondo Report Part 2 Vol 1 op cit note 571.
[636] Ibid.
[637] Ibid. South African Government Yearbook 2018/2019. Appointing Ministers is the prerogative of the President of the country. Ministers served at the pleasure of the President and can be dismissed anytime the President wishes.
[638] Bhorat et al op cit note 66 at 12.

appointments were made.[639] These appointments compromised and debilitated good corporate governance. Compromised persons such as Molefe in 2011 and Anoj Singh in 2012 were appointed to key positions as Transnet's Group Chief Executive Officer and Group Financial Officer, respectively.[640] Furthermore, Garry Pita was appointed the Group Supply Chain Officer.

These appointments were followed by the appointment of Iqbal Sharma, particularly as chairman of the BADC in 2012.[641] The leadership of Molefe, Singh, Pita, and Sharma led to huge irregular expenditures and fruitless and wasteful expenditures at Transnet. Creating the BADC was critical to the planned R300 billion budgeted for capital expenditure at Transnet, referred to in its Market Demand Strategy, in which R213.6 billion of the needed funding would come from operating income.[642] The BADC spent R145 billion in the first six years of its budget.[643] These undesirable appointments at Transnet during the tenures of Zuma as the President and Gigaba had far-reaching consequences, culminating in the State of Capture Report of the Public Protector.[644] The recommendation of the Public Protector resulted in the establishment of the Zondo Commission. The political interference in appointing the most favoured persons continued beyond Gigaba's four years at the DPE. Brown's appointment at the helm of the DPE cemented the rot and disregard for compliance with legislation and SCM policies at the DPE's SOEs, reaching a crescendo.[645]

There was no question that good corporate governance was disposed of, evidenced by conflicts of interest, criminality, the governing political party and political interference, greed, lack of accountability and ethical leadership. These are the dominant factors undermining good corporate governance in SOEs. However, the AG seemed convinced that procurement

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[639] Zondo Report Part 2 Vol 1 op cit note 571 at 26-28 and 30-36. Zuma refused to appoint Sipho Maseko the Group Chief Executive Officer of Transnet contrary to the decision of the Board. Hogan reminded Zuma the appointment of his preferred candidate Gama raised corporate governance issues. Zuma was least concerned about corporate governance. Instead, he decided that Transnet would not proceed with the appointment of a GCEO until the legal proceedings relating to Gama were finalised. Gigaba appointed Gama as the new Minister of DPE subsequent to Zuma dismissing Hogan; All Africa 'Gupta-Zuma-Sharma-Essa-Molefe & Transnet. The Theft of Over R10.6 billion (1064 X R10m)' available at www.*AllAfrica.com* Accessed on 10 December 2022. Zondo Report Part 4 Vol 3 and Zondo Report Part 4 Vol 4 op cit note 635.

[640] Ibid at 13.

[641] Ibid.

[642] Transnet Media Release (10 April 2012) *Transnet Launches R300bn Plan Which Will Create Thousands of Jobs*.

[643] Public Protector Report (2015/2016) op cit note 65

[644] Ibid.

[645] Zondo Report Part 2 Vol 1 op cit note 571.

processes were often not followed due to incompetence. Having had the benefit of various literature and the reports of the Commissions undertaken in her research, the researcher is convinced that if incompetence contributed to non-compliance with procurement requirements, that was a minor contribution. The AG argues that if SOEs' management did not have an ulterior motive to undermine good corporate governance during the procurement of goods and services, they would not have rigged tenders, concealed information, and destroyed and falsified records to cover up the trail of the resultant corruption and the state capture.[646] That kind of behaviour demonstrated the complete disregard of policies and legislation, but criminality crept in. The employees, including senior executive and non-executive managers, were comfortable doing anything because they had the blessings of the executive authorities in charge of the DPE of SOEs and Zuma.

Sometimes, the interference and or instructions came directly or indirectly from Zuma.[647] During the Zuma presidency, no equivocation refused to be pliable and blindly followed his instructions, and of his cohorts to dish tenders to his chosen few had severe repercussions.[648] The former Minister of the DPE, Hogan, and the former Ministers of Finance, Nene and Gordhan, were dismissed by the President as Ministers in their respective portfolios because they were not sufficiently cooperative as expected of them. Hogan's refusal to compromise the interest and sustainability of SOEs came at a price. Hogan's pushback against Zuma's grip on SOEs and her unequivocal refusal to behave improperly and unlawfully came at a cost to

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[646] Zondo Report Part 2 Vol 2 op cit note 522, Part 1 Vol 1 op cit note 571, Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State Report (Zondo Report Part 4 Vol 1) *The Attempted Capture of the National Treasury* and Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State Report (Zondo Report Part 4 Vol 2) *Free State*.

[647] Jeanette Chabalala. ''South Africa deserves to know' – the questions Zuma dodged at Zondo commission.' *News24* 16 February 2021 available at *https://www.news24.com* Accessed 10 December 2022, At the time an application was brought to the Constitutional Court, Zuma had been implicated directly by 40 witnesses. Zuma refused to testify, nevertheless; Kabous le Roux. 'Jacob Zuma implicated - for the 35th time - in testimony at the Zondo Commission' 15 October 2020 available at *https://www.capetalk.co.za* accessed on 10 December 2022. Siyabulela Mapoma testified that Zuma had written him a letter instructing him to pay a supplier R8m for wheels, which were never delivered.

[648] Zondo Report Part 4 Vol 3 and Zondo Report Part 4 Vol 4 op cit note 635, Barbara Hogan affidavit. In her statement, Ms Hogan testified that during her short-lived tenure as the Minister of the Department of Public Enterprises, former President Zuma undermined her authority. Although the PFMA require the Minister to account for the performance of the SOEs in her department to Parliament, Zuma continued to interfere with her obligations to appoint the board and the chairperson as the shareholder representative of government in Transnet. Furthermore, Zuma "improperly and recklessly" took away the fiduciary duties of the accounting authority/board to appoint Chief Executive Officers of the Transnet and its subsidiaries. The conduct of Zuma flew in the face of good corporate governance in the PFMA, its regulations, Protocols and the King Code. The PFMA specifically impose the duty to the accounting authority in sections 49-51 read with chapters 7-9.

her.[649] Hogan's testimony about Zuma's interference in appointing SOE directors and CEOs lays bare the extent to which good corporate governance was compromised, if not jettisoned.[650] This explains the AG's findings of irregular expenditure, wasteful and fruitless expenditure and high budget overruns of projects at Eskom and Transnet. The case of Eskom will be specifically discussed in detail in chapter 5.

The interference in management was not exclusive to Transnet. A pattern emerged that can be gleaned from what transpired at SAA and its subsidiaries. Through his appointees, Zuma was responsible for the demise of good corporate governance in these SOEs during his presidency. He usurped the power of the executive authority in charge and assumed control of appointments of boards and executives in SOEs.[651] This conduct goes against the grain of the Protocol developed by the DPE, the PFMA, the Companies Act, the Constitution and other governance measures. Hogan's successor, Gigaba, reversed all Hogan's endeavours to protect SOEs from Zuma's tentacles. Gigaba appointed Zuma's preferred candidates contrary to the law, weakening good corporate governance in the affected SOEs.[652] Essential internal controls and good corporate governance were collapsed and compromised further in that a new supply chain structure was put in place in the form of the BADC chaired by Iqbal Sharma.[653] The manipulation of good corporate governance tenets is unmistakable and financially crippled Transnet and Eskom.[654] At times, the interference came from Zuma directly or indirectly.[655]

The quality of appointees to the boards of directors had a bearing on the failure and or success of the accounting authorities and the SOEs.[656] Attributes associated with the quality appointments to SOE boards, such as accountability, ethics, experience, integrity, professionalism, qualification, respect for the rule of law and skill, were non-existent. If these

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[649] Ibid.
[650] Ibid.
[651] Ibid. Nkuhlu op cit note 540 at 31.
[652] Barely two months after his appointment, Gigaba appointed Iqbal Sharma to the Transnet Board and Mafika Mkhwanazi remained Chairman. Garry Pita was appointed Group Supply Chain Officer at Transnet in February 2011.
[653] Parliamentary Monitoring Group (2011/2012) *Transnet on its Annual Report.*
[654] Zondo Report Part 4 Vol 3 and Zondo Report Part 4 Vol 4 op cit note 635, Barbra Hogan's statement. AG Reports from 2009/2010, 2010/2011, 2011/2012, 2012/2013, 2013/2014, 2014/2015, 2016/2017, 2017/2018, 2018/2019, 2019/2020, 2020/2021. Eskom and Transnet incurred huge irregular, fruitless and wasteful expenditure. Fruitless and wasteful expenditure originated in overpayments due to inflated prices to suppliers. Advancing payments were made before goods were delivered or services were rendered. Loans to Optimum Mining, a Gupta company, to pay Glencore for the sale of the coal mine.
[655] Zondo Report Part 4 Vol 3 and Zondo Report Part 4 Vol 4 op cit note 639.
[656] TM Serongoane and DC Ukwandu 'Measures for the Development of Corporate Governance Practices for State-owned Enterprises in South Africa' (2020) 29 *Administratio Publica* 44-69.

characteristics determined the composition of the boards and political interference was disposed of, the SOEs' management would more likely than not appreciate the importance of implementing the adopted sound corporate governance. Therefore, accountability would not be considered an encumbrance. If executive authorities of the SOEs and the President did not involve themselves in managing state organs, SOEs would not be dysfunctional due to poor leadership and governance.[657] However, history paints a bleak picture for the future due to inappropriate appointments and influence on the SOEs' boards if the status quo remains.[658] This level of intervention proved to be the downfall of most SOEs.

4.7.5. Hitachi and Chancellor House deal with Eskom

The ANC knew for some time that the government would eventually have to build power stations to boost electricity reserves to enable Eskom to supply electricity to South Africa consistently. Eskom was given the go-ahead to build Medupi and Kusile power stations, expected to contribute 9600 megawatts to Eskom after completion in 6 years.[659] The building project was not completed timeously due to the contractor's failure to execute it. One of the contractors, Hitachi Power Africa, the ANC's Chancellor House joint venture partner, was tasked to do 60% of the work involving boilers for the Medupi power station but did not execute it promptly.[660] Medupi and Kusile are scheduled for completion in 2023 and 2026, effectively ten and thirteen years, respectively. Eskom's procurement process was compromised because Valli Moosa, the chairperson of the board and a member of the ANC fundraising committee, presided over the award of the contracts for the power stations.[661] The 60% of the work allocated to Hitachi Power Africa translated into R3 billion for Chancellor House in the Eskom job.[662]

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[657] Ibid. Lynley Donnelly 'Gigaba faces ghosts of SOEs past' *Mail & Guardian* 7 April 2017 available at *https://mg.co.za* accessed on 10 December 2022.
[658] Malherbe and Segal op cit note 366; Bhorat et al op cit 65 at 361.
[659] Staff Writer 'Fresh delays at Medupi and Kusile amid eye-watering cost' *BusinessTech* 19 October 2022 available at *https://businestech.co.za* accessed on 10 December 2022.
[660] Phillip De Wet and Mmanaledi Mataboge 'Chancellor House: R266m for nine years of lies by ANC partner' *The Mail & Guardian* 29 September 2015 available at *https://www.mg.co.za* accessed 10 December 2022; Hunter Qaanitah 'Hitachi and Chancellor House: How the events unfolded' *The Mail & Guardian* 29 September 2015 available at *https://www.mg.co.za* accessed on 10 December 2022; Franz Wild 'Chancellor House made 5000% return on Hitachi investment – Sec' *moneyweb* 5 October 2015 available at *https://www.moneyweb.co.za* accessed on10 December.
[661] Ibid Eskom because This contributed to the delays. This was enabled by the Through its investment arm Chancellor House invested influence and insignificant amount $190 819 for 25% stake in Hitachi Power Africa. Chancellor House.
[662] Ibid.

The United States Security Exchange Commission's (the US SEC) investigation of the Hitachi Power Europe deal established that the boiler contract was initially granted to Alstom, a French multinational company.[663] Whilst Alstom SA was in protracted negotiations with Eskom, Hitachi Power Europe requested Chancellor House to swing the contract in its favour, which was realised. The US SEC concluded that Hitachi Power Europe contravened the Foreign Corrupt Practices Act (FCPA) and bribed the ANC, which was denied. Nevertheless, Hitachi Power Europe settled the US SEC bribe and paid $19 million. The Medupi project remains incomplete nine years later. Hitachi undertook to repair 9000 faulty welds at Medupi to be in commission in 2013.[664] Only six units started supplying power to Eskom around June/July 2015. High Power Africa bought out Chancellor House in an undisclosed deal. This research agrees with Mmusi Maimane, the former DA leader, that the Hitachi Power Africa deal and the delay in bringing Medupi online cost the country dearly, running into billions of rands.[665]

What transpired with the Medupi contract confirms that improper procurement processes should not be countenanced under any circumstances. It is undeniable that there was a conflict of interest. Valli Moosa and his board did not act in the best interest of Eskom and the stakeholders. Furthermore, allocating the boiler's job to Hitachi Power Africa was ill-conceived and corrupt. Corruption is endemic in the country as it was during the Apartheid era.[666] The difference is that freedom of the press and expression brought corruption to the fore. South Africa is overwhelmed by load shedding, which stands at stage 1 when the researcher was busy with this thesis. In addition, the trains were out of commission for a considerable time, and SOEs have been unable to pay salaries and realise their goals and objectives. That is the price paid by South Africa for SOEs' lack of accountability, financial reporting, transparency and communication with stakeholders in line with Vorster and Marais.[667] Non-compliance with

[663] Ibid.
[664] Wild op cit note 660.
[665] Ibid. Eskom spokesperson claimed that the contract was above board.
[666] Van Vuuren op cit note 23 at 115 and Friedman op cit note 27 at 61. For example, President Nico Diederichs oversaw the import of donkeys and grain for farmers in which only 10% of these animals were delivered and the rest undelivered but fully paid for the inferior grain quality. The difference between the Diederichs time and the ANC government in 2006/2007 there was no corporate governance in place and section 217 of the Constitution. The NP was the law. Medupe and Kusile deal the deals were overseen by the Eskom Chairperson who did not declare his interest in the outcome of the procurement because he was the ANC fund raising committee.
[667] Shaun Vorster and Christelle Marais 'Corporate Governance, integrated reporting, and stakeholder management: A case study of Eskom' (2015) 8 *African Journal of Business Ethics* 31- 57.

good corporate governance is thanks to the ANC government's failure to adhere to the legislation, policies, and regulations it adopted.

4.8.The role of the executive authority and the President of the country

What ultimately happens at SOEs would depend on how much the incumbent executive authority treasures their position. In the instance of the DPE SOEs' ministers, Gigaba and Brown acquiesced to Zuma, but Hogan resisted.[668] The removal of Hogan from her position sent the message out to those who contemplated resisting Zuma's wishes, which would not be tolerated. The researcher hypothesises that the executive authority has had to appoint boards of directors for the SOEs working with them to realise Zuma's instructions. This explains the rationale behind Gigaba appointing his board that he could rely on to effectuate his Commander's directive. Gigaba made these appointments upon his arrival at Denel, Eskom, SAA, and Transnet. The process was followed when Brown succeeded Gigaba as the executive authority in the DPE. It is essential to address the challenges and the need for boards of directors to properly exercise their fiduciary duties in SOEs during their term of office.

4.8.1. The appointment of and the role of the Board of Directors - the accounting authority

Having said that, the executive authority reality of the situation, the members of the Board of Directors appreciate, commit to the SOE and understand their duties. Otherwise, they will compromise their collective fiduciary responsibilities and their capacity. The board of directors should not abandon or lose sight of their responsibilities to the SOE. Unfortunately, this happened often.[669] Boards of most SOEs which do not focus attention on exercising their fiduciary responsibilities properly are likely to compromise themselves and affect the SOE. Following regulations, policies, and legislation that urge them to develop and comply with

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[668] Amil Umraw 'Malusi Gigaba was the start of governance problems at SAA says Sizakile Mzamela' *BusinessLive* 26 June 2019 available at *https://www.businesslive.co.za* accessed on 10 December 2022. The former CEO of the SAA testified to the Zondo Commission. He told Zondo that governance under Barbara Hogan was sound at the SAA.

[669] Editor's note 'Former Transnet CEO testifies at the state capture' *Times Live* 11 March 2021 available at *https://www.timeslive.co.za* accessed on 10 December 2022. The Transnet board of directors abdicated their responsibility to please the Minister and President Zuma. They allowed the appointment of Mr Siyabonga Gama and payment of R17 million for legal fees although the court had ordered him to pay Transnet legal fees; SABC News 'State Capture Inquiry: Former chairperson of Transnet Mafika Mkhwanazi testifies. Gigaba a central player in a lot of wrong doings at SOEs: Carolus' *SABC News* 19 October 2020 available at *https://www.sabcnews.co.za* accessed on10 December 2022.

good corporate governance is crucial.[670] However, most deferred to the executive authority's preference, which assisted them in keeping their position in the SOE and securing their future appointment on other boards of SOEs. Since the advent of Zuma's repurposing SOEs, state institutions and government departments, some members of his cabinet intimidated boards. Ideally, boards operating honestly stick to what is right irrespective of the executive authority's desires or wishes because the executive authority does not have fiduciary duties, whereas boards do. In other words, the buck stops with the board of directors. Their fiduciary duties are exclusive to them by their appointment as directors.

Non-compliance with good corporate governance is magnified during auditing and when the SOEs are not a going concern because of monetary shortfalls. When the boards of SOEs are prevented from executing their fiduciary duties outlined in the PFMA and the Companies Act contrary to their general responsibilities, their ability to govern responsibly and in the interest of these companies weakens. The duties and responsibilities herein go to the heart of good corporate governance. Interestingly, when executive management and the boards are called upon to account for their actions before the Parliamentary Committees and SCOPA, the executive authorities never admit to Parliament or the public that the stratagem was theirs.[671] Generally, executives and boards follow the orders of their masters to avoid being dismissed from their lucrative positions.[672] However, this does not mean that executive managers and board directors are always victims of the SOE's shareholders.

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[670] PFMA, Policies, Corporate Plan, Companies Act, the Constitution, statute that established SOEs and the Treasury Regulations, which espouses good corporate governance. For instance, the chairperson of PRASA, Judge Makhubela was alleged to have shared confidential information with lawyers of Siyaya and insisted that the SOE settle with that company when it was not justifiable to do so. According to the head of the legal department and her subordinate before the Zondo Commission who stood their ground, were vindicated by the court, which decided in favour of the PRASA in the dispute with Siyaya.

[671] Chantal Presence 'Minister Brown hints that the board could be rotated' *IOL* 21 January 2018 available at *https://www.iol.co.za* accessed on 10 December 2022. The former Minister Lynn Brown, during her term of office at the Department of Public Enterprises, did not admit her culpability for management not accounting and explaining the fruitless and wasteful expenditure incurred at Transnet. During her term at the helm of the Department of Public Enterprise, Ms Brown claimed that she did not know that the board and executives would not attend the scheduled SCOPA meeting on 6 December 2018. Transnet was expected to attend SCOPA to explain the fruitless and wasteful expenditure of R692m. Instead, she feigned ignorance of what transpired at Transnet and threatened to rotate the board if it did not carry out its fiduciary duties. Ms Brown, too, failed to attend the SCOPA meeting, claiming that she was not well but had attended the Cabinet meeting.

[672] Zondo Report Part 2 Vol 1 op cit note 571.

They are usually culpable because they are driven by self-interest, greed, and instructions from the executive authority without concern for the SOEs.[673] Sometimes, boards of SOEs, executive and non-executive management and executive authority jointly engage in nefarious activities, ignoring sound corporate governance principles.[674] This suggests a lack of ethical leadership. For instance, Transnet's executive and non-executive managers enabled corruption by systematically weakening the governance structure.[675] Transnet is in the freight transport and logistics business, which is the heartbeat of the country's economy. It is also the caretaker of pipelines, port networks, and rail in South Africa. It has five divisions: Transnet Freight Rail, Transnet National Ports Authority, Transnet Ports Terminals, Transnet Rail Engineering and Transnet Pipelines.

Transnet is fundamentally important for affordable, efficient and smooth goods ferrying through the economic system within the country and to ports for export and import.[676] Simply put, Transnet cannot afford to fail because its failure would have a catastrophic effect on the country's economy. It is perplexing that the executive authority, accounting authority, and Zuma did not appreciate that weakening good corporate governance and operational structures would plunge the country's economy into the dark abyss for a long time. Until the conduct and role of the board, enablers, executive management, executive authority and Zuma were revealed in over 200 000 Gupta emails in SOEs, the connivance, corruption and state capture could have continued unabated.[677]

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[673] Bhorat et al op cit note 66 at 47; Zondo Report Part 2 Vol 1 op cit note 571 50-51. The new board of Transnet appointed by Gigaba with Mkwanazi at the helm did everything within its power to reinstated Gama. The arbitration was paused, and the high court order abandoned. Deneys Reits Attorneys' Mahlangu advised Gigaba to inform President Zuma and his assistants that a settlement with Gama was about to be concluded. This was despite Gama havening committed irregularities that were a dismissible offence.

[674] Public Affairs Research Institute (24 August 2024) *Transnet Inquiry Reference Book: Version 1* at 2. For example, Denel, Transnet and Eskom as well as their subsidiaries.

[675] Ibid. Zondo Report Part 2 Vol 1 op cit note 571 at 64-67. Transnet, under the leadership of Mkwanazi, agreed to pay Gama's legal cost even though Gama owed it legal fees.

[676] Ibid.

[677] Africa Confidential 'KPMG feels the heat' (2017) 58 *Africa Confidential* 1; The Editorial Team. 'Gupta Leaks" Emails Set to Show the Family's South Africa Influence'. *Sunday Times* 28 May 2017 available at *https://www.timeslive.co.za* accessed on 10 December 2022; Mike Cohen and Amogelang Mbatha 'Zuma's graft scandal lays bare chaos in SA Police' *Moneyweb* 8 June 2017 available at *https://www.bloomberg.com/politics/articles/2017-06-07/zuma-s-graft-scandal-lays-bare-chaos-in-south-african-police?cmpId=GP.Pol&utm_campaign=Pol&utm_medium=bd&utm_source=google* accessed on 10

4.8.2. Appointments of executive managers

The appointment of CEOs in most SOEs resides with its accounting authority. This aligns with the King Code on Corporate Governance and the Companies Act.[678] Therefore, when the accounting authority appoints the CEO and submits the appointee to the executive authority, that decision must be respected unless the MOI or relevant legislation provides otherwise,[679] unless the appointment was irrational. Good corporate governance was undermined in the past and continues to be even after the State of Capture report of the Public Protector and the commencement and conclusion of the Zondo Commission. This is done by an executive authority that adheres to good corporate governance. The said conduct is unbecoming of the portfolio, unprofessional and contrary to good corporate governance, and disappointing and embarrassing. For example, the board of directors of Mango had recommended the appointment of Glenn Orsmond as CEO.

On 27 September 2019, Bekhumuzi Magwaza, the Chairman of SAA, sent a letter to Gordhan advising him of its recommendation for Mango. Gordhan disagreed with the board of directors' decision and instructed the boards of Mango and SAA to appoint Bezuidenhout, the acting CEO, instead. His action effectively emasculated the board of directors. Gordhan's conduct and decision were at odds with the legislation and governance protocols developed and adopted by the DPE. Gordhan's action goes against what he was opposed to during Zuma's tenure. His preference for an unqualified candidate contradicts the standards in section

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December 2022; Staff Reporter. '#GuptaLeaks: How MultiChoice paid the Guptas Millions' *Mail & Guardian*. 24 July 2017 available at *https://mg.co.za* accessed on 10 December 2022. 200 000 Gupta emails exchanged amongst various players in the corruption at Eskom, Transnet, other SOEs and some private sector participants were the catalyst for the investigation of the State of Capture, which culminated in the appointment of the Zondo Commission of Inquiry. The Zondo Commission emboldened witnesses to come forward with information about corruption and the lack of good corporate governance in SOEs. Non-compliance with good corporate governance at the Public Investment Corporation, an investment arm of the Government Employees Pension Fund, was laid bare in the Mpati Commission established to investigate corruption.

[678] King Code 3 principle 8.1.1 authorises the appointment of CEO. Section 66 provides that the board of directors is responsible for the management of the company. The Companies Act applies to SOEs unless specifically exempt from its application.

[679] Andile Sicetsha. 'Nico Bezuidenhout: Mango Airlines CEO's credentials and qualifications' *The South African*, 22 November 2019 available at *https://www.thesouthafrican.com* accessed on 10 December 2022. Bezuidenhout's highest qualification is Standard 10 (Grade 12), which he acquired in 1994 whereas Glenn Orsmond had a B.Com degree and 30 years airline experience; Ngoepe Karabo and Mzilikazi wa Afrika 'Pravin Gordhan 'imposed' Mango CEO' *IOL*, 27 October 2019 available at *https://www.iol.co.za* accessed on 10 December 2022; Tebogo Tshwane 'Black Management Forum takes Mango CEO challenge to Court' *The Citizen* available at *https://www.citizen.co.za* Accessed on 10 December 2019.

195(1)(h) of the Constitution. Public administration is premised on values and principles that exemplify good human resources management.

Effectively, the roles of the Mango and SAA boards of directors embodied in sections 50 and 51 of the PFMA and sections 66, read with section 76 of the Companies Act, were usurped by Gordhan, the executive authority of the DPE. This is reminiscent of what transpired when Gama was favoured for appointment to the position of the GCEO of Transnet by Zuma even though he was neither considered suitable for the position nor recommended by the board.[680] Unfortunately, Gordhan, the current Minister of DPE, learnt nothing from the controversy that arose when a non-competitive candidate was imposed on Transnet's accounting authority while recruiting the CEO. When he ascended to the position of the executive authority of the DPE, he slid with ease into imposing his will on the accounting authority of the SAA.[681] He failed to walk the talk. He emulated Zuma, Gigaba and Brown by insisting on appointing his preferred candidates in SOEs.[682]

His testimony to the Zondo Commission rang hollow because he interfered in the affairs of SOEs and the DPE. Defending the interest of the SAA and upholding principles of good corporate governance espoused in the amended King Codes, the policies, the PFMA, and its regulations should have determined his approach to do right by the board of directors of SAA. Instead, disregarding the board's duty, he appointed his candidate and not the one interviewed and recommended by the board. It is abundantly clear that the minister was least interested in advocating principles geared to support and carry the message that good corporate governance is necessary and contributes to the rule of law. It is concerning that Gordhan continued the unsavoury practice when the Zondo Commission was busy investigating the State of Capture flagging corruption.

This kind of conduct is repugnant to good corporate governance. Unless urged to do so by legislation, the King Code, and the recruitment policy, the executive authority should not have been the determinant of who gets appointed to key executive positions. Gordhan's

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[680] Zondo Report Part 2 Vol 1 op cit note 571 at 31- 34. The board's preferred candidates during the first and second recruitment process were not appointed despite Brown accepting the recommendation of both candidates. Ironically, in the first recruitment process, Gordhan was the preferred candidate to be appointed GCEO but withdrew from the process. During the second recruitment process, Sipho Maseko was recommended for the appointment, but Zuma was not agreeable to Maseko's appointment. He wanted Gama even though he was not suitable for appointment for legitimate reasons.

[681] Ibid.

[682] Van der Westhuizen op cit note 496.

preference should not dictate the outcome of recruitment. The determinant should be the recruitment policy and processes, the delineation of roles of the executive authority and the board in the PFMA, the Companies Act, King Code IV, the Protocol and Policy documents. The toxicity of unlawful interference in recruiting essential positions in SOEs always leaves an aftertaste - a substantial financial burden in the form of bailouts, stunted delivery on the mandate and failure to sustain an SOE. This is a reflection on the infraction of good corporate governance.

4.8.3. The role of the executive management

Like in the private sector, the board of directors of SOEs manages the SOEs. The boards of directors delegate their authority to executive managers. For instance, Gama, Molefe, Koko, Anoj, Montana, and Motsoeneng for violating their fiduciary duties as key executive managers in their managed SOEs.[683] They did not elevate reasonable corporate governance requirements– accountability, ethics, integrity and transparency.

4.8.4. Challenges SOEs face due to cadre deployment and rent-seeking

The ANC-led government is believed to be responsible for the mess of the country due to corruption and state capture. This is not true because it is far from the reality. These two concepts precede the ANC government because they were recorded during and after the Dutch and English colonisation of the Cape. Cadre deployment is as old as colonialisation, if not older. The researcher argues that the ANC is blameworthy because it did not learn anything from history. Instead of charting its way forward and following the precepts of good corporate governance, it marshalled through legislation and governance protocols, embracing King Codes for public sector institutions and policies. It opted to walk in the footsteps of the NP and perpetuate corruption and state capture.[684] This argumentation flows from its policy of

[683] They were in executive positions in Transnet, Eskom, Prasa and the SABC. Gama, Koko, Anoj and Molefe are criminally charged for their culpability. Their cases are pending before the courts. Motsoeneng and Molefe were obliged to return the money they were paid. Molefe the pension fund pay-out and Motsoeneng the incentive for clinching the deal with Multichoice. Gama was obligated to refund the R500 000.00 with interest he donated on behalf of Transnet money without the necessary authority. The interest of the SOEs were completely disregarded.
[684] Ferial Haffejee and Ivor Chipkin *Days of Zondo* (2022) at 14-17; Friedman op cit note 27; William Gumede 'ANC corruption is major cause of South Africa's failure – and the polls will show it' *The Guardian* 8 May 2019 available at *https://www.theguardian.com* accessed on 10 December 2022; The Conversation 'What may have set the ANC on a path to corruption' *BusinessTech* 7 September 2016 available at *https://www.businesstech.co.za* accessed on 10 December 2022. The ANC-led government approves the appointment of directors, chief executive officer, chief financial officers; See Affidavit to Zondo Report "The ANC-led government approves the appointment of directors, chief executive officer, chief financial officers" Zondo Report Part 4 Vol 3 and Zondo Report Part 4 Vol 4 op cit note 635 - Barbara Hogan's statement.

deploying cadres not aligned with the requirements in paragraph 5.1.6.1 of the Protocol.[685] If a qualified person was inadvertently appointed, they are more likely than not to be bullied and sometimes coaxed to ignore the principles embodied in the regulatory framework and legislation on good corporate governance.[686] The prerequisite of the ANC-led government is the personal relationship between the appointee and the powers that be.[687] Loyalty to the party in charge of government suffices as a qualifier for SOEs' board appointments and CEO, irrespective of experience and academic qualifications.[688] For instance, this deployment policy is reflected in the appointments previously made to the SAA board, which proved disastrous for the effective management of this SOE.[689] The said appointment led to the demise of SAA. The board Chairperson and the Chairperson of the risk and audit committee were at the forefront of non-adherence principles in all fours with good corporate governance in the SOE.[690] It is, however, interesting that the Chairperson of the risk and audit committee was a chartered accountant.[691]

The SAA, a victim of state capture, was sold to the Takatso Consortium (Takatso), which did not bring value to the SAA. Instead, the sale of the majority of the SAA sparked debates amongst others about the National Treasury, which did not play a role in the sale of

[685] The appointment of executives and non-executives at Denel, Eskom, Prasa, SAA, SABC, Transnet and SAPO.
[686] Zondo Report Part 4 Vol 3 and Zondo Report Part 4 Vol 4 op cit note 635. Hogan the former Minister of the Department of Public Enterprises. There is history of Hogan resisting Zuma's instructions and wishes because she was principled.
[687] The appointment of Ms Myeni as the chairperson of the board of SAA because of her alleged proximity to the then President Zuma and serving on his foundation. Her power is alleged to have extended to matters at ESKOM as alleged by Mr Sipho Tsotsi, which was not refuted by Ms Myeni. Instead, she opted for her right to keep silent in terms of section 35(1)(a) of the Bill of Rights of the Constitution of the Republic. SAA was run down, and she was subsequently declared a delinquent director for life by the High Court. Protocols on Corporate Governance paragraph 8. This is in reference to a board comprised of persons without integrity, accountability, competence and lacking relevant and complimentary experience, expertise and skills.
[688] Ibid.
[689] Blackmand and Dall op Cit note 26; Setumo Stone 'How the cancer spread' *News24* 21 May 2017 available at *http://www.news24.com* accessed on 10 December 2022.
[690] Business Insider SA 'Seven things you need to know about Dudu Myeni – and how her silence could land her in jail' *Business Insider* 5 November 2020. Myeni was accused of holding up an agreed deal with Airbus for the swap of A320 for A330. This cost SAA dearly. She was also accused of changing the board's resolution to appoint a service provider for aircrafts even though they would be too costly for the airline. This conduct caused losses at SAA.
[691] Marelise Van der Merwe 'Your investigators could have done better, more, Kwinana tells Zondo on missing documents' *fin24* 7 November 2020 *http://www.news24.com* accessed on 10 December 2022. Former board member of SAA and Chairperson of SAA Technical was accused of fraternising with a non-compliant company to supply ground service to SAA and solicited R100m. Kwinana had an audit firm during her tenure at SAA and SAA Technical.

the SAA to Takatso.[692] According to Alf Lees, the National Treasury intimated that it was not involved with the conceptualisation, negotiation and finalisation of the terms and conditions of the conclusion of the contract between the DPE and Takatso.[693] The Director General of the DPE also alleged that he was side-lined by Gordhan. Takatso had been identified as a suitable suitor for the SAA by the DPE. There was no evidence that the agreement to sell 51% of SAA was compliant with legislation regulating the Air Services Council Licensing Authority, the Competition Commission, and the Competition Tribunal.[694] Non-compliance with legislation is an excellent corporate governance issue; therefore, the SAA transaction failed to pass the master. Debates about whether the National Treasury played a role in the sale of SAA to the Takatso are still out there.[695]

National Treasury was engaged after Gordhan identified Takatso as a suitable suitor for the SAA. There was no evidence that the agreement to sell 51% of SAA was compliant with legislation.[696] During the State Capture investigation by the Zondo Commission, Gordhan proceeded to finalise the deal contrary to concerns raised in the investigation. The deal is shrouded in secrecy because some terms and conditions are confidential. This suggests that the disregard for good corporate governance is a norm in the DPE irrespective of who the Minister as aptly demonstrated by Gordhan's conduct in the SAA Takatso deal. Good corporate

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[692] Section 54 of the PFMA requires the board of an SOE which intends to dispose a significant shareholding in that SOE to send a request to the executive authority which is the representative shareholder for recommendation. Thereafter this request must be submitted to the relevant executive authority of the treasury to approve. This was not done according to Treasury. The Director General of the DPE was according to him side-lined by Gordhan in that transaction although he is the accounting officer; DA Media Release 'National Treasury concern with the sale of shares of SAA' 21 March 2022 available at *www.da.org.za* accessed on10 December 2022.

[693] Ibid. Gidinza Banele 'SAA on track to finalise Takatso deal by March 2022' *Business Report IOL* 22 September 2022 available at *https://www.iol.co.za* accessed on 10 December 2022.

[694] The Air Services Licensing Act 115 of 1990, the Competition Act 89 of 1998. Thomas Devon 'Licensing Council gives SAA 90 days to reveal Takatso Equity Ownership Deal' *EWN* 12 August 2022 available at *https://www.ewn.co.za/* accessed on 10 December 2022. The South African Air Licensing Council gave the SAA to comply with the requirements within 90 days or else it will withdraw the licenses to fly.

[695] DA Media Release op cit note 692; Smith Carin 'Gordhan, DPE pushed for more information on SAA Takatso deal' *News24* 23 March 2022 available at *https://www.news24.com* accessed on 10 December 2022. Justice Erasmus in the application for more information directed the DPE to provide non-confidential information. He further directed the DPE to submit confidential information to him in the court. The DG of Treasury, Mogajane informed Scopa that Treasury was not part of the negotiation with Takatso in the SAA deal. The terms and conditions of the transactions were not made public. He was concerned about the transaction. News2wire 'SAA funding gap not plugged in Godongwana's mid-term budget' 28 October 2022 available at *https://www.engineeringnews.co.za/article/saa-funding-gap-not-plugged-in-godongwanas-mid-term-budget-2022-10-28* accessed on 23 February 2024 meaning that the government still has financial exposure in the SAA deal despite Takatso acquiring 51% of SAA for R51.00.

[696] Ibid.

governance requires accountability, ethical conduct, responsible management and transparency. The DPE and its executive authority ignored these basic precepts of governance.

The National Party did not want to be outdone by the Governors in the Cape Colony. Appointments to positions were not based on merit.[697] According to Levy et al. 'South Africa has no history of using an examination system as a non-political means for merit-based recruitment; good standing within the Broederbond was the Afrikaner Nationalist government's cadre deployment.'[698] In other words, the ANC is not different from the National Party. Competency was not a criterion for placement in positions or on boards of SOEs the same way it was and continues to be done in the ANC government. Cadres deployed or employed find themselves in an unenviable position where they have to choose between the ANC and the precepts of the constitutional requirements.[699] Levy et al. posit that the way SOEs were managed during the Mbeki presidency was tempered with sufficient equilibrium between rules and deals, which instilled confidence in the 'future rise, growth to accelerate, and poverty to fall'.[700] After 2010, the ANC was over-enthusiastic about deploying and employing cadres and failed to appreciate the need to do so in a balanced and measured way to benefit the country and its people. What unfolded at the SOEs devasted the economy, leaving the government with huge debts and guarantees. This was achieved with the help of various third parties to benefit a few who did not spend most of the money in the country but took it overseas.[701]

The ANC's culture of cadre deployment preceded Zuma's tenure, except that he took it to another level. During Mbeki's presidency, companies were not given carte blanche but were nevertheless benefactors of the ANC. Unfortunately, some SOE executives and non-executives in SOEs, leaders and politicians in the governing party went rogue.[702] Their conduct flies in the face of the constitutional requirement for all spheres of government, including state organs,

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[697] Ibid.
[698] Brian et al op cit note 606 at 19.
[699] Ibid.
[700] Ibid at 15.
[701] Hofstatter op cit note 377 at 63.
[702] Gertrude Makhafola 'President Zuma has gone rogue, says Barbara Hogan' *IOL*. 31 March 2017 available at *https://www.iol.co.za* accessed on 12 December 2022; Oosthuizen Marius. 'Executives goes "rogue" on the ANC – the party totally split' *BizNews* 29 May 2017 available at *https://www.biznewsco.za* accessed on 12 December 2022; Professor Dirk Kotze. How President Zuma used the capture of state institutions to stay in power. *The Conversation* 6 November 2016available at *https://theconversation.com* Accessed on 12 December 2022. Kotze suggests that when Treasury thwart Zuma's plan, his kindred in state companies, and the Guptas and the Hawks would announce their resumption of the SARS investigation. As soon as loan guarantees are availed by Treasury, the investigation dies down.

to provide practical, transparent, accountable and coherent governance.[703] The governing party scored its own goals through its uncaring, unethical, unaccountable lack of professionalism and transparency and an irresponsible attitude to governance.[704] For example, the ANC used its investment arm, Chancellor House, to secure a 25% stake in Hitachi Power Africa, which secured a contract with Eskom in the Medupi project.[705] This is particularly concerning because, in 1994, the governing party initiated measures to build a solid and accountable government.

A responsible and transparent government is essential to the country's transformation agenda, prioritised since independence to lay the foundation for democracy and good governance.[706] Things fell apart when some institutions were established to support democracy and the rule of law, which are relied on as the bastions of good governance and the rule of law.[707] It is fair to say that the ANC encouraged and enjoined SOEs to dispense with good corporate governance in SOEs for its benefit. The casualties are access to external finance, high costs of capital and low firm valuation, poor strategic decisions, high risks of corporate crises and scandals, failure to reduce poverty, failed service delivery, and inequality.[708]

4.9.Collaboration between the SOEs and enablers from the private sector and their role

The SOEs could not have successfully destroyed the fabrics of good corporate governance on their own without the assistance of enablers. Enablers can be characterised as persons or companies, incorporated or unincorporated, or professional service providers who encourage or enable negative self-destructive behaviour in another. In the context of SOEs, self-

[703] Section 41(1)(c) of the Constitution of the Republic.
[704] This is further demonstrated by the reports in the press about the conduct of the most senior member of the Cabinet and the Secretary General of the ANC. Mzilikazi wa Afrika 'Who blew whistle on Gordhan's chief?' *Sunday Independent*. 22 November 2020 available at *https://www.iol.co.za* accessed on 12 December 2022; Setumo Stone, Queenin Masuabi & Khumalo Junior 'Ace and his men declare war' *City Press* 22 November 2020 available *https://www.news24.com* accessed on 12 December 2022..
[705] K.A Mashamaite and P.S. Raseala 'Transgression of Corporate Governance in South Africa's State-owned Enterprises (2019) 16 *Bangladesh -Journal of Sociology.* 124-134.
[706] Parliamentary Monitoring Group, (03 December 2014). *SABC Chair alleged misrepresentation of qualifications to National Assembly Inquiry*. Six years later the National Prosecuting Authority failed to prosecute former Chairperson of the SABC for embellishing her CV with qualifications she did not have. A warrant of arrest was issued. The endeavours were made to arrest Ms Tshabalala. The NPA failed.; Kaunda Selisho. 'Court issues arrest warrant for former SABC Chair, Ellen Tshabalala, who 'can't be found'' *The Citizen* 19 March 2020 available at *https://www.citizen.co.za* accessed on 12 December 2022.
[707] Williams op cit note 445.
[708] Blackman and Dall op cit note 26 at 15-16; Ray Mahlaka 'How Gigaba sold South Africa for a song' *Daily Maverick* 5 February 2022 available at https://www.dailymaverick.co.za/article/2022-02-05-how-malusi-gigaba-sold-south-africa-for-a-song/ accessed on 24 February 2024; Maseko op cit note 546 at 128-129; Hofstatter op cit note 377 33-44.

destructive conduct occurred when SOE management conspired with third parties, causing the mismanagement of SOEs. The effect of this was the loss of taxpayers' money, failure to effectively deliver services on behalf of the government where applicable and as expected, the government to provide funds or guarantees for their continued existence, the sabotage of the economic development of the country and its people, the impugned reputation of SOEs and the government. Gigaba's appointment as the Minister of the DPE was the beginning of the repurposing of SOEs.[709] Repurposed DPE SOEs were the breeding grounds for corruption, fraud, self-enrichment and state capture. SOEs were targeted to ensure that the leadership and their chosen cohorts have access to their purses, having calculated the budget.[710]

These people were propelled by the desire to assuage their personal needs and self-esteem, amassing personal wealth criminally and that of third parties in total disregard for justice, inequality and eradicating poverty.[711] They did everything in their power to achieve their goal. Some SOEs were repurposed. Bhorat et al. explained repurposing as 'the organised process of reconfiguring how a given state institution is structured, governed, managed and funded so that it serves a purpose different to its formal mandate.' This description included the reconstituted boards of directors deliberately rendered malleable to facilitate the employment of preferred CEOs and CFOs identified and appointed by the Guptas.[712] The repurposed SOEs eroded governance and working structures.[713] These players in government and SOEs were in the excellent company of the private-sector enablers, such as accountants, auditors, banks, consultants, international and national, and lawyers[714] who enthusiastically undermine the rule of law.

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[709] Blackman and Dall op cit note 26 at 15-16; Ray Mahlaka 'How Gigaba sold South Africa for a song' *Daily Maverick* 5 February 2022 available at https://www.dailymaverick.co.za/article/2022-02-05-how-malusi-gigaba-sold-south-africa-for-a-song/ accessed on 24 February 2024; Nkuhlu op cit note 540 at 128-129; Hofstatter op cit note 377 at 33-44.

[710] Blackman and Dall op cit note 26 at 41. SOEs value of procurement stood at R212, 726, 000, 000.00 between 2010-2011. Eskom and Transnet topped the 13 SOEs with their budget standing at R74, 000,000, 000.00 and R70, 000,000,000.00 respectively. Eskom and Transnet were followed by SAA R14,800,000,000.00, Telkom SA R13, 000,000,000.00 and PetroSA R12,000,000,000.00.

[711] Nkuhlu op cit note 540 at 14, 28 and 32-33. Stimpel op cit note 445 at 85.

[712]. Gigaba ignored Gantsho in favour of the Guptas' favourite person Molefe. Gantsho had fared better in the interview than Molefe; his shortfall was not being the Guptas' candidate; Maseko (2021) 128; Public Protector Report (3 of 2015/2016) op cit note 65; Zondo Report Part 1 Vol 1 op cit note 522; Zondo Report Part 2 Vol 1 op cit note 571.

[713] Serogoane and Ukwandu op cit note 656.

[714] Open Secrets: *The* Enablers op cit note 467; Nkuhlu op cit note 540.

Enablers were aware of the folly of their action. They consciously devised and participated in corruption, looting and state capture.[715] When exposed, these enablers feigned ignorance of what unfolded.[716] Some were calculated in their dealings – after making money from the state capturers' bank accounts; they decided to withhold their services and close their accounts.[717] The Open Secrets Report suggests that the role of enablers was not comprehensively dealt with in the Zondo Commission[718] and requires further attention. The Open Secrets asserts that the feigned ignorance by the private-sector enablers is a façade, hypocritical and does not provide a good picture.[719] The private sector played a crucial part in enabling the state capture.

However, attention to the report of the Public Protector's Report did not delve deeper into what transpired but gave a glimpse of the rot. The Public Protector was working against time because her term was ending. Her recommendation gave birth to the state-capture Zondo Commission. In this section, the researcher briefly discusses the attitude of enablers and the part they played in the SOE's dissipation and the country's damaged economy.

4.9.1. Accountants and auditors

Auditors were considered honourable, professional and reliable to audit and give an objective opinion about the financial position of auditees. The four dominant audit firms, Deloitte & Touché (Deloitte), Ernst & Young, KPMG and Price Waterhouse Coopers (PwC), also provide internal auditing services, which is lucrative.[720] In addition to auditing services and tax advice, they provide advisory and consultancy services, leading to conflict of interest. The conflict of interest affects the independence, objectivity and integrity of auditors.[721] The advisory and consultancy services are essential to audit firms because of their contribution to the bottom line, and conflict of interest is ignored if not overlooked. Audit firms compromised their work ethic and professionalism when auditing private and public sector companies, some of which

[715] Brian et al op cit note 606 at 2.
[716] Nkuhlu op cit note 540 at 36-37. Nkuhlu lamented that when enablers are caught instead of accepting responsibility and confessing their unlawful conduct they use the looted money to defend themselves. They hire the best lawyers to defend them.
[717] For example, the ABSA Bank Limited, First National Bank Limited, Nedbank Limited and Standard Bank Limited closed the accounts of the Gupta's linked companies.
[718] Kyle Cowan *Sabotage Eskom under Siege* (2022) 7.
[719] Ibid.
[720] Ibid 32; Nkuhlu op cit note 540 at 15.
[721] Cowan op cit note 718 at 33; Nkuhlu op cit note 540 at 15-20.

paid the ultimate price of failure.[722] The dominant four audit firms have contributed to unethical and unprofessional conduct in SOEs and private and public sectors.[723] They straddled the external auditing, internal audits, advisory and consulting services and tax advice and failed to strike a balance in the process.[724] It is perhaps appropriate to record that although Ernst & Young is implicated in wrongdoing in other jurisdictions, it did not contribute to state capture in the country.

The Open Secrets Report 2018 study confirmed that accountants often did not set up shell companies for clients. This task was left to lawyers and agents who focused on incorporating companies.[725] Most accountants comfortably create stratagems for clients to achieve their goals, encompassing tax evasion, fraud, and money laundering.[726] Examples of such practices are evidenced by the flow of money from SOEs, which ended up in these shelf companies' local and international bank accounts. These accountants and auditors collaborated with SOEs' management and third parties, which came at a high cost to the government, the public, and the SOEs and its stakeholders. The unprofessional conduct of accountants and auditors should not be overlooked, and they must be called to account for enabling state capture.

4.9.1.1. Deloitte & Touche

The accountants and auditors in South Africa enabled corruption, economic crimes and state capture.[727] These accountants and auditors also dipped their filthy and ugly hands in the coffers of SOEs. They provided advisory and consultancy services to SOEs acquired improperly.[728] Deloitte charged Eskom five times more for professional services. Eskom declared a dispute with Deloitte and took the matter to court. Deloitte agreed to pay back R150 million from R207

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[722] Ibid 33-34. 2017 saw Steinhoff International Holding NV share price collapse by 90% due to accounting irregularities. Its Deloitte audit outcome was unqualified in 2015 and 2016. Steinhoff had to restate its financials a few months later because there were question marks about R100 billions of non-South African assets. A similar situation arose in South Africa when VBS a mutual bank had to be liquidated after it had received an unqualified audit outcome from KPMG; Michael Marchant 'PWC and Nkonki audit firms that clipped the SAA's wings' *Daily Maverick* 26 July 2021 available at *https://www.dailymaverick.co.za* accessed on 12 December 2022. The SAA went into business rescue, employees lost their jobs and their salaries were unpaid for a long time .

[723]Ibid.

[724] Erkens, Hung and Matos op cit note 48.

[725] Op Secrets Secrets: *The Enablers* op cit note 467 at 33.

[726] Ibid. This finding was brought to the attention of the Zondo Commission to alert it to possible claims by implicated accountants that they were unaware that they were involved in illegal activities.

[727] Ibid.

