An examination of the corporate governance failures and challenges at key South African SOEs and the implications on enterprise efficiency: A case study of ESKOM

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DECLARATION

I, **Dustin Joshua Davids**, hereby declare that "***An examination of the corporate governance failures and challenges at key South African SOEs and the implications on enterprise efficiency: A case study of ESKOM***", is my original work (except where acknowledgments indicate otherwise) and that neither the whole work nor any part of it has been, is being, or is to be submitted for another degree or examination in any other University or academic institution. All sources and materials used are duly acknowledged and properly referenced. I authorise the University of the Western Cape to reproduce for the purpose of research only, either the whole or any portion of the contents in any manner whatsoever.

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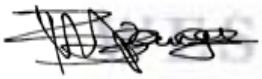

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DEDICATION

I dedicate this thesis, which is a contribution towards the body of knowledge within the legal space, to the Creator of Heaven and Hearth, the Great and Wise Architect of the Universe, Jehovah Yahweh; including the blessed Trinity (Yeshua and the Holy Spirit).

Without you I am nothing and without you this project would not have been. Thank you for the grace and favour that you have bestowed over my life.

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ABSTRACT

An examination of the corporate governance failures and challenges at key South African SOEs and the implications on enterprise efficiency: A case study of ESKOM

Corporate Governance encapsulates a set of rules and corporate systems which have been established to steer a company in a certain direction. In the case of State-Owned Entities, these entities were established as a mechanism to provide a strategic developmental social upliftment focus to the population of South Africa. Moreover, directors have an individual and collective fiduciary responsibilities and should ensure that the principles of corporate governance, including instruments such as the Memorandum of Incorporation, are upheld and realised through well-informed decisions.

This research aimed to investigate what the major corporate governance failures were at Eskom, including what impact these failures had on the enterprise efficiency and sustainability of the State-Owned Entity. This research paper investigated the roles and duties of the individual directors, the board of directors in terms of section 76 of the Companies Act; including the role of the representative of the shareholder, which is the relevant Minister and political head of a department under which the State-Owned Entities falls. The director and the board should ensure that they always make decisions and act in the best interests of the company through good faith, care, skill, diligence and loyalty whilst avoiding any conflicts of interest which may arise.

This research paper attempted to provide a balance between the analysis of applicable legislation, case law and the examination of the actual instances of identified corporate governance breaches through decision-making and actions on the part of the senior management, the board of directors and the responsible Minister of State-Owned Entities in general, vis-a-vis Eskom specifically. This was done through analysing cases such as *Democratic Alliance v Minister of Public Enterprise and Others; Economic Freedom Fighters v Eskom Holdings Limited and Others; Solidarity Trade Union v Molefe and Others* (33051/2017; 34568/2017; 34042/2017) [2018] ZAGPPHC, *Eskom Holdings SOC Limited v McKinsey and Company Africa (Pty) Ltd and Others* (22877/2018) [2019] ZAGPPHC and other parliamentary and forensic reports.

The findings of this thesis indicated that that there were breaches and irregularities which undermined and contravened corporate governance ideals in general; including those specific ideals as legislated in section 76 of the Companies Act by the senior management, board of directors and responsible Minister of Eskom.

The research paper also makes recommendations specifically geared towards improving enforcement of corporate governance standards relating to State-Owned Entities, and among such recommendations is the establishment of a specialist court to deal with corporate governance cases and scandals in light of the chequered history of State-Owned Entities' governance crisis and procurement scandals. The recommendations also include a proposed inclusion in the Public Finance Management Act 1 of 1999 of a liability clause for political heads of departments under which State-Owned Entities fall for failing to provide proper oversight on the governance of such State-Owned Entities.

KEYWORDS AND PHRASES

Board of Directors

Business Judgement Rule

Companies Act 71 of 2008

Corporate Governance

Directors

Duty of Care and Skill

Eskom

Executive Authority

Fiduciary duty

Governance failures

In the best interest of the Company

Shareholder

State Owned Entities

LIST OF ABBREVIATIONS

AGSA:	Auditor-General of South Africa
BTC:	Board Tender Committee
CEO:	Chief Executive Officer
CFO:	Chief Financial Officer
MOI:	Memorandum of incorporation
Portfolio Committee:	Portfolio Committee on Public Enterprises-
PFMA:	Public Finance Management, 1999 [No. 1 of 1999]
SCM:	Supply Chain Management
SBTC:	Special Board Tender Subcommittee
SMT:	Senior Management Team
SOE/ SOEs/ Entity:	State Owned Entity
The Act:	The Companies Act, 2008 [No. 71 of 2008]
The Board:	The Board of Directors

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CHAPTER 1: INTRODUCTION AND BACKGROUND TO THE STUDY

1.1 INTRODUCTION

Governance within a corporate environment is defined as effective leadership which is based on ethical principles and compliance to laws and regulations.[1] Furthermore, corporate governance can be regarded as a set of system, rules and processes by which the activities of a corporation are directed.[2] Corporate governance thus provides a degree of certainty that the shareholder who financed the corporation will get a return on the investment made.[3] This means that better governance of a corporation will ensure that the funds of an investor are used productively and will therefore yield better returns for those investors.[4]

Corporate governance is important to the corporation due to the fact that it allows the corporation to access capital at competitive rates, attract foreign direct investment and employ a better calibre of employee within the job market.[5] The importance of corporate governance extends to eliminate the agency problem which is created between principals and agents, whereby there is a risk that the agents will make decisions to benefit themselves and not the corporation.[6] Corporate governance is also deemed important as it positively impacts the corporation's operating performance, market value and stock returns.[7]

Broadly, State-Owned Entities (hereafter SOEs), or as often interchangeably referred to as State-Owned Companies (SOCs), play a strategic role within the economy of a country[8] and are regarded in developing countries as devices which should stimulate and accelerate the Gross Domestic Product, including benefitting infrastructure development and deliver basic services to the citizenry in certain key sectors.[9] Most importantly, SOEs are regarded as a significant contributor to the economy of both

[1] PriceWaterhouseCoopers State Owned Companies: The new Companies Act, PFMA and King III in perspective (2012) *Steering Point No:*4 3.
[2] De Kluyver C *Corporate Governance* (2012) 4.
[3] Love I 'Corporate Governance and Performance around the World: What we know and what we don't' (2011) 26 *The World Bank Observer* 44.
[4] Love I (2011) 45.
[5] Naidoo R *Corporate Governance: An essential guide for South African Companies* 3 ed (2016) 14-27.
[6] Love (2015) 45.
[7] Love (2015) 45.
[8] Naidoo R (2016) 353.
[9] Madumi P *Are State-Owned Enterprises (SOEs) Catalysts for or Inhibitors of South African Economic Growth?* (The 3rd Annual International Conference on Public Administration and Development Alternatives, Stellenbosch, 2018) 60.

developed and developing counties,[10] while also playing a fundamental role in impacting the urban growth and development of countries.[11] Therefore, SOEs are expected to create public value within a country by providing social benefits to its citizens in terms of affordable, reliable and safer product and service outcomes

Section 7(*b*)(i) of the Companies Act 71 of 2008 (hereafter the Act) purposes the development of the South African economy by encouraging enterprise efficiency within companies. Furthermore, section 8(2)(a) and section 9(1) of the Act binds SOEs to be compliant to its overall purpose, which includes the promotion of innovation and investment into South Africa,[12] achieving economic and social benefits,[13] enhancing the economic welfare of South Africa within the global economy,[14] and encouraging efficient and responsible management.[15] This research paper will identify and analyse the major corporate governance failures at Eskom, a key SOE in South Africa, and how those governance failures negatively impacted on Eskom's enterprise efficiency; including the sustainability of its business. Furthermore, the research paper will ascertain how corporate governance practices can be improved to lead to enterprise efficiency.

1.2 RESEARCH PROBLEM & PROBLEM STATEMENT

It has been pointed out that the democratic government of South Africa, post 1994, inherited non-performing SOEs from the previous dispensation, the apartheid government which pursued discriminatory policies.[16] However, since 2013, some SOEs have become liabilities to the economy of South Africa, which is a deviation from their strategic purpose. During 2018, none of the SOEs obtained a clean audit outcome, while those who have done so in previous years, slipped into a state of degeneration.[17] For example, South African Airways was unable to submit its financial

[10] Kim C & Ali Z 'Efficient Management of State-Owned Enterprises: Challenges and Opportunities' (2017) *ADBI Policy Brief No 4* 1.
[11] Ovens W 'The Role and Significance of State Owned Enterprises, Public Entities and other Public Bodies in the Promotion of Urban Growth and Development in South Africa' August 2013 available at *http://www.cogta.gov.za/cgta_2016/wp-content/uploads/2016/05/IUDF-STATE-OWNED-ENTEPRISES.pdf* (accessed on 16 May 2019) 5-6.
[12] Section 7(c) of the Companies Act 71 of 2008.
[13] Section 7(d) of the Companies Act 71 of 2008.
[14] Section 7(f) of the Companies Act 71 of 2008.
[15] Section 7(j) of the Companies Act 71 of 2008.
[16] Thabane T & Snyman van Deventer E 'Pathological Corporate Governance Deficiencies in South Africa's State-Owned Companies: A Critical Reflection' (2018) 21 *PER/ PERLJ* 3.
[17] Auditor-General of South Africa '*Governance, oversight and sustainability of state-owned entities*' (2018) 114-139.

statements in time for auditing, and the entity could not repay some of its loans which had matured.[18] The South African Broadcasting Corporation (hereafter SABC) obtained non-compliant findings against it on its procurement processes and its inability to repay its loans.[19] Corporate governance at Denel Soc Ltd[20] (hereafter Denel) was found in disarray because of the following challenges: cash flow challenges, management's inability to avail to the board of directors credible data for decision making purposes, general mismanagement and lack of leadership accountability.[21]

Some strategic SOEs, such as Eskom, South African Airways and Denel, have put a considerable amount of pressure on the South African fiscus due to constant requests for financial bailouts in order to remain operational. [22] The governance challenges at the power utility could pose a further risk on the economy of the country through labour unrest, load shedding and the unaffordability of the citizens to afford the constant electricity increases which are requested by the power utility.[23] Moreover, according to Moody's Investors Service, the corruption which have taken place at the SOEs during the last decade has negatively impacted on the corporate governance principles of South Africa, and has strained the economy through the constant requests for bailouts.[24]

The reason why Eskom was chosen as the unit of analysis for this study was that it is one of the largest and most important SOEs in South Africa and contributes over 95% of generated electricity to South Africa.[25] Furthermore, Eskom is one of the biggest producers of electricity on the African continent and poses the biggest threat to the

[18] Auditor General of South Africa (2018) 125.
[19] Auditor General of South Africa (2018) 126.
[20] Denel is a state-owned aerospace and military conglomerate which was established in 1992 by the South African Government.
[21] Denel *2018/19 Integrated Report* (2019) 10.
[22] Section 1(2*)(a)(b)* of the Special Appropriation Bill 2019.
[23] South African Government 'Parliament on Eskom's briefing over its governance and operational challenges' available at *https://www.gov.za/speeches/Eskom-briefs-public-enterprises-committee-22-apr-2015-0000* (accessed on 13 April 2020).
[24] Moody's Investor Service 'Rating Action: Moody's downgrades South Africa's ratings to Ba1, maintains negative outlook' available at *https://www.moodys.com/research/--PR_420630* (accessed on 27 April 2020).
[25] Ovens W 'The Role and Significance of State Owned Enterprises, Public Entities and other Public Bodies in the Promotion of Urban Growth and Development in South Africa' August 2013 available at *http://www.cogta.gov.za/cgta_2016/wp-content/uploads/2016/05/IUDF-STATE-OWNED-ENTEPRISES.pdf* (accessed on 16 May 2019) 56.

economy of South Africa.[26] When one weigh the ideals of the agency theory against the annual outcomes of the entity, the fundamental factor has been that there was a breakdown in its financial management obligations, including business decisions, which increased the financial and operational risk for the power utility.[27] Two other important factors which impacted on the current state of Eskom includes governance challenges[28] and a lack of transparency in its operations.[29] Eskom has been the only SOE which has been highlighted by the Auditor- General of South Africa (hereafter AGSA) as needing urgent intervention in order to continue its business operations for the future years to come.[30] Some of the findings made by the AGSA which negatively impacted on the governance structure of Eskom, and which put the economy of South Africa at risk, included uncompetitive and unfair processes, non-compliance to the Public Finance Management Act 1 of 1999 (hereafter PFMA), supply chain management weaknesses and high irregular expenditure which could not be accounted for.[31]

One of the challenges which Eskom has encountered which blends into the agency theory of corporate governance includes the fact that the Government, as the only shareholder in the SOEs, failed to conduct proper and consistent oversight over the operational and financial practices of the power utility.[32] This eventually led to the erosion of the corporate governance practices within the power utility. Overall, the root causes of the operational regression of Eskom; including the majority of the SOEs in South Africa, were due to weaknesses in internal controls and poor risk management practices.[33] One of the primary attributes of underperformance in SOEs included corporate governance incompetence, whereby the boards of most of the SOEs did not

[26] International Renewable Energy Agency *Prospects for the African Power Sector* (2012) 15.
[27] Crompton R 'Explained: Why Eskom is in so much trouble' *Independent Online News* 2019 available at https://www.iol.co.za/news/opinion/explained-why-Eskom-is-in-so-much-trouble-9238470 (accessed 14 April 2020).
[28] Joffe H 'SA pays price of Eskom's disastrous governance' *Business Day Live* 2015 available at https://www.businesslive.co.za/bd/opinion/columnists/2015-03-25-sa-pays-price-of-Eskoms-disastrous-governance/ (accessed 14 April 2020).
[29] Yelland C 'Much greater levels of transparency are needed from Eskom' *Business Maverick* 2020 available at https://www.dailymaverick.co.za/article/2020-03-30-much-greater-levels-of-transparency-are-needed-from-Eskom/ (accessed 14 April 2020).
[30] Auditor General of South Africa (2018) 135.
[31] Auditor General of South Africa (2018) 135.
[32] Auditor General of South Africa (2018) 138.
[33] Auditor General of South Africa (2018) 139.

know what they were doing, or failed to detect institutional risks and therein failed to intervene timeously by putting mitigating measures into place.[34]

1.3 RESEARCH QUESTION

The question that the research will answer is: what were the major corporate governance failures at Eskom which have negatively impacted on enterprise efficiency and the sustainability of its business, and how can the corporate governance practices be improved to lead to enterprise efficiency?

1.4 RESEARCH OBJECTIVES

1.4.1 To identify and discuss theories critical to corporate governance, to discuss the legal personality of a company and to identify the regulatory framework which impacts on corporate governance in SOEs;

1.4.2 To discuss the various duties of the director, amongst others, which includes the duties of proper purpose and acting in good faith, the duty to avoid conflicts of interest, the duty of care and skill and the Business Judgement Rule in South Africa;

1.4.3 To highlight and discuss the corporate governance irregularities at Eskom, including the failures by the various respective boards and ministers of that SOE; and

1.4.4 To highlight findings, draw conclusions and make recommendations on how Eskom can move towards a degree of good corporate governance.