[728] Lupiah Kiri and Luke Feltham 'Private-sector players who provided facilitated public-sector fraud' *Mail & Guardian* 25 February 2021 available at *https://mg.co.za*. accessed on 12 December 2022.

million fees it had received for services.[729] Deloitte was actively defrauding an SOE without shame and would have gotten away with the fees if Eskom did not pursue it in court. Furthermore, these auditing firms' advisory and consultancy services provided to SOEs included easing the movement of the illegal proceeds of crimes.[730] The Big Four accounting and audit firms were found wanting for non-professionalism, signing off on accounts of companies that subsequently collapsed.[731]

Deloitte provided Transnet auditing services, wherein the audits appeared to be clean. Deloitte was led by Thega Marridar and, subsequently, Trushar Kala.[732] It is disappointing and surprising that this was the case; although Transnet had unreported irregular, wasteful and fruitless expenditures, it received unqualified opinions. These audit outcomes prove that corruption had already taken root by 2010, and auditors hid the truth. Deloitte was again an effective enabler. During this period, the Transnet board was led by Phaswana. Interestingly, his board could not detect that something was amiss with Transnet's audit outcomes.

4.9.1.2. KPMG South Africa

KPMG consistently issued unqualified audit opinions for Oakbay Investments while there were inexplicable money flows between it and the Tegeta and Estina projects.[733] It also audited two Guptas-connected companies, Linkway Trading and Accurate Investment, a Dubai-based entity.[734] Linkway Trading was described as a construction company. Therefore, its involvement in running weddings was farfetched and should have been seen for what it was.[735] Wessels, the senior auditor at KPMG responsible for the two Gupta companies, turned a blind eye to evidence even after a junior auditor raised the alarm to the seniors.[736] The senior auditors

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[729] Ibid; Reuters 'Eskom picks Deloitte as next external auditors' *Fin24* 04 Nov 2021 *https://www.news24.com/fin24/companies/eskom-picks-deloitte-as-next-external-auditors-20211104* accessed on 23 February 2024; Garth Theunissen 'Eskom's choice of Deloitte as auditors is likely to raise eyebrows' *Business Day* 22 November 2021 available at *https://www.businessday.co.za* accessed on 12 December 2022. Eskom argues that Deloitte Consulting is not the audit firm. The argument is nonsensical because they are in the same stable. This was not the first controversy surrounding, Deloitte had acquired jobs at Eskom unethically in 2016 and 2017.

[730] Ibid.

[731] Michael O'Dwyer 'Big Four accountancy firms refuse to back sharing audit work with smaller rivals' *Financial Times* 21 August 2021at available at *https://www.ft.com* accessed on 12 December 2022.

[732] Annual Reports of Transnet in the years 2010/2011 and 2011/2012. These results are demonstrative of collaboration between the board, management and auditors, but for Molefe and Anoj, corruption and manipulation of governance in Transnet.

[733] Ibid.

[734] Stimpel op cit note 445 at 108-109.

[735] Ibid. KPMG's conduct enabled money to be transferred into a construction company to pay for the lavish wedding at Sun City at the expense of the people of South Africa.

[736] Ibid at 108.

ignored the red flag and denied wrongdoing. Subsequently, KPMG acknowledged that the auditor acted unprofessionally. Wessels appeared before the IRBA and claimed that he was naïve and had acted unprofessionally. The IRBA found him guilty of 'egregious dishonesty' and was an 'active participant in subterfuge', struck him off the roll of auditors, ordered him to pay its costs, and decreed that Wessels' name, KPMG's and the outcome be made public.[737]

The tendency of KPMG to provide companies with unqualified audits even if they did not deserve that in the private sector extended to the public sector SOEs. KPMG audited Transnet, an SOE, from 2011 to 2016. Although Transnet failed to comply with good corporate governance throughout this audit period and incurred irregular, fruitless, and wasteful expenditures, it got a clean audit every year. Between 2011 and 2016, Transnet and its subsidiaries continued to receive an unqualified audit despite growing irregular expenses.[738] The accountants fooled the public and facilitated state capture by covering up the corruption over the years, including the fruitless, wasteful and irregular expenditure.[739]

4.9.1.3. SisweNtsaluba Incorporated auditor of Transnet post Deloitte audits

In pursuit of fees and profits, SizweNtsaluba Inc., the most prominent black-owned auditing firm in Southern Africa, compromised their integrity, ignored signs of impropriety, and, in some instances, were active participants.[740] SisweNtsaluba Incorporated audited Transnet for five years under the leadership of Collin Mashishi between 2013 and 2017, receiving unqualified opinions.[741] This was during the grand state capture by the Guptas and their companies. Considering the inflated contracts for acquiring advisory and consultancy, this auditee's audit outcome was surprising. Furthermore, this clean audit was during the height of the acquisition of locomotives at unjustifiable prices and non-delivery.[742] This was despite the irregular, fruitless and wasteful yearly expenditure followed by Gama, even before Molefe's tenure at Transnet. The clean audits did not cease.

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[737] Ibid at 109.

[738] Transnet Annual Report (2015/2016) *Transnet received an unqualified audit although the irregular expenditure was specifically mentioned in the annual report*. PwC and NkonkiSizwe were auditors of SAA since 2012. The AG took over the audit of SAA in 2017. PwC and NkonkiSizwe for five years allowed the SAA to sink to the bottom of the corruption and state capture pit. Neither of the two raised the failure of the SAA to account for its finances, governance and non-compliance with the legislation.

[739] Ibid.

[740] Nkuhlu op cit not 540 at 19 and 43; Amabhungane and Scorpion 'KPMG Missed More Money Laundering Red Flags' *Daily Maverick* 17 November 2017 *https://www.dailymaverick.co.za/article/2017-11-17* Accessed on 12 December 2022.

[741] Annual Reports of Transnet for financial years 2012/2013, 2013/2014, 2014/2015, 2015/2016 and 2016/2017.

[742] Ibid.

The fruitless, wasteful, and irregular expenditure challenges received attention as they plagued Transnet, resulting in qualified audits.[743] Only after the senior audit manager was changed. The researcher posits that the evidence led before the Public Protector and the information in the trove of emails led to the State of Capture Report, SizweNtsaluba Grant Thornton Inc. realised the folly of its audit outcomes. Unqualified audits became unsustainable in light of the developments. SizweNtsaluba Grant Thornton Inc. continued to audit Transnet for three years until 2020/2021. SizweNtsaluba Grant Thornton Inc. woke up from its audit slumber and qualified for the Transnet 2017/2018, 2018/2019 and 2019/2020 audits. Fruitless, wasteful and irregular expenditures going back to 2011 were picked up by SizweNtsaluba Grant Thornton Inc. after these auditors had ignored them for years. Consequently, the audit outcome at Transnet was a qualified opinion.[744] The governance in Transnet received attention in 2019/2020, but the damage due to corruption, fraud and state capture affected its ratings with the Rating Agencies.

4.9.1.4. PriceWaterhouseCoopers

PriceWaterhouseCoopers (PWC) was the auditor of the SAA for five years. In its enthusiasm to remain the auditor of the SAA and its subsidiaries, PWC disregarded the continued failure of internal controls. PWC did not flag the precarious financial position in the SAA, non-compliance with legislation, procurement policies and processes, the disregard of its strategic direction and compromised internal controls. The SAA had significant challenges, including liquidity and ongoing concerns, but PWC conveniently disregarded that. For five executive years, PWC gave SAA clean audits despite the questionable conduct of Myeni and her board, Kwinana, Nhatsi and Zwane.[745] There cannot be a plausible explanation for the clean audits that SAA received unless there was collaboration and cooperation with the PWC senior

[743] Public Accounts SCOPA 'Transnet Annual Report, deviations, expansions, & SIU investigations, with the DPE Minister' 9 March 2021 available at *https://www.pmg.org.za* accessed on 12 December 2022. Transnet received a qualified audit opinion for the 2017/2018, 2018/2019 and 2019/2020 financial years SizweNtsaluba Inc.'s advisory and consulting services and auditing were acquired by Grant Thornton. SizweNtsaluba Inc. was renamed SizweNtsaluba Grant Thornton Inc., which continued to audit Transnet for an additional three years. During the last three years of auditing, Transnet, and during the state capture uproar, SizweNtsaluba Grant Thornton Inc.'s audit opinion changed from unqualified to qualified audit and the fruitless, wasteful and irregular expenditure was reported going back to the 2011 audit period. This is an indictment on SizweNtsaluba Grant Thornton Inc.'s questionable professionalism. The change of name does not erase history.

[744] Annual Reports of financial year end 2017/2018; 2018/2019; 2019/2020.

[745] Stimpel op cit note 445 at 61-64; 66-70 and 71-76. Board member, Anthony Dixon after asking for clarity about the consolidation of the SAA debt resigned his position. Meyer also resigned after being informed that the board lost confidence and trust in him. Myeni in a meeting in which Dr John Tambi was present took away Stimpel's cellular phone and pen device.

manager(s) who oversaw the audits the researcher submitted. The shenanigan at SAA is extensively discussed in previous paragraphs in this chapter. The writing was on the wall - corruption was the order of the day, fraud was normalised, suitable corporate governance structures were dismantled, and the SAA was the casualty of state capture. The auditors executed their duties unprofessionally without the necessary moral turpitude. Managers of the SAA and its subsidiaries, including the board of directors, allowed private companies and people to benefit from it unjustifiably and with impunity.[746] The board of directors involved itself in the day-to-day management of the SAA, which made decisions which were not in the interest of the SAA. Based on the outcome of the Zondo Report and its conclusion, it is encouraging to know that the person(s), including the board of directors and the then ministers of the DPE, mismanaged the SAA.

4.10. The Bankers

The flow of money from SOEs' bank accounts to other entities depended on the banks' attitude and willingness to assist the corruptors, fraudsters and money launders with their multiple bank accounts.[747] This enabled unfettered money laundering. Banks failed to act responsibly and looked out for transactions in bank accounts without proving actual activities in the companies. It is exciting and inexplicable that banks processed money transfers between Transnet, banks and third parties without confirming and establishing the basis for the payments, justification and source of the money flow to multiple international and local bank accounts.[748] For example, Nedbank failed to comply with the requirements, particularly section 29 of FICA, failing to report suspicious transactions to the FIC. In addition, sections 20, 21 and 22 of FICA were ignored.

Other banks, such as ABSA, First National Bank, and Standard Bank, failed to comply effectively with FICA, contributing to corruption, fraud, and money laundering. If the banks

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[746] Zondo Report Part 4 Vol 1 op cit note 646. In the Zondo Report, it is very clear that the internal skilled employees' duties were usurped by the duties of the overpayments made, and contracts, inflated prices and goods and services not delivered.

[747] Stimpel op cit note 445 at17-18 and 60-66. Transnet paid R67 million into the Standard Bank Account for which Mark Shaw was the signatory. The payment was commissioned from CSR, which had received R600 million from Transnet for relocation costs. The R67 million was paid out in four instalments into shelf companies.

[748] Ibid at 20, 64-65. Transnet paid CSR, which, in turn, paid Tequesta, a shell company in Hong Kong, a fee for 359 locomotives into the HSBC bank. Tequesta had not done any work for Transnet except as a conduit for unlawful payment. HSBC failed to stop the R5.3 billion transaction from the CSR bank account into two companies, Tequesta and Regiments Asia. $100 million paid into Regiments' HSBC bank account was transferred to 24 banks in Johannesburg, Dubai and the USA. These payments were made to shell companies, including Tequesta.

had been diligent, as expected, the breakdown in good corporate governance at SOEs would have been realised much earlier. The banks pretended they neither knew nor suspected something was amiss at SOEs such as Denel, Eskom and Transnet, even with the volume and frequency of money flows. The researcher hypothesises that it was convenient for the banks to look the other way. The banks were motivated by the money they made from these suspicious transactions.[749] They pretended they were unaware that criminality was in progress. In other words, they were the greatest pretenders.

If state capture had not been flagged by the Public Protector in 2016, the banks would have continued their business as usual. They reacted when the state captured reports, and the emails were sent to the public to protect themselves. They did not care about the impact of their services on the country's economy. The researcher contends that the banks could not have missed transactions that frequently went through Gupta's accounts and associated companies. It is incumbent upon banks in line with FICA to continually conduct due diligence on huge transactions in clients' bank accounts to identify money laundering.[750] If the banks were unaware of the suspicious transactions, they were negligent and should have done a better job. South Africa's legal systems for money laundering are considered sufficiently robust but require reporting the crimes. If banks fail to report these suspicious transactions, neither POCA nor PRECCA can kick in.

Local and international banks facilitating money laundering and state capture are ABSA, Bank of Baroda, First National Bank, HSBC, Nedbank, Standard Bank and Standard Chartered.[751] The four central banks, ABSA, First National Bank, Nedbank and Standard Bank, notified the Gupta-linked companies of their intention to close their bank accounts in 2016 and subsequently closed them.[752] The ANC, government and Zuma intervened in the dispute

[749] Ibid at 18-19 and 22.
[750] Ibid at 22; Sections 20, 21 and 22 of the FICA.
[751] Ibid.
[752] Sarah Smit 'State of capture inquiry: Zondo to hear why banks cut Gupta ties' *Mail & Guardian* 17 September 2018 available at *https://mg.co.za* accessed on 12 December 2022; Staff Writer 'Banks tell how government threatened banking licenses after closing the Gupta linked account' *BusinessTech* 19 September 2018 available at *https://wwwbusinesstech.co.za* accessed on 12 December 2022; Michael Appel 'SA banks kowtowed to the ANC over Gupta banks accounts closure' *BizNews* 29 June 2022 available at *https://www.bnews24.com*. accessed on 12 December 2022.

between the Guptas and the banks.[753] The executive authorities and Zuma did not appreciate the magnitude of the SOEs' financial and reputational damage. The effect and significance of the concomitant job losses and unpaid salaries of employees, the attachment of properties of some SOEs[754] and the collapse of pension and provident funds of workers were lost to these politicians.[755] The researcher postulates that Zuma and some of his ministers did not appreciate the potential catastrophe that would have resulted in the local banks being sanctioned for permitting money laundering. In addition, they did not comprehend the economic effect of the international banking platform's closure on the South African banks had they not terminated their relationships with the companies involved in money laundering. Alternatively, they did grasp the seriousness of such action but did not care about the consequences. For example, in 2017, former minister Mokonyane famously said, "Let the rand fall. We will pick it up" when Fitch and S&P downgraded South Africa.[756] It was also irresponsible because this utterance was made to defend Zuma for repurposing and allowing his people to steal from SOEs. She was, unfortunately, not the only defender of Zuma. The researcher believes the ANC politicians' arrogance, audacity and ignorance are boundless and costly.

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[753] Sarah Smit '#StateCaptureInquiry: Banks expose the ANC interventions in Gupta accounts closure' *Mail & Guardian* 19 September 2018 available at *https:mg.co.za* Accessed on 12 December 2022. Banks were called to Luthuli House. First National bank declined, but ABSA and Standard Bank attended the meeting. Zuma believed that the banks' conduct was tantamount to collusion; Jillian Green 'Report: Another bank seems to be closing its doors on Gupta-controlled companies' *Daily Maverick* 2 March 2017 available at https://www.dailymaverick.co.za/article/2017-03-02-report-another-bank-seems-to-be-closing-its-doors-on-gupta-controlled-companies/ accessed on 12 December 2022. Bank of Baroda took longer than the other banks to close the Gupta companies' accounts abandoning Zuma's friends.

[754] Schalk Burger 'Solidarity to auction Denel's assets to pay R90m to pay debts owed to employees' *Creamer Media: Engineering News* 14 July 2022 available at *https://www.engineeringnews.co.za* accessed on 12 December 2022. The first auction was scheduled for 15 July 2022. The corporate bank accounts of Denel were attached by Solidarity. Solidarity is not the only trade union representing workers owed salaries by Denel. The losses workers incur are immeasurable in the short and long term; The Conversation Report 'Corruption in state-owned companies hurts low-skilled workers the most, we show' 21 September 2021 avaialable at *https://theconversation.com/corruption-in-state-owned-companies-hurts-low-skilled-workers-the-most-we-show-how-165420* accessed on 12 December 2022. Transnet controls the entire goods rails transport in the country. It is essential for the economy of the country for export. Export is an important and necessary mode of transport of goods contributing to the economic development of the country. If the economy of the country fails, the poor are affected in a big way.

[755] Ibid. The employees lose the pension fund and provident fund investment returns when their pension is not transferred to the administrators. They also lose access to medical aids if their contributions are not paid.

[756] Editorial 'Here is the chance for Mokonyane to lift the rand' *Financial Mail* 2 April 2020 available at *https://businesslive.co.za* accessed on 12 December 2022; Majakathatha the Rouge 'We are waiting for Mokonyane to pick up the rand' *City Press* 13 June 2017 available at https://www.news24.com/citypress/voices/we-are-waiting-for-mokonyane-to-pick-up-the-rand-20170613 accessed on 23 February 2024.

4.11. Advisory Services Consultants

Some SOEs affected by corruption and state capture were let down by their executive and non-executive management and the responsible executive authorities. Management, the ministers responsible for the SOEs, collaborated with advisory services consultants, undermining good corporate governance tenets. Comfortable and confident in the knowledge that Zuma sanctioned the restructured SOEs, the board, executive managers, and the relevant ministers enthusiastically implemented schemes that weakened accountability, internal controls, procurement and compromised governance.

Supply chain management, one of the essential avenues in acquiring goods or services, was deliberately jeopardised, if not sabotaged, in repurposed SOEs and state institutions. This had nothing to do with lack of competence, knowledge and expertise but conscious conduct. This action benefitted Zuma and others in the more than R500 billion budgeted for acquiring goods and services for SOEs such as Denel, Eskom, SAA, Telkom, and Transnet and in key institutions such as SARS. In the instance of SARS, it was more surreptitious. SARS's capacity to collect tax, investigate tax evasion and stop unjustified and unlawful tax refunds was constrained. The executive managers, boards of directors, some ministers, advisory services consultants, Zuma and his favoured companies and persons were greedy, intentional and irresponsible. Instead of the executive and non-executive management doing their work, they sourced services from advisory services consultants to execute their mandate even when they had the capacity.[757] This constituted dereliction of duty.

The route taken by the category of persons referred to in the preceding paragraphs was to acquire goods or services improperly at all costs. That came into sharp focus in the Eskom, PRASA, SABC, SAA, SARS, Telkom and Transnet.[758] These SOEs' management is guilty of providing their preferred tenderers a competitive advantage. It is impossible to create an opportunity for third parties to offer goods or services for a fee(s) after preparing the SOE RFP and competing in the tender process. This conduct gives rise to a conflict of interest and cheating inconsistent with 'fairness, transparent, competitive and cost-effective procurement required by section 217 of the Constitution. Furthermore, such behaviour constituted a failure

[757] Williams, Stimpel and Mosilo op cit note 445.
[758] Nugent op cit note 541; Stimpel op cit note 445 at 12-13 and 35-36. Bain assisted SARS draft the RFP for itself. Bain provided consultancy services to the Independent Development Corporation (IDC), PIC and DBSA as well. Its tentacles extended to the African Union led by Dr Nkosazana Zuma.

by the board to execute their fiduciary duties to protect the assets of the SOEs. This is demonstrative of dishonesty and lack of integrity, which conduct was not in the best interest of the SOEs. Doing so, they acted unprofessionally and prejudiced the SOE's financial interests.[759] Such conduct was not conducive to good corporate governance. Such conduct was incongruent to service. In some cases, the advisory services consultants provided advice even though the SOEs did not need it. Furthermore, the advisory services consultants did not have experience or knowledge of that field and were unfamiliar with the nuances of the SOEs.[760] This posed a risk to the SOEs because they did not get services contracted for but financial losses, which in most instances resulted in fruitless and wasteful expenditure and irregular expenditure, sacrificing the fiscal security of the SOEs. In instances where the SOEs lacked the expertise, consultants continued use stunted their development and capacity building. It was striking that the SOE's executive and non-executive management and the executive authorities' inclination to give such assignments to international advisory services providers such as Bain & Company (Bain) and McKinsey and Company ('McKinsey').

These advisory service consultants were not interested in the success of the SOEs and the country but in their fee book. Their reputations were tainted, but they managed to secure profitable briefs from the SOEs. They were good at increasing unemployment, overcharging their clients, and being unable to provide suitable solutions. Regrettably, the sacrificial lamb was good corporate governance in its entirety. This was inevitable because the SOEs were purposely restructured to achieve Zuma's goals.[761] The sacrifice culminated in SOEs suffering devastating financial losses at the expense of taxpayers, increased job losses, inability to pay employees' salaries and the country's damaged reputation.[762] The conduct of SOE managers,

[759] Section 50 – 55 of the PFMA.
[760] Williams op cit note 445 at 83. Williams considered the conduct of Bain comical to assert that it had expertise because on its own admission it was not proficient with the South African situation; Ibid 54 - 56 Williams indicated that Bain caused SARS to have a tax collection shortfall of R100 billion. The shortfall had a far-reaching effect on the fiscus of the country because the government's finances were constrained and that affected delivery to the people.
[761] Williams op cit note 445 at 96 - 97. In the instance of Bain, it prepared documents that contained extensive plans to reorganise the economy of the country. 18 meetings were held with Zuma which, according to Williams is unusual for a president of a country. These meetings took place during corruption and state capture allegations. This raised eyebrows but the ANC did nothing about these unprecedented occurrences.
[762] Ibid. Employees at the SAA, SARS and Telkom amongst other SOEs lost their jobs. Denel and its subsidiaries, the Post Office and SAA were also unable to pay salaries of their employees and their contribution to medical aid and pensions and or provident funds. The government's guarantees exposure grew exponentially.

including non-executives, the executive authorities and advisory services consultants, was detrimental to these SOEs' continued existence and success.

Conflict of interest issues reared their ugly heads in big auditing companies like Deloitte & Touché, Ernst & Young, KPMG, and PWC, which have hybrid operations such as advisory services consultancies. Local auditing companies Sizwe Ntsaluba and Gobodo joined the hybrid advisory services consultancy. To maximise looting, Regiments Capital and Trillian were created as the Black Economic Empowerment (BEE) partners of the international advisory services consultants, which concentrated on advisory services only. These audit firms' narrative was that a Chinese Wall was in place to maintain independence between the two arms. The researcher submits that the so-called Chinese Wall is a myth. The incestuous relationship is such that both the audit and the advisory services. SOEs were alleged to not have internal expertise, which was not true in most instances. Those with the know-how and abilities were prevented from executing their functions and, at times, prevented from accomplishing their work by the executive managers or accounting authorities for ulterior purposes. This creates an opportunity for goods and services to be sourced from consultants. Consultants seize the chance to make money from SOEs.

The situation is the breeding ground for allowing themselves to be sucked into the web of corruption, dishonesty, fraud and money laundering by consultants. Bain & Company, McKinsey and Company, and Trillian contributed to the erosion of good corporate governance in SOEs. The repercussions of the conduct and involvement when providing consulting services negatively affected the community and economy of the country. Effectively, most consulting firms did not cover themselves in glory locally and on the international stage.[763] Consultancies appointed and approved by SOEs, such as Bains and McKinsey, involved themselves in advisory services with significant impact on policy issues, consequently posing a risk to democracy.[764]

The enthusiasm with which SOEs' executive and non-executive management abandoned and sacrificed good corporate governance, especially in procurement, boggles the mind. The SOEs allowed consultants to prepare RFPs and RFIs to suit the services they proclaimed to

[763] Williams op cit note 445 at 107.
[764] Ibid; Chipkin Ivor et al. 2018 *The Shadow State* (2018). According to Jonas, he was alarmed when he realised that the progress the country made since democracy to change state institutions into mediums to deliver services and development and strengthen the constitutional foundations of the country's democracy were severely threatened by greedy appendages of a meagre but dominant business and political elite.

have skill in the areas of SOE's business, which benefited consultancies.[765] This took place indiscriminately whether the SOEs had the requisite skills internally. The in-house skilled personnel were sidelined by the captured executives and non-executive management with the blessings of the executive authority and the first citizen of SOEs.[766] This was irrespective of whether these consultants had experience, knowledge, or the required expertise to make SOEs successful. Consequently, it is beneficial to its clients. In short, they came with a tainted reputation. Services rendered by these international advisory consultants did not benefit the SOEs but their fee books.

4.11.1. Bain & Company

Bain & Company, one of the world's top three advisory and consulting firms, did everything possible to secure its advisory and consulting contracts in SOEs at all costs. It used its relationship with Zuma to advance itself because it was privy to its SOE plans.[767] Bain invested in grooming potential appointees to crucial positions in SOEs, for instance, Moyane and Maseko at SARS and Telkom, respectively.[768] These appointees would hit the ground running upon arrival at the SOE because the plans were prepared in advance. The researcher agrees with Williams that Bain's contribution to corruption and state capture was insidious and had nefarious intentions. For example, Bain did not have the necessary skills to advise SARS.[769] Bain worked with Zuma to transform the country's economy to its detriment by appointing Moyane as the Commissioner of SARS.[770] Furthermore, Bain was directly involved in plans

[765] Williams op cit note 445; Nkuhlu op cit note 540.
[766] Ibid. In the instance of SAA, the Treasury Unit was excluded from preparing RFPs or RFIs for financial services' procurement. Gigaba and Brown condoned that because they were keen to remain on the Zuma cabinet. Neither Gigaba nor Brown did anything about Myeni's ethical shortcomings and unprofessional conduct, even when it was brought to their attention by other board members.
[767] Op cit note 443 at 127-128.
[768] Ibid at 7-9; Natasha Marrian 'What brought Sars to its knees?' *BusinessLive* 06 September 2018 available at *https://www.businesslive.co.za* accessed on 12 December 2022. Massone presented the SARS restructuring to Moyane before his appointment to SARS. This means he knew in advance that Moyane was going to lead SARS. Massone also knew of the pending appointment of Sipho Maseko to Telkom.
[769] Emsie Ferreira 'Zondo: Like Moyana, Zuma was central in Sars capture' *Mail & Guardian* 5 Jan 2022 *https://mg.co.za*. Accessed on 12 December 2022. Williams op cit note 445 at 96 – 101. Bain was shamelessly committed to changing the economy of South Africa and lining its pockets with the taxpayer's money. This it achieved and raked in billions of rans.
[770] Greg Nicolson 'Bain & Co planned to work with Zuma to 'reshape the SA economy', says the former partner Athol Williams' *Daily Maverick* 23 March 2021 available at *https://www.dailymaverick.co.za* accessed on 12 December 2022; Op cit note 443 at 11- 13, 118 and 145-150; Mark Bechard 'How Zuma and Moyane exerted a 'Bainful' influence on SARS?' *Moonstone Industry News* 10 January 2022 available at *https://www.moonstone.co.za* accessed on 12 December 2022. Bechard reported that Bain provided Moyane the "TM First 100 Days" 100 days plan before he was even employed at SARS. This finds credence in Williams's book where he details how Moyane, Bani and Zuma collaborated.

and strategies enabling state capture.[771] According to Williams, the offensive against SARS was deliberate, producing two documents in anticipation of Moyane leading SARS. The "TM First 100 Days" document was done in May 2014. Bain and Moyane wanted SARS to continue collecting but 'with weakened governance and enforcement' for Zuma's friends to dodge tax and allow state capture.[772] The tax was completely disabled but worked with Regiments Capital, and Trillian also found its way into providing services to SOEs. None of the SOEs escaped these consultancies' insidious claws. In this section, each consultancy's role will be briefly outlined. The researcher does not intend to delve deeper into these consultancies; suffice it to highlight their contribution to hollowing out various SOEs. Upon landing at SARS, Moyane effectively ignored and jettisoned procurement policies with the help of Bain, changed the organisational structure to its detriment, got rid of its tax collection oversight ability and suspended the robust information technology system in place.[773] Justice Nugent Commission concluded that there was a 'massive failure of integrity and governance at SARS'.

The repercussion of the dismantled governance at SARS was the under-collection of tax in 2016 by R30.4 billion,[774] which rose to R50 billion in 2017/2018.[775] The R50 billion tax collection shortfall forced the government to increase the value-added tax (VAT) to 15%. This increase affected low-income people the most, even if certain foodstuff goods were exempt from VAT and other services.[776] Zondo concluded that Moyane and Zuma weakened SARS, which was once considered one of the best revenue collection services in the world.[777] In addition, the cost of Moyane's appointment was the loss of human resources at SARS - 2000 highly skilled senior managers and investigators. The Minister of Finance's authority was undermined with impunity because Zuma enabled Moyane to do as he wished in pursuit of

[771] Ibid. Williams op cit note 445 at 127-131.
[772] Ibid at 144-148. It is disheartening and shocking that Zuma was a party to such schemes when he was the head of the Government of South Africa. This had a devastating effect on the collection of tax.
[773]Nugent op cit note 541 at 3-4.
[774] Pauli Van Wyk 'Moyane turns to Zuma in his bitter battle with Gordhan' *Mail & Guardian* 24 February 2017 available at *https://mg.co.za* Accessed on 12 December 2022. Moyane took unilateral decisions undermining the authority of Gordhan, the then Minister of Finance. He went to the extent of increasing salaries and bonuses at SARS, including his. He was told that he could not determine his own bonus but disregarded National Treasury. Moyane contravened the PFMA and the SARS Act. Moyane did not care because he knew he had Zuma.
[775] Annual Report of South African Revenue Services (2017/2018).
[776] Finance Standing Committee (28 February 2018) '2018 Budget: hearings' *Parliamentary Monitoring Group*; Nugent op cit note 541.
[777] Zondo Report Part 1 Vol 1 op cit note 522; Zondo in his report indicated that SARS was a world class institution which did not neither needed consultants nor to be restructured. He was of the well-considered view that the purported profound strategy to refresh was a ploy for the takeover of SARS. one of the respected; Bechard op cit note 770.

their agenda. This was confirmed by the weakened SARS and verifiable by the President's dismissal of Gordhan as the Minister of Finance.[778] With the dismissal of Gordhan by Zuma, he nailed his colours to the mast and sent a clear message that his agenda would not be derailed. Procedures, good corporate governance, the rule of law and the integrity of South Africa were unimportant. SOEs were rendered ineffective and subject to advisory service consultants' unbridled power.

Key SOEs were lost because Bain was allowed to meddle in the procurement processes at Eskom, Public Investment Corporation (the PIC), and Telkom.[779] At Telkom, Bain benefited from a contract explicitly designed for it. Bain initially earned R200 million, but the fees at Telkom ballooned to R1 billion.[780] The expensive advice Telkom received was not worth it because the cost-cutting and turnaround strategy was not implemented.[781] Instead, 790 employees of Telkom subsidiary BCX lost their jobs.[782] Neither Bain nor Maseko were concerned by the company's and the employees' costs. The loss of employment extends beyond job loss because it affects society and the economy. It is concerning that Jabu Mabuza, the chairperson of Telkom, worked jointly with Maseko and Massone to capture Telkom for wicked purposes and in pursuit of Zuma's objectives with far-reaching implications for the country's economy.[783] SOEs allowed Bain untampered access to their coffers under the guise of advisory and consulting services fees. Mabuza was involved in four of the nine meetings with Zuma, Maseko and Massone. Project Phoenix was discussed to restructure the ICT sector,

[778] TJ Strydom and James Macharia 'South Africa's Zuma sacks Gordhan as finance minister in reshuffle' *Reuters* 30 March 2017 *Reuters* available at *https://www.reuters.com/article/idUSKBN1710XE/* accessed on 23 February 2024.
[779] Williams op cit note 4435 at 223-224
[780] Ibid at 224.
[781] Ibid; Zondo Report Part 1 Vol 1 op cit note 522.
[782] Sabelo Skiti 'First Sars, now Telkom hit by Bain' *Mail & Guardian* 20 September 2018 available at *https://mg.co.za* accessed on 12 December 2022; Willaims op cit 445 at 84-85. The initial plan targeted 6000 job losses. This plan was leaked. According to William Bain was not bothered that GCEO of Telkom, Maseko ignored the conflict of interest arising from Bain training him for his position at Telkom. Maseko gave Bain consultancy work after the RFP was designed for it to get the work.
[783] Willaims op cit note 445 at 86–88 and 96-98. Massone advised Paul Meehan in an email that he thanked Mabuza for the Telkom business. Furthermore, that Mabuza would chair the Africa Advisory Board and massage the relationship with the Minister of Finance pertaining to SARS And the Nugent Commission. If corruption and state capture were not exposed. Bain was an important cog in state capture. Massone had unlimited access to Zuma. He recommended that reform plans, including restructuring Eskom, be termed 'presidential projects. However, after the revelations of Judge Nugent Commission, he requested the global marketing head to hide his connection to Zuma.

and Maseko was identified as the head.[784] Zuma, Massone, Mabuza, and Maseko had grandiose plans that, if realised, would have captured the state on a grand scale. Greed, power, self-interest, and total disregard for the public and the country won over good corporate governance. Bain had an opportunity to state its case but chose not to.[785] Massone was scheduled to appear before the Nugent Commission and left the country.

4.11.1.1. Bain cover-up to the Nugent Commission investigation

Instead of responding to the Nugent Commission's questions, Bain appointed Baker McKenzie, an international law firm, to investigate its unlawful role in repurposing SARS, corruption and state capture.[786] Furthermore, Baker McKenzie defended Bain before the Department of Justice (the DOJ) when it was being investigated for contravening section 104 of the Foreign Corrupt Practice Act of 1977 (FCPA).[787] Bain acquired the business from SOEs bribing officials at SARS, Telkom and the Zuma. The DOJ investigation forced Bain to compromise with it without admitting guilt. By compromising with the DOJ, Bain protected itself from civil and criminal sanctions that could have resulted from the bribery in South Africa when it solicited contracts at SARS. Massone coached Moyane and Maseko for their positions at SARS and Telkom, respectively.[788] In both instances, Bain secured contracts with SARS and Telkom contrary to proper procurement policies and procedures. Bain returned R214 million paid by SARS for disrupting the smooth and professional way SARS ran before Moyane's appointment.

Massone neither testified to the Nugent Commission nor the Zondo Commission. Bain did not even act against Massone, who returned to Italy. The researcher submits that if Bain had nothing to hide and was not a participant in corruption, fraud, restructuring SARS and state capture, its senior officials kept up to date by Massone would have testified. Lord Hain's

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[784] Ibid. Jabu Mabuza was appointed to chair the board of Eskom by Ramaphosa and Gordhan. It's difficult to understand why he secure that position when he was involved and participated in the looting of Telkom and Project Phoenix. Project Phoenix if it was realised would have taken state capture to another level. It is hard to understand how Ramaphosa and Gordhan could have missed Mabuza's role in corruption and state capture which happened under their noses at Telkom. Williams asserts that Mabuza was willing and keen to be the chairperson of Africa Advisory Board. Furthermore, whilst Mabuza was on the board of Eskom and its chairperson, he accepted the position of CEO and his niece's company acquired a business with Eskom which ran into hundreds of millions of rand.

[785] Ibid.

[786] Nugent op cit note 541; Williams op cit note 445 at 36 and 64.

[787] Amended 15 U.S.C.

[788] Nugent op cot note 541; Williams op cit note 445 at 135. The payments by Bain to Duma Ndhlovu to gain access to Zuma constitute bribery.

passion and consistent pressure on the United Kingdom government paid dividends. Bain was banned from doing business with the government for three years.[789] After sustained criticism against the National Treasury for failing to take a stance against Bain, it was finally banned from doing business with SOEs and state institutions for ten years.[790] However, the cost to South Africa's - economy, finances, operations and reputation is immeasurable. The researcher concurs with Lewis's opinion that although Bain and McKinsey returned huge fees earned from the affected government agencies, that was not restored.[791] Williams posited that the fees returned do not include those gained from the public sector, which ran into billions of rands. Lewis was correct that justice dictates that Bain should also face criminal charges for dastardly deeds. Bain deliberately played a significant role in weakening good corporate governance with Zuma with sinister intentions which were realised.[792]

The Director of the Helen Suzman Foundation made written plea and submissions to the DOJ to reconsider its decision about Bain's conduct and its eligibility for criminal charges.[793] The researcher opines that Nicole's action is commendable and must be supported because Bain's conduct was cunning, cruel, and vicious, undermining the interest of low-income people and the country's economy. It is fundamentally vital that the DOJ reconsiders its decision and look closely into what transpired between Bain and Ambrobrite. Bain's role in

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[789] Julia Kollewe 'Bain barred from UK Government contracts over 'grave misconduct' in South Africa' *The Guardian* 3 Aug 2022 available at *https://www.theguardian.com* accessed on12 December 2022; Selby Makgoko 'Corruption would not thrive if companies were banned – as the UK did with Bain' *Daily Maverick* 21 August 2022 available at *https://www.dailymaverick.co.za* accessed on 12 December 2022; Cotterill Joseph 'Bain & Co, tax and Jacob Zuma: a tale of "state capture" in South Africa' *Financial Times* 14 January 2022 available at *https://ft.com* accessed on 12 December 2022.

[790] Reuters Staff 'South Africa bans consultancy Bain from state contracts for 10 years' *Reuters* 29 September 2022 available at https://www.reuters.com accessed on 12 December 2022. Ray Mahlaka 'Treasury slaps Bain with a ten-year ban form state contracts over 'corrupt and fraudulent practices' Daily Maverick 29 September 2022 available at *https://www.dailymaverick.co.za* accessed on 12 December 2022; Anthony Squazzin 'Bain banned from South African government contracts' TechCentral 9 September 2022 available at *https://techcentral.co.za* accessed on 12 December 2022 Africa had no choice but to ban Bain. This barring followed the UK three-year ban.

[791] David Lewis 'DAVID LEWIS: Bain and McKinsey offer snake oil in champagne bottles' *BusinessLive* 11 October 2022 available at *https://www.businesslive.co.za/bd/opinion* accessed on 12 December 2022.

[792] Williams op cit note 445 at 96-103. Williams asserts that Bain seemed to be deeply lodged ANC and government business. Massone's involvement included him getting privileged government information of the country, including the planned training of the South African Police Services which he had identified for the Italian police department. He was involved in organizing the acquisition of non-lethal Beretta firearms.

[793] Nicole Kritz 'DOJ must reinvestigate Bain – HSF' *Politics Web* 19 September 2022 available at *https://www.politicsweb.co.za* accessed on 12 December 2022. Kritz of the Helen Suzman Foundation made an impassioned plea to the DOJ to reconsider its decision to not investigate Bain Global and Bain SA and institute criminal proceedings against it. She is of the view that the Baker McKenzie report submitted to the DOJ which the two commissions had no sight of could be contradicted by the Nugent Commission of Inquiry and the Zondo Commission Report.

corruption, fraud, and state capture deserves a criminal indictment by the NDPP to send a solid message to advisory consultants and sundry that criminality will not be tolerated. More importantly, transgressing laws and policies of the countries will be punished. Such conduct must be frowned upon.

4.11.2. McKinsey and Company

McKinsey, the fourth most extensive advisory and consulting firm by income and the number one most valued brand, did not want to miss out on the gravy train in SOEs.[794] McKinsey secured contracts for services from Airport Company of South Africa (ACSA), Denel, Eskom, SAA and Transnet outside the procurement procedures in place at these entities.[795] The fees for such services were inflated to cater for embedded Gupta-linked company Trillian Companies.

McKinsey's new Black Economic Empowerment (BEE) partner was a sub-contractor of McKinsey.[796] McKinsey's work with Regiments Capital/Trillian companies earned R1.5 billion between 2012 and 2016 from Transnet contracts.[797] Regiments Capital rewrote the business case to increase the costs for the 1064 locomotives by R16 billion.[798] This was criminal, but McKinsey, the lead consultant Transnet, concluded the deal was unconcerned. This violated all tenets of good corporate governance. McKinsey did not mind, although the fees earned from this were not above board. Compliance with corporate governance in the private sector is voluntary, unlike the public sector, where it is compulsory. McKinsey's primary focus was the continued acquisition of undeserved consulting contracts contrary to the

[794] Emma Rovit 'Top 10 Consult firms' *Rocket Blocks* 13 August 2020 available at *https://rocketblocks.me* accessed on 12 December 2022; The Consulting Report 2022 *The Top Consulting Firms in 2022* 1 available at *https://www.theconsultingreport.com* accessed on 12 December 2022 Lewis bemoans McKinsey's disregard for conflict of interest and its ability to represent multiple companies in the same sector.
[795] Fundudzu Report op cit note 574; Mosilo op cit note 445 at 30.
[796] Xolisa Phillips 'South Africa: McKinsey tries to mop 'shocking' state capture mess' *The Africa Report* 20 December 2020 available at *https://www.theafricareport.com/193472/south-africa-consulting-firms-including-mckinsey-under-fire-in-state-capture-probe/* accessed on 23 February 2024: Romain Chanson 'South Africa: Consulting firms, including McKinsey under fire in 'state capture' probe' *The Africa Report* 12 April 2022 available at *https://www.theafricareport.com/193472/south-africa-consulting-firms-including-mckinsey-under-fire-in-state-capture-probe/* accessed on 24 February 2024.
[797] Open Secrets: *the Enablers o*p cit note 467 at 52 & 55; Moliso op cit note 445; Zondo Report Part 2 Vol 1 op cit note 571; Fundudzi Report op cit note 574.
[798] Ibid.

procurement processes of Transnet at all costs.[799] The extent of cooperation between McKinsey and Transnet management and the level of rot was so deep that McKinsey, like some of its peers, was comfortable being paid unjustifiably inflated prices.[800] McKinsey's audacious criminal conduct was and still is inexplicable; however, it is not surprising. David Lewis quoted an ex-employee of McKinsey who asserted that McKinsey's policy is "We don't do policy. We do execution." McKinsey was cunning, disloyal, greedy, and evil even to its South African business partners. McKinsey's loyalty was earning fees at all costs. It dropped Regiments Capital, its South African consultancy partner, and embraced the Guptas-associated Trillian companies to ensure continued business with Eskom and Transnet.[801]

McKinsey's testimony to the Zondo Commission and Parliamentary Portfolio Committee was incredulous. It claimed that bringing the Trillian companies on board before due diligence was completed and without signed contracts was a mistake. The researcher posits that McKinsey misled the Parliamentary Portfolio Committee and Zondo Commission. Conducting business as it did was calculated and intentional and would not have been a mishap. McKenzie knew that its conduct was wrong. McKinsey knew who Trillian companies represented but chose to protect its business with Transnet and sacrificed South Africa and its people. McKinsey knew it secured work contrary to procurement processes and could have been executed by Transnet's competent, experienced, qualified in-house employees.[802] McKinsey did everything within its power to secure work with SOEs.

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[799] Al Lewis 'Is global consulting giant McKinsey evil?' *MarketWatch* 25 September 2013 available at *https://www.marketwatch.com* accessed on 12 December 2022. It is interesting that Transnet began working with McKinsey in 2005 despite its tarnished reputation due to the advice it provided many American companies. Clearly, Transnet failed to do its homework because if it had done so, it would have known that McKinsey was expensive and its reputation was not matched by what it had on its profile. In the article, Lewis highlighted many incidents in the history of McKinsey where its advice led to the losses of billions of dollars in companies such as General Electric, General Motors, the catastrophic merger of AOL and Time Warner and advised AT&T that mobile telephony had no future. One of its senior partners peddled insider information. He was convicted in 2012. It is known for the high fees it charges but clients keep going back to them for advice. Lewis suggests that management of these companies keep going back to McKinsey despite expensive and worthless advice, at times paid for by shareholders.

[800] Air Services Licensing Act op cit note 694; Phillip Xolisa reported that McKinsey offered to pay back the R650 million fees earned from Transnet. However, Transnet is indifferent insofar as the fees earned. McKinsey is indebted to Transnet R1.2 billion inclusive of interest; Zondo Report Part 4 Vol 1 op cit note 646.

[801] Mosilo op cit note 445 at 15 & 24. Trillian Asset management, Trillian Capital Partners and Trillian Financial Advisory collectively referred to as the Trillian companies.

[802] Williams op cit note 445; Fundudzi Report op cit note 574; Zondo Report Part 4 Vol 1 op cit note 646.

It was neither a mistake nor surprising that McKinsey assisted Gama in acquiring a Master of Business Administration degree.[803] Gama and McKinsey engaged in academic dishonesty. It cheated and helped Gama defraud the New York University Leonard Stern School of Business and the London School of Economics and Political Science (NYU Stern School of Business). McKinsey bribed Gama with academic assistance to secure Transnet contracts contrary to the Supply Chain Management Policy and the legislative prescripts.[804] The researcher posits that McKinsey's action constituted bribery contravening section 34 of PRECCA and section 104 of the FCPA discussed in the previous paragraph. McKinsey knew bribery was a crime but proceeded to exchange favours with Gama. It is improbable that McKinsey was unaware that the concomitant favours raised conflict of interest and constituted corruption. McKinsey should not have aided and abetted Gama's qualifications at NYU Stern School of Business. In return, Gama threw good corporate governance in the dustbin for money and personal benefit at the country's and Transnet's expense. Gama compromised Transnet's procurement policy and procedures as he did when he was the CEO of Transnet Freight. Furthermore, as an American company, it should have known that its conduct was criminal and did not accord with the FCPA.

McKinsey continued milking Denel, Eskom, SA Express, and Transnet. McKinsey was the common denominator in these SOEs i.e. the service provider. It collaborated and was in cahoots with the executives and the accounting authorities in corruption, fraud and the state capture spree. McKinsey's conduct was calculated, criminal, irresponsible and unprofessional. To prove its innocence, McKinsey employed global law firms Norton Rose Fulbright and Morrison & Foerster and a forensic investigator to investigate its involvement in state capture. The researcher hypothesises that the exercise was not intended to address McKinsey's role but to hide its connivance. This is another instance where the National Treasury should crack the

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[803] World Economic Forum listed among Gama's qualifications a Master of Business Administration from New York University Leonard Stern School of Business the London School of Economics and Political Science (NYU Stern School of Business) available at *https://www.wef.org* accessed on 12 December 2022. Statement of Robert Fine to the Zondo Commission 11 November 2017; Zondo Report Part 4 Vol 1 op cit note 646; Peter Du Toit and Jan Cronje 'McKinsey admits helping the Transnet CEO with MBA, but Gama says only aid was editing' news24 6 August 2018 available at *https://www.news24.com* accessed on12 December 2022.

[804] Ibid. NYU Stern Business School announced the investigation in August 2018. It is incumbent upon New York University Leonard Stern School of Business the London School of Economics and Political Science (NYU Stern School of Business) to withdraw Gama's degree as soon as the investigation is finalised. It is disappointing that four years after NYU Stern School of Business became aware of Gama's deceit the investigation is still not completed.

whip. It must prohibit SOEs, state institutions, and government departments from doing business with complicit advisory and consultancy firms collaborating with SOEs and other third parties to corrupt and defraud the public of much-needed money. The stolen money could have been utilised to address the country's economic development, service delivery, poverty eradication, unemployment, and employment.

McKinsey knew it was favoured during the Transnet transaction because Singh shared information about the planned acquisition of locomotives.[805] The NDPP must be applauded for charging McKenzie criminally. The applause is fitting considering that for years, the NDPP folded its arms and did nothing about the corruption of companies, bribery, and fraud McKenzie and its business partner Regiments and Trillian committed at Eskom, SAA, and Transnet. These SOEs' boards, management and executives were not innocent bystanders but actively collaborated with McKinsey, the enabler. McKinsey paid back money unlawfully received from the SOEs referred to in this paper, and it is indeed insufficient to reverse the effect of the harm caused.

4.11.3. KPMG Services (Pty) Ltd

SARS Commissioner Moyane did everything he could to undermine good corporate governance for nefarious purposes. With the assistance of Bain and Moyane, all the gains and the excellent work SARS had achieved in the past were reversed. To undermine SARS, he acquired services from various advisors, including lawyers. KPMG Services (Pty) Ltd reported to SARS about the unlawfulness of its High-Risk Investigation Unit (the HRIU), termed the 'Rouge Unit.'[806] The HRIU was the successor to the SARS Special Operations, previously known as the National Research Group (NRG).[807] KPMG Advocates Sikhakhane SC and Trengrove SC with Advocate Nxumalo buttressed the conclusion reached by KPMG that HRIU was unlawfully established.[808] This report followed on the heels of the 2014 report of Advocates Sikhakhane SC, Nasreen Rabaj-Budlender, and Advocate Ramano.[809] Pillay was

[805] Fundudzi Report op cit note 574 at 10.
[806] Nugent op cit note 541 at 76.
[807] Ibid at 76-77. The NRG was subsequently disbanded and left with six members led by Johann van Loggerenburg which was titled the HRIU.
[808] Ibid; Parliamentary Committee 'PP Inquiry day 72: Evidence Leaders' 2023 *Parliamentary Monitoring Group* The HRIU was constituted of van Loggerenburg, Richer, Ravele, Hore, Lacky, and many other employees of SARS. The HRIU investigated unlawful trades referred to it;
[809] Ibid 78-79. This 2014 report related to an investigation which was initiated against van Loggerenburg pursuant to a complaint by van Loggerenburg's girlfriend Belinda Walters that he was engaged in disclosing disclosed a taxpayer's information to her unlawfully. SARS key personnel left SARS.

suspended despite Advocate Brassey SC's legal opinion that it was premature to suspend Pillay. The SC advised SARS to bring charges against him concerning the rouge unit. He opined that it should not be included in the chargesheet because the charges were not backed by facts and, consequently, unsatisfactory.[810] The KPMG, to the tune of R24 million, confirmed the existence of the rouge unit and that it was illegal, which report caused havoc and hysteria at SARS.[811] It led to resignations, dismissal and suspensions of good, hardworking and conscientious employees.[812] KPMG subsequently returned the fees earned from SARS, but the harm was done.

KPMG withdrew its SARS report and apologised. The apology was late, and SARS paid the price for KPMG's Report. Gordhan was outraged because KPMG International neither apologised to the former employees of SARS nor him for the resultant harm caused and pain endured by them.[813] Honest and hardworking former SARS employees' reputations were destroyed due to KPMG's complicity in corruption and state capture. The Nugent Commission report confirmed Gordhan's accusation of KPMG having contributed to the capture of SARS, devastatingly affecting its performance.[814] SARS problems mounted during Moyane's tenure. SARS experienced challenges refunding Value Added Tax (VAT) in 2016.[815] These problems led to VAT vendors lodging complaints with the Tax Ombud's office.[816] The Tax Ombud's office investigated the VAT refund delays complaints. The Guptas companies were unaffected by these delays and were refunded VAT contrary to the law.[817] Refiloe Mokoena, head of legal, sanctioned the refund into a third party's bank account, contrary to section 44(3)(d) of the Vat Act of 1993 (Vat Act 61 of 1993).[818] Again, good corporate governance was a casualty. The

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[810] Ibid; Martin Brassey SC (2014) 'In re Allegations of Potential Misconduct' *South African Revenue Service* 5-6.
[811] Ibid.
[812] Pravin Gordhan 'KPMG was complicit in the capture of SARS – Pravin Gordhan' *politicsweb* 15 September 2017 available at *https://www.politicsweb.co.za* accessed on 12 December 2022.
[813] Ibid.
[814] Nugent op cit note 541. SARS not achieving its target in 2014/2015 by R7.335 billion; 2015/2016 R11.292 billion; 2016/2017 R30.709 billion and 2017/2018 the shortfall was R49 billion.
[815] Ibid at 123-124
[816] Ibid.
[817] Ibid.
[818] Ibid. 'Any amount of tax which is refundable to any vendor in terms of section 16(5) in respect of any tax period shall, to the extent that such amount has not been set off against unpaid tax in terms of subsection (6) of

unjustified and unlawful changes effected at SARS have everlasting ramifications in the economy and finances of the country thanks to KPMG's enthusiasm to assuage Moyane and conspire with him for nefarious reasons.

4.11.4. Trillian Financial Advisory, Trillian Capital Partners and Trillian Asset Management

Eskom paid Trillian companies R600 million for services purportedly rendered.[819] Mothepu, the CEO of Trillian Financial Advisory, testified under oath that the services the company provided Eskom were not worth the money paid.[820] Zondo Commission was that Trillian did not provide Eskom services, justifying payment of that fee.[821] Furthermore, Eskom had the internal capacity to execute the work billed for by Trillian.[822] The tax invoices submitted for payment were corruption mechanisms to transfer money from Eskom to Trillian. This money was used to finance the purchase of Optimum Coal. Mothepu confirmed further that no contracts between McKinsey and Trillian justifying the flow of funds between these two companies received from Eskom. Trillian was also a conduit and an enabler for corrupt activities and state capture at Eskom. Trillian received unjustifiably preferential treatment from Eskom and McKinsey.

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this section, be refundable to the vendor by the Commissioner: provided that – (d) the vendor had furnished the Commissioner in writing with particulars of the enterprise's banking account or account with a similar institution to enable the Commissioner to transfer a refund or other amount due to the vendor to such account: Provided that where the vendor which is – (i) a company that is not a resident of the Republic requests that the refund or other amount be transferred to a bank account or an account with a similar institution in the Republic other than that of the vendor; or (ii) (aa) a subsidiary company, as defined in section 1 of the Companies Act, 2008 (Act 71 of 2008), of a holding company, as defined in section 1 of that Act, requests that a refund or other amount be transferred to the bank account with a similar institution in the Republic of the holding company;… the vendor must notify the Commissioner in writing and must indemnify the Commissioner against loss by the vendor or thee State as a result of such instruction.' In the instance of the four Gupta's companies this did not happen. The Guptas companies bank accounts were closed by the four banks in the country. An affidavit from Terbium Financial Services (Pty) Ltd facilitated the payment into its attorneys' bank account. This was a flagrant disregard of good corporate governance and the VAT Act.

[819] Mosilo op cit note 445 at 108-110. Mothepu was surprised that Trillian six weeks after it commenced business it paid R325 million, R75 million and R85 million towards the purchase of OCM by Tegeta; Smit Sarah 'High Court tells Trillian: Pay back the Eskom money' *Mail & Guardian* 18 June 2019. https://mg.co.za Accessed on 12 December 2022; *Eskom Holdings SOC Limited v McKinsey & Company Africa (Pty) Ltd, Trillian Management Consulting (Pty) Ltd, Trillian Capital Partners (Pty) Ltd, National Directorate of Public Prosecution & MMS Nxumalo* N.O. [2019] ZAGPPHC 185.

[820] Ibid.

[821] Parliamentary Committee Report (31 October 2017) *Corporate Governance in Eskom-Trillian.* Mothepu was the CEO of Trillian; Mosilo op cit note 445.

[822] Ibid.

4.11.5. Regiments Capital

Before establishing Trillian companies, Regiments Capital enjoyed a cosy business relationship with the Guptas, their associated companies and McKinsey. Regiments worked with McKinsey. These two, along with Trillian, made money at the expense of Eskom, Transnet, and SAA. Regiments were privileged to make unbelievable millions of rands corruptly and unjustifiably, and this was done contrary to good corporate governance. Executive managers from both sides cost Transnet and Eskom dearly. Regiments' s complicity in defrauding SOEs was immeasurable. The losers were South Africa's economy and people with low incomes. It is heartening to know that when writing this research, the NDPP charged players responsible for corruption and state capture.

4.12. Lawyers

Other consultants who contributed to corruption, fraud and state capture-related activities are lawyers. Lawyers have a history of and continue to advise and defend SOEs which were indirectly engaged in atrocious human rights violations, such as Armscor in South Africa.[823] In the 21st century, lawyers have played an important role in covering up and protecting corruptors and corruptees, fraud, and other nefarious activities during active state capture.[824] They provided legal advice and facilitated illicit money flow and confidentiality engineering.[825] Lawyers, whether law firms or sole practitioners or advocates, were weapons used by SOEs to attack, discredit and vilify committed employees, whistle-blowers and dedicated accounting authorities' members who were pro-good corporate governance.

These lawyers' services include defending and providing legal opinions and forensic investigation services to SOEs. Furthermore, some lawyers chaired disciplinary hearings, and others offered prosecutorial services in disciplinary hearings of workers who were troublemakers, such as whistle-blowers. According to Bohmke, Heinrich's lawyers have not covered themselves in glory and were in the thick of things during the ten years of state capture.[826] Lawyers were unscrupulous predators focused on earning fees in total disregard of

[823] Open Secrets: *The* Enablers op cit note 467 at 39.
[824] Heinrich Bohmke 'Of Lawyers and State Capture'16 November 2019 available at *https://www.businesslive.co.za/fm/opinion/on-my-mind/2019-06-06-heinrich-bhmke-the-role-of-lawyers-in-state-capture/* accessed on 12 December 2022.
[825] Ibid.
[826] Ibid.

ethics. They operated under the guise that everyone has a right to legal representation and to have the services of a lawyer of his/her/its choice.

Bohmke Heinrich laments that Bell Pottinger and KPMG paid the price for their role in state capture, but lawyers escaped. 'Yet, the action of lawyers, without whom not a fraction of the damage could have been done, have gone unremarked.'[827] Although lawyers can represent clients who approach them for services, their decisions and actions must be balanced with professional ethics. SOEs charged Exorbitant fees for investigations, legal advice, and related services. Lawyers are bound by professional ethics when they provide service to their clients. It is fundamentally vital that they avoid conflicts of interest, do not overreach their clients as a premium for delivering misleading legal opinions, and accept prosecutorial services and presiding officers over concocted disciplinary processes. They should not tell their clients what they want but need to hear. Covering unsubstantiated investigations to cover up their clients' wrongdoing should be reconsidered. The failure of lawyers to advise SOEs accordingly cost SOEs dearly, and the public is still paying the price for that.[828] Corruption and state capture cost the economy of the country R5 Trillion in the four years preceding 2019, according to David Fowkes, the South African Reserve Bank economist. He said the negative effect on the country's economy was worse than anticipated.[829]

4.12.1. Baker McKenzie

As already pointed out in the preceding paragraphs, Baker McKenzie was the hired weapon to extricate Bain from its intentional decision to bribe and corrupt officials of ACSA, Eskom, SARS, Telkom, Transnet, PIC, and the IDC, amongst others. Although it was not precisely the accused but its client, it disregarded every ethical obligation by submitting to the DOJ without giving it to the Nugent Commission and the Zondo Commission. This kind of conduct raises concerns. It would not be farfetched to conclude that it covered its client's tracks.[830] This

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[827] Ibid.

[828] Ferial Haffejee 'State Capture Inquiry cost the state R1 billion but saved billions more - Judge Zondo' *DailyMaverick* 30 June 2021available at https://dailymaverick.co.za accessed on 12 December 2022; Amela Ramo 'State Capture Inquiry: Almost R1 Billion Spent. Was It Worth It? *Eyewitnessnews* 27 June 2022 available at https://ewn.co.za accessed on 12 December 2022.

[829] SARB 'Damage from the economy 'worse than suspected' *news24* 6 June 2019 available at https://www.news24.com accessed on 12 December 2022.

[830] Williams op cit note 445 at 31; Bain & Company 'Statement:SARS Commission of Inquiry – September 2018' 2 September 2018 available at https://www.bain.com accessed on 12 December 2022*;* Bain issued a statement that it hired Baker McKenzie to investigate what transpired with SARS; Bain reports back about the outcome of the investigation. Bain & Company 'Statement: SARS Commission of Inquiry – December 2018' 17 December 2018 available at https://www.bain.com accessed on 12 December 2022.

conduct was brought into sharp focus in Kritz's letter to Leon of the DOJ, highlighting the lack of transparency. This conduct enabled Bain to dodge the bullet it deserves the researcher submits.

4.12.2. Hogan Lovells

Hogan Lovells was a state capture enabler at the SARS. Like Bains, Hogan Lovells was intimately involved in covering up when SARS failed good corporate governance. Hogan Lovells conduct facilitated the realisation of rot that took hold at SARS. It contributed to SARS being a shadow of itself. Hogan Lovells cleared Makwakwa, the right-hand man, of Moyane's wrongdoing instead of objectively considering the allegations against him. It earned huge fees from SARS. Brian Biebuyck, its former partner, and Angelo Agrizzi were linked and tasked to make illicit payments to Patrick.[831]

4.12.3. Stein Scop Attorneys

Stein Scop provided Trillian Capital Partners and Trillian Gupta company legal services.[832] Trillian paid this law firm R100 million for alleged services rendered. It received money in its trust account, which it could not explain.[833] The funds that Trillian deposited into the trust account of Stein Scop were purportedly fees earned as subcontractors of McKinsey at Transnet during Molefe and Gama's tenure. The failure of good corporate governance at Transnet is well-documented and will not be discussed in detail. This can also be gleaned from the inflated fees paid to McKinsey and its subcontractors, Trillian and Regiments Capital. The Zondo Report is replete with transactions at Transnet that are not in line with good corporate governance. The Zondo Report recommended initiating criminal actions against Gama, Molefe, Anoj and others. The NDPP has outdone itself, considering its history of no action, because it indicted 15 persons involved in state capture.

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[831] Ibid at 44; Hogan Lovells Media Release 'Law firm 'appalled' that former partner implicated in State Capture testimony' 18 January 2019 available at *https://www.hoganlovells.com* accessed on 12 December 2022; Rupert Neate 'London law firm accused of role in South Africa scandal' *The Guardian* 15 October 2018 available at *https://www.theguardian.com* accessed on 12 December 2022; Setumo Stone 'State Capture law firm rebrands. others jump ship' Sunday Independent 6 March 2023 available at *https://www.iol.co.za* accessed on 12 December 2022.

[832] Open Secrets: *The Enablers* op cit note 467 at 43.Trillian was Stein & Scops biggest client which was paying a premium for legal service.

[833] Ibid at 43-44. According to Open Secrets the law firm of Stein & Scop benefited a lot from Trillian. Stein and Scop was also involved in the persecution of the blower; Mosilo op cit note 445 at 125. Trillian paid Stein & Scop R18 million to fight Mothepu. Trillian spent an exorbitant amount to avoids paying Mothepu R2.3 million.

Stein Scope enthusiastically defended Trillian when confronted with facts, claiming attorney and client privilege. This privilege should not be misused, mainly when such consultations did not occur in anticipation of a trial. Stein Scop was also involved in disciplining Mosilo Mothepu, an employee of Trillian after she blew the whistle. Whistleblowers are punished for having integrity and being professional.

4.12.4. Cliffe Dekker Hofmeyr

State-owned enterprise management have used lawyers to circumvent and ignore good corporate governance. The researcher asserts that the lawyer's role in the state capture is inexcusable. With well-written advice, legal opinions and reports from reputable law firms and advocates, SOE managers, boards, and executive authorities became encouraged to realise their instructions and plans. Cliffe Dekker Hofmeyr was instrumental in Eskom forcing Glencore out of its supply contracts. Cliffe Dekker Hofmeyr enabled Eskom to bypass good corporate governance. The biggest winner was the Guptas, and South Africa lost spectacularly. Eskom helped Tegeta purchase Glencore and facilitated the coal supply, which did not meet the specifications. The Gupta companies were overpaid for the below-standard coal. Questions remain unanswered: why lawyers are not held accountable, why they are not required to return the fees they made from their dealings with SOEs that led to state capture, and whether attorney-client privilege is abused.

4.12.5. ENS

ENS defended Myeni and the SAA after agreeing with BNP Capital to provide services to raise R15 billion for its debts. Every person is entitled to be represented by a lawyer of his/her/its choice. ENS In return, BNP Capital was to be paid a fee of R300 million.[834] The service hived off for BNP Capital could have been done by the in-house treasury Unit of the SAA. Good corporate governance was thrown out the window in favour of BNP Capital, which secured an agreement without competitive bidding for the service. The procurement policy, legal frameworks, King IV and governance Protocols were rendered irrelevant. BNP Capital was

[834] Stimpel op cit note 445 at 152 - 153. Gerhard Van Niekerk from ENS represented the SAA and responded to the letter of demand from the Webber Wentzel on 12 July 2016. Stimpel was suspended because she stood her ground and did not sign the single source document Nhantsi instructed her to sign. According to her, the SAA Treasury had capacity to carry out the work BNP Capital was being contracted to do by Nhantsi and the board. Confining the job to BNP Capital was contrary to procurement procedures of the SAA.

favoured because the board, the CEO, the CFO, Kwinana, and the Audit and Risk Committee Chair supported and voted for a deal which was not good for the SAA.

4.12.6. Webber Wentzel

Webber Wentzel let Transnet down when it advised it in the acquisition of 1064 locomotives. The circumstances that led to the goods suppliers' appointment to supply Transnet with the locomotives were out of step with good corporate governance. On an excellent fee, Webber Wentzel provided the environment for Transnet to be looted.[835] In Part II Vol 2. of the Zondo Report, there is no doubt that the agreements entered into with Transnet were not conducive for Transnet. Webber Wentzel allowed Transnet management, the BADC, and the board of directors to rob SOE. Corruption, fraud, and money laundering occurred but could have been prevented if Transnet had received appropriate consultant's advice. The researcher posits that, but for enablers, state capture at Transnet could have been minimised if not prevented. When Transnet consulted it, the rot had already taken hold. Again, the opportunity to improve good corporate governance was missed.

4.12.7. Werksmans

PRASA hired Werksmans to investigate corruption and state capture allegations. The interim board did not follow proper supply chain processes. The Auditor General's concerns raised the irregular appointment of Werksmans brought in to probe irregularities at PRASA. Ironically, the team brought in at PRASA to correct non-compliance with good corporate governance did not fail to commit the same. These investigations cost PRASA R300 million.[836] The fees averaged a third of the Zondo Commission's yearly costs, with a team smaller than the Zondo Commission's. The Zondo Commission incurred a billion rand over four years. The researcher posits that the Werksmans investigation costs are almost a third of the Zondo costs over four years and several extensions.

Although Werksmans knew it was appointed to investigate irregularities at PRASA, it did not ensure it was properly appointed.[837] According to the AG, Werksmans was not correctly appointed, and this was flagged in its report to the Parliamentary Committee on Report on

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[835] Open Secrets: *The Enablers* op cit note 467 at 43; Werksmans (1064 report 7 December 2017) *Acquisition of 1064 Locomotives for Transnet's General Freight Business ("Transaction"): Inquiry Report (*2017)

[836] Ibid.

[837] Ibid. Zondo Report Part 4 Vol 2 op cit note 646 at 842 - 843. There was a suggestion that the Popo board did not appoint Werksman on an open tender. His son was alleged to be serving articles with Werksman, an allegation Popo denied.

PRASA.[838] The new board did not comply with PRASA's procurement processes, which has a bearing on good corporate governance.[839] Werkman's role in overcharging an SOE was not limited to the PRASA's investigation. Lord Hain referred to the Werksmans' flawed report into Robert McBride's conduct, which legitimised the groundless investigation in favour of the state capturers. The researcher shares the same view as Lord Bain that Werksmans should not have involved itself in McBride's matter. However, it all depends on the values of the law firm.

4.12.8. Advocate Sikhakhane and KPMG

Unfortunately, the private sector involvement compromised Advocates as well. Advocate Sikhakhane Senior Counsel's (Advocate Sikhakhane SC)report confirmed the existence of the 'rouge unit' that Gordhan allegedly unlawfully established at SARS. SARS's Pillay appointed Advocate Sikhakhane SC to investigate the legality of the established investigative unit within SARS. The Sikhakhane SC Report gave credence to the propaganda of SARS led by Moyane and Zuma, which caused the dismantling of the one institution performing very well.[840] His report found support from the Public Protector Mkhwebane.[841] the Nugent Commission, the Zondo report, and the Constitutional Court decision in 2022 questioned the credibility of the Sikhakhane SC finding.[842] The referral of the outcome of the high court review application to the Constitutional Court put a final nail in the Public protector's report. The Constitutional Court was of the view that there was no merit in the Public Protector's findings.

4.13. Lessons for the private and public sector

The public sector in particular SOEs are facing a difficult task to make the overarching legislation to work. The reality is that implementing an overarching legislative framework alone will not address the underlying malfeasance issues. A more holistic approach to arrest factors that contribute to lapses in good corporate governance of SOEs. It incumbent on the

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[838] Ibid. Piet Rampedi, Ngoepe Karabo and Mzilikazi wa Afrika 'Law firm Werksmans Attorneys' R300m Prasa bonanza' *IOL* 4 August 2019 available at *https://www.iol.co.za/news/politics/law-firm-werksmans-attorneys-r300m-prasa-bonanza-30298801* accessed on 12 December 2022; James Stent 'EFF' sinister sudden interest in PRASA' *GroundUp* 14 August 2019 available at *https://www.groundup.org.za* accessed on 12 December 2022.
[839] Ibid.
[840] Pauli Van Wyk 'Five things to know about the State Capture's findings and its recommendations to SARS' Daily Maverick 4 January 2022 available at *https://www.dailymaverick.co.za* accessed on 12 December 2022.
[841] Nugent op cit note 541.
[842] *The Public Protector and Busisiwe Mkhwebane v Pravin Jamnandis Gordhan, The President of the Republic of South Africa, The Speaker of the general Assembly, The Minister of State Security, the National Prosecution Authority, The National Commissioner of Police, Visvananathan Pillay, George Nkgakane Vigil Magashula and The Economic Freedom Fighters* 48521/19. The Constitutional Court dismissed the Public Protector's appeal of the review of her report on the rogue unit.

private sector to re-evaluate its approach as well. The Companies Act and the King Code IV regulate corporate governance of private sector companies. Both the private sector and the public sector have two corporate governance guidelines in common. If the private sector adheres to corporate governance principles when it conducts business in its space, why does it not do the same when it does business with the public sector?

Profits, big salaries increases and incentives for the boards of directors and executive managers in the private sector should not be the only driver in the private sector. The SOEs management and politicians must also not be driven by lining their pockets with undeserved wealth at the expense of the people and the economy of the country. Both sectors must have a long-term vision. The success of the SOEs augers well for both the private and the public sector. International investors with a long-term plan are bound to consider the country as an investment destination which will benefit business South Africa. opportunity for their business expansion. SOEs business underwritten by good corporate governance has the potential to bring South Africa in the world stage. The researcher submits that private sector does not have to enable bad business ethics and corruption in the SOEs. Enablers have the power to switch off the oxygen for poor corporate governance in SOEs. Private sector could be a good enabler.

4.14. A modicum of success in South African SOEs

Although many SOEs were flagged for failing good corporate governance, a few received clean audits, including the DBSA.[843] Our reality in the country is that the exceptions are few and far between. Some executive and non-executive managers kept their side of the bargain by managing the SOEs conscientiously and responsibly, such as the DBSA. The DBSA was an example of an SOE that was adequately managed. However, it would be remiss of the researcher to disregard the reality that although it managed to get clean audits, this does not mean it was not in all material respects in good shape; however, compared to most SOEs, it acquitted itself well. The DBSA audit results indicated a well-run SOE in 2018/2019, 2019/2020 and 2020/2021. The Parliamentary Committee, however, questioned the rationale behind the AG giving the DBSA a clean audit despite many irregularities established during the 2019/2020 financial year audit. The AG allowed the DBSA to investigate these irregularities. It was concerned that the AG gave the DBSA the right to investigate itself. The

[843] Standing Committee on Public Account (3 February 2021) *SOE Audits of 2019/2020: engagements with Auditor General*.

researcher postulates that the DBSA should not have been given that latitude. She is of the view that the AG was over-generous to the DBSA. The DBSA is in the same situation as Bain, which investigated and submitted the report to the DOJ. It is not unreasonable to be sceptical and suspect that the DBSA could also have sanitised its findings. The AG would not be the wiser if it did not subject the DBSA to a rigorous investigation. Although the researcher is sceptical, she refrains from taking the matter further. Suffice it to say that it respects AG's decision, and she knows AG's expertise.

Load shedding also makes the country unattractive as an investment destination. However, load shedding will be discussed in full in Chapter 5. The ANC government took a leaf from the National Party and the former colonisers' corruption and state capture. It grew into thorny branches, which compromised and tainted its reputation poorly. The government needs to go back and dust the agreements it reached with the AU, SADC and the international conventions it adopted as law and utilise them with its local rules, policies and good practices to engender good corporate governance.

When it took over the government, the ANC government did not find good corporate governance instruments in place in the country. It created good corporate governance laws and policies accordingly but failed to implement them effectively. The wheels came off after 2008, and there was no desire to strengthen the advantage it had generated. The researcher argues that although there were scandals before 2008, there was a semblance of economic growth, which averaged four from 2002 to 2006 and 5.5% in 2002/2008. The ANC government achieved 5.5% economic growth. The downside was that the quality of services was not as it should be. Irregular fruitless and wasteful expenditures were incurred, affecting the financial performance of SOEs.

Arguably, the astronomical amount of money transferred and or paid into the Guptas-linked companies' bank accounts was laundered in cahoots with the banks was shocking, all due to weakened and discarded good corporate governance in SOEs and in these banks.[844] Nedbank and Standard Bank played a role in the financial transactions of the Gupta-associated

[844] Michael Appel 'State Capture and the banks…' they were supposed to be the frontline' *Biznews* 11 March 2022 available at *https://www.news24.com* accessed on 12 December 2022; King Code 4 is applicable to the private sector and the public sector. In the public sector it is compulsory and specifically adopted by National Treasury for SOE's and other state organs. In the private sector its voluntary in nature. The banks also failed to comply with the Financial Intelligence Centre Act.

companies in the Zondo Report.[845] Nedbank was flagged explicitly for investigation by the NPA and the Zondo Commission in the instance of SAA and Transnet-related transactions.[846] The Bank of Baroda led money laundering for the Guptas and their companies.[847] Nedbank closed the Guptas and their related companies' bank accounts but continued its relationship with the Bank of Baroda, aware that its banking relationship with the Guptas continued. Among the banks that afforded Transnet the R3 billion of the R12 billion loan, Nedbank was the only one that swapped the interest rate to the detriment of Transnet and South Africans, especially the poor.

The repurposed SOEs and other state organs such as the prosecuting authority, the intelligence services, SARS and the security state agency constrained their capacity to function effectively. This led to corruption and state capture festering and affecting every fibre of society. People experiencing poverty and the economy were the losers. The Zondo Commission hoped things would improve, but that was not true. Perhaps the recommendation will give impetus to the NPA to do its work and prosecute perpetrators of crime implicated in criminal activities prohibited by FICA, the PFMA, POCA and PRECCA.[848] The researcher proposes that the NPA could be challenged by the capacity to prosecute all those implicated because it was eviscerated when competent and committed prosecutors and investigators were dismissed. The calibre of appointees to the NDPP and the dismissal of non-conforming appointees during

[845] Sarah Smit 'Nedbank features negatively in state capture report; Standard defends itself' Mail & Guardian 18 January 2022 available at *https://mg.co.za*. accessed 12 December 2022.

[846] Zondo Part 1 Vol 4 op cit note 646; Nedbank participated from the interest swap which cost Transnet R780 million interest payable to Nedbank. Regiments earned R335 million and R162 million from the changes recommended by Ramosebudi of Transnet's Treasury contrary to the applicable policy. Transnet's interest repayable for R4.5 billion of the R12 billion escalated from 9.1% to 11.82%.

[847] Michael Marchant 'Unaccountable 00006: Bank of Baroda and Nedbank - banking on State Capture' Open Secrets 20 February 2020 available at *https://www.opensecrets.org.za* accessed on 12 December 2022. Marchant reports that the Bank of Baroda laundered R4.5 billion.

[848] Ibid at 24; DA Press Release 'Shaun Abrahams must be axed for protecting corrupt cronies' 11 July 2017 available at *https://www.da.org.za/2017/07/shaun-abrahams-must-axed-protecting-corrupt-cronies/* accessed on 12 December 2022. Abrahams failed and or refused to prosecute criminal cases laid by Maimane against the Guptas, Ashu Chawla, Nazeem Howa, Mosebenzi Zwane, Gigaba, Muthambi, Des Van Rooyen, Duduzane Zuma and Matshela Koko despite criminal case charges laid going back 1200 days by Mmusi Maimane. News24 'Shaun Abrahams NPA must be fired, Maimane tells Zuma' *Daily Maverick* 11 July 2017 available at *https://www.dailymaverick.co.za/article/2017-07-11-npa-head-shaun-abrahams-must-be-fired-maimane-tells-zuma/* accessed on 23 February 2024. According to the Daily Maverik, Abrahams dropped charges against Nomgcobo Jiba upon landing the position of NDPP; 686 persons were referred by the SIU referred to the NPA to prosecute in 2018 and they were not prosecuted.

the Zuma rule could impede the successfully bringing perpetrators to justice.[849] For example, Menzi Simelani was appointed as the head of NDPP. The DA successfully challenged the appointment, which the Constitutional Court confirmed.[850] The Constitutional Court found the decision of the President to appoint Simelane wanting. Zuma appointed Nxasana to lead the NDPP and subsequently let him go with a substantial payout, replacing him with Shaun Abrahams. Abrahams withdrew charges against Jiya, and his reluctance to act against those implicated in corruption and state capture indicated a compromised NDPP. The private-sector participants provided the platform that enabled corruption, fraud and money laundering to occur and thrive in SOEs.[851] Abrahams directly and indirectly enabled state capture. Without the enablers, the SOEs would not have successfully gouged their finances, leaving them dire financially. The SOEs' desperate financial position will likely continue for a long time.

4.15. Conclusion

The workers, their families and the economy paid the ultimate price for non-compliance with good corporate governance at SOEs such as Denel, PRASA's subsidiary Autopax[852] and Metrorail, and SAA experienced financial challenges. This dereliction of duty by SOE management at SAA came at an economic and human cost that resulted in non-payment of salaries for some time and, finally, reduced most employees. Employees lost their jobs, some could not pay their mortgage bonds and were evicted, and their dependents and families suffered. They cannot contribute positively to the country's economy.[853]

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[849] Chipkin el at op cit note 764 at 123-124. Zuma appointed Menzi Simelani as the Director of the NDPP in 2009. Zuma subsequently appointed Nxasana as the NDPP. His service was terminated because he had challenged the integrity of Nomgcobo Jiya.

[850] *Democratic Alliance v The President of the RSA & Others* 2013 (1) SA 248 (CC). The appointment of Simelani was challenged by the DA. The challenge culminated in a court case, which resulted in his appointment reversed and the decision to appoint him irrational and illegal by the SCA. The decision of the SCA was confirmed by the Constitutional court.

[851] Karabo Ngoepe. 'Looting Bonanza cost R13 billion' *Sunday Independent* 7 February 2021 available at *https://www.IOL.com* accessed on 23 February 2024. The Special Investigating Unit (SIU) reported six months of PPE corruption spree; Babelo Skiti 'SIU uncovers 'procurement scam syndicate'' *Sunday Times* 7 February 2021 available at https://www.timeslive.co.za/sunday-times/news/2021-02-07-siu-uncovers-procurement-scam-syndicate/ accessed on 23 February 2024. R13.3 billion between March and November 2020 was spent on procured PPE. It is evident from the SIU's reports that the government departments used the urgency surrounding the Covid-19 outbreak to disregard good corporate governance, flouting the law.

[852] Isaac Mahlangu 'Salaries not paid at state-owned bus company' *Sowetanlive* 1 June 2021 available at *https://www.sowetanlive.co.za* accessed on 9 December 2022 *BusinessLive* 28 April 2020; Koka Mpho 'Employees go hungry as Autopax unable to pay September salaries' *SowetanLive* 6 October 2021 available at *https://www.sowetanlive.co.za* accessed on 20 June 2022; Payi Bulelwa 'Fears of job losses as cash strapped Autopax is unable to pay salaries' *Weekend Argus* 14 November 2021 available at *https://www.iol.co.za* accessed on 20 June 2022.

[853] Stimpel op cit note 445.

Good corporate governance was the casualty of the repurposed SOES and other state institutions. What also stands out is that SOEs' management consciously discarded it with the blessing and support of politicians. It was dispensed with deliberately to achieve a specific agenda to benefit a few at the country's expense. Poor corporate governance in SOEs had far-reaching repercussions, culminating in corruption at a significant scale and state capture, destroying the country's economy and stunting service delivery to people with low incomes and reputations. Employees, taxpayers and customers felt the effects of this intentional and reckless conduct.

The resultant negative financial situation of SAA was the sale of 51% of its shares to a third party. This sale led to debate because good corporate governance was not followed.[854] Gordhan's conduct in his leadership of the DPE suggests that the more things change, the more they stay the same. This act contravenes section 54 of the PFMA. Effectively, Gordhan and the DPE were obliged to notify the National Treasury, and failure to do so was not in line with good corporate governance. The deployment of cadres in boards and the appointment of selected employees, for example, to SOEs was not in the interest of South Africa but for the few to achieve specific anti-South Africa goals.[855]

SOEs have sufficient guidelines to ensure compliance with good corporate governance. These are found in Codes, frameworks, legislation, policies, the Constitution and other instruments supporting combating and eradicating corruption. It is apparent from the level of corruption in the country and some SOEs that, despite advanced mechanisms to regulate good corporate governance, the extent of non-adherence and its application is too high. This conduct compromises the sustainability of SOEs. Furthermore, this refusal and disability to conform to good corporate governance hurts the economy and finances of and to attract investment into the country. The government has no prospect of creating jobs at the rate they are being shed.

The role played by executive authorities and Zuma cannot be understated. The third parting actors and SOEs' executive and non-executive management roles should not be underestimated. They facilitated the grand fraud, theft, corruption and state capture. State

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[854] Siphokazi Vuso 'SAA sale bid haunts Gordhan' *Sunday Independent* 30 March 2022 available at *https://www.iol.co.za* accessed on 12 December 2022. Siyabonga Mkhwanazi 'Scopa calls for answers on the 51% stake sale of SAA' *IOL* 24 March 2022 available at *https://www.iol.co.za* accessed on 12 December 2022; Carin Smith 'Gordhan DPE pushed for more on Takatso SAA deal' *fin24* 24 March 2022 available at *https://www.news24.com* accessed on 12 December 2022. Carol Patol 'Gordhan and Godongwana step up public spat over the SAA' *fin24* 12 April 2022 available at *https://www.news24.com* accessed on 12 December 2022.

[855] Ibid.

capture would not have succeeded without enablers such as auditors, internal and external, banks, consultants, weakened law enforcement agencies, prosecuting authorities, and third parties such as the Guptas and their associated companies. The Zuma factor emboldened executive and non-executive management and the relevant executive authorities. The AG's report on the achievement of SOEs in the 2019 financial year indicates that SOEs' audit performance worsened in the past five years. No SOE achieved an unqualified clean audit opinion. Some got qualified audit opinions and other disclaimers. The disclaimer means the annual financial statements of these SOEs cannot be relied on; the question of the going concern of an SOE was not addressed adequately.

The amendment of the PAA gives the AG more authority and power to independently initiate investigations by the SIU or any agency when necessary. This gives the AG the power to expedite the investigative process that would generally be delayed at the Presidency. The appointment of unqualified persons to the SOEs' boards of directors is one of the main contributing factors to the failure of SOEs. The success of SOEs is dependent on good corporate governance. For SOEs to prosper and deliver as contemplated by the government, the boards of directors must champion good corporate governance to stave off the risk of corruption, fraud and money laundering.

Advisory services, internal and external auditors, local and international banks, and lawyers were instrumental in the realisation of corruption and state capture at the level it was when the Public Protector issued a report. Some accounting and executive authorities enthusiastically and vigorously worked hard to please their masters – the Guptas and Zuma. Shockingly, the private sector enthusiastically participated in corruption and state capture without any shame. However, praise singers of the private sector suggest that the public sector cannot manage SOEs. The question remains: why does the private sector still give McKenzie, Bain, SAP, EOH and many other businesses?

CHAPTER 5

CASE STUDY ESKOM LIMITED, PASSENGER RAIL AGENCY SOUTH AFRICA AND SOUTH AFRICAN BROADCASTING CORPORATION

5. INTRODUCTION

The previous chapter dealt with the state of good corporate governance in SOEs and the challenges they are faced with. It was established that SOEs did not comply with good corporate governance. There was a flagrant disregard for financial management, internal controls, King Code, procurement policies, the Protocol, section 217(1) of the Constitution, PFMA and regulations and various legislative frameworks. The failure of SOEs to abide by the principles of accountability, ethical conduct, fairness, responsible management and transparency left most of them in dire financial straits. In the previous chapter, the researcher focused on the enablers' contribution to the state of failed good corporate governance.

Maladministration, malfeasance, mismanagement, pure corruption, and fraud negatively affect people. South Africans suffer due to load shedding and expensive and limited commuter transport, constraining their capacity to engage in economic activities and confining their access to news and information. In addition, this led to employees losing their jobs, homes, dignity and livelihood. The conduct of the SOEs led to Rating Agencies downgrading their investment grades, making it difficult for them to raise affordable and cheap finance. Eskom, PRASA and the SABC (the 3 SOEs) are examples of some SOEs that failed to comply with good corporate governance, resulting in corruption and state capture.

In this chapter, the researcher focused on the 3 SOEs. Eskom and the SABC are two of the major public entities listed as such in schedule 2 of the PFMA tasked to provide electricity and public broadcasting, respectively. PRASA is listed in schedule 3B of the PFMA with the mandate to cater for transporting passengers by rail and coaches. The 3 SOEs executive and non-executive management's attitude towards the erosion of good corporate governance with the support of the responsible executive authorities are considered vis-à-vis the relevant instruments at their disposal. The effect of the 3 SOEs failures impact on the economy of the country is highlighted. The 3 SOEs executives and non-executive management praxis culminated in their failure to execute their mandate accordingly. Generally, the 3 SOEs are regulated by their respective enabling legislation, for instance, Eskom, the Eskom Conversion Act of 2001 (Act 13 of 2001), PRASA, the Legal Succession Act of the South African Transport Act of 1989 and the SABC, the Broadcasting Act of 1999, (Act 4 of 1999). Neither

trio complied with nor followed the principles of good corporate governance. The trio was hit by scandal after scandal about corruption, fraud, money laundering, theft, and state capture.

The 3 SOEs were found wanting by the Public Protector in the State of Capture: October 2016, Derailed: August 2015 and When Governance and Ethics failed: February 2014. The Public Protector found the 3 SOEs failed to comply with good corporate governance consequently, corruption and ineffective management took hold. Where reference was made about, or examples were given in the previous chapter about any of these SOEs, the researcher will not traverse them in this chapter. However, it is important to highlight that the 3 SOEs in this chapter were exemplary. Eskom was unfortunate to be managed by the same executive managers who managed Transnet at the beginning of 2015. This exacerbated the interruption of electricity generation, transmission and distribution, including financial and reputational damage. The financial and reputational fallout in the 3 SOEs was monumental. The common thread in the 3 SOEs is the corruption supported by the executive authorities. However the finger pointed to the highest office. This chapter is structured as follows – introduction, historical overview of Eskom, PRASA and the SABC, good corporate governance compliance, failures at the 3 SOEs, and conclusion.

5.1.Eskom

5.1.1. Historical overview of Eskom

Before the birth of Eskom, the largest electricity generator, transmitter and distributor, electricity was generated by 18 private entities and 40 municipalities.[856] These different and multiple electricity generators used different technical standards and operating frequencies, making interconnection impossible.[857] The need for sufficient electricity rose due to economic activities concerned with processing raw materials and manufacturing factory goods.[858] According to Van Niekerk, the railways required inexpensive electricity to run their trains. The need to develop and grow the country's economy after the union of 1910 gave rise to the government's momentum to consolidate and increase electricity generation in the country.[859]

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[856] Sandra Van Niekerk et al 'Why Eskom is in a mess and what to do about at: A Companion to Eskom Transformation' 2020 *Alternative Information & Development Centre* 1-146.
[857] Dr Grové Steyn *Investment and Uncertainty: Historical experience with power sector investment in South Africa and its implication for current challenges* (Working paper, Graduate School of Business at the University of Cape Town, 2006) 8.
[858] Open Secrets Unaccountable 00006 op cit note 847.
[859] Ibid.

This need led the first Prime Minister of South Africa, General JC Smuts, to entrust the Government Engineer Robert Kotze and Hendrick Johannes van der Bijl to draft a new Act to regulate electricity generation.[860] The work of Kotze and van der Bijl culminated in the passing of the Electricity Act of 1922 (Act 4 of 1922) (the Electricity Act).[861]

The Electricity Act established the Electricity Supply Commission (Escom), a public business enterprise and the electricity regulatory body, the Electricity Control Board (ECB), in 1923.[862] The ECB governed Escom. Its other function was to license the electricity supply and set the tariffs.[863] The ECB held this position until it was replaced by the National Energy Regulator of South Africa (NERSA) in 1995.[864] Eskom was tasked to provide and deliver affordable electricity to mines, railways, and the 'public' but was not required to make a profit.[865] Escom received grants from the government to generate, transmit and supply electricity, although it was not directly answerable to parliament but to the line minister.[866] To realise its mandate, Escom successfully threshed a contract with the South African Railways, which gave it the right to take over the Colenso power station to electrify the railway line between the Transvaal and Natal.[867] It continued with this strategy and agreed with the Durban local government to build the Congella power station and Cape Town to build the Salt River power station.

Escom, buoyed by the ECB, opposed the application of the Victoria Falls and the Transvaal Power Company (VFTPC) to change its supply license for a permit to build a 60MW plant in Witbank.[868] This Escom challenge led to an agreement between it and VFTPC that it would fund the construction of the 60MW plant, and VFTPC would build and manage it.[869] Escom contracted with VFTPC to operate Escom's power stations, which have a capacity twice

[860] Van Niekerk op cit 856.
[861] Ibid.
[862] Ibid The white people benefited from access to cheap and affordable electricity from the apartheid government; Eskom Heritage 2023-2013 The establishment of Escom was preceded by the Power Act in 1910 of the Transvaal Colonial Government. The Power Act allowed the government to expropriate electricity generation from private entities because electricity was considered a public service; Brian Ashley et al 'Eskom Transformed: Achieving A Just Energy Transition for South Africa' 2020 *Eskom Research Reference Group*.
[863] Ibid at 9. Van Niekerk op cit note 856 at 1.
[864] Ibid.
[865] Ibid.
[866] Ibid at 9.
[867] Ibid.
[868] Ibid at 10.
[869] Ibid.

that of VFTPC.[870] Capitalising on the near end of VFTPC's concession, Escom acquired VFTPC's power stations for £ 14,500,000 on 1 July 1948.[871] Escom continued expropriating independent private power stations until it became a monopoly of electricity generators, transmitters, and distributors.[872] It exercised its right in the Electricity Act to use the revenue generated from selling electricity to fund its operational costs and capital expenditure[873] to produce cheap, reliable electricity. Escom was a not-for-profit organisation and consequently was exempt from paying taxes to the government. Its status enabled it to realise its mandate and played a crucial role in driving the growth of the capitalist economy in South Africa by providing affordable and dependable electricity to the mining, railways, and manufacturing businesses.[874]

The country's interconnection was completed in 1973.[875] Escom strived to ensure over capacity, but between 1971 and 1975, the electricity demand was high and outpaced its ability to add capacity.[876] The margins had dropped from 17% to 11% by 1975, causing anxiety for Escom. Escom initiated the additional build programme to increase its capacity from October 1974 to 1982 by building power stations such as Matla with 600MW capacity and Duvha with another 600MW in November 1975.[877] Furthermore, it added to the building programme an unjustified nuclear power station, Koeberg, which commenced in August 1976 and was scheduled for completion in 1984.[878] Koeberg contributes 4.4% of the total electricity generated in South Africa.[879] In 1979, the electricity demand increased due to the oil crisis, which reduced the reserves by 12%.[880] Escom, contrary to good corporate governance, constructed and built Lethabo and Tutuka power stations with the capacity of 3706MW and

[870] Ibid at 10. VFTPC owned power stations with 267.6MW and 117.6MW compressed air plant and a large, compressed air transmitter and distribution networks.
[871] Ibid. The price classified it as the biggest in the history of South Africa at that time.
[872] Rampedi et al op cit note 838. Steyn 857 at 9. In its first year Escom became a key player as power generator.
[873] Ibid. Escom built two hydro electric energy plants in Maldeviespruit and Sabie.
[874] Ibid.Ashley et al op cit note 862 at 26.
[875] Steyn op cit note 857 at 13.
[876] Ibid.
[877] Ibid.
[878] Ibid at 14–15. Koeberg was neither an economic nor a significant capacity addition. According to Steyn the Koeberg built was imposed by government for political and strategic reasons on Escom management. Koeberg was not completed on schedule. This decision is demonstrative of the fact political interference is historical and is not new at Eskom.
[879] Ashley Theron 'Eskom's Koeberg nuclear experience' *ESI Africa* 7 April 2016 available at *https://esi-africa.com/features-analysis/eskoms-koeberg-nuclear-experience/* accessed on 28 February 2024.
[880] Steyn op cit note 857.

3708MW, respectively, without following the tender process.[881] The cost of creating these power stations was too high, and Escom could have saved it if the tender process had been followed. The low reserve capacity of Escom was exacerbated by the unavailability of the 1373MW electricity supply it used to get from Cahora Bassa, Mozambique. In addition, the three other power stations – Kriel, Arnot, and Matla, which were not operational, also worsened the level of reserves at Escom.[882] This led to winter electricity shortages, which forced Escom to load-shift the mines and municipalities.[883] Steyn said this was the second load shedding in Escom's history. The first load shedding had occurred between 1948 and 1953.[884]

5.1.1.1. Capacity expansion, procurement incongruent with good corporate governance and increased expenditure

Jan Smith, the CEO of Escom, forecasted that capital expenditure of R65 billion will triple its capacity to 70 000MW by the end of the century.[885] Escom commissioned boilers and turbines to add 22 260MW to the grid, although it did not have the experienced personnel to undertake such a vast building programme.[886] The magnitude of this building programme was equal to 97% of Escom's total plant in commission, making it vulnerable. According to Steyn, the ordered equipment required new technologies, which was partly proven at the stage of the order. Senior engineers were unsure which option to choose, and the Management Committee was undecided. Escom faced cost-related challenges for the building programme, which increased prices for the public and the industries.[887] To expand its electricity generating capacity, Escom approached foreign commercial funders.[888] The tariff charged and deposited into the Capital Development Fund and the Revenue Fund were insufficient to sustain servicing

[881] Ibid. Undermining and or ignoring procurement where there are tender regulations for public tender is contrary to good governance. However, it is important to point out that good corporate governance as is expected and known today is different to the 1970s and 1980s. There was no section 217 of the Constitution of the Republic in place and other governance instruments adopted after the new dispensation.
[882] Ibid 16 - 17. The availability reduced from 85% in 1975 to 71.9% in 1983. The problems with the three power stations ranged from abrasive coal supplied at Arnot, design problems with Kriel caused boiler to slag up, massive tube leaks and Matla suffered from the same problems.
[883] Ibid 18.
[884] Eskom 'A Short History of Eskom 1923 – 2001 Part 1' available at *https://www.sahistory.org.za* accessed on 15 December 2022.
[885] Steyn op cit note 857 at 19.
[886] Ibid.
[887] Van Niekerk op cit note 856 at 1; Steyn op cit note 857 at 22-24
[888] Ibid; Ashley op cit note 862 at 26.

foreign debt for the building programme undertaken between the 1970s and 1985.[889] One of Escom's largest customers, Railways and Harbours, was apprehensive of financial governance at Escom, considering that Escom was not audited and controlled by the government.[890]

Procuring goods and services without following the tender process, acquiring boilers and turbines with unproven technologies, and lacking qualified and experienced human capital were indicators of failed governance. The costs of financial governance failures were passed on to the public and business customers of Escom.[891] The increased fuel costs were the main driver of the reasonable price increases in 1975 compared to the 15% tariffs in April 1976 and 25% in January 1977.[892] The price was reduced in 1978, but the benefit thereof was wiped out by the price hike for three consecutive years from 1981 to 1983, which caused a national outcry, especially from the farmers.[893]

5.1.1.2. The National Party Government's response to its constituencies and Escom

The National Party government prioritised the interest of farmers for various reasons. They were important because they were the party's voting constituency and oversaw security in farming and rural areas where insurgency into the country by ANC and Pan African Congress (PAC) cadres were likely to penetrate the government to execute attacks.[894] Prime Minister PW Botha appointed a Commission of Inquiry headed by De Villiers to address farmers' and other consumers' concerns about price increases in addition to addressing planning and plant performance.[895] 1977 saw the electricity price increase by 166% compared to 1971.[896] South Africa saw electricity interruptions in 1975 across the country for 24 hours due to a malfunctioning relay.[897] PW Botha let Smith go after the De Villiers Commission Report.

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[889] Steyn op cit note 857 at 24. The Electricity Amendment Act of 1971 provided for the Development Capital Fund. It is important to note that Escom planners overemphasised demand growth for 1980s and going forward. The cost of under supply power R2.20/kWh compared to the 10c.kWh for supplied power.

[890] Ibid.

[891] Ibid at 27. There was concern that price increases would continue.

[892] Ibid at 28.

[893] Ibid; Van Niekerk op cit note 856 at 2; Steyn op cit note 857 at 30. The cost of fuel diesel, generation operations and the interest increase payable by Escom left it no choice but to increase the tariffs. The farmers were an important constituent of the National Party according to Steyn.

[894] The ANC and PAC. Were declared terrorist organisation. They were burned from the country and considered threats to its security.

[895] Williams op cit note 445 at 30-31; Eskom 'Heritage History in Decades 1983-1993' available at *https://www.eskom.co.za* accessed 15 December 2022. Steyn op cit note 857 at 4. Eskom was considered wasteful and unreliable by its customers.

[896] Ibid. South Africans on the electricity grid found Escom inefficacious and wasteful. There was outrage when Eskom built Megawatt Park in 1977.

[897] Eskom Heritage the Years of Consolidation 'Demand for electricity soars' *https://www.eskom.co.za* accessed on 15 December 2022.

The De Villiers Commission Report resulted in another amendment to the Electricity Amendment Act 1985. Parliament passed the Eskom Act of 1987 (Act 41 of 1987), commonly called the Eskom Act. The name Escom was changed to Eskom by the Eskom Act. The ECB was replaced with the Electricity Council (EC), in which private-sector customers were represented.[898] The EC appointed the management board. Eskom began to operate as a commercial company. The Capital Development Fund and Revenue Fund were discontinued. The EC was given the authority and power to set national tariffs. Eskom was overseen by the Department of Public Enterprise, and the non-regulatory functions of Eskom were amalgamated into Eskom Enterprise.[899] Eskom revised its capacity requirements but continued with the building of new plants. It decided to mothball or reduce reliance on older inefficient power stations and those that could be utilised economically.[900] Furthermore, the creditors were granted the right to approach the courts, set the tariffs and seize the assets of Eskom should it fail to pay its debts.[901]

In its expansion programme, Eskom agreed with Rand Coal to supply coal for the Majuba power station. Subsequently, Rand Coal identified an oblique fault in the coal seam, which it had not picked up during the geological mapping study.[902] Both parties agreed to close the Majuba Colliery. An alternative to feed the Majuba power station with coal was the rail and road, which had financial implications. The road mode of conveying coal to the first three units of Majuba had additional financial implications.[903] There were debates within Eskom on whether to add four to six Majuba units in 1995, but the majority decision prevailed to proceed with adding three more units. At that juncture, Eskom had already deactivated older plants with 1710MW output, and that did not sit well with the National Electricity Regulator, which protested Eskom's decision. Eskom gave a special price dispensation for smelters and ferrochrome industries, charging them less than other electricity users.[904] Eskom had a substantial surplus estimated to last until 2010.[905]

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[898] Williams op cit note 445 at 33-34.
[899] Van Niekerk op cit note 855 at 2; Steyn op cit note 857 at 32 -34.
[900] Ibid at 36. Ingagane, Camden, Highveld, Taaibos, Grootvlei, and Komati were mothballed in 1991.
[901] Ibid at 34.
[902] Ibid at 37.
[903] Ibid. The cost of 16,5c/kWh compared to a new coal station Eskom approximated at 5.6ckWh.
[904] Ibid. Alusaf smelter availed 300MW in 1993 plus 760MW in 1996. The ferrochrome concluded a 370MW for 1996 and another 1470MW were scheduled for 1997-2000.
[905] Ibid.