1.5 BRIEF LITERATURE REVIEW, JUSTIFICATION AND SIGNIFICANCE OF THE STUDY

There are elements which impact on corporate governance, which will be briefly highlighted in this part such as the role and duties of the board of directors and the liability on directors should good governance not have been exercised under their tenure. This part presents a brief literature review. In the process of considering views from writers on the subject of corporate governance challenges especially in the SOEs context. This part also identifies the gap in the knowledge, which justifies this study.

[34] Naidoo R (2016) 354.

Section 49 of the PFMA legislates that every public entity must have an accounting authority.[35] Two options are afforded to the entity, which includes that if the entity has a board then that board is the accounting authority.[36] Firstly, section 66(1) of the Act directs that the business of an entity must be directed under the supervision of a board, which must comprise of no less than three directors for a public company.[37] Cassim argues that section 66(1) of the Act constitutes the first time where the power of the function of management is conferred on the board.[38] According to Davis J in *Kaimowitz vs Delahunt*, the board is not responsible for the daily operation of the entity.[39] The board is responsible for the overall management of the affairs of the company,[40] while executive management is the role of the managing director (hereafter MD) and his/ her team of executives – the Managing Director normally operates with delegated authority from the board.[41] Naidoo refutes the management function of directors by stating that the function of directors is only towards directing and not managing an organisation.[42] Naidoo continues to argue that directing a company requires a "more intellectual process", which the function of management does not afford.[43] The Organization for Economic Cooperation and Development (hereafter OECD) affirms the position of Naidoo by directing to its member states that the board is "chiefly responsible" for the monitoring of the performance of the company, amongst other duties.[44] The King IV Report on Corporate governance support the position of the OECD and Naidoo and refutes the view of Davis J in recommending that the board should assume responsibility for steering and setting the direction for the company.[45] However, the literature does not identify how the aforementioned chief responsibility impacts on the efficiency of the enterprises.

[35] Section 49(1) of the Public Finance Management Act 1 of 1999.
[36] Section 49(2)(a) of the Public Finance Management Act 1 of 1999.
[37] Section 66(1) of the Public Finance Management Act 1 of 1999.
[38] Cassim R 'The Power to remove Company Directors from Office: Historical and Philosophical Roots' (2019) 25 *Fundamina* 38.
[39] *Kaimowitz v Delahunt and Others (8728/2016) [2016] ZAWCHC 212; 2017 (3) SA 201 (WCC)* 19.
[40] Kaimowitz v Delahunt and Others (8728/2016) [2016] ZAWCHC 212; 2017 (3) SA 201 (WCC) 12.
[41] Kaimowitz v Delahunt and Others (8728/2016) [2016] ZAWCHC 212; 2017 (3) SA 201 (WCC) 21 & 27.
[42] R Nadoo (2016) 9.
[43] R Naidoo (2016) 9.
[44] Organization for Economic Cooperation and Development *G20/OECD Principles of Corporate Governance* (2015) 45.
[45] Institute of Directors in Southern Africa *KING IV Report on Corporate Governance for South Africa* (2016) 47.

Secondly, if the entity does not have a controlling board, then the Chief Executive Officer is the Accounting Authority; subject to any specific legislation which is applicable to that entity.[46] It is only in exceptional cases whereby the relevant Treasury Department may approve or instruct another person or body to be the Accounting Authority to an entity.[47] However, during a 3- month period in 2019, the board of Eskom approved the dual role of the chairperson to the chief executive officer (hereafter CEO).[48] According to Tessema, the notion of duality on corporate governance in the Gulf Corporation Council, whereby the chairperson assumes the role of the CEO, has a negative impact on the company whereby it impairs the functioning of the board in monitoring the quality of the disclosure of information .[49] Dey, Engel and Liu argues that duality in corporate governance in the United States of America (hereafter USA) received increased attention due to the association with corporate scandals. [50] It is further assumed that the implementation of duality in corporate governance decreases agency costs whereby the costs associated with monitoring the actions of the CEO is reduced.[51] However, section 49(1)(2) of the PFMA directs that every public entity must have board as an accounting authority, which must be accountable for the financial management of the entity.[52] Furthermore, section 49(2)(b) of the PFMA legislates that only if a board is not present the CEO assumes charge of the entity. These aforementioned sections negate the concept of corporate governance duality which Dey, Engle and Lui; as well as Tessema, alludes to. The aforementioned sections of the PFMA also negates the duality instance which occurred at Eskom, unless directed in the Memorandum of Incorporation of the entity. Naidoo argues that the role of the Chairperson is an ex-officio position and is a final arbiter on the conduct of a meeting.[53] Section 36(1)(2)(a)(b) of the PFMA legislates that every constitutional institution must have an Accounting Officer, who serves as the Head and CEO of the Institution.[54] An

[46] Section 49(2)(b) of the Public Finance Management Act 1 of 1999.
[47] Section 49(3) of the Public Finance Management Act 1 of 1999.
[48] All News Agency 'Eskom board backs Mabuza is dual roles as chairman and CEO' *https://www.iol.co.za/business-report/energy/eskom-board-backs-mabuza-is-dual-roles-as-chairman-and-ceo-30062739* (accessed 31 July 2020).
[49] Tessema, A 'The impact of corporate governance and political connections on information asymmetry: International evidence from banks in the Gulf Cooperation Council member countries' *Journal of International Accounting, Auditing and Taxation* 35 (2019) 3.
[50] Dey A, Engel E and Lui X 'CEO and board chair roles: To split or not to split?' (2011) 17 *Journal of Corporate Finance* 1595.
[51] Dey A, Engel E and Lui X (2011) 1596.
[52] Section 49(1)(2) of the Public Finance Management Act 1 of 1999.
[53] Naidoo R (2016) Page 88.
[54] Section 36(1)(2)(a)(b) of the Public Finance Management Act 1 of 1999.

inference is made that in accordance with the King IV Report, the board chairperson and the CEO of the institution cannot be joined in their duties, as it may create a conflict of operational interests.[55] The literature only highlights the impact of duality in the USA and the Middle East. However, there is no literature which measures that impact of duality on the efficiency neither on the sustainability of the company.

Flowing from the aforementioned arguments, an important question to be posed is whether a director can be held liable for failing to uphold his/ her duties against the fiduciary duties and duty, care and skill? It is argued by Muswaka that the Business Judgement Rule, which has been codified within the Act, acts as a shield against liability imputations if the director can prove that he/ she has taken reasonable and diligent steps to become informed on a matter, had no conflict of interest in a matter and had a rational basis for believing that his/ her decision was taken in the best interest of the company.[56] [57] Mupangavanhu argues that the Act has not achieved the purpose and clarity of standards, due to omissions and ambiguities in the formulation of the standard of care, skills and diligence provisions within the Act.[58] Mouhiudeen opines that a director can be held accountable against the codification of fiduciary duties, through section 77 of the Act.[59] Similarly, a director is liable against the partial codification of duty, care and skill; whereby a claim in delict can be brought again the plaintiff.[60]

The findings of this research will not only be beneficial to the exercise of good corporate governance in general, but will assist policy makers and SOEs in South Africa to improve on regulations and corporate governance practices.

The research of this thesis would assist oversight bodies, such as state departments and portfolio committees in the legislatures, to understand and assist SOEs in

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55 Institute of Directors in Southern Africa (2016) 53.

56 Muswaka L 'Directors' Duties and the Business Judgment Rule in South African Company Law: An Analysis' (2013) 3 *International Journal of Humanities and Social Science* 89.

57 Institute of Directors in Southern Africa 'The Business Judgement Rule' available at https://cdn.ymaws.com/www.iodsa.co.za/resource/collection/6AFA1967-5252-4F2C-A3B1-08DFA678F43B/The_business_judgment_rule.pdf (accessed 5 May 2020).

58 Mupangavanhu BM *Directors' Standards of Care, Skill, Diligence, and the Business Judgment Rule in View of South Africa's Companies Act 71 of 2008: Future Implications for Corporate Governance* (published PhD thesis, University of Cape Town, 2016).

59 Mohiudeen S *The Effect of the Partial Codification of the Common Law Duties of Directors In The Companies Act 71 Of 2008 on the Liability of Directors* (published LLM thesis, University of the Western Cape, 2018) 39.

60 Mohiudeen S (2018) 41.

formulating resolutions and recommendations which would encourage cultures of good governance practices. It should be noted that there is a link between the value derived from maximising projects and efficient operations in SOEs and the enhanced level of oversight over governance.[61] In addition, the corporate governance practices in Eskom led to a breakdown in terms of the corporate governance principles, which impacted negatively on the economy of South Africa. The findings and recommendations of this research will assist in creating an understanding of what led to the breakdown of the corporate governance principles in Eskom, in order to avoid a future recurrence thereof. This would ensure that SOEs incorporate a turnaround strategy that will see them returning to their original developmental purposes and impact positively on South Africa, its economy and its citizens.

1.6 RESEARCH METHODOLOGY

The research will be qualitative in nature, since the sources of information will solely be derived from secondary texts.[62] Therefore, the research will make use of journal articles, legislation and court case reports, internet newspaper sources, books, e-books and official electronic documents.

In addition, the research will be a descriptive research project. A descriptive research project is a non-experimental research that includes describing the current state of affairs of a subject matter while understanding how various factors impedes on the current state of the subject matter.[63] Furthermore, a descriptive research project follows on exploratory research projects. Although the concept of corporate governance within various other South African SOEs have been explored in various other research papers which were exploratory in nature,[64] this research paper will identify and discuss the corporate governance failures within Eskom, which other theses on corporate governance on SOEs in South Africa did not address.

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[61] Love I (2011) 45.

[62] Creswell JW *Research Design Qualitative, Quantitative and Mixed Methods Approaches* 4 ed (2012) 232.

[63] Salkind NJ *Exploring Research* 8 ed (2014) 269.

[64] The primary theses which were perused in preparation for the research project to be undertaken includes Kondlo N *The Importance of Corporate Governance in South African Family-Owned Companies: Effects Of Ownership And Board Composition On Performance* (published MPhil thesis, University of the Western Cape, 2016; including Mupangavanhu BM *Directors' Standards of Care, Skill, Diligence, and the Business Judgment Rule in View of South Africa's Companies Act 71 of 2008: Future implications for Corporate Governance* (published PhD thesis, University of Cape Town, 2016).

1.7 CHAPTER OUTLINE

This research paper will comprise of five chapters.

CHAPTER 1: INTRODUCTION AND BACKGROUND TO STUDY

Chapter one will include and focus on the introduction, problem statement, significance of the study, research question, aims and research methodology.

CHAPTER 2: THEORETICAL FRAMEWORK & CORPORATE GOVERNANCE REGULATION

The focus of chapter two is to lay a foundation for important corporate governance concepts including key definitions of terms like 'corporate governance', importance of good corporate governance to SOEs, theories of the company related to the nature of the company (including the concept of separate legal personality of a company); including the enhanced role of the shareholder in SOEs and the regulatory framework for the governance of SOEs in South Africa.

CHAPTER 3: DIRECTORS' DUTIES, DECISION-MAKING AND LIABILITY

Chapter three will highlight and discuss how the duties of directors and their governance roles which includes, amongst others, the duty of care and skill that impacts on the decision-making abilities of the individual directors of a company; including how the courts deal with the issue of bad decision- making of directors. Furthermore, the Business Judgement Rule will be discussed.

CHAPTER 4: CORPORATE GOVERNANCE CHALLENGES AT ESKOM – EXAMINATION OF SELECT CASES

Chapter four will discuss the factors which led to the corporate governance failures at Eskom, such as supply chain management contraventions, including the inability of the respective boards and ministers to introduce any mitigating action to rectify the governance and financial irregularities at that SOE.

CHAPTER 5: FINDINGS, RECOMMENDATIONS & CONCLUSION

Chapter five will present the findings of the study, including proposing recommendations for Eskom and SOEs in achieving good governance practices. This chapter will also conclude the study.

CHAPTER 2: THEORETICAL FRAMEWORK & CORPORATE GOVERNANCE REGULATION

2.1 INTRODUCTION

The focus of this chapter will be to lay a foundation for important corporate governance concepts, which will include key definitions such as 'corporate governance' in an international and South African context. This Chapter will also study the different approaches to corporate governance in terms of the theories which impacts on the company. It is also important to study the nature of the company through the concept of separate legal personality of a company. The enhanced role of the shareholder in SOEs will be discussed in relation to upholding the ideals of corporate governance in the SOEs. This chapter will conclude with the introduction and discussion of the regulatory framework which undergirds the governance of SOEs, like Eskom, in South Africa.

2.2 CORPORATE GOVERNANCE IDEALS PERTAINING TO SOES AND THE STATE OF CORPORATE GOVERNANCE IN SOES IN SOUTH AFRICA

Globally, the function of good governance is to act in the interest of the public at all times.[65] The principles which guides companies in general, and SOEs in particular, includes operating with integrity, ethical values, transparency, manage performance, internal controls and developing efficient financial management systems.[66]

Furthermore, the OECD provides similar guidelines to the implementation of the principles of corporate governance in SOEs in that the state must act in an informed and active manner as owner, and that the boards should have the necessary authority, competencies and objectivity to carry out their functions of strategic guidance and monitoring of management. Boards should act with integrity and be held accountable for their actions.[67]

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[65] International Federation of Accountants 'Good Governance in the Public Sector—Consultation Draft for an International Framework' available at *https://www.ifac.org/system/files/publications/files/Good-Governance-in-the-Public-Sector.pdf* 11 (accessed on 25 June 2020).

[66] International Federation of Accountants 'Good Governance in the Public Sector—Consultation Draft for an International Framework' available at *https://www.ifac.org/system/files/publications/files/Good-Governance-in-the-Public-Sector.pdf* 11 (accessed on 25 June 2020).

[67] Organisation for Economic Co-operation and Development 'OECD Guidelines on Corporate Governance of State-Owned Enterprises' 3 available at *https://www.oecd.org/corporate/guidelines-corporate-governance-soes.htm* (accessed on 20 October 2020).

In South Africa, the Department of Public Enterprises developed a protocol guideline on Corporate Governance in the Public Sector (hereafter the 'Protocol Guidelines on Corporate Governance in the Public Sector' or the 'Protocol on Corporate Governance') which includes principles to guide departments and SOEs towards proper governance in order to deliver social goods and services to improve the quality of life of all South Africans.[68] The Protocol on Corporate Governance provides a guideline which ensures good governance as follows:[69]

- The Executive Authority (hereafter the Minister or Executive Authority) should exercise strategic control over the SOE's consistently with their accountability to Parliament and the public;
- The Executive Authority should set clear objectives for SOE's;
- Any social service obligations that a SOE is to undertake should generally be specified through a Shareholder Compact; and
- The directors of SOEs must develop business strategies, policies and procedures and monitor the actions of senior management.

Timothy opines that with all the guidelines, directives and legislations which have been put in place for SOEs in SA, the entities should be performing well and add socio-economic value to the country.[70] However, the reality is that SOEs in SA have been beriddled with financial and corporate governance mismanagement.[71] Thabane and Van Deventer supports the viewpoint of Timothy by stating that although legislation and directives are in place, most SOEs remains uncompliant with the corporate governance legislation and directives.[72] For example, Eskom has experienced major financial liquidity and corporate governance challenges over the past few years which severely hampered its potential to positively contribute to the developmental agenda of the South African government. During the 2017/18 financial year, Eskom incurred an irregular expenditure bill of R19,6 million at the end of that financial year.[73] This has

[68] Department of Public Enterprises *Protocol on Corporate Governance in the Public Sector* (1997) 3.
[69] Department of Public Enterprises *Protocol on Corporate Governance in the Public Sector* (1997) 7-8.
[70] Timothy S 'Governance In State-owned Enterprises – How They Are Held Accountable' *Polity* 6 September 2018 available at https://www.polity.org.za/article/governance-in-state-owned-enterprises-how-they-are-held-accountable-2018-09-06 (accessed 16 April 2019).
[71] Timothy S 2018.
[72] Thabane T & Snyman-Van Deventer E 'Pathological Corporate Governance Deficiencies in South Africa's State-Owned Companies: A Critical Reflection' (2018) 21 *PER / PELJ* 1.
[73] Auditor-General of South Africa '*Consolidated General Report on National and Provincial Audit outcomes: PFMA 2017-18*' (2018) 4.

led to many SOE's, like Eskom, receiving several cash injections (or "bailouts") in the form of billions of rands from the state due to their inability to execute on their mandates over several years.[74]

2.3 THEORIES OF THE COMPANY AND NATURE OF CORPORATE RELATIONSHIPS

2.3.1 Agency Theory

The agency theory is positioned in the principal-agent framework. This framework indicates that there is an agency relationship which exist, whereby the principal delegates work to the agent.[75] The context of the agency theory is that there is a separation of ownership and control between the principal and agent.[76] The board of directors represents the shareholder of a company and is accountable to it and responsible for the company, while the senior management are the agents who execute the mandate and are accountable to the board of directors.[77] The agent is empowered with the authority to make decisions on behalf of the principal.

However, the crux and problem of this theory is where there is a risk that the agent will likely make decisions in his/her own interest instead of the interest of the principal.[78] This represents the agency problem which the theory tries to deal with. Interestingly, the agency theory is also regarded as a contractual agreement whereby the internal governance mechanisms of the company should be reconciled with the interest of the shareholder, while also possessing an element of risk whereby the actions of the agent is not adequately monitored.[79] The theory also deals with another specific problem in that the principal and agent find it difficult to reconcile different tolerances, or appetites, for risks within the company.[80]

A remedy which has been proposed to address the agency problem was through the offering of appropriate executive incentives to the agents.[81] It is also viewed that the eradication of the duality, whereby the Chairperson assumes the additional role of the

[74] Thabane T & Snyman-Van Deventer E (2018) 1.
[75] Mallin C *Corporate governance* 3 ed (2010) 15.
[76] Mallin C (2010) 15.
[77] Hendrikse JW & Hefer- Hendrikse L *Corporate Governance Handbook: Principles and Practices* 2 ed (2012) 4.
[78] Padgett C *Corporate governance: theory and practice* (2012) 212.
[79] O'Sullivan N & Wong P 'The Governance Role of Takeovers' in Keasey K & Thompson S & Wright M (ed) *Corporate governance: Accountability, Enterprise and International Comparisons* (2005) 155.
[80] De Kluyver CA *Corporate governance* (2012) 4.
[81] Yusuf F, Yousaf A & Saeed A 'Rethinking agency theory in developing countries: A case study of Pakistan' (2018) 42 *Accounting Forum* 281.

Chief Executive Officer, would strengthen the monitoring capacity of the principal on the agent.[82] The agency problem would also be minimised through specific designs of accountability procedures, audit committees and the monitoring of the agent's performance through information systems.[83] It will be established that the agency problem is still alive within Eskom, in spite of the establishment of the accountability procedures and audit committees within the SOE.[84] Therefore, in the case of Eskom, the agency problem has not been minimised through the establishment of the aforementioned accountability structures.

2.3.2 Communitaire Theory

The Communitaire theory posits that the company is the promotor of the advancement of social and political values in addition to only being a wealth-maximisation machine for the shareholders.[85] Mupangavanhu supports this notion by highlighting that this theory is the balancing link between the contractarian and concession theories which emphasises that companies have social and political dimensions to them in addition to the economic dimension.[86] The theory has been modelled in former communist states, whereby companies have been created for the specific purpose of serving the interests of the state.[87] In the context of South Africa's SOEs, the idealism and aim of this theory is present because the entities have been established to 1) achieve economic growth, 2) reduce poverty, 3) addressing market failure, 4) deliver key infrastructure projects and 5) ensure equal citizen access to services.[88] The theory also serves as proxy in companies in favouring the delivery of services which meets the needs of the society being served.[89]

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[82] Shaukat A & Trojanowski G 'Board Governance and Corporate Performance' (2018) 45 *Journal of Business Finance and Accounting* 185.

[83] Shrivastava P & Addas A 'The impact of corporate governance on sustainability performance' (2014) 4 *Journal of Sustainable Finance and Investment* 22. See part 2.5.1 of Chapter 2.

[84] See parts 4.2.3, 4.2.4, 4.3.3, 4.3.4, 4.4.3, 4.4.4, 4.5.3, 4.5.4 and 4.5.5. of Chapter 4

[85] Ackerman M & Cole L 'Making Corporate Law More Communitarian: A Proposed Response to the Roberts Court's Personification of Corporations' (2016) 81 *Brooklyn Law Review* 973.

[86] Mupangavanhu BM *Directors' Standards of Care, Skill, Diligence, and the Business Judgment Rule in view of South Africa's Companies Act 71 Of 2008: Future implications for Corporate governance* (published PhD thesis, University of Cape Town, 2016) 40.

[87] Al-Hawamdeh A & Welch R 'Corporate Governance and Workplace Democracy: Some Paradigms and Paradoxes' (2016) 56 *Journal of Law, Policy and Globalisation* 2.

[88] Kikeri S 'Corporate Governance in South African State-Owned Enterprises' available at https://openknowledge.worldbank.org/handle/10986/30029 (accessed on 1 August 2021) 1.

[89] Mupangavanhu BM (2016) 41.

Through this theory, the corporation is regarded as a tool through which the policies of the state is advanced, while also advancing corporate social responsibility and the well-being of employees.[90] This is done by the company forgoing short-term benefits for longer term economical and societal benefits.[91] In terms of decision making at the level of the board of directors, Miller posit that this theory proposes that when the board of directors resolves on matters, that the interests of all the stakeholders of the company should be considered.[92] However, Mupangavanhu argues that the shareholders are regarded as the proxy for societal wealth and therefore shareholder wealth should be maximised; while the board of directors should consider the interests of the collective corporate shareholder and thereby make decision in the best interest of the company.[93]

2.3.3 Concession Theory

According to the Oxford dictionary, a concession is a contract which authorises a person to use the resources of the state for a special and specific purpose.[94] Mupangavanhu posit that the concession theory conceptualises that a company is the creation of the state and therefore owes some form of return to the state; usually in the form of being a good corporate citizen in society.[95] The origin of the concession theory can be traced to 1819 when Justice Marshall indicated that a corporation is an artificial being, invisible, intangible and existing only through law; while possessing properties which its creator conferred upon it.[96] Padfield articulates that the creation of the concession theory views the company as a massive capital accumulation device that was only made possible by the legislation created by the state which could not have been actualised through private business interest or a fail of lack of private business funding.[97]

[90] Al-Hawamdeh A & Welch R (2016) 2.
[91] Ackerman M & Cole L (2016) 971.
[92] Miller S 'Fiduciary Duties in the LLC: Mandatory Core Duties to Protect the Interests of Others Beyond the Contracting Parties' (2009) 46 *American Business Law Jour*nal 254.
[93] Mupangavanhu (2016) 43.
[94] Oxford University Press *The Oxford South African School Dictionary* (2010) 126.
[95] Mupangavanhu B (2016) 39.
[96] Padfield SJ 'Rehabilitating Concession Theory' (2014) 66 *Oklahoma Law Review* 331.
[97] Padfield SJ (2014) 332.

Regarding the actual implementation of the theory, Kayiklik opines that the concession theory is *inherently receptive to regulating corporations.*[98] Furthermore, the company is to serve a public purpose and is assured of limited liability.[99] Linking the concession theory with the creation of Eskom, it can be viewed that the SOE was created by the State in 2001 through the assenting of the Eskom Conversion Act 13 of 2001. This theory is very much active in the public sector through the legislative creation of 128 SOEs in South Africa, which are supposed to act as vehicles of developmental upliftment.

Both Mupangavanhu and Padfield agreed that the concession theory is outdated and antique in addressing the challenges which are associated with the modern corporate governance theories, such as the corporate social responsibility theory.[100] However, Padfield further argues that the concession theory might still have relevance in the restoration of a balanced allocation of power amongst the company, state and shareholder.[101] The author of this research thesis agrees with the viewpoint of Padfield, in that if good corporate governance is exercised in SOEs, their development objectives will be realised and be evident through the socio-economic upliftment of the citizens.

2.4 THE SEPARATE LEGAL PERSONALITY OF A COMPANY

A company, as a legal personality, is the creation of legal concept wherein the company has no physical existence and is therefore unable to perform duties which are of human nature.[102]Section 19(1)(b) of the Act will be discussed hereunder which affirms the separate legal personality of a company. One of the benefits of the separate legal personality of the company is that the company's assets, profits, debts and liabilities remains vested in the company, and cannot be regarded as assets of the shareholders.[103]

[98] Kayiklik A 'How Elizabeth Warren Is Reviving the Concession Theory of the Corporation' available at https://clsbluesky.law.columbia.edu/2019/11/01/how-elizabeth-warren-is-reviving-the-concession-theory-of-the-corporation/#_ftnref1 (accessed on 28 July 2021).
[99] Kayiklik A (2019) https://clsbluesky.law.columbia.edu/2019/11/01/how-elizabeth-warren-is-reviving-the-concession-theory-of-the-corporation/#_ftnref1 (accessed on 28 July 2021).
[100] Mupangavanhu B (2016) 40. Padfield SJ (2014) 327.
[101] Padfield SJ (2014) 360.
[102] Cassim F, Cassim M, Cassim R *et al Contemporary Company Law* (2012) 31.
[103] Mupangavanhu B (2016) 44.

So what are the benefits for the shareholders and directors in terms of the separate legal personality of the company? For one, the shareholders have limited liability in terms of the debts of the company.[104] Another benefit is that all debts and liabilities are borne by the company itself.[105] [106]The shareholders are not liable for any debts or other obligations of the company except to the extent that the Memorandum of Incorporation of a company and the Companies Act 2008 provides otherwise.[107] However, it is common cause that only agents of the company are authorised to manage the affairs of the company.[108] This excludes the shareholders, as they are not authorised to bind the company in terms of contracts or to participate in business transactions.[109]

So what authorises a company as a legal personality, or a juristic person? Section 19(1) of the Act confirms the status of the juristic person through incorporation, by legislating that the company—[110]

> (a) is a juristic person, which exists continuously until its name is removed from the companies register in accordance with this Act;
>
> (b) has all of the legal powers and capacity of an individual, except to the extent that—
>
> (i) a juristic person is incapable of exercising any such power, or having any such capacity; or
>
> (ii) the company's Memorandum of Incorporation provides otherwise

In support of Section 19(1) of the Act, Becker defines the concept of the legal personality of a Company as a personality which can be enjoyed by a group of natural persons.[111]

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[104] Mupangavanhu B (2016) 45.
[105] Mupangavanhu B (2016) 45.
[106] Delit H 'Separate legal personality: What does it mean for companies and what are the limits?' available at *https://debeerattorneys.com/2020/06/09/separate-legal-personality-what-does-it-mean-for-companies-and-what-are-the-limits/* (accessed on 7 August 2021).
[107] See s19(2) of the Companies Act 2008
[108] Mupangavanhu B (2016) 45.
[109] Mupangavanhu B (2016) 45.
[110] See s 19(1)(*a*)(*b*)(*i*)(*ii*) of the Companies Act 2008.
[111] Becker R *Disregarding the separate juristic personality of a company: An English case law comparison* (published LLM thesis, University of Pretoria, 2014) 4.

2.5 THE ENHANCED ROLE OF THE SHAREHOLDER IN THE CORPORATE GOVERNANCE OF SOES IN SA

In all companies, whether private or in SOEs, there exist a universal set of principles which are associated with the role of shareholders in companies. These include that the shareholder must adhere to the best practise framework as follows:[112]

- Acting in best interest of the owners;
- Business priorities of maximising shareholder value;
- Shareholder activism by economic and market value added;
- Super-ordinate goal of the maximisation of shareholder value;
- Improved investment returns; and
- Shareholder responsibility of providing capital.

In addition to the aforementioned universal framework, the overall responsibility of governance of the shareholder lies concomitantly with the board of directors.[113] This is due to the fact that the individual director shares a fiduciary duty to the company through the duty of care and skill, vis-a-vis the overall resolutions and decisions of the board of directors as a body. This means that although the decisions of the board is collective in nature, the individual responsibility of the fiduciary duty still remains legally bound on the director.[114] It is also worth noting that the risk of capital investment always lies at the door of the shareholder whether in private, public or government companies.[115]

Specifically in SOEs, the Minister possesses the right to ensure that the board of directors are accountable to her/ him.[116] This is because the Minister appoints the executive- and non-executive members of the SOE, and therein lies the accountability duty to the Minister.[117] In addition, this leads to the practise where the Minister's will prevails in terms of direction of the board and SOE.[118]

[112] Hendrikse J & Hefer-Hendrikse L (2012) 17-18.
[113] Hendrikse J & Hefer-Hendrikse L (2012) 132.
[114] Naidoo R (2016) 371.
[115] Hendrikse J & Hefer-Hendrikse L (2012) 33-41.
[116] Naidoo R (2016) 370.
[117] PWC (2011) 2.
[118] Naidoo R (2016) 371.