The NP government began commercialising Eskom in 1987 but did not alter its public entity status. After the dawn of democracy, the new government continued where the National Party left off. It did not reinstate Eskom's tax-exempt status but expected it to roll out mass electrification for those not catered for by the Apartheid government.[906] Between 1994 and 2000, Eskom, together with municipalities, delivered and brought electricity to 2.5 million households.[907] However, this had ramifications for Eskom because it could not recover the costs of electrifying all these households. Only 50% of South Africans received 3.3% of national income, according to the Living Survey of 2014/2015.[908]

To address the shortfall, Eskom increased electricity prices by more than 400% in ten years. Future households' electrification had financial implications because further funding was required. Zulu opined that in an endeavour to assist poor households and senior citizens, the government had allocated money to municipalities, but the money was not used for its intended purpose. According to him, at the end of the 2019/2020 financial year, R9 billion was transferred to municipalities for free basic electricity but was never employed; accordingly, the municipality owes Eskom billions of rands.

5.1.2. Corporatisation of Eskom post-1994

The corporatisation of Eskom continued after the De Villiers Commission. The Eskom Act was replaced with the Eskom Conversion Act of 2001 (Act 13 of 2001).[909] It was incorporated in terms of the Companies Act of 1973 (Act 61 of 1973) and repealed by the Companies Act of 2008.[910] The government subsumed Eskom with the intention of listing it on the Johannesburg Stock Exchange; however, that did not materialise.[911] Instead, the electrification roll-out continued, culminating in an additional 5.3 million households put on the grid, bringing the

[906] Andile Zulu 'Eskom's death cause by policies and political choices' *Mail & Guardian* 10 October 2022 available at *https://mg.co.za* accessed on 15 December 2022.
[907] Ashley et al op cit note 862 at 26. According to Ashley et al in 1993 26% of the population of South Africa had electricity including the homelands. 12% of those who lived in rural areas had access to electricity. The electrification of households stood at 66% by the end of 1999.
[908] Ibid.
[909] AIDC 'A Brief history of Eskom 1923 to 2015' February 2021 available at 1 *https://aidc.org.za* accessed on 15 December 2022; Jaap de Visser et al 'The Legal Framework for The Appointment and Dismissal Of Members of Eskom, PRASA And The SABC' 2018 *The Dullah Omar Institute for Constitutional Law, Governance and Human Rights* 19.
[910] Ibid; Athol op cit note 445; Van Niekerk op cit note 855 at 1.
[911] Ibid at 2; Van Niekerk op cit note 855.

total between 1990 and 2004 to 7.8 million.[912] The electrification drive pursued President Thabo Mbeki's policy goal to have 92% of households on the grid by 2012. The government did not factor in the necessity to increase the electricity generation capacity. It also did not address the price changes when its price compact with Eskom was not extended.[913] These missteps saw the National Energy Regulator take control and introduce a different pricing system.[914] This change affected Eskom's revenue because it could not cross-subsidise the electricity roll-out by passing on charges to its major customers.[915]

The failure of the government to extend the price compact with Eskom and its tax-exempt status resulted in Eskom paying taxes to the government and still having to roll out electrification at its own cost. Despite these challenges, within a decade of the ANC government taking over, electricity was availed to tens of millions of people and not only the white minority as it was during Apartheid.[916] For example, Eskom is also an important strategic SOE that generates, transmits, and distributes electricity to people and businesses and is critical for the economic growth of the country. Eskom is a particular case because of the catastrophic effect it would have on the economy should it collapse totally.[917] The repercussions of the fall of Eskom are comparable to that of the financial crisis 2008.[918]

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[912] Eskom 2003-2012 'Eskom Heritage *Our Recent Past* - "Shift performance and grow sustainability"' 3 *https://www.eskom.co.za/heritage/history-in-decades/eskom_2003-2012* 15 December 2022 accessed on 26 February 2024; Hofstatter op cit note 377 at 74. Hofstatter in his book refers to Professor Eberhard, the founder of Energy and Development Researcher Centre commending Eskom for electrifying Black areas. At the time of the democracy in 1994, all whites including farmers in far flung areas had electricity and Blacks did not have in the country.

[913] Nugent op cit note 541.

[914] Ibid.

[915] Van Niekerk op cit note 855; Steyn op cit note 857.

[916] Ibid. According to Brian Dames more than 83% households in South Africa had access to electricity.

[917] The effect of non-compliance with good corporate governance at Eskom and corruption resulted in load shedding. Bulelwa Payi 'Load shedding caused the city of Cape Town up to R12b' *IOL News* 17 February 2019 available at *https://www.iol.co.za/news/south-africa/western-cape/load-shedding-costs-western-cape-up-to-r12bn-19348261* accessed on 21 February 2023; Ayanda Mthetwa 'The true cost of load shedding in Rands and cents–life and death' *Daily Maverick* 15 February 2019 available at *https://www.dailymaverick.co.za/article/2019-02-15-the-true-cost-of-load-shedding-in-rands-and-cents-and-life-and-death/* accessed on 21 February 2023; Staff Writer 'Eskom blackouts cost South Africa R80billion per month' *Business Tech* 25 March 2015 available at *https://businesstech.co.za/news/trending/83429/eskom-blackouts-cost-south-africa-r80-billion-per-month/* accessed on 21 February 2023; If load-shedding has an impact referred to by Deloitte in 2008, complete failure of Eskom will be disastrous for the economy of the country because Eskom touches just about every sector of the economy.

[918] Nikhil Sonnad 'The most memorable phrase of the financial crisis taught us the wrong lesson' 13 September 2018 available at *https://qz.com/1387808/the-financial-crisis-in-2018-the-lessons-of-too-big-to-fail-and-moral-hazard* accessed on 21 February 2023 According to Sonnad, the government of the US gave AIG a bailout of $186 billion and relief funds to big banks such as JP Morgan Chase, Citigroup and the three automotive companies.

5.1.2.1. Electricity access and load shedding and Eskom Accolades

There was a price to pay for the feat the ANC government achieved in electricity roll-out. The surplus of Eskom's electricity reserves was reduced from 15% to between 8% and 10% by 2007.[919] Eskom had warned the government that the grid could be strained in five or six years. Mbeki acknowledged that the government failed Eskom by not taking its advice to capacitate its electricity generation capacity.[920] Nevertheless, Eskom went on to achieve accolades between 2004 and 2012 for connecting 7 800 000 households to the grid – the Markinor Sunday Times Grand Prix Award, Markinor Sunday Times most admired brand, the Golden Key Award for Public Body of the Year, Ernst & Young for corporate reporting, and second for Ernst & Young Sustainable Reporting for 2011.[921] Furthermore, Eskom won the JSE Spire for Best Issuers, won a Gold Medal in Sector Excellence, and its finance company jointly won the EMEA Finance Award for Nqaba Finance 1 Limited.[922] Eskom's ability to keep South Africa's lights on during the 2010 World Cup and the accolades it won between 2011 and 2012 put a positive spin on its reputation.[923]

According to Thabo Mbeki UNISA speech in 2022, after load shedding, Eskom commenced the building programme of Medupi and Kusile Power Stations, which were scheduled for completion in 2011 but were not. In 2019, Eskom indicated that it would spend R8 billion to fix design defects of both stations. The delay of these power stations negatively affects electricity generation. The African Development Bank, in June 2022, admitted that Medupi would not make money during its lifetime.[924] This was after Eskom spent R135 billion 11 years later than the scheduled completion date and commissioning the power station.[925] The researcher asserts that the money spent on Medupi and Kusile neither benefitted Eskom nor South Africa Incorporated. Kusile, with a price tag of R81 billion and scheduled for completion

[919] Ibid at 5-6.
[920] Kabelo Khumalo & Bongani Mdaka 'Engineers advice to build more power stations was ignored' *Sunday World* 25 September 2022 available at *https://sundayworld.co.za* accessed on 15 December 2022.
[921] Brassey op cit note 810 at 3-9.
[922] Ibid 11. The EMEA Finance Award for Eskom's R5 billion residential mortgage-backed borrowing programme.
[923] Ibid 12.
[924] Bloomberg News 22 June 2022.
[925] Terence Creamer 'Eskom sets August 2024 target date for the return of damaged Medupi 4' *Creamer Media's Engineering News* 12 May 2022 available at *https://www.engineeringnews.co.za* accessed on 15 December 2022. According to the Chief operation Officer of Eskom estimated that retrofitting the FGD at Medupe stands at R35 billion and R42 billion. This is after R8.7 billion was spent to address the design problems of Medupi.

after six years, remains incomplete. Its cost ballooned to R161 billion, twice the initial price. It is now scheduled for completion in 2024.[926]

In the interim, Eskom continued to experience load shedding in 2014, 2020, and 2021, as well as in 2022 and 2023. The Council of Science and Industrial Research (CSIR) reported that load shedding in 2020 stood at 1,798GWh compared to 2,521GWh in 2021.[927] Load shedding is still stalking the country in 2023 and will worsen.

5.1.3. Good corporate governance at Eskom

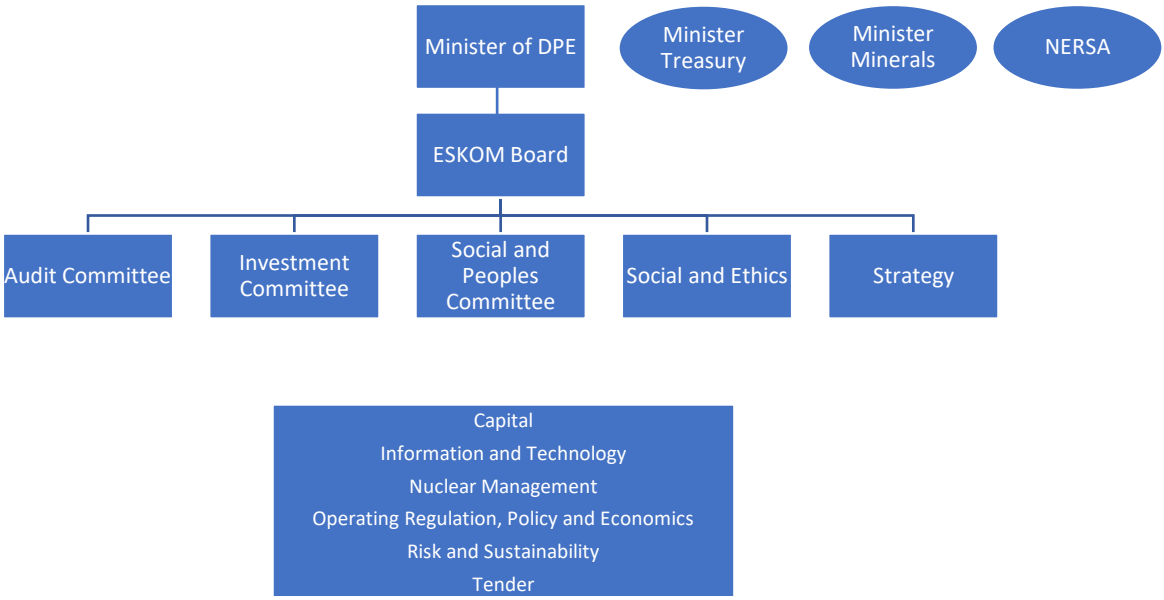


Figure 1: Eskom Governance Structure

Figure 1 is a depiction of the governance structure of Eskom. Subsidiaries are not reflected in this picture. Eskom has mini boards for generating, transmitting and distributing electricity not included here. The Minister of the Department of Public Enterprises is the

[926] Editor 'A mere R300 billion extra to retain (some) power -Eishkom' *BizNews* 14 May 2022 available at www.biznews.com accessed on 15 December 2022; Creamer op cit note 925; Nkosinathi Duma 'Eskom: R161 Billion Kusile Power Station On Track For Completion in 2024' *EWN* 09/06/2022 available at *https://ewn.co.za*. accessed 15 December 2022.

[927] Staff Writer 'South Africa has seen a 40% increase in load shedding and it's to get worse' *BusinessTech* 7 June 2022 available at https://businesstech.co.za accessed on 15 December 2022; The CSIR expressed concern that the Energy Availability Factor (EAF) declined to 61,8% in 2021 and this include unplanned outages worrisome for the future.

shareholder representative of the government in Eskom. The Minister in charge of the Treasury is responsible for finance oversight, and the Minister in the Department of Mineral resources and Energy (DMRE) for Policy, respectively. [928] Loadshedding continued in 2023, and the President decided to appoint Minister Kgosientsho Ramokgopa in the Presidency responsible for electricity. In addition, Eskom is impacted by NERSA. NERSA's duties entail to 'Promote competition and competitiveness within the energy industry; Promote regulatory certainty within the energy industry; Promote accessible and affordable energy for all citizens; and establish and position NERSA as a credible and reliable regulator.[929] The mandate of Eskom is to supply the country with affordable, stable electricity efficiently and sustainably. The researcher submits that this presupposes that businesses and people must enjoy access to electricity if they pay for it. If Eskom does not fail in its mandate, South Africa's economy has the prospect of growth. However, that was threatened by state capture 2 and our electricity shortage.

Two important regulators have oversight over Eskom - the National Energy Regulator of South Africa (NERSA) and the National Nuclear Regulator (NNR). The researcher chose to highlight NERSA and its objectives before engaging the governance structure of Eskom because it affects the price charged for electricity. NERSA, the regulator, is established in terms of the National Energy Regulator of South Africa Act of 2008. The researcher is not in any way disregarding the importance of the NNR. The object of the NERSA Act is to ensure that the energy supply is uninterrupted, promote diversity of supply, effective management thereof, and energy access to improve the quality of life of the people, contributing to the sustainable development of the country's economy.[930] The list of objects is long, and the researcher focused on 2(a), 2(b), 2(i) and 2(l) for the purpose of this research; however, the researcher does not negate the importance of the others. At this juncture, electricity is not uninterrupted, the quality of life is not improved, and the economy of the country is in no way sustainable at the rate of load shedding experienced. Jobs are lost, businesses are closing because the electricity supply

[928] Treasury play a key role about ensuring that the SOEs spends money that they budgeted for and have. Furthermore, that such money is spent for purpose. In addition, Treasury gives SOEs the latitude to engage in other business including the acquisition, creation and disposal of an of a significant stake in it. This is regulated in terms of section 54(1) of the PFMA. Important. The SOEs must follow the proper procedures to effectuate its decision by requesting permission to the DPE and the request be endorsed by the said minister and forwarded to treasury for approval which is not unnecessarily withheld.
[929] NERSA 'Our Profile' available *at* https://www.nersa.org.za/our-profile/ accessed on 23 February 2024.
[930] Section 2 of the NERSA Act.

is not sustained, healthcare is compromised and so on. Electricity is inaccessible because it is costly, and there appears to be no respite in the future. Eskom received a tariff increase of 18.65% on 22/23.

It is perhaps appropriate at this stage to highlight the mandate of the Eskom. Eskom, the main generator of 90% of electricity in the country and supplier of 30% of electricity in the southern African countries, failed to achieve its mandate. Its governance resides in the 15 members of the board of directors. Appointment of alternate directors is not permissible in line with the Memorandum of Incorporation (MOI). The shareholder appoints directors. Eskom has 13 non-executive directors, five of whom have experience in engineering, energy policy and energy delivery. The CEO and the CFO are ex-officio executive directors. The board has five subcommittees depicted in the above picture and is supported by the executive managers who are members of the executive committee. The board's subcommittees are established in line with the King Code IV and manned by skilled persons to contribute meaningfully to the board and Eskom.

The board's responsibilities are embodied in the Board Charter concluded with the shareholders and the MOI. The Board Charter provides for the governance framework embodied in – 1) Strategic Intent Statement setting out the agreed mandate and strategy of Eskom; 2) Shareholders Compact with key performance indicators and key performance measurements in support of the Strategic Intent Statement clarifying the objects of Eskom; 3) the Corporate Plan to give effect to the Strategic Intent and to support the Corporate Plan; (4) MOI; and the legislative framework which includes the Companies Act, PFMA, Eskom Conversion Act, the King Code IV and Protocols developed by the DPE and the applicable policies and procedures.[931] Interestingly, reference is made to the Protocol, but the Eskom board, in its annual financial statements, aver that it follows King Code IV. The Protocol outlines the appointment of directors, but the MOI determines their appointment. This gives rise to confusion.

Eskom's Board Charter regulates board processes, meetings notices, attendance, declaration of interest, keeping records and minutes, agenda, retention of board documents, number of meetings per year, duties of directors' vis-a-vis conflict of interest, delegation of authority, decision-making process by directors, confidentiality and acquiring independent

[931] Clause 2 of the Board Charter.

advice, performance evaluation, directors' development, remuneration and out of pocket expenses. It also outlines the obligations of the shareholder and the strategy, supervision of management, management, governance of financial matters, risk management, compliance and control, and stakeholder relationship management. The board of directors are expected to be conversant with and understand the role and duties of the Group Company Secretarial and not use this office for personal interest. However, during the time of Suzanne Daniels, the dismissed Group Company Secretary, Compliance and Head of Legal was entangled in corruption and state capture.[932] The conclusion of Advocate Nazir Cassim SC, the chairperson of her disciplinary hearing, was that she committed serious misconduct; she violated her duty of good faith, trust and confidence in Eskom.[933] The board of directors of Eskom and executives colluded with Tegeta Exploration and Resources (Tegeta) with the assistance of the Group Company Secretary. The Board Charter and internal controls of Eskom were disregarded.

In the Board Charter the question of the independence of directors emphasises that: 1) the directors must not have worked at Eskom in an executive position; 2) his/her family must not have business interest in Eskom; 3) close associates and friends do not have contracts with the company; 4) he/she is not a Company Secretary; 5) the director is not a representative of the shareholder to avoid him/her taking decisions that favour his/her appointer; and 6) does not receive remuneration from Eskom. Based on the provision of the Board Charter, the Eskom board would tick all the correct boxes, but many of the board members who previously served in that capacity were not independent, as contemplated by Annexure A. For example, the deceased former chairperson, Dr Ben Ngubane and chairperson of Eskom's letter of resignation of Mr Tsotsi was drafted by the Guptas associated person but failed to disclose his conflict of

[932] Zondo Report Part 4 Vol 2 op cit note 646. The Commission found that Daniels was in dereliction of her duties when she drafted a resolution for the board to pay Tegeta R1.68 billion disguised as prepayment for Coal to Optimum Coal Mine for the supply of coal when it was assistance for the purchase of OCM from Glencore. There was no reason why the payment was not made to OCM.

[933] Eskom Media Desk 'Disciplinary hearing recommends summary dismissal of Suzanne Daniels – Eskom' *Politics Web* 23 July 2018 available at *https://www.politicsweb.co.za* accessed on 15 December 2022. Daniels was charged with – availing confidential information of Eskom with third parties; involvement in McKensie and Trillian transactions; involvement in the Tegeta deal; and acquiring services and paying for such services to represent the chairperson of Eskom board Dr Ngubane in matters before the parliamentary Committee which were unrelated to Eskom but the SABC.

interest or tenuous lack of independence.[934] Ngubane was succeeded by Jabu Mabuza, who was exalted as a businessman with impeachable integrity. He was the chair of Business Unity South Africa (BUSA) and Business Leadership South Africa (BLSA).[935] What unfolded at Eskom could not be explained.

Mabuza worked full-time as an acting group chief executive whilst being the chairperson of the board.[936] This ran contrary to paragraph 4 of Annexure A to the Board Charter. Gordhan should not have requested Mabuza to act as an executive chairperson because he was put in a difficult position. The executive chairperson was compromised and should not have accepted the appointment. Thus, questions were raised when his niece acquired a R100 million contract from Eskom.[937] The public must have confidence in the shareholders and the board of directors' decision-making process. Eskom resources must be employed within the confines of clean governance. It was and still is imperative that when Eskom acquire services, it must do so governed by principles that resources are used efficiently, economically and effectively.[938] The manner of the use of resources is important because they are scarce or not plentiful. It is important to remember that South Africa's resources are deployed to service the Apartheid debt. Furthermore, the South African government is still catching up with and working on addressing the majority who were previously excluded from accessing electricity and other amenities during Apartheid. The government decided to use SOEs to provide electricity and

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[934] Sikhonathi Mantshantsha 'Ben Ngubane's first speech 'drafted' by the Gupta's allies' *Business Day* 2nd June 2017 available at *https://www.businesslive.co.za/bd/national/2017-06-02-ben-ngubanes-first-speech-drafted-by-gupta-allies/* accessed on 24 February 2024. "Salim bhai. An amended version for your approval," wrote Howa, referring to "brother" in Hindi. He attached the document "Statement by Dr Ben Ngubane, chairperson of Eskom, on behalf of the board"

[935] Staff Reporter 'Eskom's new chairman is a man of unimpeachable integrity' *Mail & Guardian* 21 January 2018 available at *https://mg.co.za* accessed on 15 December 2022; Athol op cit note 445. He appointed Maseko who was coached by Bain. Immediately upon his appointment Bain was appointed for advisory services it was not qualified for. The RFP was designed for Bain. Mabuza had a close relationship with Massone.

[936] Lynley Donnelly 'Gordhan appoints the Eskom chair, Jabu Mabuza' acting chief executive *Mail & Guardian* 29 July 2019 available at *https://mg.co.za* accessed on 15 December 2022; Staff Writer 'Jabu Mabuza appointed acting Eskom Chief Executive' *Business Tech* 29 July 2019 available at *https://www.businesstech.co.za* accessed on 15 December 2022. The appointment of Mabuza found support from the private sector. BUSA BLSA.

[937] Sabelo Skiti 'Eskom cancels dodgy R100 million tender linked to Mabuza's niece' *Mail & Guardian* 31 July 2020 available at *https://mg.co.za* accessed on 15 December 2022. Eskom spokesperson Sikhonathi Mantshantsha said an internal investigation revealed "irregularities in the process leading to the awarding of the contract". "Eskom is currently reviewing the roles played by all stakeholders in awarding the tender, including the role of its own employees. Where applicable, disciplinary processes will be pursued, and criminal charges laid. "It is important to note that Eskom has not suffered any financial losses as a result of this irregularity as any payment would have to follow services rendered," Mantshantsha said. He added that negotiations are under way with the second placed bidder.

[938] Section 195(1)(b) of the PFMA

other services to the majority, who had been excluded in the past. It must pay particular attention to the poor and the vulnerable. Electricity is one of the many resources that the majority needs and has needed for a long time.

What happened in the Mabuza debacle ran contrary to good corporate governance and called into question the bona fides of the shareholder and the quality of appointments it made.

5.1.3.1. Eskom Big Budget and Procurement Framework

Eskom, one of the SOEs with the biggest budget for acquiring goods and services, was deliberately targeted by Zuma and his ilk. The researcher asserts that Zuma's desire expressed by Gigaba to achieve a developmental state was not genuine but sinister. There was a disjuncture between his desire and what was happening on the ground. Eskom was used as a cash cow for the Zuma family, the Gupta companies, consultants, the executive authorities, the executives and non-executive management, the ANC and connected persons. The executive authorities were enthusiastic to please Zuma. For example, Brown amended the MOI of Eskom in 2016. She reserved for herself the power and right to appoint the board of directors[939] and the CEO of Eskom.[940] Capability, competency, experience, honesty, integrity, independence and qualification were not the criteria required to fill the positions of CEOs, CFOs and board members at Eskom. Evidently, the executive authority's criteria were the capacity to kowtow to power, compromised candidates, connected persons and cadres.[941] Zuma desired and was interested in the appointment of the executive authority at Eskom[942] and achieved this through his proxies, DPE ministers, who served at his pleasure. This proved to be Eskom's undoing.

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[939] Clause 3.7 of the MOI. "It is specifically recorded that only the Shareholder, in exercising its Ownership Control in terms of section 63(2) of the PFMA, may appoint or remove the Directors in terms of section 66(4)(a)(i) of the Companies Act." Furthermore clause 14(2) "The non-executive Directors shall be appointed by the Shareholder for a period of 3 (three) years (the "term"), which appointment is renewable annually, provided that no non-executive Director is appointed for 3 (three) consecutive terms."

[940] Clause 1.2.40 "Ownership" In relation to the company, means the ability of the Shareholder in accordance with the provisions of section 1 of the PFMA, to exercise any of the following powers to govern the financial and operational policies of the Company in order to obtain the benefits from its activities: 1.2.40.2 to appoint or remove all or the majority of the Directors; 1.2.40.2 to appoint or remove the Company's CE; 1.2.40.3 to cast all, or the majority of, the votes at meetings of the Board; 1.2.40.4 to control all, or the majority, of voting rights at a general meeting of the Company."

[941] The appointment of Molefe, Anoj and Tsotsi. Molefe and Anoj were appointed at Eskom at the behest of Zuma because of the good job they did when they were GCEO and GFO respectively at Transnet. Gama was also supported by Zuma to head Transnet. Gama was previously found guilty of serious transgressing the procurement process at Transnet Freight. He appointed the former General Nyanda's security company for an exorbitant service fee. Gigaba appointed Mantshantsha Chairperson of the board of directors of Denel. Mantshantsha was struck off the roll of attorneys for stealing a client's money in his trust account.

[942] Public Protector Report (3 of 2015/2016) at 90.

Eskom had and still has governance measures in place like other SOEs referred to in the preceding chapter, with its own peculiarities discussed in this chapter. The peculiar nature of the business of Eskom required it to take into consideration the Mineral and Petroleum Resources Development Act of 2002 (Act 28 of 2002) (MPRDA) and the National Environment Management Amendment Laws Act of 2014 (Act 25 of 2014) (NEMA). Eskom's business environment includes coal mining because the bulk of its electricity is generated from coal; therefore, it is required to manage the residue stockpiles and deposits properly. It is obliged to set aside money for the rehabilitation of coal mines mined exclusively for it by mining companies it has agreements with. Eskom contributes money to the environmental rehabilitation trust fund for the future rehabilitation of the mines.[943] Eskom, like any SOE Procurement Framework, must comply with section 51 of the PFMA, section 217 of the Constitution and the PFA. In addition to the laws referred to in this paragraph, Eskom SCM policies '…must be fair, equitable, transparent, competitive and cost-effective'.[944]

To comply, Eskom had in place – a) procurement in the normal cause of business, b) short-term emergency coal procurement, c) procurement and supply chain procedures, d) medium-term coal procurement mandate, and the conflict of interest.[945] Eskom's Procurement and Supply Chain Management Procedure 32-1034 (the PSCM Procedures 32-1034) is the overarching procurement policy which incorporates emergency procurement and short and medium-term procurement. The PSCM Procedures 32-1034has a bearing on the Eskom Short Term Coal Procedure GGP1194 (the STCP GGP 1194); The Medium-Term Coal Procurement Mandate (MTCPM) and the Procurement and Supply Chain Procedures 32-188 effective from 1 December 2006. After the adoption of the PSCM Procedures 32-1034, the MTCPM remained binding until 2018. None of these procedures enhanced the procurement process at Eskom but opened it up for manipulation.

5.1.3.2. Eskom Manipulation of Supply Chain Management

Despite Eskom having comprehensive PSCM Procedures 32-1034 in addition to the Protocol, King III, National Treasury Regulations, and section 217 of the Constitution, the executive and

[943] Chipkin et al op cit note 764.
[944] Section 217 of the Constitution and section 51 of the PFMA.
[945] Eskom Procurement and Supply Chain Management Procedures 32-188 which was effective from December 2006 and replaced with 32-1034. Eskom Short Term Emergency Coal Procedure GGP 1194 effective April 2004. Eskom Procurement and Supply Chain Management Procedure 32-1034. The Medium-Term Coal Procurement Mandate of August 2008 was valid until 2018. Eskom Conflict of Interest policy 32-173.

non-executive managers and the executive authority in charge continued to deliberately undermine good corporate governance in most extraordinary way. Gigaba and Brown, at various points during their tenure as the DPE ministers, were complicit, bold and duplicitous.[946] Another minister entangled in Eskom for the Gupta and its related companies was Mosebenzi Zwane.[947] Zwane muscled Glencore to sell Optimum Coal Holdings (OCH) to Tegeta by issuing mining stoppage notices to its various companies.[948] OCH was slapped with a heavy fine of R2,17 billion for noncompliance with its obligation to deliver coal to Eskom.[949] The amount was contrived to muscle Glencore OCH's shareholder out of its contract with Eskom.[950] Effectively, Glencore was strangled, left it with no choice but to sell its company to Tegeta, an associated company of the Guptas.[951]

Gigaba, Brown and Zwane, when questioned about their roles in assisting Gupta's linked companies during the Zondo Commission, feigned ignorance.[952] For example, Gigaba claimed that he was unaware that there were procurement issues at Eskom. This executive authority aborted the revamping of Koeberg at the cost of R4 billion during Dames' time as the GCEO of Eskom. Gigaba's tenure saw R57 billion channelled to the Guptas for no value. Gigaba claimed that the board of directors did not share such information with him.[953] Brown aborted the R1.86 billion requested by Exxaro to develop the land, and Zwane assisted Tegeta purchase OCM and expedited its mining license. Their proximity to the Guptas and dependence on Zuma to keep their cabinet position speaks volumes. The three executive authorities' integrity was compromised, and their leadership was based on personal gratification.

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[946] Gigaba appointed the board of directors led by Tsotsi of Eskom contrary to the Eskom Conversion Act of 2001 and the MOI and Brown did the same when she appointed Molefe the CEO of Eskom; Hofstatter op cit note 377 at 78.

[947] Valencia Talane 'Eskom pre-payments to Tegeta enabled by willing agents' *Biz21* 13 May 2022 available at *https://bizcommunity.com* accessed on 15 December 2022. Online Tenders 2021 'Gupta's deal with Zwane in the spotlight' available at *https://www.iol.co.za* accessed on 15 December 2022. Zwane was the Minster of Minerals and Energy.

[948] Chipkin et al op cit note 764 at 13-21. Zwane used the Mine Health and Safety Act of 1996 to effect his goal. Glencore had no choice but to sell OCH to Tegeta. He also approved the acquisition of OCH by Tegeta enabling it to comply with the condition precedent of the sale quickly. According to the Parliamentary Committee on Public Enterprise on The Inquiry into Governance, Procurement And The Financial Sustainability Of Eskom Dated 28 November 2018.

[949] Ibid.

[950] Ibid at 17.

[951] Ibid. According to this report Tegeta shareholders included – *Mabengele Investments (Pty) Ltd owned by Duduzane Zuma and Elgasolve (Pty) Ltd* owned by Essa a partner of the Guptas.

[952] Minister Zwane the Minister of Minerals Resources and Mining, Ministers Brown and Gigaba DPE.

[953] Esme Ferreira 'Gigaba said 'it was an unfortunate coincidence' that SOEs were captured on his watch' *Mail & Guardian* 23 June 2021 available at *https://www.mg.co.za* accessed on 15 December 2022.

Brown denied knowing about Molefe being gifted with a pension pay-out worth R30 000 000.00 (thirty million rand), although he was with Eskom for 16 months only and not five years to qualify.[954] The subsequent reinstatement of Molefe to Eskom was also unknown to Brown.[955] There is a litany of examples of irregularities and compromised internal processes at Eskom – a) irregular payments made by Eskom; b) favours extended to the Guptas-linked companies which acquire contracts; c) non-compliance with procurement procedures; d) financial assistance given Tegeta to assist; e) exorbitant and inflated amounts paid to the Gupta linked companies unjustifiably for obscure reasons conveniently claimed ignorance.[956] In some instances, outrageous narratives by Gigaba and Brown are not backed by facts that the executives and non-executive managers misled them. None of them took responsibility for what unfolded at Eskom. Between 2010 and 2018, Gigaba, Brown and Zwane, enthusiastic in pursuit of delivering to Zuma and securing their ministerial positions, brought Eskom to its knees.

The researcher contends that the board of directors of Eskom failed to uphold their fiduciary duties. They are responsible as a collective and individually for ignoring the fundamentals of good corporate governance. The board of directors also failed to put ethical management first and instead, deliberately, with nefarious intentions, destroyed Eskom. There could be no reason for them to conduct themselves incongruent with good corporate governance. They knew and or ought to have known that it was criminal, unethical and unprofessional to mismanage Eskom. There should be accountability and consequences for such conduct and for everyone who was involved in overseeing and managing one of the most valuable and critical contributors to the economy of the country.

5.1.3.3. Challenges due to the ANC

Good corporate governance problems did not begin in 2010 when Gigaba was appointed the Minister of the DPE. Alec Erwin was the DPE Minister when the Chancellor House and Hitachi Power Africa joint venture came about and resulted in Alstom SA losing out to the two due to the influence of the ANC. However, the appointment of Gigaba at the helm of the DPE proved fatal to the DPE SOEs. It overshadowed Eskom's past achievements. For example, in 1997,

[954] Minister Brown claimed that she was not aware of the pension purchase for Molefe. The practice and policy at Eskom were that CEO have to have been in that position for 5 years before he or she qualifies for the pension.
[955] Zondo Report Part 4 Vol 2 op cit note 646; Public Protector Report (3 of 2015/2016).
[956] Ibid, Trillian Management (Pty) Ltd, Trillian Capital Partners (Pty) Ltd, Capital and McKinsey and Company.

Eskom was voted the best company for good corporate governance. In 2001, Eskom won the Financial Times Global Energy Award for Power Company of the Year in New York. All these gains were wasted, and the country was hit by load shedding in 2007. Load shedding was inevitable because the Mbeki government did not support increasing electricity generation capacity. It left building additional power stations until too late.

Eskom redeemed itself after the disastrous load shedding in 2007. Gigaba announced that the government intended to appoint new boards of directors for Denel and Eskom in pursuit of Zuma's quest to reshape public policy and bring about a developmental state. As a precursor to his active role in remodelling SOEs in his portfolio, Gigaba boldly asserted that the government would be actively involved in the areas of planning, policy, strategic direction and oversight. This was the beginning of the end of good corporate governance envisaged and provisioned for in various legislative frameworks, policies, the Protocol and the King Code after 1994. This can be discerned from the way the Gigaba board at Eskom failed to exercise their fiduciary duties as required by the Companies Act and the PFMA and did his bidding.

The appointment of Tsotsi as the Chairperson of the board of Eskom was deliberate and proved calamitous to its endeavour to take itself out of the financial hole it was in. Gigaba and Tsotsi followed instructions and did not put Eskom's and the country's interests first. Eskom's debts grew exponentially due to incomplete power station overruns such as Medupi and Kusile, as well as unprocedural procurement of goods and services. Tender processes were circumvented, prices were inflated, and procured goods and services were not delivered, but payments were affected. Alternative electricity availed by Independent Power Producers (IPP) prior to 2010 was costly to purchase to stave off, manage and reduce load shedding. However, the biggest spending without cost benefits was contracts dished out to the Gupta-linked companies. It is perhaps appropriate and fair to submit that the costs of IPP energy have come down between 2010 and 2020. However, the IPP energy was not sufficient to stop load shedding in 2014 and 2015.

According to Van Niekerk, load shedding in 2014 and 2015 was inevitable because the situation deteriorated at Eskom. Factors such as – a) lack of financial plan to pay for the new build; b) Medupi and Kusile behind schedule increasing the cost of their construction; c) expensive coal costs overstated due to state capture; d) inability to get tariffs applied for with NERSA worsened its revenue; e) low electricity demand; f) overspending on diesel costs in 2013 and the cost doubling in 2014 to R10.6 billion; g) non-payment for electricity by municipalities pushing the arrears to R21.1 billion. The researcher submits that Eskom had itself to blame for the situation it was in. The seven factors identified by Van Niekerk, except

(d) and (e), are indicative of a failure to manage conscientiously. Managing diligently goes in tandem with good corporate governance. This was lacking at Eskom because its executive and non-executive managers, as well as the executive authorities, threw away the rule books.

Despite having the duty to manage in accordance with the Corporate Plan, Financial Plan, Strategic Plan, Shareholders Compact and the Eskom Act, the Constitution and the PFMA in place as required by the National Treasury, Eskom's management deviated from rules and procedures. Eskom's failure to implement good corporate governance threatens its continued existence and could lead to a total blackout if real changes are not made quickly and responsibly. Eskom did not act differently from failing SOEs. Compromised and continued corruption at Eskom was reported in the press, and by the departed De Ruyter, it does not auger well for Eskom's future. The previous chapter's conclusions about SOEs' attitude and lack of commitment to good corporate are not different from Eskom's. However, in Eskom, there is a sense that the rot is set in so deep that the prospects of rescuing it are remote.

5.1.3.4. President Ramaphosa chairperson of the Eskom War Room as Deputy President

President Ramaphosa was appointed the chairperson of the Eskom War Room during his deputy presidency under Zuma. His main task was to steer Eskom away from and find a solution to load shedding.[957] The war room was tasked to tackle cogeneration changes by extending current agreements with private corporations, expediting the substitution of diesel with gas to pump up diesel power plants, bringing to the fore independent power producers programmes and retrofitting energy-efficient technologies for all electricity consumers in residential areas, business and public buildings and municipalities. Ramaphosa's intervention neither stopped load shedding nor the non-compliance with good corporate governance at Eskom.[958] Van Onselen posits that Ramaphosa failed Eskom, paddled by Molefe and his cohorts when he was in charge of the war room.[959] It is interesting that Ramaphosa's did everything within his power to keep Zuma secure in his presidency. He was present and

[957] South Africa Government News Agency 'Presidency clarifies Deputy President's role in Eskom's War Room' 20 May 2015 available at *https://www.sanews.gov.za/south-africa/presidency-clarifies-deputy-presidents-role-eskom-war-room* accessed on 15 December 2022. This War Room constituted Departments of Energy, Cooperative Governance and Traditional Affairs, Public Enterprise, National Treasury, Economic Development, Water and Sanitation and Eskom.

[958] Erin Bates 'Inquiry told of Zuma's worry over Eskom 'war room' led by Ramaphosa' *Daily Maverick* 11 September 2020 available at *https://www.dailymaverick.com* accessed on 15 December 2022.

[959] Ibid.

participated during the various motions of no confidence brought against Zuma during the height of corruption and state capture 2. His conduct cannot be disregarded.

5.1.3.5. Hadebe and De Ruyter

Upon ascending the presidency, Ramaphosa appointed Gordhan as Minister of the DPE. Jabu Mabuza was appointed chairperson of Eskom, and Phakamani Hadebe was appointed CEO.[960] Hadebe was cognizant of corruption at Eskom and vowed to deal with it. By February, Hadebe and the board secured the R20 billion needed, of which R10 billion was earmarked to prevent the suspension of Eskom bonds by the JSE and the balance for the outstanding AFS.[961]

Upon arriving at Eskom, Hadebe began cleaning up the rot. He reported that 1049 cases were investigated.[962] Eight hundred twenty-two were completed. Seventy-nine employees left on their own accord, and 250 were suspended without salary. He suspended the group executive of the capital division, Abram Masango, for various allegations of improper conduct pertaining to the Kusile build project.[963] Detlinger reported that Eskom reviewed supplier contracts and dismissed 97 employees. 11 senior executives suspected of wrongdoing were dismissed, and 11 criminal cases were opened against nine senior executives, triggering the International lenders to avail R57 Billion.[964] Hadebe resigned due to ill health in May 2019, effective the end of July 2019.[965] Moola posits that Hadebe, in addition to his health, did not get the requisite support to turn the ship around because Ramaphosa and Gordhan blinked and capitulated to

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[960] Cowan op cit note 718 at 24. Mabuza was appointed in January 2018 whilst Zuma was still the President of the country. This explains why he was considered favourably and Zuma did not reject Mabuza's appointment the chair of Eskom.

[961] Lynley Donnelly 'Eskom chief Hadebe Mr Fix-it' Mail & Guardian 2 February 2018. *Mail & Guardian* available at *https://mg.co.za* accessed on 15 December 2022. Hadebe was considered the fixer because of his extensive experience after fixing the Landbank, worked for treasury for 19 years. He was effective at treasury and challenged the Rating Agencies rational for rating the country. Before joining Eskom, he was the CEO of Corporate and Investment Banking at Barclays.

[962] Luvuyo Mkentane 'Eskom clean-up will leave no stone unturned - Hadebe' available at *ILO* 19 Nov 2018 available at *https://www.iol.co.za* accessed on 15 December 2022.

[963] Ibid. Cowan op cit note 718 at 25 – 26. Masango was charged with his former Eskom colleague Hlakudi. They are charged with Tubular Construction Trindade and Michael Lomas currently holed up in the United Kingdom. Cele S'thembile 'UK Grants South African Extradition request in Eskom Fraud Case' Bloomberg 16 December 2022available at *https://www.bloomberg.com* accessed on 15 December 2022. Michael Lomas extradition application was allowed by the UK Magistrates on 16 December 2022.

[964] Lindsay Detlinger 'Eskom Making Progress in Cleaning House, Says Hadebe' *EWN* 21 November 2018 available at *https://ewn.co.za* accessed on 15 December 2022. Hadebe bemoaned the reality that the arrests and prosecution were outside his scope. The Parliamentarians agreed with him.

[965] Gia Nickolaides 'Eskom CEO resign due to 'unimaginable demands impacting his health' *news24* 24 May 2019 available at *https://www.news24.com* accessed on 15 December 2022. Lynley Donnelly 'Hadebe resigns from Eskom citing ill health' *Mail & Guardian* 25 May 2019 available at *https://mg.co.za* accessed on 15 December 2022.

salary increases of 7.5% and the reluctance to charge union members who sabotaged Eskom.[966] Mabuza was appointed the executive Chairperson of Eskom.

De Ruyter succeeded Hadebe. The researcher submits that appointing Mabuza, the chairperson of the board of Eskom, was a mistake, if not cynical. Mabuza, with Bain and Massone, engineered the appointment of Maseko, the Group CEO of Telkom.[967] Williams, in his book, contended that Mabuza was also a participant in the grand plan of Project Phoenix, which was intended to transform the economy of the country.[968] Mabuza accepted the offer to chair Bain's Africa Advisory Board Bain. He met with Zuma, Massone, and Maseko on four occasions during the grand plan discussions.[969] Ramaphosa and Gordhan should have known that Mabuza was involved with Bain when rules of clean management were distorted and good corporate governance was circumvented. Ramaphosa and Gordhan were senior members of the National Executive Committee (NEC).

Their top position in the cabinet accorded them the privilege to access information. They should have known that Mabuza was compromised. He should not have been appointed the chair of Eskom. However, he enjoyed the support of the private sector. The researcher contends that the private sector should not be looked to for integrity. It is the private sector companies that enticed, bribed, corrupted, facilitated money laundering and enabled corruption and state capture. The moral and business fibre of South Africa was broken. Perhaps corruption in the private sector and lack of governance should be considered for research by another researcher in light of its role in the destruction of SOEs. This is another instance of governance failure that affected the country. Mabuza should have neither been appointed under any circumstances nor praised undeservedly.[970]

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[966] Nazmeesa Moola 'Why Eskom CEO Phakamani Hadebe resigned' *Daily Maverick* 30 May 2019 available at *https://www.dailymaverick.co.za* accessed on 15 December 2022.
[967] Athol op cit note 445 at 85-86.
[968] Ibid. According to Williams Massone advised Paul Meehan to express his appreciation of the business Bain got from Telkom when they meet.
[969] Ibid.
[970] Auriela Mbokazi 'Jabu Mabuza: Business titan and inspirational leader' *Business Times* 14 November 2021 available at *https://www.businesslive.co.za/bt/business-and-economy/2021-11-14-jabu-mabuza-business-titan-and-inspirational-leader/#google_vignette* accessed on 23 February 2024. It is interesting that at the time Mabuza dies Williams had already written his book for everyone to know who the real Mabuza was. The award of the tender to his niece at Eskom during his tenure was already in the public space. Mabuza let South Africa down and surely did not act with integrity and should not be praised. Eskom is in a mess and the SOEs were repurposed. He met with Zuma, Maseko and Massone more than once. That should say something. He was thanked for the business.

It is concerning that the very people tasked to improve Eskom's performance appointed a person of Mabuza calibre at its helm and the acting GCEO when Hadebe resigned. The challenges Eskom faced and is currently dealing with are linked to the conduct of the management in the past, corruption and state capture, which was the consequence of deliberate disregard of good corporate governance. The appointment of De Ruyter to the helm of Eskom did not turn its performance around. According to Cowan, it continued to be fraught with electricity supply challenges. Load shedding continued unabated. Excuses after excuses were given, including sabotage.[971]

5.1.3.6. Alleged sabotage of Eskom

In 2018, Koko bragged that he refused to sign the IPP agreements although sanctioned by the board and the government. He alleged that the IPP would not contribute to the reduction of load shedding and the concomitant expenses thereto.[972] He was, however, willing to see South Africa sign a nuclear deal that would cost the country R1 trillion, increasing generation by 9000MW.[973] It is ironic that Koko did not appreciate that R1 trillion was unaffordable.[974] The current skills shortage within Eskom was monumental, and uncertainty around the completion of the nuclear plant in the prevailing environment.[975] Hadebe signed the IPP contracts. The refusal by Koko to sign the IPP contracts put Eskom three years behind schedule.[976]

Such conduct sabotaged the guidelines given to the War Room to find alternative environmentally friendly electricity. The success of Ramaphosa at Nazrec put to rest the question of the nuclear plant, although Zuma had already signed the deal with Putin and had urged Minister Joemat-Petterson to sign the secretive agreement with Russia.[977] Zuma and Putin's plan failed to undermine the robust checks and balances of the country in their

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[971] Cowan op cit note 718 at 19.

[972] Ibid at 19 – 20. Koko believed that the IPP electricity programmes he was expected to sign was prohibitively expensive. His preference was nuclear energy which was favoured by Zuma.

[973] Ibid. Karyn Maughan and Kirsten Pearson *NUCLEAR: Inside South Africa's Nuclear Deal* (2022) 109. Discussions around nuclear was robust and emphasis was placed on the cost benefits analyses for South Africa. Treasury addressed the nuclear cost as far back as 2015. Nene the Minister of Finance refused to blindly sign the nuclear deal and this led to his sacking. The decision wiped out R387 billion on the JSE and cost a loss of148 000 jobs.

[974] Ibid.

[975] Ibid. The Koeberg was not completed on time and cost more than was budgeted.

[976] Ibid.

[977] Qaanitah Hunter and Lionell Faull 'Jacob Zuma secret nuke 'stich-up'' *Mail & Guardian* 25 September 2014 available at *https://mg.co.za* accessed on 15 December 2022; Op cit note at Maughan & Pearson 973 at 94. Although Joemat-Petterson had signed the nuclear she subsequently realised the enormity of her decision and stalled the deal.

enthusiasm to finalise the nuclear deal.[978] Good corporate governance would have been undermined at the highest level with impunity.[979] Koko's delay affected the output of and contributed to the Eskom and the War Room's mandate.

Koko not only refused to sign the IPP contract but also made power station managers sign disciplinary cards, which gave managers no option but to run the power stations hard instead of shutting them down to effect repairs and much-needed maintenance.[980] Cowan suggests that the extent to which power stations were run likely contributed to their constant breakdown. The news24 investigations in late 2021 led to the conclusion that the maintenance of power stations was compromised within Eskom. Managers were apprehensive about being suspended without pay. Thus, they disregarded the obvious poor conditions of power stations. The collapse of electricity generation impacted transmission and distribution, which nearly paralysed the country and proved costly. With 58GW generation capacity, Eskom generates 44 GW, of which 38GW is generated from coal-powered power stations.[981] They were aware that Eskom was in a dire financial situation, estimated at R400 billion. At the last medium-term budget of the Minister of Finance, Godongwana, in October 2022, the government intimated that the government would take over two-thirds of the Eskom debt. The government indeed took over some of Eskom's debts.[982] This gave Eskom some reprieve because its rating improved after 15 years. This decision could enable Eskom to raise capital.