Certain challenges are prevalent in the role of shareholder in the SOE, such as the appointment of the board through ministers has also proven to be detrimental to SOEs. In Kenya, it was reported that "politicised directors" enjoy the protection of the Minister who appointed them. This leads to ineffective management of SOE's, a lack of technical sector experience, a diminishment of the standard of care and skill required of a director, poor quality of financial statements, lax cost control inadequate management information systems and quality control.[119] Moreover, an abuse of the fiduciary duties of the Minister can be present, because the SOE is insulated from economic failure and can cause that the Minister in her/ his oversight role slump into a state of complacency.[120]

In order to combat the aforementioned challenges, it is recommended that the responsible Minister adopt an active shareholder attitude instead of a passive shareholder attitude. This can be done by the shareholder meeting with the board of directors, removing non-performing board members and advancing policies in the interest of national development.[121]

2.6 REGULATORY FRAMEWORK

2.6.1 The Companies Act, 2008

The Act provides direction to all companies and SOEs in South Africa in terms of incorporation, registration, including the organisation and management of companies; amongst other matters which are connected to the Act.[122] As the purpose of the Act has been highlighted in Chapter 1 of this research, it was and is necessary to highlight why the Act has been enacted. The reasons include that the legislation had to be responsive to the legal, economic and social context of the democratic South Africa post-1994.[123] This responsiveness included protecting the interests of the stakeholders of the company, considering relaxed remedies meted to companies,[124] rapidly acclimatising to the global economic changes, being receptive to foreign direct

[119] Mwaura K (2017) 49-50. PWC (2011) 2.
[120] PWC (2011) 2.
[121] Larker D & Tayan B *Corporate Governance Matters: A closer look at organizational choices and their consequences* (2011) 394. PWC (2011) 2.
[122] The Companies Act 71 of 2008 s1.
[123] Department of Trade and Industry *South African Company Law for the 21st Century: Guidelines for Corporate Law Reform* (2004) 7.
[124] Department of Trade and industry (2004) 10.

investments [125] and ease the bureaucratic process of registering and doing business in South Africa.[126]

The Act recognised SOEs as companies; while the Companies Act of 1973 incorporated SOEs as public companies.[127] The recognition of SOEs as companies is legislated within the Act under section 1.[128] Interestingly, boards of directors of SOEs are held accountable to the decisions taken in terms of the strategic operations, including compliancy of the Act.[129]

Section 8 of the Act legislates that SOEs are deemed to be profit companies, indicating that these entities are established for purpose of yielding financial gains for its stakeholders.[130] The shareholder is considered to be the executive authority, which is the Minister[131]. Wandrag opines that the shareholding rights and powers are exercised by the executive authority as per the directive of the PFMA.[132]

Section 9 of the Act legislates that the executive authority has authority to grant exemptions to any provisions of the Act which applies to the SOE as a public company. It should also be noted that the Act does not contain any directives for the appointment or removal of directors who serve on SOE boards.[133]

Although section 214 of the Act legislates on the definition of the guilt/ offence of company persons who falsify company accounting records,[134] the remainder of the section directs on the parameters on the definition of guilt/ offence of a person who intentionally with a fraudulent purpose in mind, provided false or misleading

[125] Department of Trade and industry (2004) 13.
[126] Department of Trade and industry (2004) 15.
[127] De Visser J, Waterhouse S, Muntingh L, Wandrag R & Komote M (2018) 7.
[128] The Act recognises the existence of companies that were registered as a company under the Companies Act, 1973; including defining and recognising Schedule 2 and 3 public entity enterprises as legislated in the Public Financial Management Act, 1999. References can be found on pages 11 and 18 of the Act.
[129] PricewaterhouseCoopers & Institute of Directors in Southern Africa 'State-owned enterprises: Governance responsibility and accountability Public Sector Working Group: Position Paper 3' available at *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 1 August 2021).
[130] The Companies Act 71 of 2008 s 8(2)(*a*). De Visser J, Waterhouse S, Muntingh L, Wandrag R & Komote (2018) 7.
[131] Department of Trade and Industry (2004) 4.
[132] The Public Finance Management Act, 1999 s 63. De Visser J, Waterhouse S, Muntingh L, Wandrag R & Komote (2018) 7. The Minister and board of directors must ensure that the SOE spends its funds within its annual appropriated or mid-year adjusted budgets.
[133] De Visser J, Waterhouse S, Muntingh L, Wandrag R & Komote (2018) 7.
[134] The Companies Act 71 of 2008 s 214(1)(*a*).

information on any matter; including being party to defraud creditors, employees or for any other fraudulent purpose.[135]

The Act, between sections 75 to 77, provides for the fiduciary responsibilities of the directors of companies; including consequences for breach of the standards of conduct and decision-making principles.

2.6.2 The Public Finance Management Act, 1999

The PFMA applies to all government organs which includes SOEs, such as Eskom. This is because Eskom is listed as a company under Schedule 2 of the PFMA as a major public entity and is subjected to the PFMA.[136] The objective of the PFMA is to ensure that all financial management transactions is undertaken in a transparent, sound and accountable manner.[137] Furthermore, the PFMA has been adopted to ensure that the executive authorities, accounting authorities, accounting officers and all other stakeholders involved in the company manages the revenues, expenditures, assets and liabilities of the company in an efficient, effective and economical manner.[138]

Chapter 7 legislates that the financial responsibility of the Minister under which the SOE is located, is to ensure that he/she execute his/her duty within the authorised budget of that Entity and must ensure that the Entity is compliant to the PFMA.[139] Chapter 6 provides legislative direction for the establishment of accounting authorities, who are the board of directors of an SOE.[140] Hereby, the fiduciary duties and general responsibilities of the board of directors are legislated,[141] which will be discussed in detail in chapter 3 of this research paper.

A critique of the PFMA has been that it does not deal with the appointment and dismissal of the board of directors, which has caused many governance problems for SOEs in South Africa.[142] Furthermore, the responsible Minister of the SOE appoints and dismisses the accounting officer under the definition of ownership control under

[135] The Companies Act 71 of 2008 s 214(1)(*b*)(*c*).
[136] The Public Finance Management Act 1 of 1999 schedule 2.
[137] The Public Finance Management Act 1 of 1999 s 2.
[138] The Public Finance Management Act 1 of 1999 2.
[139] The Public Finance Management Act 1 of 1999 s 63(1)(a)(2).
[140] The Public Finance Management Act 1 of 1999 s 49(1)(2)(a).2
[141] The Public Finance Management Act 1 of 1999 s 50 51 52 54 55.
[142] De Visser J, Waterhouse S, Muntingh L, Wandrag R & Komote (2018) 5.

chapter 1 of the PFMA. According to Wandrag, this is an inherent risk due to the fact that the accounting officer will be accountable to the responsible executive authority directly and not the board of directors; and therefore impedes on the accountability line to the board.[143] In addition, Kikeri argues that the PFMA does not make provision for the appointment of the board of directors; including the treatment of the developmental mandates and objectives of SOEs.[144] In sharp contrast to the aforementioned arguments of Wandrag and Kikeri, Malan J states in the case of *Mpofu v South African Broadcasting Corp Limited (SABC) and Others (2008/18386) [2008] ZAGPHC 413* that executive authorities does not have the power to appoint or dismiss and only 'approves' any accounting officer's appointment, based on the recommendation and appointment of the board of directors.[145]

2.6.3 King Codes on Good Governance

The King Committee was established in 1992 on the heels of the British Cadbury Committee to provide governance codes on matters such as accountability, financial reporting, responsibilities of directors and auditors and the ethical conduct of businesses in South Africa.[146] The King codes are voluntary regulatory mechanisms that were introduced to compliment the binding regulations on companies, such as the Act and PFMA. Therefore, the King codes are not legally binding on any company.[147] However, the King codes have been adopted by all SOEs and reference to the King codes are made in the annual reports of these entities.[148] Additionally, the judiciary will consider the King codes when reviewing governance practices in South Africa.[149]

[143] De Visser J, Waterhouse S, Muntingh L, Wandrag R & Komote (2018) 6.
[144] Kikeri S (accessed on 1 August 2021)
[145] *Mpofu v South African Broadcasting Corp Limited (SABC) and Others (2008/18386) [2008] ZAGPHC 413* paras 24-25.
[146] Naidoo (2016) 45.
[147] Kondlo N *The importance of corporate governance in South African family-owned companies: Effects of ownership and board composition on performance* (published LLM thesis, The University of the Western Cape, 2016) 41.
[148] In its Annual Integrated Report for the 2017/18 financial year, Eskom refers to its attempts to comply with the requirements of the KING IV principles 67 times throughout its Report. This referral to the KING principles reverberates through the annual reports of all the SOEs of South Africa, as an instruction from National Treasury though its guide for the preparation of annual reports.
[149] Werksman Attorneys 'A review of the King IV Report on Corporate Governance' available at https://www.werksmans.com/wp-content/uploads/2013/05/061741-WERKSMANS-king-iv-booklet.pdf (accessed on 6 August 2021).

The aim of the most recent King code was to make its governance principles more accessible to all companies in South Africa.[150] Thus, the King IV code differs from its predecessors on three primary matters, which includes: [151]

- outcomes based governance- the board of directors is responsible for the ethical culture, performance and internal controls of the company; including stakeholder management;
- apply and explain- the principles should be applied and disclose an explanation on the governance practices of the code; and
- the structure of the code- the principles of the King IV has been reduced to 17 against the 75 principles of the King III code to make it more easier to interpret and implement.

2.7 CONCLUSION

This chapter concentrated on the corporate governance ideals which is prescribed to SOEs, which guides that interventions should be in place to optimise and achieve the desired outcomes for which the company has been established. The Executive Authority should also exercise consistent strategic control through the board. However, in reality, the SOE's in SA have experienced various financial and governance mismanagement. A result has been that most of the SOEs in SA had to receive bailouts from the government in order to continue to operate.

The theories which govern the relationship of the company have also been examined, such as the agency theory, which is an inward looking theory; regulating the complex relationship between the board of directors and senior management. This theory posits that there is a distinct separation of ownership and control between the principal and the agent. The communitaire theory forces the shareholder, board and senior management to look outward to advance social and political values through the SOE. The concession theory highlighted the contractual relationship between the government and the company. The theory advances that the SOE has been

[150] Werksman Attorneys 'A review of the King IV Report on Corporate Governance' available at *https://www.werksmans.com/wp-content/uploads/2013/05/061741-WERKSMANS-king-iv-booklet.pdf* (accessed on 6 August 2021).

[151] KPMG 'King IV Summary Guide' available at *https://assets.kpmg/content/dam/kpmg/za/pdf/2016/11/King-IV-Summary-Guide.pdf* (accessed on 6 August 2021).

established by the government to serve the public purpose, while being assured of limited liability.

The SOE is regarded as a separate juristic person, with a legal personality, through being established by Section 19(1) of the Act. All debts and liabilities are carried by the company. The company will also be guaranteed of operating as a going concern, even though it may experience a change in directorship or senior management.

It has been established that the shareholder also has a fiduciary duty to the company. This is through the fact that the Executive Authority must appoint and remove directors and therefore should have a more active shareholding role and attitude by meeting regularly with the board.

This chapter concluded by discussing the impact the legislative framework has on the execution of the principles of corporate governance within the SOE in South Africa. These legislative instruments were chosen to find the overlap and common ground in evaluating how the ideals of good governance and good corporate citizenship can be achieved within the SOEs in South Africa.

CHAPTER 3: DIRECTORS DUTIES, DECISION-MAKING & LIABILITY

3.1 INTRODUCTION

The decisions of the board of directors, more specifically individual directors, have far reaching consequences for the company on which they serve. The question that will be answered in this chapter is how the duty of care and skill, as partially codified in section 76(3) of the Companies Act 71 of 2008 (the Act), impacts on the decision-making abilities of the individual directors of a company; including how the courts deal with the issue of bad decision- making of directors. Furthermore, the Business Judgement Rule will be discussed, which have been regarded in literature as a safe haven for directors who recklessly erred in their decision-making and thereby negatively impacted on the company as a going-concern. This chapter is limited to South African case law in order to isolate and demonstrate how the judiciary has dealt with the subject matters of this chapter.

3.2 DIRECTORS' GOVERNANCE ROLE – THE FIDUCIARY RELATIONSHIP WITH THE COMPANY

Before the director's governance role will be delved into under this section, it is imperative to define what a director is. Section 1 of the Act defines that the Director of a company is:[152]

> a member of the board of a company, as contemplated in section 66, or an alternate director of a company and includes any person occupying the position of a director or alternate director, by whatever name designated

A director is a person who has been elected and appointed to serve on the board of directors of a company,[153] and who has been tasked with the responsibility to exercise objective judgement on corporate affairs[154] in the best interest of the company.[155] Macey states that the director's most elementary form of oversight is to monitor and manage senior management.[156] Macey continues to highlight challenges for directors, which includes that a director finds him/herself in a precarious position by trusting senior management, while also acting as if he/she does not trust management.[157]

[152] The Companies Act, 2008 S1.
[153] The Companies Act, 2008 s4 (*a*) and s7.
[154] OECD *Corporate Governance* (2004) 63-64.
[155] IODSA *King IV Report* (2016) 28.
[156] Macey J *Corporate Governance: promises kept, promises broken* (2008) 53.
[157] Macey J (2008) 71. This challenge which is highlighted by Macey points to the actualisation of the agency theory problem within a company.

Naidoo, writing on corporate governance, argues that a person who is nominated and appointed to become a director of a company should possess good judgment and a level of due diligence in the following areas:[158]

- Financial stability and future course of the company- an analysis of the various audited reports of the company, including litigation and claims against the company to understand the liquidity position of the company;
- Tone set by the board- understand the tone of governance and culture within the company, including the quality and balance of the board;
- Understand the compliance environment- being conversant on the company's code of ethics and key compliance policies; and
- Support and training of the board- be informed of the level of support that will be rendered to the board.

Mallin opines that an inherent risk resides on the level of the board of directors in that the decision of the board might be unduly influenced, which highlights the agency problem.[159] For example, most of the board of directors at Eskom had business interests in external companies and some decisions that were made were influenced where those companies were the beneficiaries of lucrative tenders of the SOE.[160]

3.3 THE DUTY TO ACT IN THE BEST INTEREST OF THE COMPANY

It is common cause that the director on any board has a fiduciary relationship with the company on whose board he/ she serves.[161] Mallin defines a fiduciary duty to mean an obligation to act in the best interest of another party.[162] Wiese opines that each individual director has an individual obligatory fiduciary duty towards the company, which he/ she cannot divest from, and can be held personally liable for the breach of such a duty.[163] This means that the director has a duty to be informed and fully engage

[158] Naidoo R *Corporate Governance: An Essential Guide for South African Companies* 3 ed (2016) 198-199.
[159] Mallin C (2010) 173.
[160] See parts 4.3.3 and 4.4.3 of Chapter 4.
[161] Wiese T (2017) 69.
[162] Mallin C (2010) XXI.
[163] Wiese T (2017) 69. It should be noted that the board as a collective unit does not stand in fiduciary to the company which is serves. It is the responsibility of the individual director to stand in fiduciary to the company. This principle has been stated by Naidoo R (2016) 200, while affirmed by Wiese T (2017) 69.

the matters on the agenda of the board meeting, thereby contribute towards formulating and voting on a resolution on the agenda items of the board's meetings.

What does it mean for a director to act in the best interest of the company? The Companies Act 2008 merely provides that a company director must act "in the best interests of the company", per s76(3)(b). Although the Act does not directly give the meaning of the phrase " the best interest of the company", Wiese suggests the following as guidelines to try and give meaning to the phrase "the best interests of the company" :[164]

- Establishing of social- audit and ethics subcommittees- to monitor the company's triple bottom line and approach in relation to its social, environmental and financial performance and report on these aspects which informs the company's triple bottom line to the board; and
- Establishing the interest of the shareholder- the board must ensure that it includes the long-term interest of the shareholder in its strategic plans.

Furthermore, directors should ensure that they avoid conflicts of interests, which may compromise his/ her fiduciary duty by the confliction of personal interests.[165] In support to the aforementioned statement, the Act in s76 provides that:[166]

> A director of a company must not use the position of the director, or any information obtained while acting in the capacity of a director to gain an advantage or to knowingly cause harm.

The director also has a duty to communicate information to the board which he/ she believes may not be immaterial to the company, generically available to the public or known to the other directors of the board.[167] Thus the duty of a director to act in the best interests of the company can be seen to have a broad reach. For example, if a director abuses his position to gain an advantage and to cause harm to the company, or if he does not communicate information to the board in a manner that places the company at risk or in harm's way, that is contrary to promoting the best interests of the company.

[164] Wiese T (2017) 70.
[165] Wiese T (2017) 70.
[166] The Companies Act, 2008 s76 (2)(*a*)(*i*)(*ii*).
[167] Wiese T (2017) 73. The Companies Act, 2008 s76 (2)(b)(i)(aa)(bb).

Mupangavanhu says that some South African authors seem convinced that the Companies Act 2008 advances the Enlightened Shareholder Value (ESV) approach,[168] but he expresses doubts about this, and points out that there is a lack of clarity regarding the exact approach adopted by the Act.[169] The ESV approach is considered an idea which encourages companies to pursue long-term shareholder wealth.[170] This approach supports the principle that directors should govern in the best interest of the company, through considering their long-term strategic decisions, the interests of the employees, stakeholder management and the company's corporate social initiatives.[171] However, because of the corporate governance challenges in SOEs, the ESV approach is rendered unoperational. The researcher is of the opinion that the ESV approach will only reach success when good corporate governance is stringently implemented and constantly adhered to as a cultural value and when the tone is set by the board and implemented by the senior management while reported on quarterly in management and any oversight meetings.

3.4 THE DUTIES TO ACT FOR A PROPER PURPOSE AND TO ACT IN GOOD FAITH

The duty of the proper purpose and good faith is legislated in s76(3)(a) of the Act, which states that a director must perform his/her function in good faith and for a proper purpose.[172] When directors operate within the duty of proper purpose, it implies that those directors should use their decision-making powers for the purpose for which those powers were conferred.[173] This means that the powers of the directors should not be used for illegal or unauthorised purposes.[174] Objectivity and subjectivity guides the evaluation of this duty, in that a Director could support a board resolution in a subjective manner thinking that it is/ was in the best interest of the company, when objectively he/ she could be in breach of this purpose.[175] Therefore, the test for the

[168] See Davis et al *Companies and other Business Structures* 11-12, and Cassim et al *Contemporary Company Law* 20-21, as cited in Mupangavanhu BM (2016) at 52.
[169] Mupangavanhu BM (2016) 52.
[170] Millon D 'Enlightened Shareholder Value, Social Responsibility, and the Redefinition of Corporate Purpose without Law' (2010). Available at http://dx.doi.org/10.2139/ssrn.1625750 (accessed 6 September 2021).
[171] Keay A & Taskin I 'The impact of Enlightened Shareholder Value' (2019) 4 *The Journal of Business Law* 305.
[172] The Companies Act, 2008 s76(3)(a).
[173] Naidoo R (2016) 203.
[174] Naidoo R (20016) 204.
[175] Wiese T (2018) 69.

duty of proper purpose is objective in nature.[176] The courts will determine whether the substantial and primary purpose of the directors actions were proper or not.[177]

The duty of acting in good faith is enjoined with the duty of loyalty to the company and these are regarded as the fundamental obligations of directors.[178] Some of the elements which guides the directors in acting in good faith includes exercising independent and unfettered discretion when deciding what is in the best interest of the company.[179] Directors should base their decisions on the virtue of honesty,[180] confidentiality and not for personal gain or being conflicted.[181]

3.5 THE DUTY TO AVOID CONFLICT OF INTERESTS

The duty to avoid a conflict of interest is legislated in the Act, which states that-:[182]

> (2) A director of a company must—
>
> (*a*) not use the position of director, or any information obtained while acting in the capacity of a director—
>
> (i) to gain an advantage for the director, or for another person other than the company or a wholly-owned subsidiary of the company; or
>
> (ii) to knowingly cause harm to the company or a subsidiary of the company

The director is obligated through this duty to not make decisions which causes that he/she personally benefit in the process.[183] It is opined that the goal of this duty is to ensure that the company does not incur any loss, nor damages from the decisions of the directors.[184] In order to mitigate a breach of this duty, it is recommended that directors consider enacting the following:[185]

- Complete and submit a declaration of interest which will indicate the interests of the directors before they commence acting in their roles; and
- Make a declaration before a meeting starts if that meeting's agenda conflicts with the personal and/ or personal interests of the director/s.

[176] Cassim F *et al* (2012) 526.
[177] Naidoo R (2016) 204.
[178] Naidoo R (2016) 204.
[179] Wiese T (2018) 69.
[180] Cassim F *et al* (2012) 524.
[181] Naidoo R (2016) 205.
[182] The Companies Act, 2008 s76(2)*(a)*(i)(ii).
[183] Wiese T (2018) 70.
[184] Cassim F et al (2012) 550.
[185] Naidoo R (2016) 215-216.

It should be noted that section 76(2)(*a*) of the Act does provision for the no-profit rule, as well as the corporate opportunity rule.[186]

3.6 THE DUTY OF CARE, SKILL AND DILIGENCE

3.6.1 Introduction, history and rationale of the Duty of Care and Skill

The reason for the introduction of the duty in law was to prevent directors in making decisions which would harm the company.[187] In agreement, Bowman posits that when the director exercises his/ her powers and executes his/her office in good faith and for the benefit of the company, that director is required to act with the required degree of care and skill.[188]

Prior to the aforementioned introduction, early English judicial pronouncements held that if a director made decisions and acted in a honest manner, any error of judgement would not be regarded as actionable unless gross negligence could be proven.[189] Therefore, emphasis was placed on the honesty rather than on the competence of the directors when making decisions.[190] This posed a risk that directors could pay little to no attention to the outcomes of the company in terms of benefit, as these directors possessed no knowledge of the company's operation.[191] This resulted in a reasonably low standard of care and skill that was required of directors, which resulted in that the more inexperienced or incompetent a director was, the lower the standard of care was expected of him/ her.[192] However, Naidoo opines that honesty should still be an inherent requirement of the duty of care and skill.[193]

Why is the duty important to companies? Bekink motivates that the duty is of paramount importance as it applies to all the decisions made by directors in exercising their powers to the benefit of the company and its shareholders.[194] It should be noted that the duty is a non-fiduciary duty, based on delictual or aquilian liability for

[186] Cassim F *et al* (2012) 550.
[187] Stevens R & De Beer P 'The Duty of Care and Skill and Reckless Trading: Remedies in Flux?' (2016) 2 *South African Mercantile Law Journal* 250.
[188] Bowman N 'An Appraisal of the Modification of the Director's Duty of Care and Skill' 21 *South African Mercantile Law Journal* 510.
[189] Steven R & De Beer P (2016) 252.
[190] Bekink M 'An historical overview of the director's duty of care and skill: From the nineteenth century to the companies bill of 2007' (2008) 20 *South African Mercantile Law Journal* 99.
[191] Clarke B 'Duty of Care, Skill and Diligence—from warm baths to hot water' (2016) 56 *Irish Jurist* 140.
[192] Cassim F *et al* (2012) 555.
[193] Naidoo R *Corporate Governance: An Essential Guide for South African Companies* 3 ed (2016) 203.
[194] Bekink M (2008) 95.

negligence which was formulated in subjective terms by English judiciary.[195] The duty is activated once a director attends a meeting.[196]

3.6.2 The Duty of Care and Skill in accordance to the South African Common-Law

It should be noted that South African law regarding the director's duty of care and skill was heavily influenced by English law.[197] Over time, the English pronouncement of the duty found reception and precedence in the South African jurisprudence.[198] Prior to the enactment of the Act, the rights and duties of directors were derived from contracts entered with the company, though the memorandum of association, articles of association, the Companies Act of 1973 and common law.[199]

According to Margo J, the director is expected to implement a degree of care which can reasonably be expected of a person with the same level of knowledge and experience of that director.[200] In other words, the decisions and actions of directors were evaluated according to the reasonable care an ordinary man might be expected to take in the same circumstance of that director.[201] This was the subjective approach that was used by the judiciary at the time. It was applied in order to evaluate the qualifications and experience of the director, which meant that if he/ she possessed any special expertise, the company should have benefitted from it and the decision of the judiciary would be in accordance to this.[202] In addition, the subjective test caused that the director's ignorance and inexperience were protected from liability, in that the less he/ she knew; the less will be expected from him/ her.[203] A critique of the subjective approach was that it exonerated honest, but incompetent directors from their decisions and actions, causing them to not perform their duties any better.[204]

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[195] Cassim F *et al* (2012) 555.
[196] Clarke B (2016) 140.
[197] Kanamugire J & Chimuka T 'The Directors' Duty to Exercise Care and Skill in Contemporary South African Company Law and the Business Judgment Rule' (2014) 5 *Mediterranean Journal of Social Sciences* 71.
[198] Stevens R & De Beer P (2016) 252.
[199] Bouwman N (2009) 509.
[200] *Fisheries Development Corporation of SA Ltd V Jorgensen and Another; Fisheries Development Corporation of SA Ltd V AWJ Investments (Pty) Ltd and Others [1980] 4 All SA 525 (W)* 534.Cassim F *et al* (2012) 555.
[201] Bekink M (2008) 95.
[202] Bekink M (2008) 98.
[203] Cassim F *et al* (2012) 555.
[204] Bekink M (2008) 98.

The three legal prepositions of the common law, as per *Re City Equitable Fire Insurance Co Ltd* includes that:[205]

- a director need not exhibit in the performance of his/ her duties a greater degree of skill than may reasonably be expected from a reasonable person of his/ her knowledge and experience (It is a subjective standard. Directors are not liable for mere errors of judgement).
- a director is not bound to give continuous attention to the affairs of the company. His/ her duties are of an intermittent nature to be performed at periodical board meetings.
- In respect of all duties that, having regard to the exigencies of business and the articles of association, may properly be left to some official, a director is, in the absence of grounds of suspicion, justified in trusting that official to perform such duties honestly.

3.6.3 From a lenient to a stringent approach of the Duty of Care and Skill

The common-law duty of care and skill was viewed with considerable laxity throughout the Anglo-Commonwealth jurisdictions.[206] Due to the aforementioned use of the subjective measure, it was regarded that the judiciary was taking a lenient approach to the breach of the duty and the adopted view by the courts were that the shareholders who selected and appointed the directors were responsible for the business outcomes of such unwise appointments.[207] The reasoning for the lenient approach included that the shareholders were responsible for the competence and outputs of the managers who were appointed by them; including the fact that in earlier days companies were few and directors were employed mostly part-time, non-executive persons were appointed for their title or reputation within society, and not for their business acumen.[208]

[205] Cassim F *et al* (2012) 557.
[206] Lowry J 'The Irreducible Core of the Duty of Care, Skill and Diligence of Company Directors: "Australian Securities and Investments Commission v Healey" (2012) 75 *The Modern Law Review* 251.
[207] Cassim F *et al* (2012) 554.
[208] Bouwman N (2009) 511-512.

However, the subjective approach needed to be challenged in light of the corporate governance scandals that were taking place in Enron,[209] Parmalat,[210] Masterbond,[211] Sambou Bank[212] and Fidentia.[213] The result was that the subjective approach was not fit to address the needs of companies in modern society,[214] including the impact of decision-making which negatively impact on the societies and environments within which these companies operated.[215]

The result was the establishment of a dual standard approach, which included the subjective approach as well as an objective approach. Through the included objective approach, the duty of the director could be evaluated through the standard of conduct of the notional reasonable person.[216] It is opined by Du Plessis that the pure principles of the objective standard approach included the following, that:[217]

- directors are under a continuing obligation to keep informed about the activities of the corporation;
- directors are under a duty to monitor managers and practices to determine whether business methods were safe and proper; and that
- directors should maintain familiarity with the financial status of the company by a regular review of its financial statements and this may, in turn, give rise to a duty to enquire further into matters revealed by those statements.

[209] Brancaccio D & Conlon R 'The Enron scandal: 20 years later, what's changed?' available at *https://www.marketplace.org/2021/09/23/enron-scandal-revisited-20th-anniversary-legacy/* (accessed 29 September 2021).

[210] Gray M, Amaduzzi C & Deane S 'ITALY: Corporate Governance Lessons from Europe's Enron' available at *https://www.corpwatch.org/article/italy-corporate-governance-lessons-europes-enron* (accessed 29 September 2021).

[211] The Business Report 'The Masterbond saga: 1983-2005' available at *https://www.iol.co.za/business-report/economy/the-masterbond-saga-1983-2005-750067* (accessed 29 September 2021).

[212] Finance 24 'Saambou disclosure 'undesirable'' available at *https://www.news24.com/fin24/saambou-disclosure-undesirable-20030327* (accessed 29 September 2021).

[213] Finance 24 'How Fidentia fraudster stashed cash abroad- Panama leaks' available at *https://www.news24.com/Fin24/how-fidentia-fraudster-stashed-cash-abroad-panama-leaks-20160404#:~:text=The%20Fidentia%20scandal%20saw%20its,jail%20on%20December%201%202014.&text=Maddock%20already%20served%20time%20in,plea%20bargain%20with%20the%20state*. (accessed 29 September 2021).

[214] Du Plessis JJ 'A Comparative Analysis of Directors' Duty of Care, Skill and Diligence in South Africa and in Australia' (2010) 1 *Acta Juridica* 255.

[215] Bekink M (2008) 95.

[216] Bekink M (2008) 101.

[217] Du Plessis JJ (2010) 255.

3.6.4 Codification of the Duty of Care and Skill into South African legislation

The duty is partially codified[218] in section 76(3)(*c*) of the Act, which legislates that:[219]

> (3) Subject to subsections (4) and (5), a director of a company, when acting in that capacity, must exercise the powers and perform the functions of director—
> (c) with the degree of care, skill and diligence that may reasonably be expected of a person—
> (i) carrying out the same functions in relation to the company as those carried out by that director; and
> (ii) having the general knowledge, skill and experience of that director.

As previously mentioned, the duty is partially codified in section 76(3) of the Act. It would seem remiss if the advantages of such a codification were not highlighted. According to Bowman, the advantages of partial codification includes the following:[220]

- It does not prohibit common-law growth of the duty. Instead it enhances the development of the duty through various juristic cases. Therefore, common-law principles to govern over various situations which may arise; and
- Flexibility is not compromised, as there are no incentives to find loopholes and common-law can be consulted in complicated cases.

In addition, it is worth noting that the subjective and objectives approaches are located in the aforementioned legislative section and subsections.[221]

3.6.5 The application of the Duty of Care and Skill

The South African court case that was fundamental to the duty of care and skill was *Fisheries Development Corporation of SA Ltd v Jorgensen & Another; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd & Others.*[222] In the case, Margo J summised the following South African propositions in terms of the duty of care and skill as the following:[223]

- The duty of the director is dependent on the nature of the operation of the company, including any other responsibilities assigned to him/ her. There is a difference

[218] Bowman N (2009) 532.
[219] The Companies Act 71 of 2008 s76(3)(*c*)(i)(ii).
[220] Bowman N (2009) 523.
[221] Zondi SB *A Critical Discussion of the Directors' Duties and Business Judgement Rule* (published LLM thesis, University of Kwazulu-Natal, 2018) 31.
[222] (1980 (4) SA 156 (W) 534.
[223] Bowman N (2009) 510-511.

between the full-time director and non-executive director. The non-executive director is considered to not be bound to give continuous attention to the affairs of the company, which is considered intermittent and periodical in nature. The non-executive director is also not bound to attend board meetings, although there is an expectation that he/ she will.