5.1.3.7. Ministers and the board of directors

The board of directors owe their fiduciary duties to Eskom. They do so collectively and individually. Considering that the performance of Eskom is dependent on the ability of the board to lead, it is critical that the board is made up of - '…at all times, comprise of individuals

[978] Maughan & Pearson op cit note at 973 110-114.
[979] Marianne Them 'How South Africans thwarted secret Putin/Zuma nuclear deal' *Daily Maverick* 19 December 2019 available *https://www.dailymaverick.co.za* access on 15 December 2022.
[980] Cowan op cit note 718 at 20-21. Koko prided himself that during his time and Molefe South Africa did not experience load shedding.
[981] Alister Routledge 'South Africa's power grid is under pressure: the how and the why' *The Conversation* 2 November 2021 available at *https://theconversation.com* accessed on 15 December 2022. The coal used was of inferior quality as it was in the past before the ANC government took over. Could Koko and his colleagues have read the history of Eskom coal purchase and decided to follow suit?
[982] Ntando Thukwana 'Eskom debt transfer, grants and the 2024 elections keep S&P cautious' *Moneyweb* 1 December 2022 available *https://www.moneyweb.co.za* accessed on 20 December 2022; Sarah Smit 'MTBPS Government to take a chunk of Eskom's debt' *Mail & Guardian* 26 October 2022 available at *https://mg.co.za* accessed on 20 December 2022; Staff Writer 'Government to take a significant portion of Eskom's R400 billion debt' *BusinessTech* 26 October 2022 available at *https://businesstech.co.za* accessed on 20 December 2022; Godongwane Budget Speech 'Government to take a portion of Eskom's R400 billion debts' *SANews* 26 October 2022 available at *https://www.sanwes.gov.za* accessed on 20 December 2022.

with integrity and accountability, competence, relevant and complementary skills, experience and expertise.'[983] The non-executive directors are required to monitor the performance of the executive managers, resolve conflicts of interest, and hold the executive managers accountable.[984] In the case of Eskom, persons appointed to the board of directors were not of distinction envisaged in clause 5.1.6.1. They were not of calibre and credibility with the necessary skill and capable of bringing independent judgment expected of them.[985] Gigaba and Brown did not follow these principles when they appointed their boards of directors. They appointed the directors from the lists received from outsiders such as the Gupta's business associates.[986] Even if Brown were to argue that she followed the MOI, which was not amended and adopted until 1st July 2016, it is arguable that her powers were usurped because she was given a list of directors to appoint to the board of Eskom.[987] Uncontroverted evidence led during the Zondo Commission confirms that Brown's work with Zuma enabled the capture of Eskom through the appointment of executive and non-executive managers.[988] So, none of the appointments she made accorded with good corporate governance.

The Eskom Conversion Act did not give Ministers the right to appoint the board of directors and the CEO. Nevertheless, the DPE Protocols provided for such appointments. The DPE Protocols are not acts of Parliament and are, therefore, subordinate to the Eskom Conversion Act. This means the Protocol did not have the authority of law. However, the caveat was that competent, skilled, experienced, ethical, and accountable individuals were eligible for appointment in terms of the protocol. Nevertheless, that did not stop Gigaba from appointing the new board because he was not pleased with how the former board handled the

[983] Protocol 2002 18. Clause 5.1.6.1. Clause 5.1.5.2.1 enjoins non-executive directors from being responsible for the daily management of the SOE. According to clause 5.1.5.2.3 the non-executive directors are 'individuals of calibre and credibility with the necessary skill, special expertise and knowledge to bring judgment to bear independent of management on issues of strategy, performance and evaluation thereof, resources and standards of conduct.

[984] Ibid. It is important to note that the executive managers get their mandate from the board of directors.

[985] Ibid clause 5.1.5.2.3.

[986] Ibid; Zondo Report Part 4 Vol 2 op cit note 646; Hofstatter op cit note 377. Raeesa Pather 'Gigaba at Eskom inquiry: It wasn't me' *Mail & Guardian* 13 March 2018 available at *https://mg.co.za* accessed on 20 December 2022. Gigaba blames the Cabinet for appointing people preferred by the Gupta. He claimed that he did not know of their connection with the Guptas. He denied knowing of their connection to the Gupta family and group of companies before the Parliamentary Committee in March 2018. He put forward the argument that he was disappointed that the board of directors appointed during his tenure turned out to be connect to the state of capture.

[987] Zondo Report Part 4 Vol 3.

[988] Section 16 of the Companies Act. The MOI of Eskom was changed by Minister Brown to authorise her to appoint the board and the CEO.

Koeberg tender.[989] This was a clear affront to good corporate governance. The executive authority was and is still not exempt from complying with the PFMA, the Constitution and Policies of Eskom, and other SOEs that embody good corporate governance. The ministers sent a bold message to the board and the executive managers that good corporate governance was dispensable and irrelevant. Dames was, however, of a different view, but that did not win him friends.

Gigaba's advisor, Mahlangu, disrespects the board and the executive managers of Eskom.[990] Although Tsotsi toed the line, Dames resisted the Guptas' propositions following their meeting with him and Mahlangu. According to Hofstatter, Dames remonstrated with Mahlangu and warned him never to call him to a meeting with the Guptas.[991] When Gigaba was confronted about Mahlangu arranging a meeting with the Guptas and Dames, he claimed that he was unaware of the meeting. Mahlangu was his special advisor. It was unclear how Gigaba could not have known what his advisor was doing. The researcher argues that Gigaba's conduct and his 'kindergarten' engendered defiance of good corporate governance.[992] Literally, Gigaba's message was simple: if you cooperate and work with your friends, there is a reward. The board of directors read the script and understood that the memorandum of Eskom does not come first but the interest of Zuma, the Guptas, the executive authorities, and the executive management.

5.1.3.8. Eskom, Zwane, Gigaba, Brown (Ministers) of Departments

Zwane, the minister of the DMRE showed solidarity with the Guptas' Tegeta and pressured Glencore to sell Optimum Coal Mine (OCM).[993] Zwane's DMRE threatened Glencore with the mining laws regulatory action to force its hand to sell OCM. Subsequently, the DMRE executed its threat and suspended OCM's mining license, forcing Glencore to reduce about 380 jobs. The DMRE claimed that the retrenchment of the employees was inhumane.[994] The

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[989] Ibid 81. Eight directors were dismissed without prior notice and the new board announced led by Tsotsi.
[990] Tsotsi was appointed by Gigaba and Ngubane by Brown. The MOI came into operation after their appointments.
[991] Hofsttater op cite note 377 at 80.
[992] Ibid at 79 'A former Eskom manager who'd been close to Dames described how it was like being subjected to the whims of Gigaba's kindergarten- including Brian [Dames]- like dirt,' the manager told me.
[993] Andrew England and James Wilson 'South African authorities accused over Glencore mine deal' *Financial Times* 14 February 2016 available at https://www.ft.com accessed on 20 December 2022; Zoe Schaver and Georgina Guedes 'Eskom and the sale of Optimum Coal Mine' *GroundUp* 29 November 2016 available at https://www.groundup.org.za accessed on 20 December 2022.
[994] Ibid.

Zuma plan came to fruition at Eskom when Molefe was seconded there as CEO. It was not surprising that as soon as Molefe landed at Eskom, the board abdicated its duty and responsibility and handed him authority to finalise the Coal Supply Agreement (CSA) Addendum already approved.[995] This decision was not coincidental but was deliberate. It is not farfetched that Molefe already had a brief to assist Tegeta, and the resolution of the board of directors inspired him. It is inexplicable how Eskom walked away from the Addendum that would have benefited it and OCH. OCH would have been able to supply Eskom coal, and in return, Eskom would not have had to pay exorbitant prices for coal, issue a guarantee and approve payment for a pre-order. The length to which Eskom went to secure the supply of coal from Tegeta was out of step with a normal business transaction and unjustifiable, the researcher argues. Eskom was not in the business of guaranteeing third parties funding but to generate, transmit and distribute electricity.

The board, during the chairmanship of Tsotsi and Ngubane, allowed executive managers to circumvent the Procurement Framework under the pretext of emergency.[996] This culminated in Eskom providing guarantees for a third party. Neither Eskom nor its executive managers had the authority to provide guarantees because such power resides with the Minister of Finance with the recommendation of the executive authority of the DPE, provided they are for Capital Expenditure (CAPEX) and for liability guarantees of Eskom.[997] Eskom cannot give a third-party guarantee, indemnification, or financial commitment unless that is done in line with section 66(3) (c), read with section 70(1)(b) of the PFMA.[998] Despite these provisions and clause 15.3 of the MOI, the board of directors of Eskom allowed the executives to do so in favour of Tegeta even before it became the owner of OCH. In fact, the board of directors unanimously approved a pre-acquisition agreement that committed Eskom to purchasing

[995] Chipkin et al op cit note 764 at 16. The negotiations took long but the Optimum Coal Mine (OCM) was advised that the Executive Procurement Committee approved the terms and of the fourth amendment.

[996] Gigaba did not sanction Matjila for taking a decision to sponsor TNA even though Eskom did not have the money. Parliamentary Committee Report 'Corporate Governance at Eskom; "Who is who in the Zoo"' 2017 *Parliamentary Monitoring Group* 2. Dames lamented that competent executives were let go but the Parliamentary Committee was not concerned. Dames's departure followed by competent technocrats caused Eskom to lose a team with 100years experience.

[997] Chipkin et al op cit note 764 at 22; Treasury Regulation 34.13.1.

[998] Section 66(1) of the PFMA. 'An institution to which this Act applies may not borrow money or issue a guarantee, an indemnity or security, or enter into any other transaction that binds or may bind hat institution or the Revenue Fund to any future financial commitment, unless such borrowing, guarantee, indemnity, security or other transaction- |(a) is authorised by this Act; and in case of public entities is also authorised by other legislation not in conflict with this Act…'

1,250,000 tons of coal. Everything that the Eskom board did ran counter to all tenets of good corporate governance. The conduct of the board of directors of Eskom is inexcusable, unjustifiable and unethical. The board of directors acted contrary to Eskom's interests and let it down. However, the board took these decisions to appease the executive authorities and Zuma.

The board also gave the acting group financial officer, Anoj, the power to sign the guarantee and documents and do everything necessary to effect the said guarantee.[999] Effectively, the board neglected its fiduciary duties by giving Anoj Singh carte blanche to commit Eskom to Tegeta to the tune of R1,68 billion as a guarantee after it had paid R659 million towards the purchase of OCH.[1000] The justification for the guarantee was that Eskom was financially constrained; therefore, the guarantee was better than making an outright payment to Tegeta. Eskom was not obligated to make a payment to Tegeta for no value. Many executives within the employ of Eskom, including Daniels, Govendor, Koko, Molefe, Singh, Dr Nteta, Vusi Mboweni, Mabelane Matjila, and Maritz, left Eskom one way or another in the lurch.[1001] They failed Eskom. According to the Zondo Report, Anoj Singh defrauded Eskom when he knew the R659 million payment was unjustifiable. The researcher agrees with the conclusion of the Zondo Commission that Singh must be investigated, and the findings referred to the NPA to prosecute him. It is disappointing and outrageous that Eskom's executives worked in tandem to break down the fabric of the systems of financial management and internal controls.[1002] These executives were responsible for ensuring effective, efficient, economical and transparent use of the money and other resources in a responsible manner but failed.[1003]

They were duty-bound to take effective and appropriate measures to prevent irregular expenditure, fruitless and wasteful expenditure, and under-collection on behalf of the Eskom.[1004] Last but not least, they failed in their duty to manage and safeguard the assets and liabilities of Eskom responsibly.[1005] Responsibilities are carried out as they should be availed Tegeta a guarantee of that magnitude under the pretext that it was paying it to OCM.

[999] Chipkin et al op cit note 764 at 22.
[1000] Zondo Report Part 4 Vol 2 op cit note 646 at 1048-1049. Singh, Govendor, Daniels Molefe and Koko. Daniels and Govendor prepared the resolution that facilitated the payment. Singh facilitated payment including the R659 million.
[1001] Ibid at 1039 – 1066.
[1002] Section 57(1)(a) of the PFMA.
[1003] Ibid at subsection 57(1)(b).
[1004] Ibid at subsection 57(1)(c).
[1005] Ibid at subsection 57(1)(e).

Furthermore, Tegeta neither had the coal nor the coal mine from which it could deliver from. The conduct of Eskom constituted an irregularity and contravened its procurement policies. Although the board of Eskom made the decision to give Tegeta the guarantee, it was not legally bound by it because Eskom management acted unlawfully and ultra vires. Issuing guarantees and indemnities by Schedule 3 SOEs is prohibited if it is not done with the permission of the executive authority in charge and the Minister of Finance, which accords with section 70.[1006] Such guarantees, indemnities and or security contravened section 68 of the PFMA. However, this fact was evidently lost to Brown because when questioned about the R1,6 billion guarantee, she claimed that it did not meet the threshold of materiality. Therefore, management acted lawfully. To her, it fell within the threshold of the board of directors, whereas the MOI totally prohibits the action and the PFMA.[1007] This demonstrates the extent to which Brown actively endorsed non-compliance with internal controls and good corporate governance at Eskom. This was and still is criminal and should be punishable by invoking section 86 of the PFMA.[1008]

Both Brown and Gigaba underplayed the degree of their active involvement in the management of the DPE SOEs. Brown lied without batting an eye to the Parliamentary Committee and the Zondo Commission. She denied consulting outsiders in the execution of her functions as the executive authority in charge.[1009] Brown denied that she called Tsotsi and instructed him to include Tsholefelo Molefe in the list of the four executives to be suspended. [1010]The instructions to Tsotsi confirmed Brown's participation in the management of Eskom. Also, Brown and the accounting authority failed to have Collin Matjila, the acting CEO of Eskom, disciplined for taking a decision to sponsor The New Age (TNA), knowing that Eskom was in a dire financial position. The AG raised this irregularity during the audit of Eskom and recommended that Matjila be disciplined.[1011] Unlike Dames, who had resisted pressure to

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[1006] Section 66(3)(c) read with section 70(1) "A Cabinet member, acting with the concurrence of the Minister (given specifically in each case or generally with regard to a category of cases and subject to any condition approved by the Minister), may issue guarantees, indemnity or security issued which binds – a national public entity referred to in section 66(3)(c) in respect of financial commitment incurred or to be incurred by that public entity" Payment of such guarantee or security is a charge shall be a charge against the public entity according to section 68(2)(b).

[1007] Parliamentary Committee Report 2017 Eskom Enquiry Lynne Brown 22 November 2017 1-19. Tsotsi testified before the Parliamentary Committee that Brown's executive function was executed after consultation with Tony Gupta, Saleem Essa and other Guptas. The allegation she denied. *https://pmg.org.za/page/eskom-inquiry-lynne-brown.*

[1008] Section 86.

[1009] Ibid. Zondo Report Part 4 Vol 2 op cit not 646.

[1010] Ibid.

[1011] Chipkin et al op cit note 764 at 147.

sponsor the TNA breakfast show, Matjila did the opposite.[1012] Dames insisted that procurement procedures should be followed, and this did not auger well with the powers that be.[1013]
Gigaba ordered Dames and the acting chairperson, Mpho Makwana, to cancel the Koeberg steam generator tender because they did not have authority, which Dames and Paul O'Flaherty, the Financial Director, were unaware of.[1014] O'Flaherty resigned from Eskom. Gigaba and the board made Dames' continued employment untenable, and he resigned to pursue other opportunities.[1015] Furthermore, the reality at Eskom was that Gigaba, during the state capture period, did everything in his power to retain his cabinet position in the Zuma Cabinet.[1016] Gigaba involved himself in the management of Eskom as if he were an executive manager.

For example, Gigaba did not limit his involvement at Eskom to appointing the board of directors during Dames' tenure as the CEO. According to him, Gigaba brought inexperienced 'kindergarten' advisors in the electricity generation, transmission and distribution space to exercise authority over experts at Eskom.[1017] These presumptuous young advisors with overinflated egos treated senior executives with disdain because of their proximity to Gigaba.[1018] Gigaba's special counsel, Siyabonga Mahlangu, was audacious. Dames testified that he called him to a meeting at Sahara, the Guptas company, and told him they were willing to work with him.[1019] Mahlangu was part of the entourage that travelled to India with Duduzane and Tshepiso Magashule.[1020] The researchers contend that Mahlangu's proximity to the Zuma family and to Gigaba gave him the impetus to tell Dames to avail himself of a meeting with

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[1012] Hofstatter op cit note 377 at 80-81.
[1013] Ibid. Parliamentary Committee Report 2017 op cit note 996 at 3-5.
[1014] Ibid. Dames submitted comprehensive recommendations to Tsotsi and Matjila about the Koeberg steam generator after extensive work having been done by the Koeberg team. He informed them that the board should be in a position to award the tender between two companies. Matjila subsequently brought a handwritten note with instructing him to award the tender and this he refused to do and formally submitted a formal letter to that effect.
[1015] Ibid at 3-10. Dames had requested a) performance expectations; b) control over executive appointments; c) asked for a Chief Operating Officer (COO) because O'Flaherty had resigned and Eskom was too big to be run without one in the absence of the former Financial Director; d) wanted his salary corrected; and e) to retire at 55 years like other CEO were. He was denied a COO.
[1016] Procurement of the steam generator for Koeberg was interfered with per instruction from Gigaba.
[1017] Hofstatter op cit note 377 at 79.
[1018] Ibid.
[1019] Ibid. During the Mahlangu meeting with Dames and the Guptas he was asked to organise a coal contract for the Gupta companies for Lethabo; Eskom build a gigantic power station which the Guptas would supply coal to; and to purchase thousands copies of TNA. Basically the Guptas wanted Eskom to substitute its coal supplier. This Dames found unpalatable.
[1020] Ibid at 79. Mahlangu was a director of Edward Nathan Sonnenbergs. He was presented when the Guptas offered Vuyisile Kona the SAA CEO R500 000.00 to do as instructed by the Guptas family.

the Guptas. Tsotsi, Gigaba's appointee to the chairman's position, had a conflict of interest in companies doing business with Eskom. Gigaba was aware that Tsotsi was compromised but went ahead and appointed him. He did so for nefarious reasons. If, indeed, the directors he appointed were vetted, Tsotsi should not have been chairing that board.

Gigaba made questionable appointments to the board, the CEOs and the CFO. Gigaba approved the appointment of Zethemba Khoza, who has questionable experience and qualities.[1021] He also appointed Collin Matjila, who was mired in controversies such as his involvement in the mismanagement of Cosatu pension funds, the loss of millions of rand in property deals and one for Essa.[1022] These appointments by Gigaba and Brown were irresponsible and in stark contrast to the PFMA. The Gigaba and Brown boards of directors at Eskom did not ensure that 'effective, efficient and transparent systems of financial and risk management and internal control' were maintained.'[1023] The board failed to keep in force adequate, systematic and clear 'financial and risk management and internal controls. This is indicative of a lack of commitment to good corporate governance and collaboration with the executive authority[1024] at the expense of the future of the country. The DPE executive authority in charge always excused the inexcusable or feigned ignorance. For example, Gigaba's response to the Parliamentary Committee about the worth of the chairpersons appointed to lead the board, such as Khoza and Tsotsi, claimed that he was unaware that there were incompetence issues or conflict of interest. He hid behind the Cabinet because the names of the board and chairpersons were presented to it, and it approved their appointment. That was disingenuous and implausible. Had he not recommended their names for designation to the Cabinet, they would not have held such positions. Honest executive managers would have been spared the aggravation.

Dames, in his testimony before the Parliamentary Committee, contended without hesitation that he felt the pressure as soon as Gigaba landed. Koeberg maintenance tender would have proceeded without delays but for Gigaba's instruction to him and Makwana to halt

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[1021] Parliamentary Committee Report 'Eskom: Inquiry Gigaba' 2018 *PMG* 1-21 https://www/pmg.org.za.
[1022] Hofstatter op cit note 377 at 8. Matjila denied benefitting in the property transactions.
[1023] World Bank Group 'An Incomplete Transition: Overcoming the Legacy of Exclusion in South Africa' 2018 *The World Bank* 123; Section 51(1)(a)-(h) and 51(2) of the PFMA. Subsection 51(1)(h) compels the board to ensure that public entities conform to the PFMA and any other legislation applicable to them.
[1024] The board of directors of Eskom veered away from governance which was maintained during Dames tenure. The board of Eskom under the leadership of Tsotsi's chairmanship compromised good corporate governance by not following and enforcing the PFMA emphasised in section 51(1)(a)(iii) and section 217 of the Constitution.

the tender process. This conduct was clearly contrary to the procurement procedures. It compromised good corporate governance at ESKOM. Although the Eskom board was required to ensure that the procurement and provisioning systems were fair, equitable, transparent, competitive and cost-effective, it failed.[1025] Eskom was plagued by procurement issues which were not in line with section 51(1)(a)(iii) of the PFMA. Advance payments were the order of the day. Brown took over where Gigaba left off with great enthusiasm, which saw Eskom layout guarantees and make advance payments. This was a flagrant contravention of good corporate governance. According to Dames Eskom, he was governed professionally and transparently during his tenure prior to the new board. Eskom did not get a qualified audit during his tenure.[1026] He left Eskom at the end of December 2013. He was replaced with Matjila, who went on to make questionable decisions on the TNA sponsor, a decision that Dames resisted making. The Guptas TNA received sponsorship from Eskom even though it had priorities that required attention.

Brown elevated Ngubane to chair the Eskom board, who went on to immerse himself in the affairs of Eskom. He, along with the board, approved the pre-purchase of coal from OCM. His justification was that the pre-payment of R1.86 billion to OCM/Tegeta would result in a saving of R238.9 million.[1027] The prepayment to OCM/Tegeta would be used to pay off its existing liabilities and retain its going concern.[1028] Furthermore, Ngubane contended that if OCM did not get the advance, the mine would have to close down, resulting in more than 1000 job losses.[1029] It is perplexing to the researcher that Eskom spent money it did not have to save a private company linked to the Guptas to service its coal need when the same was not done for Exxaro.[1030] Although Eskom had made advances in the past, these did not accord with a moneylender and did not have, and it still does not have the authority to do so. Eskom board's conduct was clearly contrary to good corporate governance. Ngubane failed during his chairpersonship to steer the Eskom board to imbue good corporate governance.

5.1.3.9. Executive managers' approach to good corporate governance.

[1025] Section 51(1)(a)(iii).
[1026] Eskom Media Desk 'Disciplinary hearing recommends summary dismissal of Suzanne Daniels – Eskom' *Politics Web* 23 July 2018 available at https://www.politicsweb.co.za accessed on 23 February 2024.
[1027] Ibid.
[1028] Ibid.
[1029] Parliamentary Committee Report (2015/2016); Parliamentary Committee (February 2018) *Eskom Inquiry* 2-4. The job losses were considered serious and resulted in the DMRE and DPE Ministers working with Eskom to expedite the award of the license to Tegeta's OCM to facilitate the advance of R1.86 billion.
[1030] Ibid at 1. Mxolisi Mgojo, the CEO of Exxaro disputed Anoj the GCFO of Eskom's claim.

The executives were and still are duty-bound to manage Eskom in a professional, transparent, accountable and ethical manner. Dames testified that during his tenure as CEO, governance was paid attention.[1031] He was neither a member of the Audit and Risk Committee (ARC) nor the Board Tender Committee (BTC). Dames did not involve himself in tender evaluations. In contrast, Matjila, in his short stint in his acting position as the CEO, made decisions that were contrary to ethical management and transparency.[1032] He learnt nothing from Dames' belief and approach that good corporate governance must be consistently followed. Matjila was replaced by Molefe, seconded from Transnet, and subsequently appointed the CEO for five years.[1033] It is important to highlight that Molefe and the acting CFO, Anoj, mimicked the modus operandi used at Transnet.[1034] They, with the board, did what they did at Transnet with some executive managers, which contributed to the collapse of good corporate governance. Although what transpired at Transnet is not a subject of this chapter, there is no argumentation that Molefe and his lieutenant Anoj sounded a dearth-knell to good corporate governance at Eskom as they did at Transnet.

Molefe, in his enthusiasm to please Brown, the Guptas and Zuma, did everything within his power to ensure that unjustified payments were made to underserving companies such as Deloitte, McKinsey, Optimum Coal Mine, Regiments, Tegeta and Trillian Management.[1035] His ascension to the CEO position proved to be to the detriment of Eskom. Extraordinary decisions were taken with unprecedented boldness. The contempt for good corporate governance, particularly in procurement, compliance with internal controls contemplated in the

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[1031] Parliamentary Committee Report 2017 op cit note 996.

[1032] Hofstatter op cit note 377 at 80. Dames was of the view that Eskom's CEO mandate was not to buy newspapers. Dames was more focused on ensuring that Eskom generate electricity. He referred the proposal to buy The New Age to the Eskom's media procurement team. He advised the team to follow procurement procedures and be consistent. Matjila did the opposite.

[1033] Parliamentary Committee 2014/2015 Report 'Eskom on its 2014/2015 Annual Report' available at *https://pmg.org.za/committee-meeting/21776* accessed on 23 February 2024. During the presentation of the 2014/2015 results Molefe reported that all acting positions were filled. Furthermore that Koko's suspension was lifted.

[1034] Hofstatter op cit note 377 at 46 – 45 and The R2.7 billion tender for 95 locomotives was awarded to China South Rails excluding Bombardier a company that had submitted a tender deserving of the contract. Subsequently Bombardier was awarded 240 of the 1064 locomotives required by Transnet. Bombardier sold the jet to Guptas at a discount. and increased the cost of supplying 240 locomotives to Transnet by R5 billion. Bombardier was not a stranger to corruption. Anoj the CFO and Molefe the CEO were both seconded to Eskom and subsequently appointed on contract to Eskom brought to Eskom continued to manipulate successful suppliers and make upfront payments. They also paid inflated prices to suppliers of goods and services. He moved with Molefe from Transnet to Eskom. They continued to procure goods and services contrary to Eskom's procurement procedures in the process not complying with good corporate governance.

[1035] Mosilo op cit note 445; Hofstatter op cit note 377 at 3; Williams op cit note 445 at 125.

PFMA, and legislation, cannot be understated. Eskom was financially bled dry, exacerbating its dire financial position. The conduct of Eskom's executive was and still is inexcusable, irresponsible and criminal. It is good that finally they and their associates are criminally charged and brought to account. Unfortunately, the kingpins such as Atul, Ajay, Duduzane and Zuma are still free. Atul and Ajay left the country poor.[1036] The firm, South Africa Incorporated, is falling apart because the Guptas's tentacles reached almost every sphere of the SOEs' businesses. With Zuma in the vanguard, there was no stopping the executives, some Ministers, the Guptas and their associates. There were a lot of secrets kept from Parliament even when seeking information from the executives, non-executive managers and the ministers in charge.

The executive managers neither disclosed nor acknowledged that Eskom was fraught with financial challenges and electricity generation problems. Instead, they recklessly spent money Eskom did not have, leaving the government with a huge debt and guarantees that would be an albatross for future generations.[1037] Their focus was to dispense with good corporate governance in the process, exhausting its financial resources with the blessings of Gigaba, Brown and Zuma. Money borrowed from the international funders funded corruption, which became a cost driver.[1038] The effects of their unethical, irresponsible, and unprofessionalism revibrate throughout the country and internationally and will be felt for a long time in the country. Evidently, they were least concerned about how corruption and state capture would affect the country financially and reputationally. The publicity surrounding corruption, dishonesty and rumblings around Eskom's non-compliance with good corporate governance neither bothered executive and non-executive managers nor the executive authorities in charge. The leaked email correspondence amongst the Guptas business cohorts and captured employees of Eskom and other SOEs put the looting at Eskom in the public domain. This was

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[1036] Stephen Grootes 'Brian Molefe and Anoj Singh arrests: SA's return to Justiceland will take an excruciatingly long time' *Daily Maverick* 29 August 2022 available at https://www.dailymaverick.co.za accessed on 20 December 2022; Nivan Pillay and Litha Nyhonhya directors of Regiments were also arrested; Comins Lyse 'State capture kingpin Brian Molefe and three others arrested. They were arrested for their role in the R398.4m fraud and corruption whilst they were executives at Transnet. Although they were not arrested for their activities at Eskom they mirrored similar activities at Eskom. They are most likely to be arrested for their criminal activities at Eskom; Hofstatter op cit note 377 at 72. According to Hofstatter, Regiments benefitted R485m for advice given Transnet which increased the cost of 1064 locomotives from R38billion to R54billion and increase of 40%.The Guptas, Duduzane, Tshepiso Magashule and Zuma have not yet been charged and or arrested.

[1037] Sarah Smit 'R57-billion: How the Guptas played Monopoly with state money' *Mail & Guardian* 23 June 2022 available at https://mg.co.za accessed on 20 December 2022.

[1038] Hofstatter op cit note 377at 75.

no longer rumours and innuendos but the reality of corruption and state capture.[1039] The revelations culminated in the Public Protector's report of October 2016, which was a precursor to the Zondo Commission. Nevertheless, the damage had already been done. The executive managers compromised Eskom not only by making unjustifiable payments but also by continuing to accept coal that was outside the specifications required for its power stations.[1040] This was deliberate. Eskom changed reports of the quality of coal supplied by the Guptas-linked company because the coal was unsuitable.[1041] Eskom stopped using the ISO-accredited laboratories.[1042] It is not surprising that Eskom's electricity generation facilities are haunted by breakdowns.[1043] These collapses are indicative of the wheels falling of good corporate governance. This exacerbated Eskom's challenges, although the practice was not new. Eskom compromised its reputation nationally and internationally.

According to Ashley Brian et al., a properly managed SOE qualify for cheaper finance. 'Indeed, as a public rule, public utilities qualify as low-risk borrowers, so money can be borrowed at relatively low rates because the risk of default is low.'[1044] Due to the failed execution of internal controls, accountability and responsible management, Eskom compromised its capacity to raise money from local and international financiers at a good interest rate. This self-created constraint had far-reaching repercussions for electricity generation, distribution and transmission and costs of finance to the whole of South Africa. Eskom management, board, ministers and enablers dug a hole deeper than the black hole in

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[1039] Public Protector Report (3 of 2015/2016) op cit note 65; Zondo Report Part 4 Vol 1-4 op cit note 646 and 635 is littered with how the rot set in, the role played by Guptas' people intermediaries and businesses; Mpati Commission Report 2021; Nugent op cit note 541; Amabhungane '# Gupta leaks: How Eskom was captured' *Mail & Guardian* 8 June 2017 available at *https://mg.co.za* accessed on 20 December 2022.

[1040] Ibid. Staff Writer 'Eskom paid Gupta mine millions for coal it couldn't even use – report' *BusinessTech* 26 August 2016 available at https://businesstech.co.za/news/energy/134731/eskom-paid-gupta-mine-millions-for-coal-it-couldnt-even-use-report/ accessed on 23 February 2024. Eskom signed a 10years contract with Tegeta Capital Resources for coal they both knew was not beneficial for within specifications. The contract was R400 million.

[1041] Ibid. Yanga Sibembe 'How historical use of poor-quality coal has affected Eskom's efficiency and load shedding' *Daily Maverick* 15 March 2019 available at *https://www.dailymaverick.co.za* accessed on 20 December 2022. Evidence was provided to the Zondo Commission that in 2015 already Tegeta Mining Resources supplied 'sub-standard'coal. At the insistence of Koko Eskom paying Tegeta Mining Resources R130 million for coal unsuitable for purpose.

[1042] Zondo Report Part 4 op cit note 635 and 646 at 884. Magwaza also confirmed the role of Koko in the sanctioning approval of the use of coal that did not meet the requirements. Sethowa confirmed that Kendal laboratory was used to test the quality of the coal supplied by Tegeta's OCM before it was accredited in October 2017. It is important to note that Kendal Laboratories was used as far back to 2015 to accommodate OCM. According to Mashigo in his 26 years at Eskom the company did not use unaccredited laboratory.

[1043] Op en Secrets: *The Enablers* op cit note 467

[1044] Ibid at 129.

Kimberley. This undermined the achievements of Eskom, connecting the people left out of the electricity grid by the Apartheid.

5.1.3.10. The public conduct, private sector business, employees and other factors

The public let themselves down by failing and or refusing to pay for the electricity they consumed. Others engaged in criminality by stealing cables and causing substations to catch fire by tempering with them. This created financial challenges for Eskom. Some connected themselves and their tenants to the grid. They did not pay. The culture of non-payment went deep, going back to 1986 when the community of Soweto boycotted rent payments and electricity. They were demanding the release of Mandela. Mufson posits that 30 years after Mandela, the residents of Soweto were still resisting paying electricity.[1045] According to him, a fifth of them paid electricity. In 2014, the people of Soweto still refused to pay for electricity because the ANC in the 1994 election campaign had promised free electricity for all.[1046]

The culture of non-payment is still intact. Soweto was known for debt relief every time towards the elections. Recently, the Premier of Gauteng, Panyasa Lesufi, intimated that Soweto's electricity debt will be written off. Furthermore, the public conducted itself abominably by turning a blind eye to cable theft. The researcher posits that the Premier was not doing Eskom a favour by supporting the culture of non-payment and scraping arrears in every election circle. He is aware that Eskom is struggling financially. He should instead encourage those Sowetans to pay to do so. People must be re-educated about paying for services; however, it may be difficult to convince people to pay when Eskom was besieged by corruption and state capture. The Zondo Commission brought that into sharp focus. De Ruyter, during his eNCA interview, opened a can of worms. If what he says is true, this suggests that people do not care and are not scared of arrest.

Eskom's challenges in the 20th Century during the NP government, in the last sixteen years of that Century and in the 21st Century of the ANC government are similar but have worsened.[1047] There were electricity shortages and high price hikes. A price increase of 166%

[1045] Steven Mufson 'A boycott on paying electricity in Soweto outlives even Nelson Mandela' *Washington Post* 21 December 2013 available at *www.washingtonpost.com* accessed on 20 December 2022.
[1046] Xola Potlwa 'Soweto's unpaid bills add to Eskom's financial woes' *Mail & Guardian* 19 Nov 2014 available at *https://mg.co.za* accessed on 20 December 2022; Staff Writer 'ANC promised Soweto free electricity' *BusinessTech* 11 May 2015 available at *https://businesstech.co.za* accessed on 20 December 2022.
[1047] Cowan op cit note 718 at 13.

angered the farmers, which led to the establishment of the De Villiers Commission.[1048] Hoffstatter posits that all the Whites and farmers in the most far-flung areas enjoyed electricity in 1994 whereas, just under a third of the Africans were connected to the grid. Electricity rationing, currently referred to as load shedding, did not affect Blacks because they did not have access to electricity but was limited to mines and municipalities. Municipalities catered for Whites, so it follows that they were affected. Africans did not know about load shedding or electricity; therefore, they were not directly affected by this phenomenon load shedding.[1049] They were not on the grid. The NP government was sensitive to its farmers, who were its voting fodder.

Today, the majority of the previous ones are on the grid. It is misleading and unfortunate that those who experienced rotational power then developed amnesia of convenience. It is also unfortunate that today, Eskom is unpaid by the majority of municipalities servicing people previously left off the grid. Instead of those able to pay, they are still withholding payment when they shouldn't be. The researcher is not suggesting that only Africans pay for their electricity. Some pay, others do not pay.

For Soweto, the current government was reluctant to crack the whip because of the much-needed voters. This approach is like the NP's sensitivity to its votes. The difference between the NP and the ANC government is that the ANC brought in measures for good corporate governance when it came into power, such as - the Constitution, Companies Act, Procurement Frameworks, the PFMA, the Protocol, Treasury regulations and applicable policies in the SOEs and other organs, of the state. Not It should not have compromised good corporate governance. The ANC allowed Zuma to repurpose SOEs. It blindly gave him carte blanche. He was protected by members of parliament from many notices of no confidence in corruption and state capture. They supported Zuma under the guise of radical economic transformation (RET). RET was a myth and a smokescreen to benefit the connected few.[1050]

[1048] Steyn op cit note 857

[1049] White South Africa was impacted because they had electricity. The NP ensured that even the poorest of the poor and those in far flung areas such as farmers were catered for. Their voices were heard. Africans were not economically active like the whites. There were job reservations and the economy activity and real businesses were exclusive to them. Come the ANC government African electricity roll-out happened which earned Eskom awards.

[1050] The NP also benefited members of the Broederbond. They benefited from procurement and knew which land was targeted for development.

Having brought a substantive percentage of households on the grid, Eskom undermined its success by not collecting municipal debts. The municipalities non-payment ballooned between September 2021 and 31 July 2022. Municipalities owed Eskom R49.7 billion.[1051] However, based on appeal cases brought by Eskom against Emalahleni Local Municipality and Thaba Cheu Local Municipality supported by others, it is evident that emphasis is put on Eskom to observe the Constitution and the intergovernmental department in terms of the Intergovernmental Relations Framework Act of 2005 (Act 13 of 2005). The question that has not been answered is how Eskom can comply with its duties in terms of section 51(1)(a) of the PFMA and its Constitutional obligation when municipalities fail to honour their duty to pay for electricity availed.[1052]

The researcher is not suggesting that Eskom must be given a free ride or carte blanche to switch off municipalities as and when it wants to, but the courts should be cognizant of the reality that non-payment is one of the contributing factors to Eskom's inability to service its astronomical debt and reduce load shedding. It is also incumbent on Eskom not to allow the debt to grow uncontrollably and then switch off municipalities. Eskom must robustly implement internal control and financial management to raise the alarm as soon as municipalities are in arrears. Furthermore, it must be willing to notify the government department responsible to ensure that they are not found wanting by the court and that its decisions are reviewed and set aside.

5.1.3.11. Eskom and municipalities employees and contractors and private sector enablers

Some employees were enablers. They assisted the public in connecting and reconnecting electricity illegally. A senior employee of Eskom failed and/or refused to pay for electricity for years.[1053] Hewu, responsible for ensuring that Eskom's debts were paid, was himself the perpetrator of criminality. With a salary of R3.4 million per annum, Hewu, a senior executive,

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[1051] Victoria O'Regan 'Eskom is owed R50bn by municipalities – This infographic shows which council owes what' *Daily Maverick* 13 September 2022 available at *https://www.dailymaverick.co.za/article/2022-09-13-culture-of-non-payment-leaves-eskom-with-a-r50bn-debt-headache/* accessed on 20 December 2022. Non-payment surged by R10bn between September 2021 and July 2022.

[1052] *Eskom Holdings Soc Limited v Resilient Property (Pty) Limited and others and Eskom v Sabie Chamber of Commerce and Tourism; Thaba Cheu Local Municipality and others v Sabie Chamber of commerce and Tourism and others* 2021 (3) SA 47 (SCA).

[1053] Sabelo Skiti 'Eskom exec 'quietly enjoyed' free electricity for at his home for14 years' Sunday Times 13 December 2020 available at *https://www.sundaytimes.co.za* accessed on 20 December 2022.

knew about the Code of Conduct of Eskom and should have diligently avoided this undesirable conduct. He oversaw enforcement and collection but excluded himself from accountability.

Hofstatter articulated how Eskom endeavoured to protect Koko by appointing Cliffe Dekker Hofmeyr and Nkoki to cover the tracks of brazen corruption and theft. In addition to the Guptas and their associates, as well as connected companies which were involved in corruption and state capture, there were others who tried to operate under the raider screen, according to Cowan. Cowan, in her book, referred to other corrupt players who looted Eskom from within, such as former executives like France Hlakudi and Abram Masango, who collaborated with Eskom suppliers of services Tubular Construction Projects through its directors Antonio Trindade and Michael Lomas and businessman Hudson Kgomoeswana.

These people were charged, and Lomas fled to the UK; however, his extradition was sanctioned by the Magistrate's court. The classic one was the persistence of Tshitangano and Dabengwa's single-minded support of Econ Oil and Mlonzi for the supply of diesel. De Ruyter was concerned with the high diesel price Econ Oil was being paid. Econ Oil did not comply with the Procurement Framework because it was not a refinery as specified in the tender document, but it had support from the Tshitangano and Director Dabengwa. Eventually, the Econ Oil contract was cancelled. The cancellation was challenged in court.[1054]

Employees in positions of trust have compromised and contributed to non-compliance with Procurement Frameworks. Cowan posited that De Ruyter, the GCE, was of the view that if CPO Mmbulaheni Tshitangano was earnest about saving Eskom money, he should have stopped the abuse of the practice of free-text procurement. Free-text procurement allows purchases of goods from approved, cost-effective suppliers.[1055] Purchase prices were overinflated. For instance, a single-ply toilet paper worth R4.99 was purchased for R26; one refuse bag costing R2.99 was paid for R51 each and a wooden handle mop of R39 was bought for R200 000.[1056] The Procurement Framework is ineffective because executives with oversight ignore the infractions. The free-text purchases are cumulatively huge, and Eskom has lost money historically and continues to do so.

[1054] Jan Cronje 'The big switch: Eskom ask court to undo 'patently unlawful' R8 billion contracts with Econ Oil news24 10 June 2021 available at *https://www.news.com* accessed on 20December 2022; *Eskom Holdings Soc Ltd v Econ Oil & Energy (Pty) Ltd* [2021] 3 All SA 857 (GJ).
[1055] Cowan op cit note 718 at 132.
[1056] Ibid at 132.

5.1.3.12. The private sector, international and local executives of Eskom

The private sector companies, both listed on the local and international stock, collaborated with the executives of Eskom. These companies inflated their invoices at Eskom for services rendered and unrendered. These inflated bills were not picked up, and if they were indeed realised, the internal controls failed. Collusion blossomed. Asea Brown Boveri (ABB), a supplier of service at the Kusile Power Station build, was appointed contrary to the Eskom Procurement Framework. Koko, a very senior executive's daughter and a shareholder of Impulse International was subcontracting to ABB.[1057] Koko, his associates and family, Mokwena, Frans Sithole and Watson Seswai, were charged by the NDP for the ABB deal and are on bail.[1058] Recently, the charge against Koko, his family, and associates was struck off the roll.[1059]

The debt, however, pales to the amount of money unjustifiably paid by Eskom in pursuit of corruption. The extent of corrupt payments and collusion costs that engulfed Eskom and uncollected municipalities' debt suggest that effective and appropriate steps to protect its finances contemplated by the section 45 PFMA failed. Influenced by politicians, Eskom deliberately did not crack the whip on defaulting municipalities or curb unjustifiable spending, corruption, and failure to tighten financial controls.[1060] The conduct of the board of directors and the mandated executives was indicative of the non-observance of Eskom's procurement Framework, which is at the heart of good corporate governance failure. Eskom executives and

[1057] Naledi Shange 'Eskom contractor ABB agrees to pay back R1.6 billion for 'overpayment' *Times Live* 11 December 2020 available at *http://www.timeslive.co.za* accessed on 20 December 2022.

[1058] Cowan op cit note 718. Matshela Koko and his family benefited from a corrupt contract between Asea Brown Boveri (ABB) which was initially awarded Siemens. In 2015 his company Impulse International was owned by Koko and his family and collaborated with Thabo Mokoena the owner of Leago Engineering. The unqualified Impulse International was subcontracted to ABB to do cabling work at Kusile. Mokoena and Koko's business relation ended. ABB self-reported to the DOJ and returned R1.577bn to Eskom; Kganyago Kaiser 'SIU welcomes the arrest of Former Executive of Eskom, Matshela Koko and seven others' South African Government Special Investigating Unit Media News 28 October 2020 available at *https://www.gov.za* accessed on 20 December 2022. They are charged with fraud, corruption and money laundering. Koko contravened the section 217(1) of the Constitution which enjoins open tendering, fairness, openness and competitive pricing. Koko, Mokwena, Sithole were released on R300 000.00 bail.

[1059] Emsie Ferreira Charges against Koko and co-accused removed from the roll *Mail & Guardian* 21 November 2023 available at https://mg.co.za/news/2023-11-21-case-against-koko-and-eskom-co-accused-removed-from-roll/ accessed on 26 February 2024.

[1060] Hofstatter op cit note 377 at 197 - 221. It is interesting that there was a woven web to protect looters and state capturers by hook or crook. The report concluded and submitted by Cliffe Dekker & Hofmeyr and Nkoki was unconvincing and the court and the Public Protector were not sold on that. In fact the Public Protector of State of Capturer clearly demonstrated that there was corruption and state capture at Eskom which required further investigation. The State of Capture Report of the Public Protector was a precursor to the Zondo Commission findings.

non-executives took advantage of the situation, in particular, what was being done for the Guptas and their associated companies. They confidently believed that they could hide behind them. There was lethargy and malaise within Eskom, which undermined the country's democracy spectacularly. It is regrettable that none of the participants in corruption and state capture cared about South Africa Incorporated or had respect for good corporate governance. These failures are imputable to Zuma, Gigaba, Brown and their appointed executive and non-executive managers.[1061] These three players were not bothered with and were not concerned about what would happen to Eskom if their financial interests were realised. Instead, Gigaba and Brown never acknowledged their role in Eskom's complete failure but blamed the boards and the executives for irregularities and unauthorised payments. Interestingly, these managers failed Eskom, but their enthusiasm to actualise the bidding of the Guptas companies was unmatched.[1062] Molefe failed to exercise his fiduciary duties as a member of the board of directors as he should have in line with the Companies Act and the PFMA.[1063]

Koko, amongst the acting CEOs and in his capacity as the head of generation, shared confidential information with the Guptas and gave Tegeta special treatment. That impugned Eskom's Procurement Frameworks. Matjila deliberately disregarded procurement processes and procedures at Eskom. He failed to follow the example set by Dames from 2010 to the end of 2013 by not involving himself in procurement committees. Dames, the longest-serving CEO of Eskom after Gcabashe, endeavoured to uphold and manage with integrity, strengthen internal controls and follow Eskom's Supply Chain Policies, but that was most unwelcome by the powers that be. He was overwhelmed by the interference from Gigaba and Tsotsi and threw

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[1061] Thanduxolo Jika 'Gigaba, Koko and Singh named in bombshell treasury Report on the rot at Eskom, Transnet' *Mail & Guardian* 16 November 2018 available at *https://mg.co.za* accessed on 28 January 2023. Gigaba compromised the procurement procedures at Transnet by witnessing the signing of the LSA with the Chinese locomotives company. The executives discussed the pre-payment before they attended the meeting where it was approved.

[1062] Jessica Bezuidenhout 'Matshela Koko and the Guptas' Brakfontein coal mess' *Daily Maverick* 27 February 2019 available at. *www.dailymaeverick.co.za* accessed on 28 January 2023. Mosilo op cit note 445 at 107-108. Molefe within a space of seven months Molefe called Ajay 44 times and him in turn called Molefe 14 times. Molefe hit the ground running when he was seconded to Eskom. His first business was to frustrate the OCM revised contract with Eskom. He slapped Glencore with huge penalties making it impossible for it to continue business with Eskom.

[1063] Section 76 of the Companies Act and sections 50(1)(a) to 50(2) as well as 51(1)(b) of the PFMA. From the previous chapter it is evident that executive and non-executive directors and the ministers Zuma appointed as the shareholder representatives for government (especially) to the SOEs were least concerned about good corporate governance.

in the towel. It was apparent that his continued employment at Eskom was no longer unsustainable.

Bringing in a new board headed by Mabuza in 2018 neither changed the culture of non-compliance with good corporate governance. Hadebe tried to clean up Eskom and came to realise that he was fighting a losing battle. He was succeeded by Chairperson Mabuza as the acting CEO, who did not put Eskom first. In both his capacity as acting CEO and chair of the interim board, nothing positive was achieved. He was compromised and should have declined his appointment as the executive Chairperson of the board.[1064] Instead, Mabuza received negative publicity for his niece, Nomvula Mabuza, acquiring the R100 million maintenance of boiler tubes contract with Eskom.[1065] Makgoba's elevation to the chairperson of the board did not change the culture of the corruption tender process at Eskom. Load shedding persisted. Andre de Ruyter (de Ruyter) came on board and held the position of CEO for almost three years but eventually capitulated under pressure and resigned.[1066] He gave the Eskom board three months. The researcher is sceptical of how De Ruyter's resignation will stop load shedding. Eleven CEOs later, there was no guarantee that load shedding would end.

5.1.3.13. Other factors – De Ruyter's interview

It would appear from the latest interview between Annika Larson of eNCA and De Ruyter on the eve of his departure from Eskom, which made startling revelations.[1067] These revelations suggest that the more things change, the more they stay the same. Corruption, fraud and theft continue to plague Eskom. De Ruyter told Larson that the embattled Eskom was a feeding

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[1064] Athol op cit note 445 at 84. It is interesting that he was eulogized after his death when he was involved in the appointment of Maseko at Eskom and was palling with Zuma.

[1065] Siyabonga Mkhwanazi 'Eskom scraps R100m contract to the former chairperson Jabu Mabuza's niece' IOL 1 August 2020 available at *https://www.iol.co.za* accessed on 28 January 2023. SABC News 'Former Eskom chairperson denies allegations of misconduct' *SABC* 2 August 2020 available at *https://www.sabcnews.com* accessed on 28 January 2023. After the contract was investigated it was established that there were improprieties regard the award of the contract. The price was increased from R90milliom to R100 million. ; Sabelo Skiti 'Eskom cancels dodgy R100m contract linked to tender linked to Mabuza's niece' *Mail & Guardian* 31 July 2020 available at *https://mg.co.za* accessed on 15 December 2022. The investigations revealed irregularities in the maintenance contract of boilers tube for Medupe . Nomvula Mabuza's company IDS Africa was awarded to the tender. Mabuza did not declare his interest in the contract although it was awarded to his niece. His indicated that IDS Africa had 47years experience. However, the company was registered three months after Mabuza's appointment to chairperson of Eskom in 2018.

[1066] Staff Writer 'Eskom CEO Andre de Ruyter reigns' *BusinessTech* 12 December 2022 available at *https://businesstech.co.za* accessed on 28 January 2023.De Ruyter's resignation was hailed by others and regretted by some. De Ruyter was criticized for not ending load shedding. He had declared that he would resign at the instruction of the president. Solidarity bemoaned the resignation of de Ruyter. Cowan op cit note 718.

[1067] Annika Larson on ENCA 21 February 2023.

trough. He contended that corruption was entrenched in the government, and there was no commitment to stop it in Eskom. De Ruyter posited that 'My estimate is that the money that gets stolen from Eskom is roughly R1 billion every month. We made inroads ….' He had realised that state capture was like a cancer that was unsuccessfully treated with metastasis. There was no intention to exercise internal control. Eskom became one of the breeding grounds for excesses.[1068] Mantashe, at the signing ceremony of the IPP contract, stated that De Ruyter was committing treason. Eskom was subverting the government by allowing continued load shedding to take the ANC government out of power. He asserted that there was a powerful minister who got his hold on Eskom. He referred to the smear campaign that was going around that he had for three years refused to cooperate with the State Security Agency to be vetted. He had never been requested to submit information prior to December 2022. This incensed the board and the ANC.[1069] A special board meeting decided to let him go immediately and not serve notice until the end of March 2023. He subsequently wrote subsequently book which is not discussed here.