- When a director does not suspect a company official of irregular business behaviour, that director can allocate certain duties to that official. Moreover, the director can rely on the advice given, information provided and advice sourced from officials or management. However, the director should not blindly follow the advices sourced or information provided; but should exercise his own judgement on any corporate matter.

3.6.6 Challenges of the Duty of Care and Skill

Bouwman opines that while the same requirements are provided to satisfy the director's fiduciary duty, as well as the duty of care and skill, there is a risk that the distinction between these two duties will be blurred in South African law.[224] In addition, the disadvantages of the partial codification of the duty of care and skill in the Act might result in the uncertainty of the legal position experienced by directors, shareholders and stakeholders; issues around clarity, simplicity and accessibility will not be resolved, and time, effort and legal fees in disseminating the law to extract the applicable legal principles will also be found challenging.[225]

The subjective and objective approaches within the codification of the Act cannot be applied across the business world, due to the fact that the role of directors will vary from company to company and an individual assessment will be needed for each case raised.[226] Furthermore, the standard by which the required degree of care skill is measured remains unclear.[227]

[224] Bouwman N (2009) 529.
[225] Bouwman N (2009) 523.
[226] Clarke B (2016) 139-140. Cassim F *et al* (2012) 555.
[227] Bowman N (2012) 510. Stevens R & De Beer P (2016) 252. Bekink M (2009) 95. Kanamugire J & Chimuka T (2014) 70.

3.7. DECISION MAKING

3.7.1 Memorandum of Incorporation (MOI)

SOEs, such as Eskom, are bound by the MOI between the executive authority and the accounting authority.[228] The MOI can be viewed as the 'internal' constitution of a company which may also include rules against which the company is expected to operate,[229] including being regarded as the founding document of the SOE.[230] More specifically, according to Naidoo, the MOI highlights the powers of the company; including the rights and responsibilities of the directors and all shareholders of- and association to the company.[231]

According to the Companies and Intellectual Property Commission, the MOI is considered to be the most important document which govern any company, which acts to protect the interest of the shareholders in the company.[232]

According to the Act, the MOI and any rules contained therein are binding:[233]

(a) between the company and each shareholder;

(b) between or among the shareholders of the company; and

(c) between the company and—

(i) each director or prescribed officer of the company; or

(ii) any other person serving the company as a member of the audit committee or as a member of a committee of the board, in the exercise of their respective functions within the company

The MOI is an important regulatory document, which is somewhat overlooked in a lot of research. For example, in the matter of *Mpofu v South African Broadcasting*

[228] Eskom 'Integrated report 31 March 2018' available at https://www.eskom.co.za/IR2018/Documents/Eskom2018IntegratedReport.pdf (accessed on 4 August 2021).

[229] Morajane T 'The Binding effect of the Constitutive Documents of the 1973 and 2008 Companies Acts of South Africa' (2010) *PER /PELJ* 179.

[230] KPMG 'Toolkit for the Company Director' available at https://assets.kpmg/content/dam/kpmg/pdf/2016/04/Directors%20Toolkit.pdf (accessed on 9 September 2022).

[231] Naidoo (2016) 66

[232] Companies and Intellectual Property Commission 'Memorandum of Incorporation (MoI)' available at http://www.cipc.co.za/index.php/register-your-business/companies/moi/ (accessed on 5 August 2021).

[233] The Companies Act 71 of 2008 s 15(6)(*a*)(*b*)(*c*)(i)(ii).

Corporation Ltd and Others (13815/2008) [2008] ZAGPHC 144,[234] Tsoka J ordered and set aside the decision of the Board in favour of Mpofu due to decisions and a technicality in the meeting constitution of membership of the board of directors of the SABC.[235] It is understood by the researcher that Tsoka J implied that if the MOI of the SABC provided for the technical constitution of the board as it has been constituted on the matter, that the decisions of the board would have been regarded as valid and lawful.[236]

Furthermore, any rules contained within the MOI which are inconsistent with the Act or may negatively impact on governance practice in the company may be amended by the board of directors and shareholder. However, the MOI has an interim binding effect on the governance and operations of SOEs for 20 days after it has been published, and it is deemed permanent once it has been approved by the shareholder through an ordinary resolution.[237] It is important to note that the decision making power of the SOE, according to the MOI, lies with the Board and its resolutions are effective on an interim basis until it has been ratified by the Stakeholder (Minister).[238] [239]

A challenge which has been identified is that Section 15(6) of the Act only states that the MOI is binding without directing in which way it is binding, and that the Courts will have to determine the level of it being binding through the development of common-law.[240]

3.7.2 Standard of Conduct in decision- making

Although boards are ultimately responsible for the monitoring of all decisions and to detect and prevent governance- and company failure,[241] this section will highlight the resolutions- making (decision) relationship between the stakeholder, the board, the

[234] *Mpofu v South African Broadcasting Corporation Ltd and Others* (13815/2008) [2008] ZAGPHC 144.
[235] *Mpofu v South African Broadcasting Corporation Ltd and Others* (13815/2008) [2008] ZAGPHC 144 paras 23-24 & 31-32.
[236] *Mpofu v South African Broadcasting Corporation Ltd and Others* (13815/2008) [2008] ZAGPHC 144 paras 38, 40.1 & 40.2.
[237] Morajane T (2010) 179-180.
[238] KPMG 'Toolkit for the Company Director' available at https://assets.kpmg/content/dam/kpmg/pdf/2016/04/Directors%20Toolkit.pdf (accessed on 9 September 2022).
[239] Phiri S & Nwafor A 'Remuneration of Executive Directors of State-owned Company: Mhlwana and another v Denel SOC Ltd [2021] ZAGPPHC199 (19 March 2021) in Perspective' (2022) 1 *African Journal of Law and Justice System* 41.
[240] Morajane T (2010) 181.
[241] Bravo-Urquiza F & Moreno-Ureba M 'Does compliance with corporate governance codes help to mitigate financial distress' (2021) 55 *Research in International Business and Finance* 4.

board's subcommittees; including the challenges documented in the monitoring and evaluation at these governance levels.

In the relationship between the board and the stakeholder in SOEs, the resolutions of the board usually should always reflect to protect the interest of the shareholder, as the appointing and executive authority of the board members.[242] [243] However, the role of the shareholder is to ensure that he/ she act in an informed and active manner in the operations of the board, meaning that without intruding on the governance processes, the shareholder should be aware of the matters and resolutions which the board has dealt with and will be dealing with in the future.[244] [245] This is done by reviewing the monthly report submitted by the board and ensuring that the SOE, through the direction of the board, complies with the various pieces of legislation that applies to it.[246]

The role between the board and its subcommittees is to reduce agency costs and to protect the interests of the stakeholder.[247] The function of the subcommittees is to do more in-depth analysis and robust engagements on agenda items in terms of strategic formulation and direction, whereby time constraints and the volumes of material does not allow the board to deeply engage on specific matters.[248] The subcommittees robustly engage agenda items and make recommendations to the board for its ratification, and can even pass resolutions on certain matters; but only when the board delegates such powers to this sub-level of governance.[249] In essence, the board remains responsible for all such delegated powers as the central responsible level of authority and accountability.[250]

[242] Thompson R Alleyenne P & Charles-Soverall W 'Exploring governance issues among boards of directors within state-owned enterprises in Barbados' (2018) 32 *International Journal of Public Sector Management* 266.
[243] Public Finance Management Act No. 1 of 1999 s 50(1)(*b*)(*c*)(*d*).
[244] Centre for Financial Reporting Reform (World Bank) *Corporate Governance of State-Owned Enterprises in Europe and Central Asia: A Survey* (2020) 19.
[245] In accordance with the Public Finance Management Act s64 & 65, the Minister can also issue directives which could have an impact on the governance of the SOE. The Minister is responsible for tabling the Annual Report of the SOE in the Legislature where that respective Minister is accountable to the Legislature in terms of the performance of the SOE for a specific financial year.
[246] Public Finance Management Act No. 1 of 1999 s 63(1)(*b*)(2).
[247] Pucheta-Martínez M & Bel-Oms I 'What have we learnt about board gender diversity as a business strategy? The appointment of board subcommittees' (2019) 28 *Business Strategy and the Environment* 301.
[248] De Lacy G *How to Review and Assess the Value of Board Subcommittees* (2005) 2.
[249] De Lacy G (2005) 2.
[250] IODSA (2016) 55.

Internationally, the relationship between the board and management of a company is deemed to have become more pressured and strained, especially in SOEs, due the pressure from stakeholders on boards to conduct more rigorous oversight over public companies in light of the governance scandals within multinational companies.[251] The CEO, or Accounting Officer, is regarded as having an influential role on the board through providing advice and providing information; as well as representing the administrative and financial day-to-day management of the company.[252] The functional relationship between the board and CEO includes that the board delegates its resolutions to the CEO and his/ her executive management team for institutional implementation through the company secretary.[253]

It has been documented that there remains challenges in the monitoring and evaluation of the resolutions of the board. The factors that contributes to these challenges includes:[254]

- Political interference from the respective shareholder;
- Bureaucracy in the SOE which negatively impacts on corporate governance;
- Politically appointed board chairpersons and directors who are not versed and knowledgeable on their duties and responsibilities;
- Frequent turnaround and appointments of CEOs in SOEs;[255]
- The Stakeholder's department playing a triplicate role in the SOE as majority shareholder, policy maker and regulator;[256] and
- The board being treated as political tools who is expected to do the bidding of government, which raises an agency problem.

It is submitted that although the Executive Authority is accountable to the Legislature and at cabinet level in terms of the decisions of the board; including the direction,

[251] Nadler MB 'Navigating A New Management-Board Relationship' available at https://corpgov.law.harvard.edu/2016/10/19/navigating-a-new-management-board-relationship/ (accessed 10 September 2022).

[252] Antoniadis I & Ananikas L 'Separating the roles of CEO and Chairman of the Board. The case of the Greek listed firms' available at https://www.researchgate.net/publication/280828869_Separating_the_roles_of_CEO_and_Chairman_of_the_Board_The_case_of_the_Greek_listed_firms'/link/5bb1e53045851574f7f3a677/download (accessed on 10 September 2022).

[253] Adams M *The evolving role of the Company Secretary and its impact on Corporate Governance* (published LLM thesis, University of the Western Cape, 2020) 28.

[254] Thompson R Alleyenne P & Charles-Soverall W (2018) 275-276.

[255] De Visser J, Waterhouse S, Muntingh L, Wandrag R & Komote M (2018) 2.

[256] De Visser J, Waterhouse S, Muntingh L, Wandrag R & Komote M (2018) 3.

predetermined- and financial outcomes of the SOE for a specific financial year, the final decisions and accountability to the Executive Authority relating to the SOE in terms of strategy, performance and culture lays with the main board of directors through its resolutions.[257] All other decisions at the subcommittees and CEO level are derived from the delegated authority of the main board of directors and feedback in terms of decisions taken at these sublevels should be directed to-, and appear on, the agenda of the main board in order to close the accountability and governance cycle. In the preceding chapter, one will see that the judiciary has set aside decisions of the boards which indicates that the final decision on any matter of a company lays at the will of that specific main board of directors.

3.8 THE BUSINESS JUDGEMENT RULE

3.8.1 Introduction and history of the Business Judgement Rule

The business judgement rule (BJR) was developed and introduced in the USA as far back as 1829, due to a desire to protect the directors who made unsuccessful company decisions in honesty from the hindsight judicial review, should a liability case be lodged against them.[258] The rule was furthermore established due to the large number of public liability suits brought against-, including threats that were made against directors of companies. The directors were sued due to allegations of both negligent and bad judgements that were made, including allegations that directors acted in their own interest at the expense of the company.[259] According to Kanamugire and Chimuka, the BJR is regarded as a defence for directors.[260] Mupangavanhu argues that the rule is subjective to the provision in the American Law Institute Principles of Corporate Governance (the ALI Draft), including the formulation of the rule by the Delaware courts.[261] The rule is seen as the cornerstone concept in

[257] Thompson R Alleyenne P & Charles-Soverall (2018) 265-266.
[258] Bouwman N (2009) 523.
[259] Smit I *The application of the Business Judgment Rule in fundamental transactions and insolvent trading in South Africa: Foreign precedents and local choices* (published LLM thesis, University of the Western Cape, 2016) 17.
[260] Kanamugire J & Chimuka T 'The Directors' Duty to Exercise Care and Skill in Contemporary South African Company Law and the Business Judgement Rule' (2014) 20 *Mediterranean Journal of Social Sciences* 74.
[261] Mupangavanhu B (2016) 5.

Delaware corporate law.[262] The BJR is regarded as a tool used by the judiciary for judicial review of the standard of conduct rather than being a standard of conduct.[263]

3.8.2 Codification of the Business Judgement Rule in South African legislation

The BJR has been codified under section 76(4) in South Africa through the Act. Because of this codification, and previously mentioned, the BJR is no longer a common law review standard. It is important to note that the BJR is activated the moment the director is be able to demonstrate that he/ she satisfied the requirements of section 76(4), which is subjected to section 76(3) of the Act, which indicates that directors must act in the best interest of a company,[264] including executing his/ her function with a degree of care, skill and diligence.[265] The requirements of the BJR is satisfied when it has been established that the director has taken reasonable and diligent steps to become informed about a subject matter,[266] had no material personal financial interest of the decision taken on the subject matter,[267] and believed that the decision which was taken on the subject matter was rational and in the interest of the company.[268]

This means that, provided a director satisfied the provisions contained in section 76(3) and 76(4), he or she will not be held liable for any damages that may be incurred due to decisions taken. The director can successfully raise a defence and will not be in breach of the director's duty of care and skill.

3.8.3 Rationale of the Business Judgement Rule

The BJR ensures that the judiciary will not second-guess the decisions and actions of any board of directors that can demonstrate that those decisions were reasonable, and resulted in unfavourable outcomes for the business itself.[269] The 'reasonableness' measure which the directors have to demonstrate to the courts includes that the decisions that were taken were from an informed position, either from documentation that were supplied to them and thereby informed the decision making process,[270] to

[262] Johnson L 'Unsettledness in Delaware Corporate Law: Business Judgment Rule, Corporate Purpose' (2013) 38 *Del. J. Corp. L.* 410.
[263] Botha D & Jooste R 'A Critique of the Recommendations of the Kind Report Regarding a Director's Duty of Care and Skill' (1997) 114 *South African Law Journal* 73.
[264] The Companies Act 71 of 2008 S76(3)(*b*).
[265] The Companies Act 71 of 2008 S76(3)(*c*).
[266] The Companies Act 71 of 2008 S76(4)(*a*).
[267] The Companies Act 71 of 2008 S76(4)(*a*)(*i*)(*aa*).
[268] The Companies Act 71 of 2008 S76(4)(*a*)(*iii*).
[269] Macy R (2008) 286.
[270] Naidoo R (2016) 212.

receiving advice from [preferably] an [senior or professional] employee of the company.[271]

Why would such a rule be implemented when the decisions of the board of directors could lead to an adverse outcome for the company, and threaten its financial position as a going concern? Naidoo responded that because businesses are risk- dependent, the success of the business cannot be guaranteed.[272] Therefore, if directors constantly face the prospect of liability when companies' posts adverse outcomes based on decisions taken, no one will take risky decisions; which is a requirement for business growth.[273]

3.8.4 The application of the Business Judgement Rule

The application of the BJR can be found in the judgement rendered in the *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others* (Visser Citrus) case.[274]

In the *Visser Sitrus* case, the Board of the Goede Hoop Sitrus (Pty) Ltd refused to approve a transfer of shares from Visser Sitrus who was one of the shareholders of Goede Hoop Sitrus, to Mouton Citrus who was another shareholder of Goede Hoop Sitrus.[275] Rodgers J raised two interesting points regarding the application of the BJR. Firstly, he applied the rationality requirement of section 76 of the Act and how this requirement related to the proper exercise of the power by the directors. Because of this rationality requirement, which equated the relationship between the purpose for which the power was given and the decision of the directors, the judiciary would not interfere with the decisions of the directors of the company.[276] Therefore, one of the principles of the BJR was established that the courts would not second-guess the decisions of the board of directors.

Secondly, Rodgers J assessed whether the board of Goede Hoop Sitrus was properly informed when they made the decision to refuse the transfer of shares. To this end, he was satisfied that the board was indeed properly informed when they decided on the matter.[277] According to Wiese, the Court followed the American approach in that

[271] Wiese T (2017) 77.
[272] Naidoo R (2016) 213.
[273] Wiese T (2017) 77.
[274] (15854/2013) [2014] ZAWCHC 95; 2014 (5) SA 179 (WCC) (19 June 2014).
[275] (15854/2013) [2014] ZAWCHC 95; 2014 (5) SA 179 (WCC) (19 June 2014) paras 1 & 84.
[276] (15854/2013) [2014] ZAWCHC 95; 2014 (5) SA 179 (WCC) (19 June 2014) paras 76-80. Macy R (2008) 286. Wiese T (2017) 79.
[277] (15854/2013) [2014] ZAWCHC 95; 2014 (5) SA 179 (WCC) (19 June 2014) para 86.

the board would have been found liable should their actions and decisions have been deemed as irrational.[278]

In the matter of *Mpofu v South African Broadcasting Corp Limited (SABC) and Others,* Mr Mpofu requested that the Court declare the meeting of the SABC board held on 6 May 2008 unlawful, including to declare any decision, inclusive of the decision taken to suspend him by the Board meeting on 6 May 2008 invalid and of no force and effect and to declare the resolution of the Board meeting of 6 May 2008 invalid and of no force and effect.*[279]* This was because some directors of the board were deliberately not invited to the board meeting where the aforementioned decision was taken.[280] Due to the irregularity of the Board's composition when decisions were taken and resolutions passed in that meeting, Tsoka J ordered the meeting unlawful, including that its decision and resolution being of no force or effect.[281]

Similarly, in the matter of *Democratic Alliance v Minister of Public Enterprise and Others; Economic Freedom Fighters v Eskom Holdings Limited and Others; Solidarity Trade Union v Molefe and Others,* Solidarity requested that Matojane J set aside the decision of the board of Eskom to approve the pension of Mr Brian Molefe.[282] Furthermore, the Economic Freedom Fighters (EFF) sought that the decision of the board to re-appoint Mr Molefe as Chief Executive Officer of ESKOM be declared irrational, unlawful, unconstitutional and invalid.[283] Matojane J ruled that the decision of the board was set aside, [284] because the board's decision to re-appoint Mr Molefe was non-compliant to Clause 3.6 of the Memorandum of Incorporation of Eskom,[285] and that the information which motivated the decision of the board to payout his pension was not based on all the necessary information which should have been made available to the board.[286]

[278] Wiese T (2017) 77. Botha D & Jooste R (1997) 76.
[279] (2008/18386) [2008] ZAGPHC 413 (16 September 2008) paras 1.1-1.3.
[280] *Mpofu v South African Broadcasting Corp Limited (SABC) and Others* (2008/18386) [2008] ZAGPHC 413 (16 September 2008) para 37.
[281] *Mpofu v South African Broadcasting Corp Limited (SABC) and Others* (2008/18386) [2008] ZAGPHC 413 (16 September 2008) paras 40.1- 40.4.
[282] (33051/2017; 34568/2017; 34042/2017) [2018] ZAGPPHC 1 (25 January 2018) para 13.
[283] (33051/2017; 34568/2017; 34042/2017) [2018] ZAGPPHC 1 (25 January 2018) para 15.
[284] 33051/2017; 34568/2017; 34042/2017) [2018] ZAGPPHC 1 (25 January 2018) para 82a.
[285] (33051/2017; 34568/2017; 34042/2017) [2018] ZAGPPHC 1 (25 January 2018) para 43.
[286] (33051/2017; 34568/2017; 34042/2017) [2018] ZAGPPHC 1 (25 January 2018) paras 27, 62 & 75.

3.8.5 The relationship between the Duty of Care and the Business Judgement Rule

There are certain preconditions that need to be met in order to be afforded protection by the BJR. The preconditions are set in section 76(4) of the Act which are aforementioned. If it is established that these preconditions have been met, only then can the director be afforded protection from liability by the BJR.[287] Therefore, there is a strong relational link between the duty of care and the BJR. It is therefore submitted that because the rule has been developed alongside the duty of care and skill,[288] and because of the fact that the BJR is the prerequisite which qualifies the test for breach of the [decision- making] duty of care and skill, that the link between the rule and the duty of care and skill is further solidified.[289] Another linkage that can be made, albeit a critique of Bouwman, is that the BJR muddies the application of the principles of the duty of care and fiduciary duties.[290]

3.8.5.1 Critique of the Business Judgement Rule

Some of the critiques which have been raised against the BJR includes that the rule does not have any teeth in keeping erring directors liable for adverse company outcomes due to poor decision making, which creates more problems than solutions.[291] Du Plessis opines that the thought of successful liabilities against directors, could result in upcoming potential directors flocking away from corporations' boards of directors.[292] This is problematic as the developmental ideals of South Africa which aims to ensure that the less-experienced and less-knowledgeable individuals take up positions of directorships, will be diminished.[293]

Bouwman, Botha and Jooste critique that the rule should not have been codified within the Act, due to the following reasons, that:

- the South African judiciary already followed a pattern of not second-guessing the decisions of directors in similar vein to the Delaware judiciary;[294]

[287] Bruner CM 'Is the Corporate Director's Duty of Care a Fiduciary Duty? Does it Matter?' (2013) 48 *Wake Forest Law Review* 1032.
[288] Bouwman N (2009) 523.
[289] Stevens R & De Beer P (2016) 250.
[290] Bouwman N (2009) 509.
[291] Bouwman N (2009) 531.
[292] Du Plessis J 'A comparative analysis of director's duty of care, skill and diligence in South Africa and Australia' (2010) 1 *Acta Juridica* 263.
[293] Du Plessis (2010) 287.
[294] Botha D & Jooste R (1997) 76.

- South African courts do not have a history of succeeding against directors in terms of their duty of care and skill;[295] and
- the courts of Delaware are departing from the traditional shielding which the rule offers, as it is assumed that the BJR does not cater to the needs of a modern society.[296]

However, it should be noted that the BJR does not protect directors from the decisions that were made in bad faith, not being properly informed and not for proper purpose.[297]

3.8.6 Liability of directors in terms of decision-making

According to section 77(2)(6) of the Act, directors may be held individually and jointly liable for any wrongdoing in accordance with the following provisions:[298]

> A director of a company may be held liable—
> (a) in accordance with the principles of the common law relating to breach of a fiduciary duty,for any loss, damages or costs sustained by the company as a consequence of any breach by the director of a duty contemplated in section 75, 76 (2) or 76 (3) (a) or (b); or
> (b) in accordance with the principles of the common law relating to delict for any loss, damages or costs sustained by the company as a consequence of any breach by the director of—
> (i) a duty contemplated in section 76 (3) (c);
> (ii) any provision of this Act not otherwise mentioned in this section; or
> (iii) any provision of the company's Memorandum of Incorporation.

Furthermore, Steven and De Beer opines that the duty of care and skill utilises the law of delict to hold company directors to account, and to make good the harm suffered by the wronged party.[299] A challenge present in the South Africa jurisprudence is that although the delictual principle is based on English tort law, it is modified to the South African Roman-Dutch "*chassis of delict"*, whereby the success rate of the remedy is a rare occurrence.[300] According to Bekink, a director who fails to observe his/ her duty of care and skill will be liable to the

[295] Bouwman N (2009) 533.
[296] Bouwman N (2009) 533.
[297] Wiese T (2017) 79.
[298] The Companies Act 71 of 2008 S76(2)(6)(*a*)(*b*)(i)(ii)(iii).
[299] Stevens R & De Beer P (2016) 250.
[300] Stevens R & De Beer P (2016) 251- 252.

company for any loss suffered as a result of such failure. In addition, a director's liability will be based either on delict, or if there is a contract between the director and the company, on the breach of contract.[301]

As aforementioned in this chapter, the liability of the duty of care and skill is based on the principle of *Lex Aquila*, either as fault according to *dolus* or *culpa*; which results in the loss to the plaintiff.[302] It is motivated that, should the basis for liability be accepted as aquilian, a challenge is present that it would be unnecessary to distinguish between a director's fiduciary duties and his/her duty of care and skill. The same principles would then apply to both types of duty. Furthermore, Bekink submits and answers the question posed by Mupangavanhu[303] that the proper basis for the breach of fiduciary duties still appear to be *sui generis*.[304]

3.9 CONCLUSION

In summary, the duty of care and skill was introduced to prevent directors from making decisions which could harm the company. This introduction compliments the rationale for the BJR in that the director is shielded from judicial review if he/ she can prove that he/ she acted in the best interest of the company by making decisions primarily in an informed manner. The duty of skill and care has transitioned, from incorporating a lax subjective standard which shielded incompetent directors, to a dual approach standard which included an objective standard which forces directors to familiarise themselves with the company on which they serve and to make informed decisions. This was done to be more responsive to the changing societal needs, including the corporate governance failures which have been experienced over the past two decades.

This chapter also concentrated on the governance role of the directors and their fiduciary relationship with the company. The director itself was defined, and it was established that the director should be objective in decision- making; while also ensuring due diligence by ensuring financial stability within the company and setting the tone and understanding the environment in which the company operates. Furthermore, a risk was established in that the agency problem was prevalent at the level of the execution of the fiduciary duties.

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[301] Bekink M (2008) 101.
[302] Kanamugire J & Chimuka T (2014) 71.
[303] Mupangavanhu B (2016) 48-51.
[304] Bekink M (2008) 103.

The application of the duty of care and skill was dealt with by Margo J in *Fisheries Development Corporation of SA Ltd v Jorgensen & Another; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd & Others* in that although a director is not required to have any special business acumen, decisions should be made with the necessary care that was reasonably expected of a person with his/her knowledge/ experience, while making decisions from advice received from company employees or documents. Some challenges yet remains in that 1) the standard cannot be applied across all scenarios as a blanket approach, as all cases differs; and 2) the standard by which the degree of care and skill is measured remains unclear.

The BJR is activated when a director acts in the best interest of the company, while becoming informed of a matter which will require a decision. Besides this, it must be proven that the director had no financial interest in the matter that was decided on, while also demonstrating that the decision was rational. In the matter of *Mpofu v South African Broadcasting Corp Limited (SABC) and Others,* Tsoka J set aside the determinations of the board due to it making decisions in an irregular constituted board meeting. In *Democratic Alliance v Minister of Public Enterprise and Others; Economic Freedom Fighters v Eskom Holdings Limited and Others; Solidarity Trade Union v Molefe and Others* Matojane J also set aside the decision of the Eskom board, due to non-compliance with company law while being ill-informed when decisions were made.

The relationship between the duty of care and skill; including the BJR is intertwined in that if a director does not make a decision in an informed manner and with the necessary care, the principles of the BJR will not be able to shield that director from liability; and vice versa.

CHAPTER 4: CORPORATE GOVERNANCE CHALLENGES AT ESKOM – EXAMINATION OF SELECT CASES

4.1 INTRODUCTION

Corporate governance is important in an organisation, as it can either strengthen the predetermined objectives, operational activities and financial management of the organisation towards positive annual and strategic outcomes, or it can have the opposite effect. Over the past 10 years, the corporate governance practice at Eskom has deteriorated year-on-year in the areas of irregular expenditure, procurement and contract management, revenue collection management and consequence management.[305]

This chapter will discuss the factors which led to the corporate governance failures at Eskom, such as supply chain management contraventions, including the inability of the board and Minister to introduce any mitigating action to rectify the governance and financial irregularities discovered within the SOE. This chapter will be premised on the findings of various reports on Eskom's governance failures which negatively impacted on the enterprise efficiency of the SOE. The matters which will be discussed includes the New Age Contract, the Tegeta Contract, the Trillian Contract and the Brian Molefe resignation and pension matter.

4.2 THE NEW AGE (TNA) CONTRACT

4.2.1 Introduction

The New Age was a media company which specialised in printed and televised media and that had extensive contracts with various national and provincial government departments and numerous SOEs. The acting Chief Executive Officer (CEO) of Eskom at the time, Mr Colin Matjila, approached the Eskom board, for the SOE to consider and conclude a sponsorship deal with TNA which would see the entity hosting 12 broadcasted business briefings for R14,4 million.[306] However, a few weeks thereafter, the deal ballooned to R43 million over a 3-year period.[307] The board, executives and

[305] Parliamentary Monitoring Group 'Eskom Audit Outcome' available at *https://pmg.org.za/committee-meeting/33749/* (accessed 16 November 2021).

[306] Portfolio Committee on Public Enterprises 'Report of the Portfolio Committee on Public Enterprises on the inquiry into governance, procurement and the financial sustainability of Eskom, dated 28 November 2018' available at *https://www.parliament.gov.za/storage/app/media/Links/2018/November%202018/28-11-2018/Final%20Report%20-%20Eskom%20Inquiry%2028%20NOV.pdf* (accessed on 20 October 2021). 18.