5.1.3.14. Results and impact of failed good corporate governance

There are multi-factors that were and still are indicative of failed good corporate governance. Examples of failed governance in SOEs were discussed in the previous chapter. Eskom is a classic case of – a) corruption and state capture by both the ANC and the NP;[1070] b) ineffective

[1068] Mosilo op cit note 445 at 128 -129. Eskom paid Trillian R266 million without contacts or delivering services. Trillian was paid R30.6 million, McKinsey R70 million for doing nothing. Trillian was paid sufficiently it assisted Tegeta Exploration & Resources to assist it acquire Optimum Coal Mine. Another interesting example was a turnover of ten CEOs between 2010 and 2022.

[1069] SABC interview Minister Gungubele in the presidency attacked De Ruyter instead of protecting him. Mbalula the new Secretary General ANC was scathing about De Ruyter's interview.

[1070] Friedman op cit note 27 at 55-56. The NP senior executive of the NP and Eskom's Managers at the helm collaborated and discussed contracts with big multinational corporations in the 960s. Furthermore, the NP senior members used their position to assist multinational corporations acquire agreements with Eskom. Reference was made to Dr Rademeyer an former accountant saying that Eskom lost R67 million in the 1980s for the nuclear deal that went south. This is clear evidence of the NP dealings in corruption. In addition, the Afrikaner Broederbond members benefited from the membership by getting jobs and large government procurement. John Vorster the Prime Minister of South Africa availed information to his cabinet about land that would be up for sale, where government would need land to build institutions of learning. This corruption was committed by the Afrikaners Broederbond. The state was considered the source enrichment of whites leaving Blacks outside of the economy of the country with impunity; Van Vuuren op cit note 23. According to Van Vuuren crime was sanctioned by the government - the ANC Chancellor House deal at Eskom.

maintenance of the power stations;[1071] c) use of coal that did not meet the specification of the power stations;[1072] d) failure by some consumers to pay for their consumption of electricity;[1073] e) imprudent management of power stations;[1074] f) the manipulation of procurement processes enacted by the ANC government;[1075] g) the ANC failure in the 21st century to hold its leadership Zuma responsible for the rot resulting from the repurposed SOEs;[1076] g) collaboration between the ANC ministers, boards, executives, international companies and enablers; h) the case of the majority executives of Eskom and senior politicians in the NP having collaborated with international companies which secured contract with Eskom;[1077] i) the import of unproven and unknown technology;[1078] j) the lack of foresight to negotiate contracts that would benefit Eskom in the long term by obligating such companies to transfer skills and give licenses for the manufacture the OEM parts locally both by the ANC and NP during the subsistence of such contract;[1079] k) and the lack of foresight by both the ANC and the NP.[1080]

5.1.3.15. The ANC and NP's culpability

Arguably, the ANC and the NP Apartheid government failed to do right by Eskom and the public. Both ANC and NP used unsuitable coal that did not meet the specifications of power stations. Both must go down in history as governments which are responsible for power stations that were not completed according to schedule due to having acquired unknown and unproven

[1071] Dentons Report (2 July 2015) *Report in respect of the investigation into the status of the business and challenges experienced by Eskom, instituted by the board of Eskom Holdings (SOC) Ltd in terms of a resolution passed on 11 March 2015* 20- 23 -26. As of 2015 eight of the coal powered stations had passed their midlife by more that 50%. The life circle of a coal plant is 50% - 60%. This means that by the time the ANC took control of South Africa many coal power stations were close to their mid-life.

[1072] Dentons Report op cit note 1071 at 21 & 30.

[1073] The culture of non-payment which was used during Apartheid was entrenched. The ANC upon taking power forgave the electricity debt of the townships. The town ships owe Eskom R49 billion.

[1074] Dentons Report 2015 op cit note 1071 at 24-26

[1075] Section 217, 197, PFMA Regulations The sections of these legislations were not complied with.

[1076] Allison Simon 'Jacob Zuma narrowly survives no-confidence vote in South African Parliament' The Guardian 9 August 2017 available at *www.theguardian.com* accessed on 23 February 2024. Zuma survived the motion of no confidence for facilitating corruption and state capture. The vote was 198 against and 177 for. Baleka Mbethe the Speaker announced saying "therefore the motion of no confidence in the president is accordingly negative".

[1077] Friedman op cit note 27 at 54-56. In his book Friedman suggested that Eskom incurred losses of 'hundreds of millions of Rands' in procurement that was not above board. Eskom lost R67 million in one nuclear energy deal in the 1980s which did not end well.

[1078] South African Government News Agency 2017 Eskom's Dentons report is out 7 February 2017 available at *https://www.sanews.gov.za* accessed on 21 February 2023.

[1079] Ibid. Dentons Report op cit note 1071.

[1080] Eskom Matshela Koko; The NP failed to bring the Black majority into the grid. They were left out for a long time and they were not factored into the electrification of South Africa.

technology, which contributed to the challenges Eskom faced.[1081] They were responsible for the power stations ran hard to generate electricity non-stop without maintenance over a period of time. Eskom is burdened with unfavourable historical contracts for the supply of OEM parts, such as Alstom, which preceded the ANC government. Such contracts resulted in owners charging exorbitant prices to continue supplying parts to maintain the power stations. Alstom also charged to train workers. With this kind of arrangement this SOE prospects of failure are very high. The lack of plans to bring all South Africans, in particular Blacks who were not factored into the grid, contributed to Eskom's failure.[1082] This lack of foresight caused Eskom to be overwhelmed by the demand for electricity in numbers.[1083]

It is, however, fundamental to take into cognisance the reality that the lack of foresight of the Mbeki government to authorise and support maintenance and invest in new power stations was ill-conceived.[1084] The electricity reserves were reduced due to the electrification of areas historically left off the grid. Both the ANC and the NP governments were culpable and short-sighted in their planning. The NP should not have excluded the majority of South Africans and focused exclusively on supplying electricity to whites, mining, manufacturers, industries, farmers and railways. The NP's myopic outlook turned out costly for South Africa. Eskom was long corrupted and captured prior to the ANC government taking control. The Dentons investigation revealed that 25-30 years back, in the late 1980s and early 1990s, too much pressure was put on Eskom power stations, and they were run hard.[1085] Although Majuba and Tutuka were not designed to operate two shifts Eskom to increase the electricity surplus capacity, these power stations were extended beyond their capabilities.[1086]

The Dentons reports argued and concluded that dual shifts caused the power stations to degenerate quickly, reducing their life and bringing other defects to the fore. The recklessness then, the continued corruption and historical state capture also contributed to continued load shedding.[1087] Load shedding is not an ANC phenomenon that occurred overnight or in the last 28 years of the ANC government.[1088] It is historical, and it is important to put it in its proper

[1081] Eskom (1923-2001) 'A Short History of Eskom'.
[1082] Hofstatter op cit note 718 at 17. Eskom forecasted 16 300MV and 17 500 MW based on abrupt increase in economic growth in the previous years.
[1083] Ibid.
[1084] Ibid at 15 - 17.
[1085] Mufson op cit note 1045; Dentons Report op cit note 1071.
[1086] Ibid.
[1087] Ibid.
[1088] Steyn op cit note 857; Dentons Report op cit note 1071.

perspective to avoid rewriting the history of Eskom and load shedding. Load shedding cannot be delinked from its cumulative causes, which include the use of low-quality coal in power stations that had coal specifications.

Some, if not most, of the people crying foul and complaining about load shedding as an indicator of the ANC's incapacity conveniently disregard the reality that the NP was at the helm of corruption and state capture in the country and at Eskom.[1089] The researcher is of the view that in addition to compromised maintenance of power stations, corruption played a role in load shedding. The researcher agrees with Friedman that corruption and state capture predate the ANC. Wrongdoing or corruption was kept under the rug during the Apartheid and Broederbond times. Because freedom of the press was foreign to South Africa, corruption and state capture increased exponentially during the 1970, 1980 and 1990s under the NP Apartheid government and Eskom, but it was not reported on as it is currently.[1090] Compromised good corporate governance resulted in Eskom losing its ability to provide electricity in the 21st Century. The consequences of this failure led to job losses, businesses losing money, small businesses buckling under pressure, students struggling to get continuous education, interrupted final examinations, high unemployment, a shrinking economy, insurance claims high due to electricity interruptions, high government debt ratio, health of patients compromised and looming black out.[1091]

The consequences and impact of failed corporate governance at Eskom were that -

(1) Eskom corruption took hold and debilitated it. Corruption ran across the board of directors, executive managers, executive authorities, senior managers, middle managers and the most junior of employees.

(2) The executive authorities were themselves responsible for corruption because they dropped the ball when they put personal interest first and that of Zuma.

[1089] Ibid.
[1090] Ibid at 56-62.
[1091] Thobeka Ngema 'Load Shedding: Business crumbling, massive job losses -soon union' 27 September 2022 available at *https://www.iol.co.za* 21 February 2023accessed on 23 February 2024. Vusi Adonis 'Load Shedding: Permanent stage 2 or not, small business are dying' *Business Report IOL* 24 January 2023 available at *https://www/iol.co.za* accessed on 23 February 2024. Adonis highlighted damage to electronics, security risk, high cost of business due to alternative energy, loss of productivity and load shedding cost South Africa R4 billion a day. Carin Smith 'No government should do this'-how load shedding is killing small business' *News24* 20 January 2023 available *at https://www.news24.com/fin24/companies/no-government-should-do-this-how-load-shedding-is-killing-small-businesses-20230120* accessed on 23 February 2024; Shonisani Tshingalane 'Only 77 of 400 hospital and clinics exempt from load-shedding says South African Medical Association' *Business Day* 12 December 2022 available at *https://www.businesslive.co.za* accessed on 21 February 2023.

State capture was realised due to the conduct of all referred to in this section. It is important to note that various investigations took place at Eskom. These investigations from the Parliamentary Committee, Finance and Funduzdi confirm that all was not well at Eskom. However, it would be naïve to blame Eskom only and not bring to the fore the role played by international companies which charged Eskom loaded fees when they were not doing the same where they came from.[1092]

In particular, the OEMs whose contracts ended but parts were needed from them abused their position of power.[1093] They agreed to assist by availing parts and providing training but were more interested in maximising their profits without shame despite having made hundreds of millions and others billions of rands during their contracts.[1094] It would appear that they were deliberate and decided to teach Eskom lessons because their contract ended, and some were coming to an end. There is no reasonable explanation as to why the charges were punitive in South Africa but not from whence, they came from.

5.1.3.16. Various investigations and allegations of sabotage of the new board

Forensic and other investigations were undertaken, including a National Treasury investigation by Fundudzi, the Special Investigation Unit and the Zondo Commission. The outcomes of these investigations were that the common denominators were corruption, fraud, money laundering, and state capture. What was abundantly clear was that Eskom went through a tumultuous time, which resulted in load shedding. Dentons Eskom's appointee investigated problems Eskom was faced with and concluded lack of maintenance and overworking the power station contributed to the situation Eskom and South Africa are in.

Denton's report tells us that load shedding is not a new phenomenon in South Africa. It existed long before the ANC government came to power. Furthermore, the power stations were pushed to their limits with limited and or no maintenance. The Dentons report suggests that Eskom had this coming for some time. It is suggested that the life of the power stations could have extended beyond 40 years to 60 years if properly run. Effective and regular maintenance was not carried out on the power station. Eskom, for the 2010 Soccer World Cup, kept the lights on at all costs, deferring maintenance.[1095]

[1092] Dentons Report op cit note 1071. Eskom kept the Dentons Report under wraps although it was ready in 2015. This Report was released in 2017 after Amabhungane requested the Dentons Report

[1093] Ibid.

[1094] Ibid.

[1095] Organisation Undoing Tax Abuse Report (OUTA) (2017) *Unplugging Corruption at Eskom*

2023 saw frequent and uncontrollable load shedding. Questions of sabotage were raised. It was unclear if sabotage indeed contributed to or played a significant role in Eskom's failure and electricity interruptions. Who are the saboteurs remain a mystery. De Ruyter, in his interview with Annika Larson on 21 February 2023 on ENCA, indicated that at one stage in Standerton, a saboteur was caught and handed to the police. He was subsequently released at the instructions of the Commander of the police at that police station. In another instance of sabotage, two others were released on bail, and the matter was not taken further. Sabotage was not specifically in the scope of this research. This issue will be left to another researcher to investigate in greater detail in future.

Eskom appointed a new board. The board is led by Mpho Makwana. Makwana was the chairperson of the board before the appointment of Tsotsi. Makwana, at the helm of the Eskom board, was requested to leave immediately without serving his notice. De Ruyter, during his interview with Larson, reported that he had brought the continued corruption at Eskom to the attention of Gordhan and that there was a Minister who had a grip on the SOE. De Ruyter also shared with the public that the police in Mpumalanga were in cahoots with the gangsters who were sabotaging Eskom. Suspects caught red-handed were released by the police commander in Mpumalanga. De Ruyter informed the public during his eNCA interview that when he proposed to use some of the $8.5 billion for Eskom, he was advised by a minister that he could have access provided that certain persons get a little bit of that money. This suggests that if the politicians and their cohorts get nothing but the money is used in the interest of Eskom, it cannot have access.

Another important point intended to put pressure on Eskom was the announcement by the Minister of Finance / Treasury that the government will take over R254 billion debt owed by Eskom in his budget speech. Furthermore, in the 2025/2026 financial year, the government will take over another R70 billion of Eskom's debt.

5.1.3.17. Conclusion

The management of Eskom resides with a board which has the power to delegate its power to the executive management. Eskom had eleven GCEOs in the past decade and a half, and that proved bad for it in the long term. There was maladministration, malfeasance, total breakdown of internal control and entrenched corruption. Non-executive directors and the executive authorities in charge of the SOEs under the DPE cooperated and worked together at various times against Eskom's interests. Non-executive directors abandoned their responsibility and failed to abide by their fiduciary duties found in section 50 and their general responsibility in section 51 of the PFM and principles 1, 3, 6, 11 and 13 of King IV.

The executive and non-executive directors worked closely with the private sector against Eskom's interests. They used the services of the advisors, auditors, bankers, consultants and lawyers to facilitate circumventing their duties embodied in sections 57(1)(a) to 57(1)(e) of the PFMA. In addition, they contravened every policy, law, King Code, and regulation in place, including section 217 of the Constitution, to sanction the procurement of services and goods. Procurement was the casualty of the conduct of executive, non-executive and executive authority.

The workers of Eskom have not shown concern about the Zondo Commission and did not care about the Public Protector's State of Capture Report. Corruption is endemic and entrenched at Eskom, facilitated by the employees and assisted by enablers and other third parties. The NP and the ANC failed Eskom at various stages of their government, the consequence whereof is load shedding. Had the NP planned properly when it created Eskom and factored in availing electricity to all who live in South Africa, the country would not have had an inadequate electricity supply. If Eskom, during the NP and the ANC governments had not run the power station hard and neglected maintenance, the power stations' life could have endured. The ANC did not listen to Eskom when it requested support to build additional power stations for support. Although the ANC government did not invent load shedding, it is currently at an unprecedented level. In 2023, the country experienced load shedding almost every day. In his interview with Annika Larson on 21 February 2023 on ENCA, De Ruyter, on the eve of departing Eskom, confirmed suspicions that Ramaphosa did not mean what he said in his first State of the Nation Address, 'Thuma Mina'. Secondly when he said the ANC would not tolerate corruption and would deal with it effectively in the future.

Enablers from the private sector and from the public sector have contributed to corruption and state capture. Private companies listed on stock exchanges and unlisted, as well as professionals, have a hand in corruption and money laundering, including the banks. It is interesting that Nedbank was singled out for investigating its role. All the banks have been complicit in the money laundering, which facilitated the loss in Eskom. De Ruyter intimated that Eskom was still besieged by corruption even though his team made progress.

5.2.Passenger Rail Agency of South Africa (PRASA)

5.2.1. Introduction

PRASA succeeded the South African Rail Commuter Corporation (SARCC) in 2009 in terms of the Legal Succession Act of 2008 (Act 9 of 2008). PRASA was the first and only SOE to

provide public transport. The government created PRASA as a strategy to bring forth its agenda to transform the public transport system, making it efficient and vibrant.[1096] PRASA was expected to be the gateway for a much-improved quality of life by facilitating individuals' and communities' access to socio-economic opportunities. Furthermore, it was tasked to connect them through an integrated network of mobility routes.[1097] That was to be achieved through its control of Metrorail, which operates commuter services; Shosholoza Meyl, which transports passengers across cities and regions; and Autopax, which operates bus services inter-city and in regions.[1098] PRASA also took control of Intersite, the property management subsidiary. Some of the functions were later transferred to the division PRASA Corporate Real Estate Solutions to execute (CRES).

The government's grand plan was that PRASA takeover would bring about improvements for daily commuters and long-distance passenger rail services. Its dedicated division, Metrorail, transported commuters in four provinces: Gauteng, Kwa-Zulu Natal, Eastern Cape and the Western Cape. Metrorail transported workers to and from work and other passengers to town. PRASA had 478 railway stations and 270 trains, which serviced 1.7 million commuters daily on weekdays.[1099] The Department of Transport (DOT) with PRASA were responsible for the implementation of the Rail Plan targeting operational and infrastructure improvement in preeminent areas. However, other problems hindered effective delivery to South Africa when PRASA chose the wrong path and failed to deliver on its mandate. PRASA's asset base was R19 billion in 2010/2011 inclusive of immovable properties.[1100]

Ineffective and irresponsible management, lack of ethical conduct and transparency, corruption and fraud, improper procurement processes, suspect recruitment and appointments, unmanaged and undisclosed conflicts of interest and lack of transparency set in eroding good corporate governance.[1101] This led to irregular expenditure and losses at PRASA. Indeed, PRASA was derailed.[1102]

[1096] PRASA Annual Report (2010/2011) 14.
[1097] Ibid at 13.
[1098] Ibid at 15.
[1099] Helen Suzman Foundation 'METRORAIL' 7 March 2018 available at *https://hsf.org.za* accessed on 23 February 2024.
[1100] Public Protector Report (3 of 2015/2016) op cit note 65 at 52.
[1101] Ibid.
[1102] Ibid.

The challenges PRASA faced were not new. The problems experienced are both historical, going back to the NP government, and continued to manifest themselves when the ANC government came to power. Around 2004, long-distance passengers were already looking for quick transport from city to city. Daily commuters to and from work were affected by peak hours, congestion, and delays. Trains shortage, signal problems which caused accidents, limited security in trains raised safety issues, and the shortage of locomotives and coaches' maintenance caused problems for PRASA. PRASA mode of transport for commuters was convenient and cheap compared to taxis.[1103] PRASA's Metrorail commuter trains were and still are preferred by workers because the fares were cheaper. However, it lost its attractiveness when it became unreliable, and the service was discontinued and revived in 2020. The locomotive upgrades at stations, including signal plans, were welcomed. To realise its goals and carry out its mandate, various future interventions were identified, such as – improvement of stations; electrical equipment replacement; platform extensions; stations and track upgrades; track doubling; signal upgrades; electrical upgrades from 6KV to 11KV in the main corridors, commuter rail transport and road travel across the country.[1104]

After Montana and the board failed to address the complaints, the dossier submitted by the South African Transport Allied Workers Union (SATAWU) approached the Public Protector to investigate its serious concerns. Thirty-seven complaints, including allegations of nepotism, conflict of interest, financial irregularities, mismanagement, procurement irregularities and whistle-blower victimisation, were submitted to the Public Protector against the GCEO and the board.[1105] SATAWU subsequently tried to withdraw them for inexplicable reasons.[1106] The National Transport Movement (NTM) pursued the complaint to the Public Protector further. The complaints submitted to the Public Protector were indicative and

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[1103] Tariro Washinyira 'Commuters relieved trains return to one of Cape Town's busiest stations' *Moneyweb* 3 Feb 2023 available at *https://www.moneyweb.co.za* accessed on 21 February 2023. A commuter Ralton Davids told Washinyira the bus cost R30 from Parow to Woodstock and another bus to Claremont R44.00. Metrorail costs R8.00 and spend R50.00 a week. He was happy that the return of trains will save him money to buy groceries. Another Esnath working in Tokai spend R2000.00 per month. Taxi cost her R18 from Parow to Bellville and form Bellville to Wynberg R20.00 single trip then Wynberg to Tokai another R12.00. With the train she spends R400.00 per month.

[1104] Public Protector Report (3 of 2015/2016) op cit note 65 at 52.

[1105] Ibid.

[1106] Ibid at 3-4; Open Secrets Unaccountable 00023 *How Prasa was looted and left for Scrap* 14 April 2021 *https://www.open.org.za* In 2012 SATAWU filed a complaint with the Public Protector complaining about corruption, and employment favouritism practices in PRASA practised by the GCEO Montana, other executives, some managers and middle managers;

suggestive proof of compromised good corporate governance. PRASA was fraught with irregular expenses and losses, which the executive management and compromised board of control hid.[1107] Greed, unethical conduct, self-interest, systematic mismanagement, unprofessionalism and lack of transparency were the order of the day.[1108] PRASA service deteriorated to the extent that the public, which relied on it for transportation to and from work daily, gave up due to the delays. Others took chances and climbed to the top of trains to avoid being late for work.[1109]

5.2.2. History of Passenger and goods rail prior to and during PRASA

The passenger train services in South Africa date back to 1860 when a short 3.2km line was built linking Durban and the harbour by the Natal Railway Company.[1110] The Cape Town and Eersterivier rail service for the passenger facilities commenced in 1859 and started operating in 1862.[1111] In 1872, as a result of the formation of the Cape Government Railway, expansion was started and was successfully realised.[1112] After the union of 1910, the Central South Railways, Cape Government Railways and the Natal Government Railways were amalgamated in 1916.[1113] As early as the Union, the railways were run on a business principle basis in accordance with the terms of the Union of 1910.

When the Republic of South Africa was established, the South Africa Act of 1909 was repealed with the South Africa Act of 1961. Two decades later, the South Africa Act of 1961 was also repealed, and when the South Africa Transport Services Act 65 of 1981 (SATS).[1114] The Legal Succession to the South African Transport Services Act 9 of 1989 replaced SATS and created two public entities – Transnet and the South African Rail Commuter Corporation Limited (SARCC).[1115] The effect of the changes in the Legal Succession Act was to separate

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[1107] Ibid at 5-12. Prior to approaching the Public Protector SATAWU had submitted its concerns with Montana who disregarded their request for an investigation. The complaint was forwarded to the and the board appointed its internal and external auditors Deloitte to investigate the veracity of the complaint. The outcome of Deloitte investigation was that there was no case to answer.
[1108] Ibid.
[1109] Brett Herron *Failure of commuter rail is a crime against urban poor GroundUp* 4 December 2017 available at *https://www.groundup.org.za* accessed on 21 February 2023; Staff Reporter 'Commuters rebel as Metrorail Fails' *Mail & Guardian* 13 Jun 2017 available at *https://mg.co.za* accessed on 21 February 2023.
[1110] R.A. Janse Van rensburg 'The History of The Rail Transport Regulatory Environment In South Africa' 1996 *Department of Transport Economics of the University of Stellenbosch, Stellenbosch* 2.
[1111] Ibid.
[1112] Ibid.
[1113] Ibid at 6.
[1114] Ibid at 18.
[1115] Ibid at 18-19.

uneconomic rail commuter service from economic freight.[1116] Transnet was established to commercialise harbours, pipelines, airways, road transport, rail freight and mainline passenger service.[1117] PRASA succeeded the SARCC as a vehicle to cater to rail commuters, passengers, and road transport. The former CEO of SARCC Lucky Montana (Montana) was appointed the GCEO of PRASA in 2010.

Three years into Montana's appointment as the GCEO of PRASA, its daily commuters had dwindled from 1.7 million to just 550,000 because it had become unreliable.[1118] PRASA was under siege from managers and employees responsible for personal injury insurance claims. Existent and non-existent claimants contributed to its financial demise. Whistle-blowers were dismissed, and executives who did not toe the line found themselves unemployed, although they had successfully challenged Montana.[1119] What happened at PRASA is criminal and shameful. Montana resigned from PRASA in 2015 after the Public Protector's report unpacked the rot that had taken root and flourished during his tenure and his machination.[1120] PRASA executive and non-executive management and executive authorities failed South Africa, which added to its problems of corruption, which took hold in the country, the researcher argues.

According to the report presented to the Parliamentary Committee in March 2015 by the interim board, PRASA had - 22 300km rail network, makes 550 million trips a year for commuter passenger Metrorail, 589 stations, 4638 coaches and 16,500 workers. The interim board of PRASA led by Popo Molefe (Popo) shared its plans to produce 3600 coaches and 600 trains by 2025 at R51 billion. The ambitious plans included spending R123 billion in 2035 and creating 65,000 new jobs. Rapid urbanisation growth necessitated the increase of commuter rail, and refurbishment was not an option but new trains which would cater for people with disability, including the blind and deaf. Furthermore, 4000 railway police patrols provided security for train users, and 22 new police stations were built. The DOT efforts to stabilise PRASA were frustrated by unprofessionalism in the board's office because minutes and

[1116] Ibid at 19.
[1117] Ibid.
[1118] Ibid.
[1119] Dismissals were successfully challenged but Montana was resolute that he would not work with them because the company could not trust them. He negotiated termination of employment amounting to R5 million. It is uncertain what was the board doing to stop the abuse of power.
[1120] Public Protector Report (3 of 2015/2016) op cit note 65.

resolutions taken could not be traced. PRASA received an unqualified audit for the end of 2015/2016 with adverse findings.

5.2.3. Good Corporate Governance in PRASA

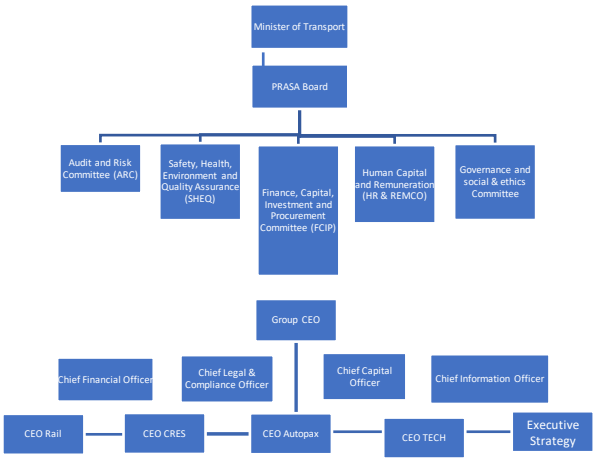


Figure 2: PRASA Governance Structure

Figure 2 depicts the governance structure of PRASA. PRASA SARCC's successor is controlled by the Board of Control (BOC). The BOC is enjoined to ensure that PRASA carries out its mandate embodied in the Legal Succession Act to the South African Services Act of 1989 (Legal Succession Act of 1989) and the PFMA[1121] PRASA is a Schedule 3B corporation bound to comply with the legislative framework, the PFMA regulations, King Code of Corporate Practices and Conduct, BOC Conduct embodied in Annexure A of the Board Charter. Like all SOEs, the BOC can delegate its powers to the executive, and this Board Charter provides a provision for the Reserved Powers of the BOC. Paragraph 15.6 limits the capacity of the BOC TO delegate its authority and responsibility to the GCEO.[1122] Governance and control ultimately reside with the BOC.[1123] The government representative at the helm of

[1121] Board Charter of the Board of Control of the Passenger Rail Agency of South Africa (PRASA) line 3.; Section 23(1) of the Legal Succession Act of 2008 provides that 'The main object and business of the Corporation is to ensure that, in the public interest, rail commuter services are provided in the Republic of South Africa.'
[1122] 'Approval of capital expenditure, acquisitions and disposal in excess of the discretionary power delegated to the chief executive officer.' Reserved power 10.6. of the Board Charter of PRASA.
[1123] Ibid at line 5.

PRASA is the Minister of the Department of Transport (DOT), who holds shares in PRASA in terms of section 4. The Minister in the Treasury is responsible for finance oversight in certain transactions that PRASA wants to enter. It must submit a proposal to the Minister of DOT to consider and then submit to the Minister of Finance to approve or disapprove.[1124] In addition, PRASA is subject to the Constitution of the Republic.

At this juncture, PRASA is the only SOE with its main objective as the public provider of rail and land transport for commuters and passengers. Continued provision of uninterrupted public transport services is fundamental to the public's quality of life. Metrorail, PRASA' subsidiary transports commuters to and from work in the four provinces referred to in this chapter. Without Metrorail public transport, crucial for the public to access their workplace, will have to find an alternative mode such as taxis and bus services, which prove too expensive. It is, therefore, incumbent on the BOC and its executive managers in charge of Metrorail to transport commuters to work without fail. This can be achieved only if the BOC does its work effectively and in line with good corporate governance.

Currently, the BOC constitutes nine non-executive members and the GCEO, including the Chairperson. Legislatively, the maximum number of BOCs is ten. Three of the ten-strong board members must have experience managing a private company. The first BOC appoints its Company Secretary. If the BOC delegates its authority and power, the decision taken based on such delegated authority must be ratified by it. The BOC can delegate its responsibility within the prescribed limits.[1125] PRASA must have a Corporate Plan in place in compliance with the requirements of the Treasury regulations for schedule 3B SOEs. The researcher considered the 2022/2025 Corporate Plan. It is a three-year plan reviewable every year to track achievements and failures in realising its goals and objectives. The Corporate Plan of PRASA acknowledges the problems it has experienced in the past and anticipates future challenges.

The board has five subcommittees depicted in the above picture and is supported by the executive managers who established the executive committee. The board's subcommittees are established in line with the King Code IV led by a non-executive chairperson. The PRASA Audit and Risk Committee is led by a Chartered Accountant. The BOC responsibilities are embodied in the Board Charter concluded with the shareholders. The Board Charter provides

[1124] Section 54(1) and (2) of the PFMA discussed and referred to in Chapter 4.
[1125] Board Charter of the Board of Control of the Passenger Rail Agency of South Africa.

the governance framework– 1) purpose of the Board Charter; 2) the general responsibility of the members of the BOC; 3) strategic planning and performance monitoring; 4) risk management; 5) regulatory compliance management; 6) reserved powers; 7) performance of the board as a collective; and 8) individual board member performance. The Board Charter has a Code of Ethics, which prescribes ethical conduct and sanctions non-compliance. Furthermore, the BOC performance assessment is done by the executive management team. The BOC member self-assess. The Board Charter is dated and does not talk to meeting notices, declaration of interest, record keeping, minutes, agenda, retention of board documents, decision-making process by directors, confidentiality and acquiring independent advice, or performance evaluation.

The Corporate Plan is one of PRASA's governance instruments. It details the past performance of PRASA and the planned future to address established weaknesses. The impact of the Buthelezi BOC's corruption, fraud and failure to embrace good corporate governance haunts PRASA. Based on PRASA's audit outcomes since 2016 are concerning in that, there are five disclaimers and one qualified. This level of performance by the past and current BOCs does not auger well for the future. What runs across these outcomes is irregular expenditure, which stems mainly from compromised and unlawful procurement of goods and services. In addition, fruitless and wasteful expenditure includes settlements for unjustified dismissals and suspensions of employees, legal costs incurred and unjustified forensic investigations to protect the BOC and the GCEO. Disclaimers mean that the AG considered the AFS submitted to it for audit but was in such a state that the AG could not form an opinion.

For the past eight years, PRASA failed to improve its performance. The failure compromised the delivery of public transport to the people of South Africa, especially the poor. The extent of the rot is illustrated with the examples discussed in this paper. PRASA owes its biggest creditor, Transnet, R8 billion. It asked the Treasury to negotiate with Transnet to let it off the hook for R1.8 billion.[1126] Its biggest creditor, Transnet, withheld services, and that also constrains PRASA's ability to deliver on its mandate. PRASA disregarded that non-compliance with good corporate governance has a domino effect. It directly affects Transnet's finances and

[1126] Banele Ginindza 'Prasa asks Treasury to let it off the hook for R1.8bn debt owed to Transnet' *Business Report* 23 Nov 2022 available at *https://www.iol.za* accessed on 21 February 2023. Shonisani Tshikalange 'Tshwane cuts off Prasa offices over R28m debt' *Business Day* 17 February 2022 available at *https://www.businessday.co.za* accessed on 21 February 2023.

its ability to deliver on its mandate. However, the researcher is not turning a blind eye to the fact that Transnet itself contributed to its current financial woes because it dished out its money during corruption and state capture. Treasury was not invited and was unwanted during the wanton spending spree by both PRASA and Transnet and only now is it called upon to intervene.

5.2.3.1. Failed governance

PRASA, like most key SOEs, was fraught with problems indicative of the disintegration of good corporate governance. PRASA's corruption, fraud and theft were not restricted to procurement of goods and services. Other corruption-affected areas at PRASA were common in injury claims brought by commuters and passengers allegedly sustained during train accidents. This phenomenon was more common in Metrorail in instances of commuter passengers. Internal controls were compromised, the company's finances were mismanaged, irregular expenditures and fruitless and wasteful expenditures were rampant but undisclosed in the AFS submitted for audit. Executive managers who sat on the board and non-executive managers failed their fiduciary duties. The researcher argues that it is unsurprising that the executive managers responsible for the day-to-day running of PRASA did not read the Riots Act.

The board itself was, in most if not all instances, involved and protected the executives. For example, when SATAWU and NTM reported Montana's failure to investigate the malfeasance and maladministration at PRASA, the board, led by its first chairperson, Buthelezi, exonerated him and himself. Buthelezi and Montana sat in the award of a tender to Swifambo Rail Leasing (Swifambo), a front company of Vossloh Espana, a Spanish railway company, in 2012. Auswell Mashaba owned Swifambo a registered shelf company with no history in manufacturing trains. Vossloh Espana is a subsidiary of Vossloh Germany. Effectively, Swifambo and PRASA gave up their endeavour to get money back for the tall trains sold and some undelivered.[1127] Stadler Investigations by Funduzdi, Howarth Forensic, the Zondo Commission, and the Public Protector's Derailed confirmed that the award was not accorded with the PRASA SCM. The Public Protector in Derailed concluded that good corporate governance was not followed. The Public protector recommended that the National Treasury investigate contracts to the value of R10 000 000.00 and more.

[1127] Open Secrets 00026: *The German Company that derailed PRASA* 23 June 2021.

The culture of denialism was more pronounced during the chairmanship of Buthelezi, who was implicated in self-enrichment from the contracts awarded by PRASA.[1128] According to the Open Secrets Report 00030, 216 contracts awarded worth R15 billion between 2012 and 2015, only 13 were correctly awarded. Buthelezi failed to declare conflict of interest contrary to the PRASA SCM of 2013. Fundudzi Report confirmed that Buthelezi was a shareholder in Makana Investment Corporation and held 55% shares in Sebenza Forwarding and Shipping (Sebenza). Sebenza benefits from a contract with PRASA. Swifambo secured a contract worth R3.5 billion for the delivery of trains that it neither owned nor manufactured signed in March 2013. Buthelezi was also conflicted in the Swifambo contract, which he signed. Swifambo and Vossloh delivered too tall trains that could not be run on the PRASA rail lines. These trains were not good for purpose.

According to the Open Secrets report of the R2.7 billion paid to Swifambo, it paid Sebenza R99 million. Swifambo admitted that Sebenza was paid the amount. However, such payment was for VAT and customs costs, but the contract between PRASA and Swifambo reserved the costs for PRASA. The extent of systematic management and maladministration at PRASA is unbelievable and shocking. Montana, Buthelezi and the board were actively cheating and defrauding PRASA brazenly contrary to their fiduciary duties. They failed to manage PRASA's money and protect its interest as they should have done in line with the PFMA. PRASA was betrayed, and the cost was not only monetary but also reputational. More players must be credited for derailing PRASA and shutting down 90% of its passenger rail business, such as Buthelezi, the Vossloh German holding company, Vossloh Espana, Swifambo and Mashaba. The board of PRASA was removed, including Buthelezi. Buthelezi's removal was too little, too late. PRASA cannot recoup the money paid for undelivered trains and tall trains, which are of no use to PRASA.

A new interim board was appointed and led by Popo Molefe (Popo). Buthelezi, in the 2013/2014 AFS, reported that PRASA was on course to achieve its goal but did not disclose that PRASA had an accumulated loss of R4.4 billion in 2014 from the 2010/2012 financial year.[1129] PRASA failed to eradicate the problems besieging the transportation of commuters and contribute to the economy of South Africa. The impact of corruption and state capture at

[1128] Open Secrets Unaccountable 00030: *Sfiso Buthelezi, the MP who derailed PRASA* Open Secrets #30 10 November 2021.
[1129] Open Secrets 00026 op cit note 1127.

PRASA on commuters in the Eastern Cape, Gauteng, KwaZulu Natal and Western Cape was immense. The blame lays squarely on the ANC government, which allegedly received R80 million from PRASA's compromised tender award to Swifambo.[1130] To avoid accounting for their dastardly conduct, the boards' and subcommittees' minutes could not be traced during the Buthelezi leadership and the subsequent board.[1131] The company secretary and custodian of such vital documents, board advisor about legislation and policies, and compliance and enforcer of board decisions did not execute his duties. He was complicit in the coverup of corruption, fraud, and state capture that benefited powerful businessmen, politicians, executives and non-executive managers at the expense of the public. The DOT claimed that it was greatly constrained.

The calibre of executive authorities appointed by Zuma at DOT affected delivery and performance at PRASA.[1132] They continued to fund PRASA losses but failed to control corruption and state capture. Targets were not achieved, performance continued to be dismal, and PRASA did not deliver its predetermined objectives.[1133] PRASA's income declined by 48% over five years, with a deficit of R1.8 billion. The cost of the workforce was R5.6 billion, which constituted 49% of its budget.[1134] PRASA was left with little room to spend on its capital expenditure but the stock renewal programme. According to the SCOPA report, 47 Shosholoza Meyl and 351 Metrorail coaches were renewed. The revenue declined, it had a R1.8 billion deficit, it could not contain the wage cost and the constraint on the capital expenditure was indicative of failed good corporate governance. The PFMA was undermined with impunity. Financial management and internal controls were thrown outside the window. PRASA's achievement was consistently dismal.

[1130] Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State Report (Zondo Report Part 5 Vol 1) *State Security Agency, and Crime Intelligence* at 690.
[1131] The Standing Committee on Public Accounts Report 'PRASA 2018/2019 financial statements, deviations, expansions, irregular, fruitless & wasteful expenditure, with Minister & Deputy Minister' 20 November 2019 available at *https://pmg.org.za* accessed on 26 February 2024.
[1132] Open Secrets Unaccountable 00023 op cit note 1106. Open Secrets Report 00023 concluded that appointees such as Ben Martin, S'Bu Ndebele, Maswangayi and Dipuo Peters former ministers of Transport were compromised.
[1133] Ibid at 4. PRASA realised 26% of its yearly target but a mere 5% improvement from the previous year.
[1134] Ibid.

Other factors impacting PRASA were the criminality and vandalism that occurred at the rail lines and stations, affecting 792 coaches.[1135] If the security was in place at PRASA was not tampered with and replaced by a security company improperly appointed by the GCEO, the damage to the infrastructure could have been avoided. The old trains could have continued to run albeit to a limited extent, unlike new trains that were too high and unsuitable for purpose. All thanks to Mtimkhulu, the GCEO, Buthelezi irresponsible politicians who obstructed justice and Ministers who manipulated the procurement policies by appointing the Board of Control (BOC) for big value tenders.[1136] The BOC was corrupt and compromised good corporate governance. The National Treasury investigation recommended that Buthelezi and his board be charged criminally but that is still to happen.

5.2.3.2. Non-compliance with the PFMA and Treasury Regulations

PRASA did not keep the financial records as it should have. The performance outcome based on the Auditor General's findings for 2016/2017 and 2017/2018 was a qualified audit outcome. In 2018/2019, annual financial statements were disclaimed. A disclaimer is the worst outcome because that means the Auditor General cannot rely on the prepared and submitted Annual Financial Statements. In 2018/2019, PRASA had an accumulated irregular expenditure of R27.3 billion and a fruitless and wasteful expenditure of R383 billion. The financial failure of this magnitude demonstrates and symbolises the disintegration of financial controls. It suggests that internal controls were not in place, and if they were, they failed. Such a situation was an indictment on the executive and non-executive management and the DOT. The DOT is expected to have a mechanism for tracking what transpired at PRASA as it submitted a Corporate Plan at the beginning of its financial year.

5.2.3.3. Non-compliance with Procurement Policies and legislative frameworks

Compliance with the procurement prescripts set out in section 217 of the Constitution, the PFMA and Treasury Regulations guidelines are uncomplicated; however, they have been used as excuses for compromised procurement even at PRASA. Montana did not appreciate the importance of compliant procurement in his limited universe – PRASA. PRASA, one of the key contributors to transporting working commuters to and from work safely and cost-effectively, should have taken heed of and learnt from the Constitutional Court decisions when

[1135] Ibid at 5. Coaches were burnt in the Western Cape. This conduct had financial implications and affected the budget of PRASA. PRASA's budget did not include the burning of coaches.
[1136] The GCEO had a limit of R100 000 000.00 in terms of its PRASA SCM of 2013.

it procured goods and services. It should have appreciated the importance of compliance with procurement policies and the legal framework espoused in *Allpay Consolidated Investments Holdings (Pty) Limited v Chief Executive Officer of the South African Social Security Agency (No 1)*.[1137] The court said -

> 'Compliance with the requirements for a valid tender process, issued by the constitutional and legislative procurement framework, is thus legally required. These requirements are not merely internal prescripts that SASSA may disregard at a whim. To hold otherwise would undermine the demands of equal treatment, transparency, and efficiency under the Constitution. Once a particular administrative process is prescribed by law, it is subject to the norms of procedural fairness codified in PAJA. Deviations from the procedure will be assessed in terms of those norms of procedural fairness. That does not mean that administrators may never depart from the systems put into place, and that deviation will necessarily result in procedural unfairness. But it does not mean that, where administrators depart from procedures, the basis for doing so will have to be reasonable and justifiable, and the change process must be procedurally fair.'[1138]

Judge Froneman, in the Allpay case, succinctly explained the importance of compliance with procurement requirements. In that case, the court held that 'It is because procurement so palpably implicates socio-economic rights that the public has an interest in it being conducted in a fair, equitable, transparent, competitive and cost-effective manner.'[1139] Procurement at PRASA was done contrary to its SCM of 2009, SCM 2012 and the SCM Policy of 2013. SATAWU asked the Public Protector to investigate maladministration and malfeasance in PRASA. The maladministration was not due to ignorance, lack of policies and legal frameworks but everything to do with manipulation of the procurement process and procedures as well as pure, simple criminality. Criminality should not be acceptable and tolerated. Montana, his colleagues and close friends, the board, ministers, businessmen and private

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[1137] *Allpay Consolidated Investments Holdings (Pty) Limited v Chief Executive Officer of the South African Social Security Agency (No 1)* 2014 (1) 604 (CC). This decision was finalised during the height of corrupt procurement at PRASA and many other SOEs. The importance of the purpose of clean procurement and its effects of the public espoused in the judgment should have made PRASA pause. That did not happen. The audacity of arrogance of those in power had no boundaries.

[1138] Ibid.

[1139] Ibid.

companies circumvented procurement requirements for goods and services.[1140] There was a coordinated effort to loot PRASA, and that goal was realised.

PRASA's procurement processes and procedures post-2012 are documented in its SCM 2013. SCM 2013 guidelines incorporated paragraph 16A3.2 of the National Treasury Regulations. This paragraph requires procurement that factors in planned demand management, acquisition management, logistics management, disposal management, risk management and regular supply chain management assessment. PRASA was least concerned about factors. Procurement was done as and when it suited the needs of the GCEO, the board, interested politicians and Zuma. Urgent and unprocedural procurement was the order of the day at PRASA. Although the SCM 2013 was shored by the National Treasury Supply Chain Management Guidelines (NTSCM Guidelines) of 2004 and National Treasury Practice Note No.8 of 2007/2008, PRASA executive and non-executive management were not bothered. That explains why, out of 216 awarded tenders, only 30 were above board. The fact that the SCM 2013 purpose was to give effect to the Constitution and the legislative frameworks applicable did not matter at PRASA. PRASA was on a frolic of its own, ignoring the Code of Conduct. It was simple and guided efficacious performance of procurement provided for the following:

i) Code of Conduct, which requires all role players in procurement to adhere to the National Treasury Code of Conduct; ii) prohibits bribes and irregular offers; iii) corruption and requires declaration of interest. Such declarations extend to employees, family, partners and associated persons where contracts are awarded.[1141] iv) in line with the Companies Act, the board delegates its powers and duties to the GCEO, who in turn delegates his duties to the Chief Procurement Officer (CPO).[1142] The CPO was bound to comply with all the regulatory frameworks and develop and implement the Supply Chain Management (SCM) accorded with the NTSCM Guidelines and the National Treasury Practice Note No.8 of 2007/2008.[1143]

ii) The GCEO appoints the CPO and the Bid Specification Committee (BSC). The BSC is tasked to review, approve, disapprove and specify tenders above R350

[1140] Ibid.
[1141] PRASA Code of Conduct at paragraph 8.
[1142] Sections 44 and 56 of the PFMA.
[1143] PRASA Code of Conduct op cit note 1141 at paragraph 9.1.

000.00; develop fair tender documents; ensure preferential procurement; and advise on deliverables and compliance with legislation.[1144] Another tier is the Bid Tender Committee (BTC) appointed by the CPO, which- a) evaluates tenders in line with the specifications, b) makes administrative evaluations, c) ensures compliance with the laws, d) prepares and submits evaluation reports; e) make recommendations to the adjudication committee; and f) maintain records of the bids.[1145] The Bid Evaluation Committee (BEC) and the Bid Adjudication Committee (BAC) are mandated by the SCM to evaluate the tender and adjudicate it, respectively. The invitation to tender, tender methods, requests for quotation, competitive tendering process, non-competitive tendering, unsolicited tenders, emergency tenders, sole source, and confinement are embodied in paragraphs 12.1 to 12.3.12.7.1 of the PRASA SCM of 2009 and 2012 which were used during the height of corruption and looting at PRASA.

The value of the tender the GCEO was authorised to approve was R100 000 000.00. This power was abused and improperly exercised in the appointment of the Siyaya Rail Infrastructure Technology (Pty) Ltd (Siyaya), which was awarded a tender of R69 985 033.00 contrary to the PRASA SCM and Constitutional requirements of section 217 according to the investigation report in 2017.[1146] Although the delegated authority to conclude contracts with service providers is vested in the GCEO, the award must be above board. The investigation outcome of the reports of TRG Attorneys, Public Protector and the National Treasury Investigation and Fundudzi was that GCEO's power was not meant to be used for nefarious and ulterior purposes. It was meant to be used responsibly and in the interest of the public constitutionally. The award of tenders to Siyaya, Abakalani Quantity Surveyors, Crane Registration and Consultants, Illiso Consulting and Molemo Consulting also contravened the SCM and other prescripts of the law.[1147] Unlike at Eskom, Denel and Transnet, the Guptas did not dominate, but Zuma's hand was still visible through his appointees such as Buthelezi at PRASA and Finance, Joel Maswanganyi, Ben Martins, Dipuo Peters and S'bu Ndebele at the DOT. The malaise was so deep at PRASA that forensic reports instituted by the board under

[1144] Ibid at paragraphs 9.5.1 – 9.5.8.
[1145] Ibid at paragraphs 9.6.1 to 9.6.6.
[1146] TRG Attorneys (2017) 'Investigation of Certain tender Supply Chain Management and Contract Award Irregularities by the Passenger R Agency of South Africa' 41 -140.
[1147] Ibid at 42 – 141.

pressure were kept secret and hidden but went public after the Whistleblower blew the whistle.[1148] Part V Vol 2 of the Zondo Commission report found that PRASA contravened its procurement process.[1149]

The Public Protector reached a similar conclusion that PRASA was riddled with corruption and good corporate governance was ignored.[1150] The transgression of the PRASA SCM was so pervasive that the Public Protector recommended that the National Treasury conduct a forensic investigation of all contracts of R10 000 000.00 and above.

186 tenders PRASA awarded were corrupt and fraudulently acquired.[1151] Siyangena Technologies (Pty) Ltd (Siyangena) was one of the 186 tainted bidders awarded a tender undeservedly valued at R5.5 billion.[1152] The contract was terminated because PRASA did not act in a 'fair, equitable, transparent, competitive and cost effect' contrary to section 217(1) of the Constitution. Siyangena contract was cancelled and set aside in following section 172(1)(a).[1153]

The Constitutional Court dismissed Swifambo's leave to appeal the cancellation of its contract confirmed by the Supreme Court of Appeal.[1154] The SCA decided that 'The award was vitiated by several material irregularities, primarily the dishonest and corrupt conduct of officials of PRASA in advertising the request for proposals regarding the supply of locomotives and awarding the contract. Swifambo has neither challenged nor contradicted PRASA's evidence that the tender was procured through corruption.[1155] It was abundantly clear from the evidence that the locomotives did not fit the specifications of PRASA. Therefore, they were not good for the purpose. The Vossloh and Swifambo would benefit, but the targeted public and the DOT would lose. The DOT identified PRASA to fulfil a specific function of providing commuter and passenger rail transport to various destinations for the people of South Africa. Daily commuters are dependent on PRASA for competent, comfortable, consistent, reliable and safe transportation to and from work for a reasonable fee. Achieving this would have

[1148] Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State Report (Zondo Report Part 5 Vol 2) *SABC, Waterkloof Landing and PRASA.*
[1149] Ibid.
[1150] Public Protector's Report (3 of 2015/2016) op cit note 65.
[1151] Open Secrets 00026 op cit note 1127.
[1152] *Siyangena Technologies (Pty) Ltd v Passenger Rail Agency of South Africa and Others* [2023] (1) All SA 74 (SCA)
[1153] *Swifambo v Passenger Rail Agency of South Africa* [2018] ZASCA 167
[1154] Ibid. The Constitutional Court had refused the condonation requested by Swifambo.
[1155] Ibid.

enabled them to engage in the economy stolen from them by the PRASA board and executive managers. Indeed, PRASA failed and was left as scrap. Although the appointment of the committees accords with National Treasury Regulation and the PFMA, the main weakness was the lack of some form of control to ensure that the GCEO acted accountably, ethically, professionally, responsibly and transparently.[1156] The weakness the researcher referred to in the PRASA SCM was that the GCEO of PRASA was protected and powerful; complaints brought against him to the Buthelezi-led board died a silent death. The PRASA board gave Deloitte its internal and external auditors the mandate to investigate and sanitise the GCEO's culpability.[1157] The PRASA board did not remonstrate with the GCEO. He, his executive colleagues, senior managers and some boards were so confident and emboldened that they refused to cooperate with the Public Protector.[1158] They withheld requested documents, constraining the Public Protector's investigation. Consequently, her report referred other matters for further investigation because information was not forthcoming.

In addition, the rollout of the 100 locomotives was not in line with PRASA SCM and National Treasury requirements for the following reasons[1159] – i) PRASA did not do a needs analysis as provided for in its procurement policy more so that is included in the National Treasury guideline; ii) specifications were the same as that of Vossloh locomotives which did not suit PRASA's need; iii) National Treasury's approval was not sought; iv) local content was not considered and Swifambo bid did not demonstrate the capacity of this nature; v) when the contract was concluded between PRASA and Swifambo, Vossloh did not have an obligation to Swifambo; vi) Montana signed the contract for R3.5 billion when he could not. The researcher contends that non-compliance with the PRASA SCM, Treasury regulation in particular 16.3.2, which PRASA adopted, and then attempted to cover-up and the fruitless expenditure go against the ethos of good corporate governance in particular the National Treasury Instruction SCM Instruction Note 3 of 2016/17: Preventing and Combating Abuse in the Supply Chain Management System. Companies that contravene the instruction such as

[1156] Montana had the propensity to abuse his power and bully his subordinates. This was demonstrated the immediate dismissal of Dingiswa.
[1157] Ibid. Three individuals Makhensa Mabunda, Mario Ferreira and Roy Moodley who since 2009 to 2014 benefitted from rigged and unlawful contracts with PRASA, nothing was done about them because they enjoyed the protection of the GCEO and Buthelezi.
[1158] Public Protector's Report (3 of 2015/2016) op cit note 65.
[1159] Zondo Report Part 5 Vol 2 op cit note 1148 at 692.

Vossloh Espana, a former subsidiary of Vossloh Germany should be restricted from doing business in South Africa.

Irregular expenditure, which PRASA did not and still does not have much to show for, was criminal. It is corruption and fraud that the perpetrator deserves maximum punishment and to be stripped of all the properties and money it may have. Good corporate governance was completely dispensed with.

5.2.3.4. Nepotism, dismissal of employees

The researcher will not address every instance of nepotism dismissals because some are included in the Public Protector's report. The GCEO of PRASA employed D Mtimkhulu, the Executive Manager: Engineering Services. Mtimkhulu claimed that he had a doctorate in Engineering when that was untrue.[1160] This unqualified employee dealt with major projects such as refurbishing train coaches and acquisition of locomotives. Mtimkhulu, in his official capacity, recommended the acquisition of 100 locomotives, drew specifications for the locomotives (designed for Vossloh and Swifambo) and priced the costs for the board.[1161] His privileged position made him untouchable. Fani Dingiswayo, the General Manager of Legal Services, was dismissed immediately for refusing to sign an irregular contract with Prodigy.

Five senior managers dismissed by PRASA's GCEO were entitled to be reinstated by the Labour Court found in their favour. Still, Montana persisted that the trust relationship was broken and paid them, sending them on their way. The researcher argues that this unchecked power of Montana resulted in irregular expenditure for PRASA. It was the arrogance of knowing that Buthelezi is on his side but was not called upon to account or make good the money to PRASA. If consequences are attached to such conduct, there would be a less fragrant disregard for accountability, ethical conduct, professionalism, the rule of law and transparency. These principles are in pursuit of good corporate governance and put an SOE in good stead to have access to funding from the financiers in the private sector. The government does not have endless resources to bail out badly and irresponsibly managed PRASA.

Another interesting black mark on Montana was the dismissal of 700 employees accused of burning train coaches. Represented by the NTM, the dismissed workers' reinstatement was

[1160] Ibid at 691- 692. Mtimkhulu had claimed a Diploma in Engineering. He did not even have those qualifications. He resigned before his disciplinary hearing.
[1161] Supra note 1153 at 169; Zondo Report Part 5 Vol 2 op cit note 1148 at 691-692.

confirmed by the Labour Appeal Court retrospectively to 2013 with pay.[1162] The Constitutional Court dismissed PRASA's leave to appeal its obligation to pay the reinstated workers retrospectively. This problem continued past the GCEO's employment at PRASA and cost it dearly. If PRASA's board had acted responsibly, it should not have allowed this mass dismissal saga to get to the constitutional court. The Popo and Ramatlakane boards were culpable and irresponsible. PRASA money could have been used to pay the reinstatement packages of the employees rather than pay lawyers. The PRASA board could afford to be that irresponsible because they knew there were no consequences.

5.2.3.5. Cadre deployment undermines good corporate governance.

The modus operandi for the appointment of board members was the same in most SOEs. Appointments to the board were not meritorious. This practice was in place and is continuing. The more a candidate is of questionable character, toes the party line, and is corrupt, the more his/her prospects of appointment or deployment are elevated.[1163] Inappropriate appointments are rampant within the ANC administration and are to blame for weakened governance in SOE boards, and PRASA was no exception.[1164] Ministers do so by appointing persons of questionable character to boards, sometimes CEOs or GCEOs. This happened more often than one can count. These appointees also go ahead and appoint their preferred persons to key positions, whether they are qualified or not. The PRASA team and collaborators benefited Swifambo and Vossloh, thanks to Mtimkulu Montana and Buthelezi, who made undeserved money and walked free.

Again, Montana was the common denominator. Montana was never called upon to take responsibility for destroying PRASA. Buthelezi also methodically undermined the PRASA procurement process and depleted its purse.[1165] After doing so, he was elevated to the position

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[1162] *National Transport Movement and Others v Passenger Rail Agency of South Africa Limited* [2018] 2 BLLR 141(LAC).

[1163] Gwede Mantashe is retained as the Minister of Minerals and Energy although he is implicated in corruption and state capture; Zizi Kodwa is the deputy Minister of State Security although he is implicated in the Zondo Commission; Arthur Fraser was appointed the Commissioner of Correctional Service even although he was implicated in the PRASA tender corruption; Gama was appointed to run Transnet although he was dismissed for dishonesty and compromising good corporate governance; Van Rooyen was elevated to the position of Minister of Finance although he was compromised as the head of Mkhonto We Sizwe Military Veterans; Buthelezi was appointed the Deputy of Finance even after gutting PRASA. Furthermore, chair of the Standing Committee on Appropriation.

[1164] Owen Okoe 'How governance failures messed up Prasa' 2017 available at *https://www.ru.ac.za* accessed on 23 February 2024.

[1165] Open Secrets Unaccountble 00023 op cite note 1106.

of deputy Minister of Finance and automatically became the Chairperson of the PIC, said Nowicki. Buthelezi is currently a member of Parliament and was elevated to the Chairperson of the Standing Committee on Appropriation.[1166] The fundamental question raised by such an appointment is what value he will add to that position, considering his background. Irresponsible Cadre deployment can be pervasive. For example, the former Chairperson of PRASA and PIC was appointed the Chairperson of the Standing Committee on Appropriation.[1167] The researcher agrees with the title and conclusion in the Open Secrets Unaccountable 00030 that Buthelezi looted PRASA and left it a scrap.

5.2.3.6. The change of guard was ineffective.

Ramaphosa came to the helm of the government under the pretext that his organisation would not tolerate corruption, fraud, or any form of state capture during his presidency. Corruption and looting are still the order of the day. Ministers continue to act contrary to the precepts of corporate governance. For example, Dipuo Peters suddenly dissolved the Popo board with immediate effect, purportedly for the Letsoalo debacle. Letsoalo was dismissed for taking a decision that negatively impacted PRASA. He dismissed the HR Executive because he was unwilling to pay him the salary the previous GCEO earned and had compromised governance.[1168] Peters believed that the board had appointed Werksmans contrary to the PRASA SCM13. The R127 million agreed to pay Werksmans was unbudgeted and not provisioned for. Peters was of the view that the spat with the AGCEO Letsoalo was not in the interest of PRASA. The Popo board successfully challenged the Minister.[1169] The Parliament's Portfolio Committee on Transport was hostile to the Popo board, and this was brought to the attention of the Speaker. The Parliament's Portfolio Committee on Transport did not request an explanation from Peters.

Popo's ascension to the board of PRASA raised expectations, especially because his board projected itself as a no-nonsense board. It appointed a forensic investigation into looting, which left the SOE on its knees. According to the Zondo Report, Popo brought the problems

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[1166] Ibid. Buthelezi was an advisor of Zuma when he was the MEC of Economic Affairs in the KZN ANC government. Zuma appointed him the deputy Minister of Finance.
[1167] Ibid.
[1168] Thanduxolo Jika 'Acting PRASA CEO Ups his own pay by 350% and demands a chauffeur' *The Sunday Times* 22 February 2017 available at *https://www.sundaytimes.co.za* accessed on 21 February 2023. Letsoalo was alleged to have increased his salary by 350%. His salary moved from R1,35 million to R5,98 million. The disagreement between him and the HR Executive resulted in the HRE's immediate dismissal. The Popo did not explain the letter sent to Letsoalo advising him that he would be entitled for the pack enjoyed by his predecessor.
[1169] *Popo Simon Molefe & Others v The Minister of Transport & Others* [2017] ZAGPPHC 120 (April 2017).

PRASA was fraught with to the attention of Ramaphosa, who was the then Deputy President and in the top six of the National Executive Committee (NEC) of the ANC. In particular, he made the six NEC members aware that Mashaba of Swifambo, the company that secured R3.5 billion contract to supply 100 trains to PRASA, told his board that he contributed R79 million to the ANC. He had appraised him of the necessity for quick intervention to put PRASA back on track. It is disconcerting that the Popo board was aware that procurement issues at PRASA were the cause of its downfall but also failed to avoid the pitfall of compromised procurement.[1170] It was found wanting for lack of compliance by not making the appointment of the forensic investigation an open tender even though the cost stood at R127 million.

Furthermore, the minutes of the board and its subcommittee could not be found. This is an indictment of how the board was running its business and meetings. Resolutions of the board and board committees must be recorded, but this was a challenge. The other indictment on the Popo board was the losses it incurred a cumulative irregular expenditure of R27 billion and a disclaimed audited financial statement. The new board of PRASA's audited financials were disclaimed. Furthermore, the issue raised in the audit was that PRASA was without a GCEO for six years. Peters had rejected a candidate for the GCEO recommended by the board. She did not believe that PRASA was ready for a new GCEO.[1171] Mbalula, the new minister of the Department of Transport, sent a CV to the interim chairperson indicating his preference for Bongisizwe Mpondo to be appointed the GCEO of PRASA, which the board led by Kweyama rejected. Mbalula dismissed Kweyama's interim board. He appointed Mpondo the administrator of PRASA. The court reversed Mbalula's decision in *#Unitebehind v Minister of Transport and Others* (2058/2020) [2020] 4 All SA 593 (WCC).

The propensity of executive authorities to interfere in the management of SOEs was very visible at PRASA. Four executive authorities appointed to PRASA interfered with the appointment of a GCEO, and none was appointed. This raised concern with the AG in her report. Nzimande alleged that he was unaware that PRASA did not have a permanent GCEO. The Ramatlakane board dismissed three executives: Ms Martha Ngoye - Group Executive: Legal Risk and Compliance; Mr Nkosinathi Allen Khena, Chief Operating Officer; and Mr

[1170] Zondo Report Part 5 Vol 2 op cit note 1148 at 777-778.
[1171] Ibid at 779-801.

Tiro Holele, General Manager: Strategy.[1172] Their case was concluded on 26 March 2024. The Labour Appeal Court (LAC) allowed the appeal in favour of PRASA because the three executives had not pleaded that their dismissal was unfair but sought specific performance. According to the LAC specific performance was untenable in a personal contract of employment especially where employees are executive managers and have to interact with the board. However, the recommendation of the Zondo Commission that Mashaba and Mabunda be criminally charged expeditiously will probably send a message that corruption will not be tolerated. Buthelezi, Gasa, Khena, Moore, Nkoenyana, Salamanje, and Montana are liable to be prosecuted in terms of section 86(1) read with 83(1) of the PFMA.

5.2.3.7. National Prosecuting Authority and the law enforcement

During the Zuma time, the law enforcement and National Prosecuting Authority (NPA) were restructured ineffectively to constrain it from doing its work. What happened to the NPA was duplicated in the Special Investigating Union, the Directorate for Priority Crime Investigations (DPCI) and the Hawks (the Law Enforcement Agencies). According to Open Secrets and OUTA, the repurposing of the SOEs extended to the Law Enforcement Agencies. The PRASA corruption is being investigated by the Spanish law enforcement authorities. The DPCI requested Sacks to help it with the investigation of the corruption at PRASA and the flow of funds.

The initial report of Sacks to the DPCI succinctly set out the flow of funds after payments were made by PRASA to Swifambo and its associated companies, Vossloh and Mashaba. According to the Zondo Report, it is unclear why the DPCI did not follow up with Sacks' report and work with him. They also did not ask him to investigate the flow of money between PRASA and Siyangena. But, for the decisions of the SCA and the Constitutional Court, PRASA would have continued to pay Swifambo and Sinyangena although their contracts were unlawful because they were secured contrary to the provisions of section 217(1) of the Constitution and section 51(1)(iii) of the PFMA.

A selected calibre of persons was appointed to key positions to ensure that Zuma and his alliances were protected and never brought to book. The reluctance was of such a nature that many people deserving of prosecution remained untouched. For example, Simelane and

[1172] Ibid at 825; *Passenger Rail Agency of South Africa and Others v Ngoye and Others* (JA78/21) [2024] ZALAC 18 (26 March 2024)

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Abrahams were appointed to the NDP, and their appointments were successfully challenged before the constitutional court. A new Director of the NDP Batohi was appointed after the settlement between Nxasana and Zuma. It took more than five years for the DPCI and the NDP to start cooperating with the Spanish authorities. The Department of Justice, Correctional Services and Constitutional Development confirmed receiving a request for mutual assistance from Spain. Auswell Mashaba, Makhensa Mabunda, Buthelezi and their partners at Vossloh Espana will still be arrested for corruption about the tall trains and the R2.7 billion paid to Swifambo.

5.2.3.8. Conclusion

PRASA did not comply with good corporate governance in all material aspects of its operation: internal controls, financial management, ethics, conflict of interest, professionalism, transparency, and responsible management were not implemented. Procurement procedures embodied in PRASA SCM 2009, SCM 2012 and SCM 2013 were not complied with. Montana signed procurement agreements the amount above his delegated authority contrary to the PRASA SCM 2009 and SCM 2012. As the GCEO, he was emboldened by the reality that his board delegated him authority outside its power to do so. The GCEO was comfortable in the knowledge that the board he was answerable to would not hold me accountable. When the board was expected to admonish the GCEO for non-compliance with good corporate governance, abuse of power, and unjustifiable dismissal, he was protected by the board. The board appointed its internal and external auditors, Deloitte, to investigate the allegations against the GCEO, which was a whitewash.

The board of directors colluded with the executive managers, which resulted in the executive failing to comply with the provisions of section 57 of the PFMA. The executive managers failed to ensure that financial management, internal controls were in place; they failed to avoid irregular, fruitless and wasteful expenditures in their management of the company. They were not diligent; consequently, they did not ensure that effective, efficient management of the agency's finances and resources were under control and that they collected revenue owing to it. 281 contracts were entered into contrary to the procurement processes. Of these, only 33 complied. Big contracts acquired by Siyangena, worth R5.5 billion, and Swifambo, worth R3.5 billion, were not in line with the procurement regime at PRASA. As a result of the Swifambo contract, PRASA was stuck with trains that were too tall for use. Swifambo was liquidated but PRASA cannot recoup its money. The Popo board appointed Werksmans to conduct forensic investigations but also did not comply with the procurement process in place.

PRASA failed to comply with good corporate governance. The repercussion of non-compliance with good corporate governance resulted in PRASA being in dire financial circumstances and relying on the government to pay its employees and finance it. PRASA did not get a clean audit as a result of corruption and capture. During the Select Committee on Transport, Public Service and Administration and Public Works and Infrastructure meeting held on 22 June 2021, the committee heard about the irregular expenditure of PRASA stands at R27.3 billion and it is unable to pay R2.4 billion to its biggest creditor, Transnet.

5.3.The South African Broadcasting Corporation

5.3.1. Introduction

The South African Broadcasting Corporation (SABC) is a public broadcaster owned by the government. The SABC was divided into five business units with five divisions – Television, Radio Transmission, Broadcast Centre and Group Functions.[1173] This raised concerns that dividing the SABC into five units was a precursor to its privatisation. The SABC had 23 radio stations and three television channels, giving it an audience of 14 million.[1174] Currently, the SABC has 19 Radio Stations, 5 television channels and 1 digital media offering.[1175] The 19th television station Channel Africa belongs to the Department of International Relations and Cooperation.[1176] The Corporate Plan records that the SABC television channels have a viewership of 28.8 million, 4.5 million of which watch its news channel.[1177]

According to the Corporate Plan, the SABC television channels and shows, radio stations, news, education, and other brands have the most popular and engaged audiences on social media. The radio stations of the SABC are the top ten in South Africa, with an audience of over 30.425 million.[1178] The SABC television stations, except its news channel station, are dependent on license fee payment.

[1173] Richard Collins (1991) 'Broadcasting Reforms Fine Tuning Apartheid' (1991) 9 *Indicator SA* 1.
[1174] Ibid. According to the Corporate Plan of 2021/2022 the SABC 4 of the 23 radio stations and 1 television channel are no longer in commission.
[1175] SABC Corporate Plan (2021/2022) available at *https://pmg.org.za/files/210512pmsabc_presentation_corporate_plan.docx* accessed on 28 February 2024.
[1176] Ibid at 6.
[1177] Ibid at 8.
[1178] Ibid at 9; SABC (2022) with Ukhozi leading with 7 603 000 weekly listeners and the XK FM 5000.

The SABC saw a decline in the payment of license fees with a budget of R4.446 billion and collected R815 million.[1179] The numbers suggest that 81.7% of license holders have not paid, and the viewership has declined.[1180] The SABC expressed that its public mandate affects its finances. For example, it was obligated to bring the Olympic games to the people. This does not auger well for the SABC and government because the government could be called upon to provide guarantees for the SABC to raise finance. This, however, does not excuse the SABC from complying with good corporate governance. It must ensure business continuity, the company's comprehensive risk management, compliance, evaluation and internal control. The SABC executive and non-executive managers are responsible for managing the day-to-day business of the SABC in the interest of the people in a constitutional manner.

This presupposes compliance with good corporate governance. It is important to note that the ANC government, four years into democracy, passed the PFMA and, a year later, the Independent Communication Advisory of South Africa of 2000 Act 13 of 2000 (ICASA Act). Thus, when the SABC executive and non-executive management and the Minister of Communication misbehaved, they were reported to the Public Protector, which produced a scathing report, "When Governance Fail", about their conduct. The Minister of Telecommunication, Faith Muthambi, was defiant, and she was taken to court for her defiance. She appropriated for herself powers she did not have in the Broadcasting Act of 2002.[1181]

5.3.2. South African Broadcasting Corporation history NP and the ANC governments

The South African Broadcasting Corporation (SABC) is the offspring of the African Broadcasting Corporation, which was the amalgamation of three radio stations of English medium from three cities in Johannesburg, Cape Town, and Durban.[1182] In 1936, the SABC was charted by the government of South Africa, offering services in Afrikaans and English. Later in the 1940s, the first African broadcast was done in African languages over the telephone line. In 1950, the SABC launched the Springbok radio station. The first commercial radio

[1179] Broadcast Media Africa 'The Broadcast Media South Africa Public Broadcasters (SABC) Prime Time Audience Declines to Below a Third 2021/2022' 8 November 2022 available at *https://broadcastmediaafrica.com* accessed on 21 February 2023.
[1180] Ibid. Media Release (11 October 2022) 'SABC Tables Annual Report 2021/2022' available at *https://www.sabc.co.za* accessed on 23 February 2024.
[1181] Minister of Telecommunications.
[1182] Gap Mampone 'SABC - 70 Years of broadcasting' *BizCommunity* 1 Dec 2005 *https://www.bizcommunity.com* accessed on 23 February 2024.

station was launched in the 1950s.[1183] The African languages broadcast for different distinct so-called ethnic languages in the 1960s. The SABC spread its wings outside South Africa, purchasing Mozambique's LM radio, later named Radio 5, then 5FM in the 1970s. The SABC focused attention on dominating the network of cultural, economic and political institutions by broadcasting in Afrikaans and English.[1184]

The NP government used the SABC as a state broadcaster and its instrument to inculcate the culture of superiority of the whites and continued to divide South Africans along racial lines.[1185] The NP used the SABC as its propaganda machine and knew how powerful and effective that had been for decades.[1186] Thus, with the advent of democracy, it was concerned about what the ANC would do when it ascended to power. The NP and others propagated for and advocated for a pluralistic broadcasting structure for the future, which will be non-racial. [1187]Good corporate governance was neither an adopted NP policy nor accountability and transparency in place at the SABC. News broadcast was geared to tell the whites what the NP believed they must hear and see nothing.

The NP controlled the SABC through the departments of Home Affairs, Post and Telegraphs, Home Affairs, Education and Information. The Broadcast Act of 1976 did not provide how the SABC would be management.[1188] There was news blackout. If the NP had not been deceptive and misleading when disseminating information through its instrument of propaganda, maybe the South African people would have seen democracy much earlier. The editorial policy and its implementation lay in Auckland Park. When necessary, the NP government minister in charge would go into the news studio and dictate what must or must not go into the news.[1189]

At the beginning of 1991, the NP set up a Task Group of fourteen people chaired by Christo Viljoen, the Chairperson of the SABC.[1190] The Task Group was made up of one African

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[1183] Ibid. This radio station derived its income from shows, dramas and comedies.
[1184] Ibid.
[1185] Ruth Teer-Tomaselli 'Nation building, social identity and television in a changing media landscape' South African History Online Chapter 5 117 available at *https://www.sahistory.org.za* accessed on 21 February 2023.
[1186] Fokane Tusi The Transformation of Broadcasting in South Africa (2003) 4. *https://archive.niza.nl.* 23 February 2023. Prepared for the Freedom of Expression Institute and the Netherlands Institute of Southern Africa (NIZA).
[1187] Collins op cit note 1173; Prepared for the Freedom of Expression Institute and the Netherlands Institute of Southern Africa (NIZA).
[1188] Ibid.
[1189] Ibid.
[1190] Collins op cit note 1173 at 20.

person, Aggrey Klaaste, the editor of Sowetan, the Bureau of Information, National Intelligence, South African Defence Force (SADF), MNet, the SABC, South African Post and Telecommunication (SAPT), Foreign Affairs and Potchefstroom University.[1191] The NP's endeavours were considered the first reasonable approach to address democratic media in the history of South Africa.[1192] There was an outcry from civil society in the manner in which the NP approached the democratisation of the Media and, in particular, the SABC. The Task Group and its report were kept secret until much later.[1193] Civil societies from different walks of life had met at various times and places to engage on the issue. The Rhodes University Media Policy Workshops, the Jabulani Freedom of the Airwaves Conference (Jabulani), University of Bophuthatswana Media Workshop, the COM/IDASA Conference and the Free, Fair and Open Conference in 1990, 1991, 1991, 1991 and 1992 respectively discussed and propagated the democratisation of the media.[1194]

Jabulani constituted 47 representatives, including the ANC, and commercial broadcasters from the homelands banded together in the Netherlands to discuss the future of broadcast in August 1991.[1195] Jabulani proposed a Commission of Inquiry rejecting Viljoen's recommendations. It also pictured the broadcasting scenario involving the public, commercial and the community.[1196] The civil society efforts resulted in the passing of the Independent Broadcasting Authority Act 153 of 1993 (the IBA Act).[1197] The first independent board of the SABC were appointed on 31 May 1993.[1198] The appointment was fraught with disagreement, and the State President de Klerk vetoed the appointment of Professor Ndebele and opted for Van Zyl Slabbert to Chair the board. Van Zyl Slabbert resigned as the chair of the SABC, and de Klerk appointed Matsepe Cassiburi to chair the SABC board. The NP control over the SABC ended, and a democratic media was finally rolled out with the passing of the ICASA Act.

[1191] Ibid.
[1192] Ibid at 6.
[1193] Ibid. The South Africa Council of Churches (SACC) was concerned that the Task Group was made up of the Broederbond and the SADF) the view that the concern Former Minister Pahad expressed the view that this Task Group was the perpetrators investigating themselves. A glimpse of the contents of the report was seen on 19 May 1991 when the Task Group began to engage views on wat should the SABC look like. Their participation led to a 130-page report which was submitted to the Cabinet. This report resulted in the
[1194] Ibid.
[1195] Ibid at 20.
[1196] Ibid at 20.
[1197] Ibid at 6.
[1198] Ibid.

When the ANC took over as the government after the first election, the board of the SABC was already in place. The ANC government passed the PFMA in terms of which the SABC was classified a Schedule 2 public entity. This meant that the SABC would be expected to comply with good corporate governance embodied in the Constitution.

5.3.3. The Legislative Framework

The Broadcasting Act of 1976 (the BA of 1976) was repealed by the Broadcasting Act 4 of 1999 (the BA of 1999) and thereafter the Broadcasting Act of 2002 after the ANC took over control of South Africa. This came with a lot of expectations, considering that during the Apartheid government, South African media was not free, and the NP was never called upon to account for its conduct. Like most SOEs, the SABC is subject to other legislation such as the Constitution, the Independent Communication Authority of South Africa Act of 2000 (the ICASA Act), the PPPFA, the PFMA and the POCA. The object of the BA of 1999 was to 'establish and develop a broadcasting public policy in the Republic in the public interest....' There are many purposes outlined in the BA that the SABC is expected to realise.

The first one stands out because it is all-inclusive and expected to - contribute to democracy, the evolution of society, the equality of genders, educate the nation and the strengthening of the spiritual and moral thread of the society. The BA of 1976 did not provide for the establishment of the board SABC, repealed by the BA of 1999. Before the repeal of the BA of 1976, several government departments controlled the SABC, and governance was incoherent.[1199] In addition, there were no good corporate governance processes in place. Section 13 of the BA of 1999 provides that the President appoints the board of twelve upon recommendation of the Parliament. Nomination of the board is required for fit and proper persons who are qualified for the position and are not prohibited from holding directorship.

The nominees are interviewed by Parliament they are considered for appointment by the President. The President will appoint one of the recommended directors as chair of the board and another as deputy chair. These board members must be diverse, including persons with expertise in broadcasting and policy technology, media law, business practice finance, broadcasting regulations, experience, frequency planning, journalism, education and entertainment, and social and labour issues. Furthermore, they must be proponents of freedom of expression, fairness, the right of the public to be informed, accountability and openness.

[1199] Foreign Affairs, Home Affairs, Post and Telegraphs, Education and Information.

The key legislation which enjoins the SABC and government to respect freedom of the press is the Constitution. This freedom is guaranteed in the Bill of Rights section 16(1)(a), which reads, 'Everyone has freedom of expression, which includes – (a) freedom of the press.' The freedom embodied in the Bill of Rights is subject to limitations found in section 36. Neither the minister nor the President can limit free speech. Therefore, the SABC and every other news channels are entitled to freely broadcast news without fear and favour. The current BA Act of 2002 moved away from using the broadcaster as an instrument to engender supremacy. Furthermore, it emphasised the importance of servicing the needs of all South Africans in a balanced fashion. The researcher aligns herself with inclusivity and service to the needs of all South Africans irrespective of status because the SABC is a public broadcaster owned by the people.

The SABC executive and non-executive management and political head and shareholder must also be cognizant of its duty to manage this state organ in an ethical manner and in line with section 51(1), which espouses the maintenance of 'effective, efficient, and transparent systems of financial control and risk management and internal controls.' It must have an internal auditor answerable to the audit committee, which follows treasury regulations and operates. It's critical that when procuring goods and services, the SABC have a procurement policy and provisioning system that is 'fair, equitable, transparent, competitive and cost-effective'.[1200] Furthermore, irregular expenses and fruitless and wasteful expenditures should be avoided. AFS must be prepared and submitted to the AG to audit and present the annual report to the Department of Telecommunication. Disposal of the business of and/or engaging in a company must comply with section 54(1) of the PFMA, which requires the SABC to request permission from the Ministers of Telecommunications and Finance.

Furthermore, employees in public administration, the category in which the SABC falls, must maintain high standards of professional ethics and must use the resources efficiently and economically. Public administration must be development orientated and service must be fair, equitable and impartial. An accountable and transparent administrator is key to providing service openly and timeously. The employees must be managed and developed to their potential.

[1200] Section 51(1)(a)(iii) of the PFMA which has similar provision borrowed from section 217(1) of the Constitution.

Other important pieces of legislation are the PPPFA, POCA and PRECCA. These are dealt with in detail in chapter four of this research. As an aide memoir the PPPFA is about procurement compliance, POCA prohibits engagement in organised crime and the PRECCA is about preventing corruption. The following section will discuss these principles in detail, where good corporate governance is discussed.

5.3.4. Good corporate governance in the South African Broadcasting Corporation

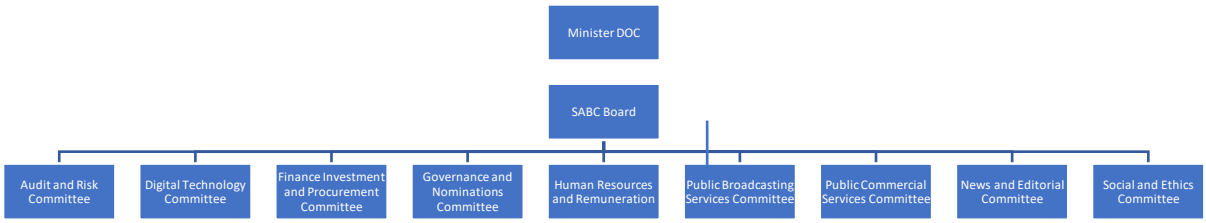


Figure 3: SABC Governance Structure

The above simple diagram embodies the governance structure of the SABC. The SABC has eleven subcommittees. Due to the nature of SABC's business, it deemed it fit to have a governance structure that represents the different aspects of its business to enable the delivery of its mandate. According to the SABC annual report, the board had a full complement of directors and was supported by its various subcommittees.[1201] The subcommittees contributed to the board executing its duties and functions. These subcommittees submitted their minutes and reports and made recommendations which added value to the decisions of the board.[1202] Subcommittees had terms of reference specific to them. The terms of reference incorporated the composition, delegated authority, attendance, roles and responsibility.

[1201] SABC Corporate Plan op cit note 1175 at 4.
[1202] Ibid at 64.

The audit committee, in particular, was constituted of three non-executive directors, with one of them chairing the committee.[1203] All the subcommittees of the board are important. A few will be mentioned specifically, such as the Audit and Risk Committee, Finance, Investment and Procurement Committee, Governance and Nominations Committee, Social and Ethics Committee, Human Resources and Remuneration Committee, the Digital, Technical Committee, Public Broadcasting Services Committee, and News and Editorial Committee. The Audit and Risk Committee, the Public Commercial Service Committee, Social and Ethics and the Human Resources and Remuneration Committee. Considering the nature of the SABC's business, it included additional subcommittees that appear suitable for the purpose. It is important that the SABC turns the ship around if it means being creative to achieve its mandate and business objectives.

If the SABC is serious about cleaning up procurement and making it compliant with the law, it would benefit it in the long term. Compromised, the disregard of, and manipulation of procurement must be in the past. The SABC has not achieved an unqualified audit in a decade, and if the Finance, Investment and Procurement Committee is functional and robust, the SABC stands a chance to turn the corner. Most of its failure to realise an unqualified audit was and still is due to irregular expenditure. The irregular expenditure was inevitably caused by procurement, which was not in line with the procurement procedures. Lack of internal controls, financial control, ethics and transparency play a fundamental role in the quality of the AFS prepared and affect audit results. The Audit and Risk Committee can assist if the executives and all and sundry care about their employer and avoid corruption, defrauding the SABC and stealing for the SABC.

The Audit and Risk Committee is twinned with the Finance, Investment and Procurement Committee. It is flagged because it has the potential to bring the SABC down with a hard crush that could see it fold. The Audit and Risk Committee must have integrity, be clean, professional, and thorough and avoid getting into deals with external auditors and internal auditors. The internal auditors must sign the Internal Audit Charter, which must be enforced without fail. When it signs the letter of engagement with the external auditors, the Audit and Risk Committee must ensure that the CFO prepares the AFS and provides the audit files to support the AFS. The Chair of the Audit and Risk Committee must confirm with the CFO that

[1203] Ibid at 65.

all the relevant supporting documents have been provided. There should be no shortcuts. Deals must not be made with either the internal auditors or the external auditors to influence the outcome of the audit. Hereunder are examples of the culture.

5.3.4.1. The culture of dishonesty at the South African Broadcasting Corporation

Good corporate governance is a new phenomenon at the SABC. For decades, the SABC used to do business without restrictions. Managers and employees were doing what they were used to before the advent of the Constitution, the Labour Relations Act, PFMA, the POCA, PFA and PRECCA. The SABC was and still is duty-bound to follow the prescripts referred to herein. Despite these legislative prescripts in more than a decade, the SABC failed to comply and was found wanting on many occasions to have done so for both the executive and non-executive managers. The transgression of these laws came at a major cost to the SABC in that it ran out of funds on more than two occasions, whence it had to go to the government to request bailouts. Although the government acceded to such requests, it did not give the SABC cash but guarantees with different financial institutions willing to work with it.

The SABC was reported to the Public Protector's Office, which issued a damning report, "When Governance and Ethics Fail". The report stemmed from the complaints made to the Public Protector. complaints – 1) maladministration, systemic corporate governance deficiencies, abuse of power and; 2) systematic corporate governance deficiencies; 3) abuse of power; 4) whether the Minister interfered in the affairs of the SABC; 5) purging of senior employees; and 6) irregular increases of selected employees' salaries. Other complaints were made to the National Assembly about the mismanagement of the SABC and its ability to deliver on its mandate as a national public broadcaster.

Furthermore, complaints were submitted to the Zondo Commission, which dealt with the New Age sponsorship and the SABC archives sold to Multichoice contrary to procurement processes. Multichoice was cleared of wrongdoing for the archives purchased from the SABC for R553 million by the Zondo Commission.[1204] Governance failures were not solely confined to procurement but were spread across all aspects of the SABC business for failure to adhere to the code of conduct, internal controls, human resources, financial control and management, editorial policies, abuse of power, legislation and ignored court decisions. The researcher will

[1204] Zondo Report Part 4 Vol 2 op cit note 646.

refer to a few examples of incongruous non-compliance with good corporate governance in this paper.

5.3.4.2. Human resources

The human resources administration at the SABC was in disarray. Unmitigated appointments of unqualified personnel were made with impunity at the SABC. Some are at the behest of and/or endorsement of the executive authority and the board.[1205] Motsoeneng was appointed the Chief Operating Officer with neither the experience nor Matric qualifications at the SABC. The Ad Hoc Committee report confirmed that he had falsified his standard 10 results. His appointment was supported by Faith Mutambi, the Minister of Communications responsible for the SABC and its chairperson of the board, Ellen Tshabalala. Motsoeneng and Tshabalala had something in common: overstating their educational achievements.[1206] Motsoeneng admitted that he did not have Matric but was hired in Free State after he got the forms from Swanepoel. Tshabalala stopped the probe into her B Comm degree at Unisa.[1207] She had claimed that the results at Unisa were manipulated. Motsoeneng's position came at a high price, from an annual salary of R1.5 million to R2.4 million, which violated the SABC Human Resources Policy and Regulation.[1208] The salary costs exclude the cost of building the studio contrary to the procurement process and the acquisition of R10 million to ensure that Multichoice had exclusivity to the SABC archive material. Furthermore, costs were incurred for the suspensions and dismissal of innocent administrative staff and journalists, which cost the SABC dearly and contributed to its irregular expenditure.[1209]

Motsoeneng and the board of the SABC appointed Duda CFO, although she had not applied for the position when it was advertised. Msulwa Daca applied and was the board's first choice. He was recommended and his name was submitted to the Minister to confirm his appointment. Minister Dina Pule did not appoint him. Subsequently, Duda was interviewed,

[1205] Public Protector Report (23 of 2013/2014) op cit note 65 at 13.
[1206] SAPA 'SABC chair successfully blocks qualification inquiry' *Business Tech* 21 October 2014 available at *https://businesstech.co.za* accessed on 21 February 2023; SAPA 'SABC chair lied about her qualifications' *news24* 13 July 2014 available at *https://www.news24.com* accessed on 21 February 2023 SAPA 'Background check confirms that SABC chair has no degree' *Broadband* 30 October 2014 available at *https://mybroadbandco.za* accessed on 21 February 2023.
[1207] Ibid.
[1208] Public Protector Report (23 of 2013/2014) op cit note 65 at 10. SABC HR002/98/A-Acting in Higher Scale Policy and Part IV of SABC Personnel Regulations.
[1209] Ibid.

and the board recommended her. Pule appointed her immediately without hesitation.[1210] The mismanagement and manipulation of HR issues were not limited to appointments. They included unjustifiable dismissals, disciplinary processes and suspensions. Several employees were suspended undeservedly, and the basis of their suspensions was not investigated. These suspensions were with pay, resulting in fruitless and wasteful expenditures for the SABC.[1211] Favouritism at the SABC was a norm.

Personnel considered undesirable because they executed their duty well and in the interest of the SABC were isolated, victimised, and dismissed, including senior managers. Journalists were dismissed, and others were suspended because they were committed to carrying out the mandate of the SABC. An unqualified senior manager, for instance, Hlaudi Motsoeneng, the Chief Operating Officer and a qualified GCEO, Mokhobo, interfered with the editorial independence at the SABC news. Both wanted to ingratiate themselves to the ANC at the expense of the integrity of the news for the broadcaster and compliance. They lost sight of the fact that their conduct had an adverse effect on journalists. The SABC was successfully challenged by the eight journalists.[1212] The outcome of their dismissal affected the finances of the SABC because it had to pay them and pay the legal costs of the journalists and its own. It would have been more just for the SABC if punitive legal costs and concomitant costs to settle with these journalists were ordered against the COO and the board members in their capacity. They were complicit and irresponsible to let the tail wag the dog.

5.3.4.3. Financial control

Financial controls and non-compliance with the regulatory framework and legislation plagued the SABC for the longest time, going back over a decade. The pattern of audit outcomes at the SABC has been disclaimers, qualified audits, and no unqualified audits. In the past decade, the SABC has had three disclaimers and qualified audits.[1213] A disclaimer is the worst audit result any SOE can receive. The AG requires auditees to submit financial statements for audit that

[1210] Ibid.

[1211] Ad Hoc Committee Report (27 January 2017) 22. These expenditures were questioned by the AG in his audit of the SABC; AG Report for 2013/2014; 2014/2015 and 2015/2016 the SABC received qualified audit results. These were due to irregular expenditure and fruitless and wasteful expenditure.

[1212] Thandeka Gqubule-Mbeki, Vuyo Mvoko, Lukhanyo Calata, Krivani Pillay, Suna Venter, Busisiwe Ntuli, Foeta Krige and Jacques Pauw.

[1213] Makhathini Bongumusi 'Commercial insolvent SABC posts a R622 million loss in 2017//2018 financial year SA's the Auditor General says he can't say whether the South African broadcaster is a going concern or not.' *Blogger* 18 September 2018 available at *https://teeveetee.blogspot.com* accessed on 21 February 2023. The SABC disclaimed in 2012/2013 2018/2019.

are free of material misstatements to enable the AG to proffer an audit opinion. Furthermore, the financial statement must fairly reflect the financial position of the auditee.

A disclaimer means the auditee's financial statement is in a state that does not give the AG the confidence and opportunity to form an audit opinion.[1214] For the balance of the years, the SABC got qualified audits which spoke to its failure to disclose and or address irregular expenditure and fruitless and wasteful expenditures. An irregular expenditure could result from failure to follow procedures, policies and legislative frameworks. These expenditures are, in most instances, connected to the failed compliance with internal controls, especially in procurement, recruitment, and financial management as expected and non-compliance with disposal of assets in terms of sections 51 and 54 of the PFMA. These sections were discussed in chapter 3. For example, the SABC disposed of its Archive to Multichoice contrary to the requisite process. This created an opportunity for the COO to benefit to the tune of R10 million for negotiating and finalising the deal. The SABC has archived material for more than 80 years, but the most uneducated COO deemed fit to just give away the archives away.

There was no accountability for having disposed of these assets for less value. Multichoice was a preferred acquirer, and processes were compromised. This kind of attitude and conduct could have dissipated the assets of the SABC and reduced its assets base but for the decision of the court.[1215] In the 2020/2021 audit, the outcome was a qualified audit, which is an improvement compared to a disclaimer. The problems with the SABC are weak internal controls, irregular expenditure, fruitless and wasteful expenditure, weak record keeping and maladministration. Although the 2022 financials have not been audited yet, the likelihood of the SABC getting a clean audit without clearing and having the irregular expenditure condoned is non-existent. This is despite the AG having given the SABC the opportunity to have the irregular expenditure condoned. However, the condonation given provided the records show what was the money spent on and whether it was value for money. The SABC's irregular expenses stand at R63 billion. The SABC could not even provide the Ad hoc Committee documents and records during its investigation performance of the outcome of the audits is not encouraging. Across the SOEs, SABC included the major problems with procurement,

[1214] Auditor General (2011/12) *Background to The Three Aspects We Audit* available at https://www.agsa.co.za accessed on 21 February 2023. In 2018/2019, 2019/2020 and 2021/2022 it got qualified audits even though government had availed R3.2 billion to it to address its financial situation.
[1215] *Hlaudi Motsoeneng v South Africa Broadcasting Corporation and others* [2022] ZAGPHC 528.

declaration of interest, and human resources-related issues such as dismissals and suspensions that result in fruitless and wasteful expenditure.

5.3.4.4. Conduct of the executive, non-executive management and the executive authority

The executive and non-executive managers have not covered themselves in glory. They have failed for years to put the public interest and that of the SABC first. The mandate of the SABC was of no consequence to them. They did not learn anything from the history of the SABC during the NP control of broadcasting and how freedom of the press was constrained.[1216] During the 2016 local elections, the SABC was self-censoring, with the COO and the board in the forefront. There was concern that Zuma and the ANC were not given adequate opportunity to put their point across, whereas the opposition parties were favoured. This led to certain newsworthy footage not being beamed.[1217] The decision was referred to ICASA, which ruled against the SABC's self-censorship. However, the SABC Board and management were adamant that the ICASA did not have the power to order it to show scenes of disquiet during the election campaigns.[1218] They expressed the view that ICASA was a Chapter Nine institution and could only make a recommendation. This conduct ran contrary to the SABC Editorial Policy. Motsoeneng removed the editor of SAfm Sunday Morning news. Stuart Pennington sent out newsletters about the gagging of editors at the SABC. This conduct by the board and management is demonstrative of a total onslaught on the editorial policy of the SABC, the Board Charter and the freedom of the press embodied in the Bill of Rights referred to earlier in this chapter.

The Ad Hoc Committee, in its report on the fitness of the SABC board, expressed concern about the conduct of the board. Its terms of reference – 1) the SABC's financial instability; 2) response to the Public Protector's report and court judgments. 3) the decision of ICASA ruling on the coverage of protest actions during the electioneering local government; 4) the board's ability to take legally binding decisions and decision-making processes; 5) the board's adherence to the Broadcast Charter; 6) the board's ability to take decisions that accord with section 13(11); and 7) governance structures in human resources, appointments of executives,

[1216] Clive Barnett *The contradictions of Broadcasting Reform in-Post Apartheid South Africa* (1998) 5.
[1217] Pierre De Vos 'Laws, orders and recommendations: The SABC gets it wrong, again' *Daily Maverick* 13 July 2016 available at *https://www.dailymaverick.com* accessed on 21 February 2023.
[1218] Ibid.

and termination of employment of affected executives. After a dramatic walkout by the Chairperson of the board accompanied by Motsoeneng and others, the Ad Hoc Committee concluded that: a) the directors of the board failed in their fiduciary duties and to provide leadership. b) The failure rendered the work environment toxic and unbearable, resulting in skills exodus, loss of competitiveness and a complete breakdown in governance. c) Tshabalala kept the Public Protector's 'Derailed' report to herself and learnt of it in the news. Tshabalala acquired the services of Mchunu Attorneys to provide a legal opinion. d) The was financial mismanagement, which put the SABC at risk of technical insolvency. e) SekelaXabisa was irregularly appointed and the SABC could do the work. f) Victimisation and irregular appointments were the order of the day. h) 'Derail' must be complied with. i) The SABC 's Archives are public assets and should not have been traded with Multichoice. j) The Amendment of the MOI by Muthambi was irregular, and court decisions must be complied with. k) Journalists' ethics were compromised, and the Broadcasting Charter must be complied with. The findings of the Ad hoc Committee confirm that the SABC failed to comply with governance in all material respects.

Having confirmed that governance was disregarded, it is perhaps appropriate to highlight that Motsoeneng was effectively in charge of the SABC with all the boards and Ministers that once served as the government shareholders during his tenure. Ministers Pule, Yarrim and Muthambi. He was also the go-to person during the board of Tshabalala, Ngubane and Maghuve. He collaborated with the ministers and the board chairpersons to do what he was instructed to do by the powers that be. He ensured that the SABC assisted in the launch of the ANN at the SABC's expense. Motsoeneng ensured that the Breakfast Show was realised for TNA. Everything he did with the support of the board chairs, ministers and Zuma put him in the pound seat. He was powerful and the person to be afraid of, even if a CEO.

5.3.5. Conclusion

The NP government used the SABC as its mouthpiece to broadcast propaganda. Objective and professional journalism was not permitted. The NP had a stranglehold on the news and the language of broadcast. The SABC was one of the biggest news broadcast media in South Africa. In the 1950s and 1960s, it extended radio broadcasts to the African people. The ANC government tried to mimic the NP but could not, thanks to the Constitution of the Republic. Over the years, the SABC was unstable because of the calibre of the board of directors appointed and the executives, such as the COO. It was weak because of the interference with

press freedom. For the first time in ten years, the SABC functioned collectively as a board, although there were disagreements from time to time.

The irregular expenditure was on the way to be placed in the registrar for the board to consider, condone, and ratify this expenditure. Nothing was, however, done with fruitless and wasteful expenditure, which reared an ugly head every year during the audit. It has not enjoyed a clean audit in more than a decade. There was rampant corruption and fraud and all the rules were thrown into the fireplace. The corruption and grand theft affected the SABC negatively. There was no accountability, fairness, transparency, or responsibility in the SABC. Ethics were non-existent. Good corporate governance was the casualty, and this affected the fiscus, threatened the continued operation of the SABC, and took away the little money the SABC could have used to carry out its mandate. Thus, disclaimers and qualified and unqualified audit opinions in the corporation.

The executive authority collaborated with non-executive managers and some selected executives to sabotage the SABC, resulting in non-compliance with good corporate governance. The SABC failed to comply with the report of the Public Protector, which called upon it to correct its way. A new board was appointed, and the executives are waiting and looking forward to a board that works in cohesion with them. The old board had worked together to take the SABC forward and was hoping for the same with the new board. The SABC, throughout the years it dealt with abuse of power, interference with Editorial independence and in procurement.

5.4. Overall Conclusion

The three SOEs do not practice good corporate governance. These SOEs are important for democracy. The thread running through them is wrong appointments of accounting authority, executive employees, proper fiscal control, non-compliance with supply chain policies and corruption. The role of the private sector in failed compliance with good corporate governance in these SOEs is evident. This has been proven by the Zondo Commission which made recommendations. The cost to the fiscus of the country by SOEs failure is enormous. It cuts into the money which could have been used by the government to deliver other services.

CHAPTER 6

CONCLUSION AND RECOMMENDATIONS

6. Conclusion

6.1. Introduction

This research aimed to explore the level of good corporate governance in the SOEs and the extent of compliance in South Africa. The research questions raised in this research were unequivocally answered. The answers from the investigation confirm that good corporate governance was not complied with even though there were measures in place for the purpose. This led to the researcher making recommendations herein for a clean and good corporate governance environment in the interest of the SOEs and their sustainability. This entailed looking at the instruments that support good corporate governance and the requisite mechanisms to realise it. Some SOEs have succession plans in place however they are not executed. This is due to the different regimes for appointments of the executive management, especially CEOs and/or GCEOs and the accounting authority in various SOEs.

6.2.Discussion of conclusions from the preceding chapters

Without traversing the conclusions reached in their entirety, it is perhaps appropriate to indicate generally that the SOEs have measures in place regulating good corporate governance but, the challenge is implementation. Some SOEs, however, have opted to engage in corruption and state capture with total disregard for good corporate governance.

For instance, the repurposed SOEs were vulnerable to criminality and complete failure, although legal frameworks, policies, the Protocol, the Constitution and the PFMA were in place. The SOEs were weakened through the inappropriate appointment of – the executive and non-executive management, including the executive authorities; the purging of committed, hardworking and honest employees; and the manipulation of the processes to achieve the nefarious goals of the architects of the repurposed SOEs. The floodgates for bribery, corruption, money laundering, racketing and state capture were opened unashamedly.

Furthermore, enablers from the private sector played an important role in facilitating the breakdown of good corporate governance and ushered in an attack against the country's economy. The 3 SOEs (ESKOM, PRASA and SABC), which are the subject of the case study, were smack in the heart of the breakdown of good corporate governance. The cost of corruption and state capture is estimated at R1 trillion. This amount could have been used to sustain the SOEs to ensure their continued businesses to facilitate the delivery of services as expected.

6.3.Recommendations

The recommendations made herein are wide-ranging and are based on the conclusions made in this research. For instance, they include the control of the SOEs, which vest in the accounting authorities or boards of directors and the executive managers; the duty of human resources divisions of the SOEs; and the instruments that regulate the SOEs, such as their enabling Acts, policies, the Protocol, legal frameworks, the Constitution and the PFMA.

It is important to state that this research considered some of the recommendations of the Zondo Commission and the approaches of other jurisdictions, especially the trio (Botswana, Namibia and South Africa) referred to in Chapter 3. Moreover, what else can the government do to ensure that good corporate governance failures are minimised in the SOEs?

To meet the objectives of this research, the following specific recommendations are made. It is hoped that their implementation will address and arrest the perennial corruption in the SOEs and enhance good corporate governance.

6.3.1. Appointment and duties of the executive authority

The best practice is for the President to appoint suitable candidates with integrity to the office of the executive authority. Simply put, the appointee must be vetted within two weeks of the appointment. Consent to be vetted must be a condition precedent. This would accord with Schedule 2 of the Constitution. The executive authority undertakes to be "…faithful to the Republic of South Africa and will obey, respect and uphold the Constitution and all other law of the Republic; and undertake to hold the office as Minister/Deputy Minister with honour and dignity…" Such appointees should always do what is in the interest of the country and neither the political party nor the President. The executive authority must not share confidential information received in his/her capacity and must execute his/her duty conscientiously.

In an instance where the Minister is also a shareholder representative for the SOE, he/she must follow the laws of the Republic and its Constitution when making decisions that affect the SOE. He/she must not make ill-informed decisions, take and implement unlawful instructions and/or engage in illegal conduct to please the President because of fear of losing his/her position. If ministers live by the Constitution and the country's law, the SOEs led by the accounting authority should fare better and execute their mandate within the confines of good corporate governance without interference. In this way, unconstitutional and unlawful instructions should not be heeded but, the interest of the SOEs, the people, and the country. This is of paramount importance for the success of good corporate governance.

6.3.2. Appointment and duties of the accounting authority

It is interesting that the SOEs' accounting authorities' appointments are not standardised. They vary depending on the enabling legislation of the SOE. However, the requirements for the SOEs to comply with good corporate governance are embodied in the Constitution, the PFMA, the Companies Act, King Code IV, the PAA and the Protocol. The Protocol is intended to regulate the appointment of the accounting authority. The appointment of the accounting authorities of the three SOEs, which are the case study appointments, differ significantly. For instance, at Eskom as a DPE SOE, the accounting authority is appointed by the Minister in terms of the MOI, notwithstanding that the Protocol also regulate it, while at PRASA, the accounting authority is appointed by the Minister of Transport in terms of its constitutive Act.

Whereas the SABC requires that nominations, shortlisting, and interviews are done by the Portfolio Committee on Communications, which is a portfolio committee of the National Assembly in the Parliament of South Africa. Thereafter, the recommendations are made to the President to appoint. Recently, the appointment of the SABC board was delayed because the then Minister of Communications, Minister Khumbudzo Ntshavheni, had issues with some of the appointees recommended, but the decision to either recommend or appoint did not rest with her. These powers to recommend after interviews and to appoint the candidate belong to the Portfolio Committee on Communication and the President, respectively.

The best practice is for the accounting authority candidates to undergo training for the position of director and be active members of the IODSA for not less than 3 years. In addition, they must voluntarily have themselves vetted every two years to maintain their status of good standing as directors. Moreover, they must attend refresher courses every second year of their appointment. Above all, they must know their fiduciary duties in the context of the PFMA and the Companies Act so that they complement each other. If the SOEs is not exempt in terms of section 9 of the Companies Act, then they are bound thereby. Furthermore, the accounting authority is specifically bound by sections 195(1) and 195(2) read with 217(1) and 217(2) of the Constitution.

The accounting authority must have within its mix at least one Chartered Accountant, a legal practitioner, and a person with expertise in the business environment of the SOEs. The appointed director must not have a relationship with the executive authority, who is a shareholder in charge of the SOEs. The members of the accounting authority must put the SOEs first in the interest of the public they serve. Members of the accounting authority must neither

owe allegiance to the Shareholder representatives nor their relatives and or friends. Otherwise, if they do so, this will compromise their fiduciary obligations to the SOE.

The person appointed member of the accounting authority must be fit to be appointed director in terms of section 69 of the Companies Act and must not have ever been declared either a delinquent director or a director of an insolvent company. The accounting authority must know their duties embodied in sections 51, 52, 53, 54, 55 and 56 of the PFMA. Finally, the accounting authority must effectuate the mandate of the SOEs found in the enabling legislation. When the accounting authority delegates its authority, it should bear in mind that the oversight and control of the SOEs is on their shoulders collectively.

6.3.3. Appointment of the executive managers and their duties

The appointment of the executive managers of the SOEs is also regulated in terms of their respective constitutive Acts. The best practice is for the appointment of the GCEOs/CEOs/CFO/CPO/Chief Compliance Officer (CCO) of the SOEs to be standardised. The CPO position must be elevated to the executive level of the Chief Procurement Executive (CPE). However, certain aspects must be nuanced based on the specific industry, such as academic qualifications and work experience. The requirements must be strictly adhered to. Neither the President nor the executive authority should have the power to compel the accounting authority to appoint a candidate of their preference, as has happened in the past. Merit should be the criteria and not political connections. Potential candidates for these positions should not be considered for appointment as they could end up doing the bidding of the President the executive authority or their nominee who looks after their interests.

Further, all the SOE executives' appointments must accord with good corporate governance. The advertisement and job description requirements for the abovementioned must be specific about the following: 1) the requisite academic qualifications in the relevant industry; 2) management experience to be specified, preferably not less than 10 years; 3) the applicability of the Constitution and the PFMA sections particularly 195(1), 195(3) and section 217(1) of the Constitution and sections 56, 57 and 83 of the PFMA. In a nutshell, these sections are concerned with effective and economical financial management, fair management, internal controls, avoidance of irregular expenditure, delegation of authority, protection of assets, transparency, and fair, economic, and competitive procurement. The minimum requirements for the CFO position are that you must be a Chartered Accountant with no less than 10 years of experience, which includes preparation of AFS and audit.

6.3.4. Interviews, recommendation and vetting

The interviewing panel must be persons of integrity, knowledgeable of applicable legislation, with academic qualifications and management experience and be vetted themselves. The panel members must not have any relationship with the candidates, should disclose interests, and should not sit in the interview. All the interviews for these executive management and accounting authority positions must be done publicly, as is the case currently with the SABC. The candidates considered and recommended for appointment must be vetted. This approach will avoid situations where the candidates delay their vetting by the SOEs.

6.3.5. Ownership of the SOES

The accounting authorities/boards of directors, executive managers, and officials of the SOEs must understand that the entities do not belong to the governing party. The governing party governs these by virtue of the privilege bestowed on it upon being elected by most of the electorate. The public, through the government, are the shareholders at large. Hence, it is the duty of the shareholders and/or their elected representatives to jealously guard their SOEs and refuse to collaborate with employees or the accounting authority executive authority or enablers to cheat or do anything that is likely to harm their interest, whether in the short or long term.

6.3.6. Performance bonus

The payment of bonuses must be linked to the performance of the employees and the executives relative to their contribution, including the success of the SOEs. The determination of performance bonuses should be based on actual performance and meeting performance targets, especially the financial, operational, risk management, legislative compliance, and business growth targets, amongst others. Furthermore, performance bonuses should only be determined and allocated after a formal audit of the entity has been issued and endorsed by either the Auditor General of South Africa or external auditors of the SOES. In addition, the accounting authorities must play a central role in determining the performance bonus quantum for all the employees and the site itself.

Additionally, constant monitoring of the performance of all employees is important. Monitoring must be done at the speed at which developments take place in the SOEs. It is imperative to digitise systems to facilitate monitoring, whether financial or operational. This will avoid the rush to evaluate the performance of employees towards the end of the financial year. Performance evaluation must be done in a fair, accountable, and transparent manner to

boost the morale of all employees. Clean audits must be the goal and the ultimate standard that the SOEs should aspire for every year.

6.3.7. Malfeasance, maladministration, and consequences

The SOEs must conduct workshops at the beginning of each financial year throughout the SOEs to remind all employees about the goals for the new budget, the strategic and operational plans, the organisational policies, legal compliance matters, and risk management guidelines. The aim is to ensure that the SOEs comply with policies and legislation and mitigate their risks, notwithstanding highlighting to all employees that malfeasance and maladministration will not be tolerated. All employees should be made aware that every act of conduct has consequences. Consequence management must be swift. This will be achieved by immediately reporting criminal conduct to law enforcement agencies and not through internal disciplinary processes, as it should be. The employees must know that corruption of any nature, including conflict of interest, is intolerable.

6.3.8. The private sector participants and or enablers

The private sector players such as external auditors, advisory services providers, internal auditors, banks, advocates, attorneys, consultants, and service providers must be sanctioned, if they involve themselves in acts of bribery, collusion, corruption, deceit, dishonesty, fraud, money laundering, racketeering, theft of SOEs resources and other offences that are regulated in terms of the PFMA, the POCA and the PRECCA. The SOE leadership must also inform its external stakeholders that corruption of any nature whatsoever is intolerable, including conflict of interest. Where acts of malfeasance, maladministration, and illegality are found – the external stakeholders should know that consequence management will follow, including reporting criminal acts to the appropriate law enforcement authorities and cutting business ties.

The private sector involved in activities must be prohibited from getting business and providing services to government agencies, government departments and SOEs. None of them must be considered too big to fail, for instance, banks which allowed money laundering after making money from the Guptas associates and connected companies. In addition, the situation played itself in the public during the building of the stadium and roads towards the 2010 World Cup. These companies were involved in tender rigging. Should they conduct themselves in that manner again in future, they should not be treated as offenders of the Competition Act but as criminals in the normal course.

6.3.9. The powers of the Auditor General South Africa (AGSA)

The AGSA office must use the powers bestowed on it in the PAA Act to bring to book employees, executive managers, and accounting authorities of the SOEs to account for their failures and/or refusal to take remedial action after its audit. For example, remedial actions not implemented within the specific time frame given by the AGSA should have repercussions. If the Accounting Officer (AO) or Accounting Authority (AA) quantified the loss and payment was not made timeously due to the failure of the AA or AO to issue a certificate of debt, the AA or AO will be required to pay for failing to pursue payment. Where the failure was not monetary but legislative and procedural, such transgression can be forwarded to the legislature to investigate or another body identified to deal with. The amendment of the PAA will bolster the ability of the AGSA to have the outcome of its audit reports taken seriously and addressed.

6.3.10. Governance surveillance and compliance enforcement

The GSCE established in the CIPC is empowered to enforce governance compliance in the private and the public sector, respectively. The GCSE must be given more teeth to keep a close eye on governance transgressions. This unit must be capacitated to swiftly act against companies, including the SOEs when governance fails. The delinquent directors of companies must be declared delinquent swiftly and banned from appointment to the office of directors. Swift action by the courts will force directors to act ethically and in the interest of the SOEs and companies they serve. The banning of directors for life or for not less than ten years would dissuade them from conducting themselves in an unethical manner.

6.3.11. Listing of perpetrators

The names of perpetrators found guilty of bribery, corruption, money laundering, and racketeering must be placed in a register for 20 years. The benefits of the crime of the perpetrators must be forfeited to the state. The NPA must bring the cases to court quickly to ensure that the perpetrators do not get the opportunity to commit the crime again. They should be prohibited from doing business with the government and the SOEs.

6.3.12. Other jurisdictions

In Chapter 3, the researcher considered other jurisdictions' approaches to good corporate governance. For instance, Namibia and Botswana have high penalties for bribery and corruption. In the case of South Africa, punishment for bribery and corruption is not sufficiently harsh in proportion to the crime committed. The government must increase the penalties to match the contravention. However, the discretion of the court should not be

tampered with. Sometimes, the penalty payable is so affordable that the perpetrator pays it off in cash and walks away.

Perhaps there should be a register of perpetrators that private sector businesses and the SOEs can use as a reference point either to ban the perpetrator from doing business with them or not. In Botswana, the DCEC takes public opinion seriously. Botswana took a multipronged approach to combating corruption. For example, the DCEC embarked on public education by engaging the public about corruption, its effects and its impact on the country and its economy. Public education is extended to schools, universities, ministries, churches and other organisations. The DCEC's approach to anti-corruption should be adopted in South Africa. It could benefit from such an approach; however, public education should form part of the curriculum from grades 4 to 12. The education should be extended to universities and other civil society organisations to instil ethical business conduct and deal with public resources.

These values must be taught throughout the years from primary school to tertiary level studies, including incorporation in civil society civic programs. 6.3.13.Specialised courts and tribunals Additional special courts and Tribunals must be established throughout the nine provinces to facilitate swift dispensation of justice. The level of corruption is so endemic and requires competent courts, tribunals, prosecutors and investigators to act quickly to convey that criminality will not be tolerated.

6.3.13. Harmonisation of appointments of executive managers and accounting authorities

Currently, executive managers and members of accounting authorities of the SOEs appointments are done by their enabling legislation. The researcher is cognizant of the reality that the SOE mandates are diverse. However, they are all obliged to manage their business in line with the constitutional and the PFMA requirements, which are of general application in every SOE.

The SOEs are all controlled by the board of directors, who delegate their authority to manage the executive managers. Therefore, a standardised set of rules should be put in place to appoint the boards and the executive managers of SOEs. The researcher proposes that a team of legal practitioners consider the current enabling legislation applicable to appointing boards and executive managers of the SOEs. Harmonise the appointment mechanism and the period of the appointment in one document.

Alternatively, amend the PFMA, which is applicable to all the SOEs and embody the appointment in it. The PFMA must continue to have preference over all other legislation regulating the SOE's appointments. The amendment must also include the section which

regulates the constitution of the interviewing panels. The public must nominate the directors, and the criteria must be included in the advertisement. Only applicants who meet the requirements must be called in for an interview. The executive manager positions must be advertised with detailed requirements depending on the environment in which the SOEs operate. The panel must be constituted in line with the PFMA. The names of the successful candidates must be published in the newspapers and must be vetted before they start in their various positions.

6.3.14. Adequate legislative foundation:

The SOEs must operate under laws that facilitate proficiency and open SOE's stratum.[1219] Statutes and the policy framework under which SOEs operate have to be adequate, clear, consistent and facilitative for their managers to know what is expected of them and facilitate the requisite know-how to execute their mandate. The private sector commercial companies and other third parties that are impacted by or compete with the business that SOEs operate in the same space must have access to and know the legal framework regulating that SOE.

One of the principles is that the government should not intervene in the running of SOEs.[1220] However, requiring the government not to involve itself in the daily management of SOEs does not mean that the government cannot give directives[1221] and develop overarching policy frameworks within which SOEs may perform.[1222] Governments have to have separate streams in place in SOEs that provide direction and daily management without interfering with SOEs. In other words, when the government intervenes, it must not do so contrary to the legal and regulatory fabric in place.[1223] These legislative instruments must be enforceable and underpinned by the rule of law[1224] with the independent judiciary in the vanguard.[1225]

A government department that has a regulatory role in a particular industry should not have ownership in an SOE that competes in the same industry it regulates.[1226] This would avoid conflict of interest. The SADC SOEs can be incorporated in the normal course using the law

[1219] Ibid.
[1220] Ibid. Keremdvhiev and Nedelchev op cit note 74.
[1221] Ibid. OECD Guidelines (2015) op cit note 251.
[1222] OECD Guidelines (2015) op cit note 82.
[1223] Ibid. OECD Guide (2015) op cit note 251.
[1224] Ibid. Melvin L Mbao & G G Komboni 'Promotion of governance and combating corruption and maladministration: the case of Botswana' (2008) 12 *African Journal Online* 49-71.
[1225] Ibid.
[1226] Ibid.

of general application, such as the company law, specific legislation regulating SOEs, and one particular SOE.[1227] With regard to the historical factors that prevailed and still affect the SADC, the recommended categorisation of SOEs is likely to take too long to effectuate legislation to guide all SOEs generally.

Many SADC SOEs continue to operate in the commercial business sphere and to have obligations to the public, which normally fall within the government services.[1228] These SOEs have to do so openly and share with the public and their competitors the extent of the grant and assistance they receive from the government fiscus.[1229] The SADC SOEs Guidelines do not preclude SOEs from playing a dual role, but they have to be fair and not use the funds for public service objectives for the commercial business they conduct. Certain rules have to be followed, such as (i) to keep two sets of accounts for the SOE– one dedicated to the commercial aspect of the business and another for the public benefit; (ii) to have in place an adequate budget and funding for the provision of government functions; (iii) to guard against overcompensating the SOE for non-commercial deliverables; and (iv) to effect remuneration equitably.

6.3.15. Policy Ownership of SOEs by the government

Government ownership in SOEs must be handled carefully and sensitively. This requires an ownership policy that is clear and unequivocal in order to prevent difficulties that could arise due to acquiescent ownership or disproportionate meddling.[1230] This could occur when SOEs are faced with multiple mandates and objectives that are contradictory.[1231] A government that explains its rationale for ownership in SOEs and communicates its objectives openly is more likely than not to earn the trust of the people and other stakeholders because they are empowered with knowledge.

The challenges do not occur due to a lack of policy only, but there are other issues that must be considered, such as the notion that the Executive Authority (Ministers) representing the shareholder government in the SOEs are legally and morally obliged to owe allegiance to

[1227] Ibid. For example, statute that regulates SOEs in the trio such as Botswana Housing Corporation Act, Botswana Meat Commission, Broadcasting Act 4 of 1991, Eskom Conversion Act 13 of 2001, Airports Company of Namibia Act 25 of 1998, Namibia Housing Enterprises Act 5 of 1993.
[1228] Ibid. Corrigan op cit note 101.
[1229] Ibid. OECD Guidelines(1999); OECD Guidelines (2005).
[1230] OECD (2016) Ethics and Business Integrity in Southern Africa. OECD Guidelines (2015) op cit note 251. OECD (2008) Implementation to Ensure Accountability and Transparency in State Ownership. See CACG Guidelines.
[1231] Ibid.

the government to the exclusion of the people.[1232] This belief has no legal basis and is misguided. Ministers, executive managers and boards of directors are caretakers of the shares on behalf of the people.[1233] This requires them to exercise their duties as overseers with the highest level of care and integrity in the public's interest.[1234] An effective way of doing this is for all management, whether executive or non-executive, to manage SOEs in an accountable manner, responsibly, transparently and with great reverence to good corporate governance, with the sole purpose of making them sustainable and facilitating the economic growth of the country for the long-term benefit of the people. In other words, SOEs must be run effectively and efficiently to ensure that the broader stakeholders can thrive and engage in the country's economic activities. Failure to manage SOEs responsibly may result in ministers being personally accountable based on the applicable laws of the state.[1235]

The management of SOEs is held to a higher standard than that of the private sector because of the nexus between ownership and the community of the country.[1236] Fairness, transparency and impartiality are prerequisites when the state is in a joint venture, strategic partnership or private-public partnership relationship.[1237] The duties and power to run an SOE oblige them to manage the entity with more circumspection and as transparently as possible.[1238] They have duties of utmost care because taxpayers fund these SOEs and are reliant on them to provide a conducive atmosphere to benefit from the necessary services and infrastructure that support the growth and sustainability of the economy. In this way, work is created, which will alleviate poverty and provide independence from government hand-outs such as social grants because, most times, such hand-outs perpetuate the inability to contribute positively to the

[1232] OECD (2013) op cit note 209 1-14.
[1233] Ibid.
[1234] Ibid. Bob Garratt, 'Thin on Top, Why Corporate Governance Matters on How to Measure and Improve Board Performance' Nicholas Brealey; Naidoo Ramani, 'Corporate Governance, *An essential Guide for South African Companies* 3 ed (2017). Mbao & Komboni op cit note 1224.
[1235] Ibid. Ministers in Botswana, Namibia and South Africa are ultimately responsible for the performance of SOEs. In South Africa in particular, ministers are subjected to Parliamentary questions about the performance of SOEs answerable to their departments. In addition, Parliament Portfolio Committees normally call ministers, boards and executive managers to account for the performance of the SOE
[1236] Ibid. This stems from the fact that the community or society is actually the financier of the SOEs. SOEs are beneficiaries of funds that flow from the taxes of the society through income tax, tax on properties, general sales tax, etc.
[1237] Ibid. This is so because the state is both the regulator and partner or shareholder. The temptation by the state to flex its muscle cannot be discounted.
[1238] Ibid. Bhorat et al op cit note 65 at 361.

economy. In addition, the tax base of the government will be improved. High unemployment reduces the tax foundation.

The appointment of directors and executive managers must be legal, procedural and transparent. Directors must be appointed publicly with the involvement of the broader stakeholders.[1239] Once this has been done, it is incumbent upon the directors of the SOEs to develop the company's strategy and set up a budget that supports the strategy. It is important that the budgets of SOEs are spent and accounted for.[1240] However, this is not achievable without the shareholder, i.e., the government, determining and communicating its policies and mandates in a clear and unequivocal manner to avoid any confusion.[1241]

The functions and objectives of SOEs should determine the category into which they belong. This presupposes dividing them into commercial, non-commercial, regulatory and commercial, or pure regulatory.[1242] It is important to be mindful of the categories of organisations that are not necessarily SOEs, and which have specific functions and objectives concerning parastatals and statutory corporations.[1243] The former has a specific and exclusive role for service delivery on behalf of the government, has specified objectives and is self-determining, i.e. parastatals.[1244] The latter are statutory corporations, which are creatures of specified statutes and are not incorporated in terms of the company laws of the country.[1245] The third are SOEs, which may have more than one function and objectives, which could be a problem[1246] if not properly managed and if the objectives are not adequately communicated.

In view of the above, it is necessary that the government be open to consider different ownership models, such as (a) the control of SOEs lying in an agency which is sufficiently

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[1239] Ibid. Appointments of directors are advertised in newspapers and requests for nominations are invited. The shortlist is made and names communicated to the public for its information. In the instance of the SABC, directors are nominated, shortlisted and invited for interviews, and recommendations made to the Executive Authority for appointments. It is of utmost importance that qualified and experienced persons be shortlisted for appointment and not those connected to politicians and comrades.

[1240] Ibid.

[1241] In some jurisdictions such as South Africa, the enabling legislation will outline the mandate, scope of application, the appointment of all officers (including the Board of Directors) and funding of the SOE, for example, the South African Broadcasting Corporation Act 4 of 1999, the Eskom Conversion Act 13 of 2001, the Legal Succession Act of South African Transport 9 of 1989. In these SOEs a Shareholder's Compact is required and entered into with the relevant executive authority in charge of the SOE. In addition, performance contracts are entered into with executive management. The same holds true in Namibia.

[1242] Ibid.

[1243] Ibid.

[1244] Ibid.

[1245] Ibid.

[1246] Ibid. Malawi Code Sector's Guidelines for Parastatal Organisations and State-Owned Enterprises 2011.

resourced and well-governed to cope with its responsibilities, and (b) dual ownership where such entities such as public enterprises in South Africa exist in the interests of the public including businesses. It is, therefore, imperative that there be a clear distinction where the government is a 100% shareholder in the SOE, which competes with companies in the private sector, simultaneously providing regulatory functions as part of its mandate.[1247] For example, Transnet SOC (Transnet) is the de facto regulator in South Africa through its division of the Transport National Ports Authority (the Ports Authority) pursuant to the Ports Act.[1248] It also provides infrastructure for transporting goods by land and sea into or from the country.[1249] In other words, Transnet facilitates imports into and exports from South Africa, SADC and countries beyond the shores of Africa, as well as port development.

Some SOEs get direction from the government's representative but have the boards that manage them, guided by the memorandum of incorporation, specific policies developed in compliance with Treasury Regulations, and other relevant statutes and mandates from the government.[1250] Governments are not precluded from exercising their active shareholder role,[1251] especially because they have a vested interest in service delivery and the sustainability of SOEs, which are fundamental to the growth of their economies.

Finally, boards, executive management, and officials should report to Parliament in some jurisdictions in SADC. The relevant Portfolio Committees also have oversight of SOEs, which most times requires accountability, transparency, and disclosure of information, which must be embodied in the Annual Report by 31 August every year, which is intrinsically linked to good corporate governance.[1252] In addition, responsible Ministers are obliged to report on

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[1247] For example, the South African Weather Service which has a regulatory function and commercial role.
[1248] *Siyakhupuka Investment Holdings (Pty) Ltd v Transnet SOC and Transnet National Ports Authority*158/CAC/Nov17; National Ports Act 12 of 2005.
[1249] National Ports Act 12 of 2005.
[1250] PFMA and Treasury Regulations; note for example in South Africa the Eskom Conversion Act and the Broadcasting Act. ` OECD Guidelines (2015) op cit note 251 at 10-11; OECD Guidelines (2015) op cit note 82.
[1251] Governments or their agents (such as the PIC) are permitted to insist on diversity when Boards are appointed if the investment value is not at risk in instances here the PIC or UIF or Compensation Fund invested. The same holds true in Botswana and Namibia. Each country is regulated by its applicable statute: Namibian SOEs are regulated by the State-Owned Enterprises Governance Act 2 of 2006 which was amended by the Public Enterprises Governance Amendment Act 2015; Botswana initially followed the King Report of 2002 but in 2013 adopted the Botswana Code of Corporate Governance. In addition, the Companies Act 18 of 2011 regulates SOEs corporate governance except for LNDC, BEDCO and LTDC.
[1252] Section 55(1)(d)(i) of the PFMA; Treasury Regulation No 28.2; Section 55 of the PFMA; Treasury Regulation No.28.1. It is important to note that these requirements are of no application to Botswana and Namibia. Nevertheless Botswana and Namibia governance are regulated in terms of their respective legislation referred to above.

the performance of the SOEs for which they are responsible when they account for their department's accomplishments annually.[1253]

6.3.16. Equality of all shareholders, including outside investors

SOEs which compete with companies in the private sector in a specific industry should not receive preferential treatment from their competitors.[1254] This is irrespective of whether or not the SOE is listed or unlisted.[1255] The state must clarify which pure regulatory functions the SOE undertakes and how it funds this aspect of its mandate. In addition, the funding of the business arm of the SOE, which contemporaneously undertakes a dual role and competes with the private sector, must be specifically identified, fair play must take place, and there should not be financial cross-subsidisation.[1256] In other words, there should be no special dispensation and favours for the SOE. The executives of the SOEs must be left to run the day-to-day management of the business with the necessary guidance from the board of directors, which is expected to do so in an accountable, open and transparent way.[1257]

Generally, the relationship between the company and its shareholders is regulated by the shareholder's agreement in the private sector.[1258] In an instance where it is an unincorporated joint venture, the agreement will regulate the SOEs' relationship with the relevant third party. This means that the government is in a partnership with a third party. If the government holds a higher percentage in the partnership, the minority partner must be

[1253] Ibid. Namibia's Minister of Finance receives audited annual financial statements; in Botswana.
[1254] OECD Guidelines (2015) op cit note 251 at 10-11 at 9-11. OECD Guidelines (2015) op cit note 82 at 18-19.
[1255] An SOE such as Telkom listed on the Johannesburg Stock Exchange or any other exchange is readily available and compliance with the listing requirements obligates such companies to avail information. Such SOEs will report on their finances twice (interim financial results) and audited financials. In addition, changes or decisions that are taken require them to issue cautionary notes from time to time depending on what is taking place in the company.
[1256] OECD Guidelines (2015) op cit note 82 at 45.
[1257] OECD Guidelines (2015) op cit note 251 at 11 and 28. Weylandt op cit note 282 at 7 and 8. Section 66(1) of the Companies Act provides that the company must be managed under the direction of the Board of Directors. The Board of Directors derives their power directly from the Companies Act and not from the Memorandum of Incorporation. However, the Board of Directors can exercise this duty by delegating authority to executive management usually led by the Chief Executive Officer or Managing Director depending on the applicable titles in a particular company.
[1258] OECD (2020) *G20/OECD Principles of Corporate Governance* 31. Section 15(7) of the Companies Act 71 of 2008. Section 15(7) 'The shareholders of a company may enter into any agreement with one another concerning any matter relating to the company, but any such agreement must be consistent with this Act and the Memorandum of Incorporation, and any provisions of that agreement which is inconsistent with the provision this Act or the provisions of the Memorandum of Incorporation is void to the extent of the inconsistency.' It is important to note that nothing precludes SOEs from entering into Shareholders' Agreement in instances where the government and private sector are in business together.

treated fairly and justly by the government.[1259] This principle differs from the protection afforded private sector company minority shareholders' rights unless these rights are specifically waived.[1260] Minority shareholders in SOEs should not unreasonably impede majority shareholders' rights when necessary decisions have to be made.[1261] In other words, minorities must endeavour to cooperate with the majority shareholders for as long as their investments are not at risk, and the interests of the SOE must always be kept in sight. SOEs, in their agreement with minority shareholders and other investors, must have specific protection which affords them the right to appoint directors.[1262]

It is incumbent on the third parties prior to acquiring equity in the SOE to request essential and sufficient information and for the SOE to avail it and assist parties in making informed decisions when they invest. Disclosing financial information comprehensively to interested parties and to all shareholders is critical and necessary, irrespective of the size of the equity an investor holds in the SOE.[1263] It is important that the information availed and disclosed to the government as a shareholder is simultaneously communicated to the minority equity holder.[1264] Where the business relationship between the SOE and a third party is in the form of a Joint Venture (JV) or a Public Private Partnership (PPP), this third party is entitled to the information. The rights and duties of each partner in a JV or PPP must be spelt out, including how disagreements will be dealt with.[1265] Issues of risk must not be overlooked. The JV or PPP partner that can assess and identify risk takes responsibility for it, which requires appropriate risk governance.[1266]

The executive and non-executive managers of an SOE must act equitably with all shareholders by being transparent when they disclose information because that conduct augers well for and is indicative of compliance with good corporate governance.[1267] This will more

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[1259] Ibid. OECD Guidelines (2015) op cit note 82. OECD Guidelines (1999) op cit note 1229. OECD Guidelines (2015) op cit note 251.
[1260] In the Shareholders' Agreement or Memorandum of Incorporation as provided for by sections 15(7) and section 15(5A)(1) to 15(5A)(4) of the Companies Act 71 of 2008 .
[1261] OECD Guidelines (2015) op cit note 82 at 33.
[1262] Ibid. The protection can be embodied in the Shareholders' Agreement. The minority shareholder can apply to court for protection against oppressive conduct in terms of section 163(1) read with section 163(2); OECD 2015.
[1263] OECD Guidelines (2015) op cit note 82 at 22.
[1264] Ibid.
[1265] Ibid.
[1266] Ibid.
[1267] Ibid; The Pearse Trust *the Core Principles Of Good Corporate Governance* 2014 2. Wiese op cit note 80 at 20.

likely than not improve its performance and attract equity investment.[1268] Equity investors want to be able to predict the performance of their investment, and proper good corporate governance is considered an indicator.

6.3.17. Principles and rules regulating the interaction of SOEs with shareholders and stakeholders

A culture conducive to an excellent business relationship benefits businesses and stakeholders.[1269] This is especially so where the SOE's mandate includes a civic programme as its first concern - this obligates the SOE to share information by keeping the public informed of the challenges, developments, and successes. How communication takes place is significant and lies with the SOE and government shareholders. Complying with the regulatory framework that guides the SOE and sensitivity pertaining to how this is being done can make or break stakeholders' confidence in the SOE. For example, the abuse of a government representative shareholder's dominant position in the SOE may manifest by the government representative's refusal to comply with applicable frameworks, policies and laws by imposing its own will. Courts are expected to be always the vanguard of the rule of law. The public must have confidence in the courts' ability and commitment to make decisions against the SOEs and anyone without fear or favour.[1270] In addition, the citizens must have confidence in law enforcers.

SOEs must adopt a robust code of ethics and conduct for employees and executive and non-executive management.[1271] These codes should be clear, simple and sufficiently detailed regarding the expected behaviour of the relevant parties.[1272] Codes must be live documents that spell out repercussions for breach and non-compliance by everyone employing SOEs. Acceptance that codes are necessary for continued good results and sustainability of SOEs is

[1268] Khoza and Adam op cit note 69. Corrigan op cit note 101.
[1269] Ibid.
[1270] In the context of South Africa. The courts in general and in particular the Constitutional Court have made decisions which went against the government and SOEs. *Corruption Watch (NPC) (RF) v Chief Executive Officer of the South African Social Services and others* (21902/2015) [2018] ZAGPPHC 7 (23 March 2018); *Corruption Watch & Freedom Under Law (NPC) v The President of the Republic and 8 others;* The Council for the *Advancement of the South African Constitution v The President of the Republic and 5 others* cases No. 62470/2015 and 93043/2015.
[1271] Bhorat et al op cit note 65 at 370; Clive Kneale *Corporate Governance in Southern Africa* (2012) 20.
[1272] Ibid. OECD (2015) Stocktaking of Anti-Corruption and Business Integrity Measures for Southern Africa.

dependent on good corporate governance, which encompasses accountability, certainty, disclosure, openness, and transparency.[1273]

Codes which are workshopped with employees and officials of SOEs during the induction upon their appointment, continued refresher courses during employment, annual updates of codes or so often as is necessary in SOEs and not shelved are more likely than not to be remembered by employees and implemented. This helps to engender compliance with good corporate governance and requires committed champions who are ethical and incorruptible. Keeping corruption at bay augers well for the contribution of SOEs to a performing economy.[1274] As such, corruptors and the corrupted must be treated the same before the courts of law and sentenced to long prison terms to affect corruption.[1275]

Corruption most times rears its ugly head in the procurement of goods and services as well in the disposal of property, both immovable and movable in SOEs.[1276] At times in human resources, uncontested vacancies are filled clandestinely, with management failing to consider merit and rather focusing on the connections the applicant has (if the post is advertised) in disregarding objectivity.[1277] At times, corruption occurs when the people involved in the

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[1273] Badham-Jones op cit note 260. Magang and Kube op cit note 239 at149 -166.

[1274] Ibid.

[1275] In South Africa in the *State v Shabir Shaik & others* 2008 (5) SA 354 (CC) Shabir Shaik was found guilty of contravening section 1(1)(a)(i) and (ii) of the Corruption Act 94 of 1992. He appealed and the SCA dismissed his appeal which was confirmed by the Constitutional Court. He did not serve out his imprisonment period and was released on parole because of ill health. Persons found guilty and sentenced for corruption must serve the full imprisonment period and not be pardoned or allowed to walk because they have friends in high places. If they are given a monetary penalty it must so high and prohibitive that others are deterred from engaging in corruption. Corruption manifests itself in many forms in the public sector and in the private sector. It is unfortunate that in the public sector it is greatly frowned upon but in the private sector described in more positive terms. Corruption in the private sector is described or explained as abuse of dominance, collusion, price fixing triggering competition law issues for instance in the case of WBHO, Avenge, LTA, Murray & Roberts, Steffanutti, Group Five who were involved in building the stadia for the 2010 World Cup and other projects in Botswana; or Steinhoff's corruption and fraud case involving Markus Jooste, the CEO, and Christo Wiese, the Chairman of the Board of Steinhoff, and which saw losses of more than R100 billion–this corruption case was referred to as accounting irregularities. To date no criminal charges have been brought against them, and the outcome of the forensic investigation has been kept confidential.

[1276] OECD Guidelines (2015) op cit note 82 at 21, 24-25 and 50; Section 55(1)-55(3) read with Treasury Regulation 28.1-28.3. The PFMA compels SOEs listed in Schedule 3 to submit annual financial statements. Section 26 of the Public Enterprises Governance Act 2 of 2006 of Namibia obligates SOEs to produce annual financial statements and ensure that they are audited. PRASA purchased passenger trains from Swifambo Rail Leasing (Pty) Ltd; the agreement entered into between PRASA and Swifambo was declared unlawful because the proper supply chain processes were not followed. Eskom's acquisition of services from McKenzie and the purchase of coal from Tegeta a subsidiary of Oakbay. *The NDPP v Tegeta Exploration and Resources (Pty) Limited and others* 83344/2018 [2019]; *Eskom Holdings SOC Limited v McKinsey and Company Africa and others* (22877/2018) [2019].

[1277] OECD Guidelines (2015) op cit note 82 at 23 and 35. The outcome of the Public Protector's Report on Pick It Up of 2018. Public Protector Report on the SABC 2016. Portfolio Committee Report on the SABC 2016.

recruitment and interviews do not declare their interest or share privileged information with a selected candidate, which is likely to give the candidate an advantage over other applicants. Sometimes, directors of the board and executive managers fail to declare an interest they may have in a contract or an issue to be discussed, such as an increase in board fees and executive salaries. The board must approve the codes and monitor their compliance closely. These form part of the internal controls in SOEs and must be consistently enforced, not only when convenient. Selective enforcement defeats the objectives and purpose of codes.

6.3.18. Requisite principles of openness, transparency and disclosure

Like their private sector counterparts, SOEs must report their financial performance annually in the form of audited financial statements.[1278] In addition to the annual reports, other information pertaining to the business of SOEs should be shared when requested by the public or the relevant portfolio committee. The financial performance of the SOE is a reliable indicator to investors about its worth and an assurance to stakeholders that there is a future. Complete disclosure of information empowers investors to make informed decisions about whether it is worth investing in the SOE.[1279] Shared information is the most objective way for stakeholders to assess and gauge the performance of the SOE.

The future achievement of the SOE and business continuity are more predictable where good corporate governance and anti-corruption measures are applied in its day-to-day management.[1280] When good corporate governance is a norm, the SOE executive managers and non-executives will not have difficulty disclosing and transparently sharing information with shareholders and stakeholders.[1281] In other words, the populace will be assured that the SOE will deliver the expected services consistently and sustainably.

[1278] Department of Public Enterprises op cit note 82.

[1279] Staff Reporter 'JSE debt-rules fail SOEs investor' *Mail & Guardian* 24 July 2017 available at https://mg.co.za/article/2017-11-24-00-jse-debt-list-rules-fail-soe-investors/ accessed on 23 February 2024. CFA Institute *Financial Reporting Disclosure* 2013 1. OECD Guidelines (2015) op cit note 82.

[1280] Wiese op cit note 80,

[1281] Minister Lynne Brown accused Eskom of withholding information and also misrepresenting the true state of affairs in the company. The Parliament Portfolio Committee Report on the State of Capture concluded that former ministers Brown and Gigaba were grossly negligent in their execution of their duties as sole shareholders of Eskom 28 November 2018 133. Marianne Mertens 'State Capture report sends 'grossly negligent' Gigaba and Brown to Zondo, wants criminal investigation' *Daily Maverick* 28 November 2018 available at https://www.dailymaverick.co.za/article/2018-11-28-state-capture-report-recommends-criminal-investigation-into-grossly-negligent-gigaba-brown/ accessed on 23 February 2024. Team 'As it happened - Brown grilled by MPs about the Gupta's state of capture' *Fin24* 22 November 2017 available at https://www.news24.com/fin24/Economy/live-former-eskom-chair-tsotsi-faces-inquiry-20171122 accessed on 23 February 2024.

Internal auditors play an important role in SOEs and may bolster compliance with internal controls. Internal auditors are there to ensure that SOEs are managed openly and transparently and that policies are not only in place but that they are adhered to ensure the requisite checks and balances. This facilitates the ability to undertake required ad hoc audits as and when necessary.[1282] The appointment of internal auditors is crucial and essential in the interest of the SOEs, not only to ascertain and monitor the existence of and compliance with internal controls but to advise the Audit Committee of any shortcomings and strengths in the SOE.[1283] This assures the Board that the executive management shares with its adequate information and that it can be relied upon. Internal auditors must have unconstrained access to the Audit Committee, Chairman and the Board.[1284] Internal auditors must bring to the attention of the Audit Committee and the Board any achievements and lapses of management through its reports.

In line with accountability and transparency, SOEs are duty-bound to report to Parliament every year and as and when called upon to do so. Although transparency and accountability are specifically a prerequisite, the SADC SOEs Guidelines are sufficiently flexible to exempt some SOEs from financial and non-financial reporting for practical reasons.[1285]

Reporting by SOEs is not restricted to financial information but must extend to the performance of SOEs on their approach to social responsibility, including the environment.[1286] The requisite transparency extends to objectives, emoluments policies, administration structures, risk assessment and accompanying party business.[1287] It is recommended that SOEs pay particular attention to (a) material risk factors which may arise in their businesses–this includes risk associated with engaging in PPPs and off-balance sheet financial exposure or investments; (b) the extent to which its budget is dependent on appropriations from the government and areas in which that does not occur; (c) substantive related party transactions such as borrowing levels

[1282] OECD Guidelines (2015) op cit note 82 at 38. OECD Guidelines (2015) op cit note 251 at 25. King I, II, III and IV have to this day always advocated internal audits and an audit committee. Treasury Regulation 27.2.1-27.2.11; Section 55 of the PFMA.C

[1283] Ibid.

[1284] Ibid.

[1285] OECD Guidelines (2015) op cit note 251 at 1-33; for instance, the National Treasury of South Africa exempted Telkom SA, a listed state-owned entity, from the application of the Treasury Regulation in response to its request to be exempt.

[1286] Wiese op cit note 80 at 17-18. Bhorat et al op cit note 65. Jayne Mammatt *The Company Directors' Handbook*, Siber Ink (2004).

[1287] King's Report III and IV; Cadbury Report 1992; OECD 1999; OECD 2015; OECD Guidelines (2015) op cit note 251; Wiese op cit note 80; Bhorat et al op cit note 65.

or investment by one state entity to another; (d) the governance structure in place in SOEs and controls in place.

6.3.19. Board of directors

The board, at the helm of accountability in SOEs, is at the centre of good corporate governance.[1288] Boards are expected to be aware of and know their fiduciary duties and take them seriously as a collective. They must be able to represent all interested parties in SOEs, and simultaneously adhere to good corporate governance. The board of directors' appointment and nomination lies with the government as a shareholder in SOEs.[1289] It is prudent to appoint the board openly and transparently to give the stakeholders confidence in the men and women running the SOEs. Their appointment must be based on their expertise and knowledge because the board is the ultimate manager of the SOEs and has concomitant responsibilities attached to its role.[1290] In other words, merit rather than political connection should be the sole criterion for appointment.[1291] Nothing precludes the government as a shareholder from appointing civil servant representatives to the board, but this could raise concerns about the board's autonomy. This could be addressed by having more non-executive directors than executive directors.[1292] The board's performance must be assessed.[1293]

[1288] Corrigan op cit note 101.

[1289] Ibid at 3; State-Owned Enterprise Act of 2006 section 26; the boards of SOEs in Botswana, Namibia and South Africa are influenced by political considerations. In South Africa, although board members are nominated, the final decision is taken by the Minister based on preference with the endorsement from Cabinet and the President. Ministers Brown and Gigaba's tenure at the Department of Public Enterprises (DPE) came at a cost to good corporate governance in SOEs they were responsible for. Connected and compromised persons were appointed to key executive position and the board of directors. For example, Transnet appointed a compromised and connected person Group Chief Executive Officer Mr Siyabonga Gama and looting occurred. Eskom appointed Mr Brian Molefe Group Chief Executive Officer of Eskom which resulted in the Gupta's companies were funded and benefited from contracts in billions of rands. Mr Odwa Mhlawana succeeded Mr Zwelekha Ntshephe. Mr Ntshepe had grown the order book of Denel from R3.5billion to R35billion. Contracts were awarded the Gupta companies and work that would have been done by its subsidiaries awarded contrary to supply chain management resulting in financial loss.

[1290] Ibid. According to Corrigan William Gumede suggested that boards have a complex relationship with government unlike in the private sector. PwC 2015 PwC opines that the board must have the following: clarity, capacity, capability and commitment to integrity.

[1291] Deloitte 'Role and benefit of corporate governance framework–attributes that contribute to governance effectiveness' (2013) *Risk and Skill Compliance Journal* available at *https://deloitte.wsj.com/articles/the-role-and-benefits-of-a-corporate-governance-framework-01664888411* accessed on 21 February 2023.

[1292] Ibid. King IV. OECD Guidelines. Cadbury Report 1992, Code of Best Practice, Botswana 2012 Guidelines for Shareholders Oversight over Parastatals. According to King, non-executive directors, because of their independence, are better positioned to be objective in dealing with company issues. Non-executive directors should meet in-committee without executive directors. OECD 2016.

[1293] Ibid. Corrigan op cit note 101 at 39, boards are expected to develop board charters and have a Shareholder's Compact to regulate the board's performance and relationship with the government shareholder respectively. OECD 2016.

Due to political interest and public opinion, board fees payable to SOE directors often cause consternation.[1294] Too low board fees affect the ability of SOEs to attract highly qualified directors.[1295] This could result in directors focusing on personal interests and corruption. Reasonable and attractive board fees must be considered based on the SOE's size, role, revenue and nature.[1296]

For boards to successfully manage SOEs, directors must act as a collective in the interest of the SOEs, and their contribution determines their success, the information they receive and the quality decisions they make. To succeed, boards must be sufficiently empowered to fulfil their obligations independent of the shareholder government.[1297] The board is required to prevent corruption, advance ethics and integrity, and champion good corporate governance.[1298] The roles of the various players in the SOE, such as that of the chairperson, the board, and the CEO, must be clear, delineated, and identifiable.[1299] This will facilitate an easy and fair assessment of their contribution to SOEs. Of importance is that the board shall always have oversight over executive management.[1300] The duty and right to appoint senior managers is the board's responsibility, depending on the legal framework which regulates them.[1301]

Ideally, the boards are autonomous, but it is possible that their management of SOEs can, in some instances, be constrained by the shareholder representative owner[1302] or the regulatory environment. This can impede boards from performing optimally. However, where the mandate and parameters within which boards function and operate are predetermined, interference can be avoided and limited.[1303] The rationale for board decisions matters from an

[1294] Ibid.
[1295] Ibid. PwC 2015 op cit note 1290.
[1296] Ibid.
[1297] Ibid. Decisions of the board must not be dependent on the political calls and interest. Corrigan op cit note 101.
[1298] OECD guidelines (2016). OECD Guideline (2015) op cit note 82, OECD Guideline (2015) op cit note 251.
[1299] Ibid.
[1300] This is so because the board is at the apex of management of the SOE. Secondly, its oversight of the conduct of the CEO is embodied in the employment contract and performance agreement between the two. Various legislation in SADC and beyond sets the parameters within which the CEO operates, for example the PFMA and the Companies Act in South Africa; Botswana Housing Corporation Act 5 of 1994. The General Manager of the Botswana Housing Corporation is equivalent to the CEO in terms of section 13 of the Botswana Housing Corporation Act. 5 of 1994.
[1301] Ibid. Botswana Housing Corporation Act 5 of 1994; Botswana Meat Commission Act 20 of 2019; laws that regulate incorporation of companies in Botswana and Namibia and as well as the regulations of the SOEs determine how and who appoints the chief executives and other executives.
[1302] Ibid. Political interest in SOEs in SADC interferes with the independence of boards.
[1303] The PFMA and Treasury Regulations; 2012 Guidelines for Shareholder Oversight over Parastatals; King Code of Governance Principles (IV).

ethical and pragmatic perspective.[1304] Ethical performance must be assessed, and this can be done by agreeing with the shareholder for the board's tenure. However, performance assessment must be revisited annually to check if the board is still on course and is not confirming but performing.

To manage effectively and accountably, boards and executive managers should develop SOE strategies informed by the objectives pre-set by the government. The strategy of SOEs developed by the board must be supported by a budget[1305] that executive managers appreciate and spend according to its purpose, and it must be fully implemented. The board must develop and put in place performance indicators, put a risk management policy in place, make key appointments in SOEs to realise their mandate, assess and evaluate the performance of executive managers, and have a succession plan in place.[1306]

[1304] John D. Sullivan 'The Moral Compass of Companies: Business Ethics and Corporate Governance as Anti-Corruption Tools. Focus' International Finance Corporation 2009 available at *https://www.openknowledge.worldbank.org/entities/publication/71948daf-d752-5362-96e1-aebaf798116d* accessed on 17 July 2018.

[1305] Ibid. Performance agreements with executive management must be in place to assess their performance in the execution of the delegated authority of the board.

[1306] Ibid. PwC 2015 op cit note at 1290 at 28-29. King IV. Sections 11 to 16 of the Public Enterprises Governance Act 1 of 2019. Botswana Code of Corporate Governance.

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