[307] Portfolio Committee on Public Enterprises (2018) 19.

legal unit of Eskom opposed the deal.[308] Despite the objections, the deal was still approved by the CEO on 30 April 2014.[309]

4.2.2 Supply Chain Management procurement irregularities

Mr Matjila approved the TNA contract outside of the SOE's supply chain management's (SCM) procurement delegation of authority. Any quotes over and above R5 million required that approval be given by the Board Tender Committee (BTC) of Eskom.[310] This was not done, as the contract was approved at the CEO's level, which presented a SCM procurement irregularity for Eskom.[311] The result was that the proper SCM procurement processes of Eskom was circumvented by Mr Matjila.[312] It is further reported that various members of the board, including senior employees of the SOE, abused their positions and were conflicted in their dealings on this matter, to the benefit of TNA.[313]

4.2.3 Failure by the Eskom Board to take action

The TNA deal was flagged by the internal audit division of Eskom as an irregular expenditure activity, including in a report by a forensic investigation of SizweNtsalubaGobodo that was commissioned by the board. The report recommended that legal action be taken against the CEO.[314] However, the board failed to investigate the allegations of this matter which included corruption and improper conduct, thereby failing to take any action against the CEO, almost 12 months after the deal was irregularly approved.[315] In addition, the board concluded that no action will be taken against Mr Matjila, who was Acting CEO of Eskom from 1 April 2014 to October 2014.[316] The Portfolio Committee on Public Enterprises (Portfolio Committee) concluded that the board failed to:[317]

- discharge its fiduciary duties;
- act in accord with the applicable legislation, including the PFMA and the Companies Act; and to

[308] Portfolio Committee on Public Enterprises (2018) 34.
[309] Portfolio Committee on Public Enterprises (2018) 112-115.
[310] Portfolio Committee on Public Enterprises (2018) 115.
[311] Portfolio Committee on Public Enterprises (2018) 115.
[312] Portfolio Committee on Public Enterprises (2018) 114-119.
[313] Portfolio Committee on Public Enterprises (2018) 125.
[314] Portfolio Committee on Public Enterprises (2018) 115-120.
[315] Portfolio Committee on Public Enterprises (2018) 120-125.
[316] Portfolio Committee on Public Enterprises (2018) 14 & 121.
[317] Portfolio Committee on Public Enterprises (2018) 126.

- take appropriate steps in light of the numerous public revelations of corruption, improper and unlawful conduct, and failure to comply with the applicable supply chain management rules.

Furthermore, it has been noted that the board destroyed a forensic investigation report into governance failures at the SOE in 2015, which led to a governance impairment in terms of leadership, operational and SCM processes.[318]

4.2.4 Failure by the Minister to take action

It is reported that when former Minister Lynne Brown took office in 2014, she did not act on the recommendations of SizweNtsalubaGobodo that action should be taken against the CEO. Moreover, some of the members of the board motivated that the Minister remove the CEO and that criminal charges be laid against him.[319] However, the Minister did not act, nor remedially intervened, on the matter.[320] It is also reported that the Minister played no active role to remedy the matter.[321]

4.2.5 Corporate Governance gaps identified in the TNA matter

It is submitted that the main gaps that led to the breach in governance in this matter was that the CEO was acting on his own volution. He did approach the main board initially, but concluded on the deal at the level of CEO.[322] The deal was outside of the delegation of authority[323] of the rank of the CEO, whereby the BTC had to approve the deal in principle and thereafter had to send it to the main board for ratification before implementation. The main issue of governance failure was that even when the board objected to the conclusion of the deal, there was no consequence management on the part of the Minister to which the CEO is accountable. This is an indication that the Minister was not espousing the expected ESV ideals.[324] In addition, members of the

[318] Eberhard, E & Godinho, C (2017) 'Eskom Inquiry Reference Book: a resource for Parliament's Public Enterprises Inquiry' available at http://www.gsb.uct.ac.za/files/Eskom%20Enquiry%20Booklet%20Sept%202017.pdf (accessed 27 November 2021) 6.
[319] Portfolio Committee on Public Enterprises (2018) 115.
[320] Portfolio Committee on Public Enterprises (2018) 116.
[321] Portfolio Committee on Public Enterprises (2018) 123.
[322] See part 4.2.1 of Chapter 4.
[323] A delegation of authority is a uniquely drafted financial policy which can be found in any state institution, and which indicates what financial amounts can be approved at what employee level, including indicating the approval route that must be followed to approve certain financial limits and quotes through written motivations.
[324] See part 3.3 of Chapter 3.

board members were conflicted in the TNA contract which breached their duties of proper purpose and avoiding conflicts of interests.[325]

4.3 THE TEGETA CONTRACT

4.3.1 Introduction

During 2016, Tegeta was a company that received preferential and favourable treatment from Eskom in relation to coal procurement contracts.[326] The Company was also operated as a subsidiary of Oakbay Investments, a Gupta-owned company.[327] This preferential treatment was to the prejudice of Glencore who had well established procurement relations with Eskom over a number of years.[328] The preferential treatment to Tegeta led to Glencore selling all the shares of its coal- supplying subsidiaries Optimum Coal Holdings (OCH) and Optimum Coal Mine (OCM) to Tegeta.[329] Furthermore, Eskom is deemed to have made an unusual guarantee prepayment to Tegeta, which enabled Tegeta to purchase OCH and OCM in order to supply coal to the SOE.[330] This was done because it is believed that Tegeta would not have been able to buy OCH and OCM and thereby supply Eskom with coal if such a prepayment was not made.[331] In addition, the best economical interest of Eskom was not placed in front of the contractual agreement with Tegeta, which saw the SOE suffer governance, financial and supply chain management irregularities and breakdowns.[332]

4.3.2 Supply Chain Management procurement irregularities

The guarantee prepayment that was made by Eskom to Tegeta was deemed as highly unusual and in contravention of the SCM processes of the SOE, as any guarantees

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[325] See parts 3.4 & 3.5 of Chapter 3.
[326] Portfolio Committee on Public Enterprises (2018) 42.
[327] Portfolio Committee on Public Enterprises (2018) 47. The Gupta brothers were involved in various illegal and irregular corporate governance and SCM activities relating to Eskom and various other SOEs and government departments in South Africa. The Gupta- owned Oakbay Investments had various subsidiary companies which traded with SOEs and government departments over a number of years in South Africa.
[328] Fundizi & National Treasury 'Final Report: Forensic investigation into various allegations at Transnet and Eskom: Tender Number NT 022-2016 RFQ 026-2017: Chapter III: Report relating to Eskom investigations' available at *http://www.treasury.gov.za/comm_media/press/2018/Final%20Report%20-%20Fundudzi%20-%20Eskom%2015112018.pdf* (accessed 2 November 2021) iii.
[329] Portfolio Committee on Public Enterprises (2018) 47; Public Protector of South Africa (2016) State of Capture: Report No: 6 of 2016/17. *http://www.pprotect.org/library/investigation_report/2016-17/State_Capture_14October2016.pdf* (accessed 20 October 2021) 352.
[330] Portfolio Committee on Public Enterprises (2018) 47.
[331] Public Protector of South Africa (2016) 20.
[332] Portfolio Committee on Public Enterprises (2018) 51.

made can only be approved by the Minister.[333] Similarly, the coal supply agreement between Eskom and Tegeta was finalised outside of the SCM regulations of Eskom,[334] and was deemed as a fruitless and wasteful expenditure incurred.[335] The preferential pricing of coal purchase from Tegeta by Eskom was to the financial disadvantage of Eskom as two of the cancelled coal-supplying contracts with other suppliers would have cost the SOE much lower prices per ton, even though the coal which was supplied by Tegeta was of an inferior nature.[336] Eskom paid R19,68 per gigajoule of coal for six months and thereafter the charge for the same gigajoule of coal was reduced to R15,50 per gigajoule for the same product.[337]

More importantly, contractual agreements were entered into between the senior management teams (SMT) of Tegeta and Eskom, which transcended the Medium-Term Mandate of the board, and which was not approved by the board.[338] It is reported that the SMT of Eskom misinterpreted the minutes of the board on the matter, in that the board only noted the matter, and thereby mistook it for approving the matter.[339]

4.3.3 Failure by the Eskom Board to take action

Most of the Eskom board members were conflicted on the Tegeta matter by having various degrees of business associations, or relations connected to the Guptas and their associates who were the ultimate owners of Tegeta.[340] At the BTC meeting of 7 March 2016, whereby the coal supply agreement was discussed, some board members did not recuse themselves as they had a direct conflict of interest to Tegeta. There was also a governance risk present that the conflicted members were privy to board documents and minutes, which had the potential to give Tegeta an advantage over its competitors.[341]

The Special Board Tender Subcommittee (SBTC) meeting of 11 April 2016, which approved the prepayment to Tegeta, was only used by the SMT of Eskom to rubber

[333] Portfolio Committee on Public Enterprises (2018) 53-54.
[334] Portfolio Committee on Public Enterprises (2018) 51.
[335] Fundizi & National Treasury (2018) 1-2. Note 1.8.
[336] Portfolio Committee on Public Enterprises (2018) 67. Public Protector of South Africa (2016) 131.
[337] Fundizi & National Treasury (2018) iv. Note 3.10.
[338] Fundizi & National Treasury (2018) 60.
[339] Organisation Undoing Tax Abuse (2018) 'Unplugging corruption at Eskom: A report by the Organisation Undoing Tax Abuse (OUTA) to the Portfolio Committee on Public Enterprises' available at https://static.pmg.org.za/171018OUTA_report.pdf (accessed 26 November 2021) 22.
[340] Portfolio Committee on Public Enterprises (2018) 51. Public Protector of South Africa (2016) 119.
[341] Public Protector of South Africa (2016) 299- 300.

stamp the agreements that were already made between the two companies.[342] In addition, most of the members of the board of Eskom had business links to companies and individuals who undertook business with the SOE.[343] Because of these conflicts of interest, it appeared that the conduct of the board of Eskom was solely to benefit Tegeta.[344]

Importantly, the Public Protector reported that the general board of Eskom had no knowledge of the true nature of the Tegeta prepayment when approval was granted, after the initial approval by the SBTC.[345] This presents a major governance breach as there should have been a fluid flow of information between the board and its subcommittees and versa vice.

As a result of the aforementioned governance irregularities, it is deemed that the board and SMT of Eskom caused substantial damage to the credibility and legitimacy of the SOE.[346] Consequently, it was opined that the board of Eskom did not exercise a duty of care, which is in violation of section 50 of the PFMA.[347]

4.3.4 Failure by the Minister to take action

The Public Protector submitted that the Eskom board was improperly appointed by the Minister and not in line with the principles of good governance.[348] The Minister had the power to put mechanisms in place at board- level to address and mitigate matters of conflicts and to manage any bias which may arise, but took no action on these issues.[349]

Moreover, the Minister was seen as passive to the governance and operational irregularities at the board-level, which made her complicit in the ongoing mismanagement and corruption at Eskom.[350]

[342] Fundizi & National Treasury (2018) iv.
[343] Public Protector of South Africa (2016) 298.
[344] Public Protector of South Africa (2016) 326.
[345] Public Protector of South Africa (2016) 326.
[346] Portfolio Committee on Public Enterprises (2018) 72.
[347] Public Protector of South Africa (2016) 20.
[348] Public Protector of South Africa (2016) 19.
[349] Public Protector of South Africa (2016) 19.
[350] Organisation Undoing Tax Abuse (2018) 85.

4.3.5 Corporate Governance gaps identified in the Tegeta matter

The main gaps that were identified in the matter were that Tegeta received favourable and preferable treatment from the SOE, which placed its competitors in a disadvantaged position. In addition, the SOE made unusual advance payments which, unless an agreement or memorandum of understanding has been signed, could be classified as an authorised-, or fruitless and wasteful expenditure.[351] The SMT of Eskom and Tegeta were non-compliant to, and contravened the medium-term mandate of the board, which posed a serious governance gap for the SOE when they concluded the deal at SMT-level.[352] There were also conflict of interest on the part of board members,[353] including that they were ill-informed on the actual value of the Tegeta contract which indicates that they did not conduct proper oversight over the Tegeta contract.[354] Once again, the responsible of Eskom, including the board, failed to introduce appropriate consequence management and take action against its own members; including the SMT of Eskom.[355]

4.4 THE TRILLIAN CONTRACT

4.4.1 Introduction

On 2 December 2016, Minister Lynne Brown replied to questions posed by Honourable Natasha Mazzone in the National Parliament. The question posed were:[356]

> (1) What amount did Trillian Capital Partners receive in service fees for allegedly negotiating the settlement of a massive insurance claim involving the explosion of a boiler at the Duhva power plant; (2) did Eskom appoint the specified company to source a new supplier to replace the exploded boiler at the Duhva power plant; if not, why not; if so, what (a) were the fees payable to the specified company in this regard and (b) are there further relevant details; (3) (a) which other contracts of

[351] An unauthorised expenditure is when a SOE spent money on a matter which was not purposed for, while fruitless and wasteful expenditure is when an SOE spent funds in vain and which could have been avoided if reasonable care been taken by its stakeholders. The Public Finance Management Act 1 of 1999 Chapter 1.
[352] See part 4.3.2 of Chapter 4.
[353] See part 4.3.3 of Chapter 4.
[354] See part 4.3.3 of Chapter 4.
[355] See parts 4.3.3 & 4.3.4 of Chapter 4.
[356] Parliamentary Monitoring Group 'Question NW2701 to the Minister of Public Enterprises' available at https://pmg.org.za/committee-question/4476/ (accessed 30 November 2021); Budlender, G 'Report for Mr TM Sexwale Chairperson, Trillian Capital Partners (Pty) Ltd on allegations with regard to the Trillian Group of Companies, and related matters' available at https://static.pmg.org.za/171031report.pdf (accessed 24 November 2021) 23.

engagement have been concluded between Eskom and the specified company and (b) what are the costs involved in each case?

The reply from the Minister was that:[357]

> (1) No amount was paid to Trillian Capital Partners for the Duvha power plant insurance claim. Eskom did not appoint Trillian Capital Partners to negotiate the settlement for the Duvha Power Plant insurance claim. (2) No, Eskom did not appoint Trillian Capital Partners to source a new supplier to replace the exploded boiler at the Duhva Power Plant. There was no need to appoint any external party to assist with sourcing.

However, in contrast to the aforementioned reply, in July 2017 it emerged that Trillian was paid more than R500 million by Eskom for consulting work conducted by McKinsey.[358] McKinsey and Trillian were collectively paid R1,6 billion, while Trillian was paid a separate total sum of R600 million in respect of three invoices submitted for work concluded on.[359] More confusingly, Eskom issued a statement on 18 May 2017 whereby it confirmed that Trillian was listed as a supplier of Eskom, but that there were no record of money that was paid to it by the SOE.[360]

4.4.2 Supply Chain Management procurement irregularities

It has emerged that the payments to Trillian was the indication that major SCM breaches and weaknesses were present in Eskom.[361] For example, it emerged that Eskom did pay Trillian R600 million between April 2016 and March 2017 which was the total in respect of three invoices submitted for payment.[362] It was submitted that Trillian did not tender for the work that was invoiced.[363] Furthermore, Eskom had no contract with Trillian to perform the work, nor receive any payment whatsoever.[364] The SCM process with respect to Trillian was also not approved by National Treasury.[365]

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[357] Parliamentary Monitoring Group 'Question NW2701 to the Minister of Public Enterprises' available at https://pmg.org.za/committee-question/4476/ (accessed 30 November 2021). Budlender, G 'Report for Mr TM Sexwale Chairperson, Trillian Capital Partners (Pty) Ltd on allegations with regard to the Trillian Group of Companies, and related matters' available at https://static.pmg.org.za/171031report.pdf (accessed 24 November 2021) 23.
[358] Portfolio Committee on Public Enterprises (2018) 74.
[359] Portfolio Committee on Public Enterprises (2018) 74.
[360] Budlender G (2017) 27 & 31.
[361] Budlender, G (2017) 32. Portfolio Committee on Public Enterprises (2018) 98.
[362] Budlender, G (2017) 31; Portfolio Committee on Public Enterprises (2018) 74.
[363] Budlender, G (2017) 31.
[364] Budlender, G (2017) 31.
[365] Portfolio Committee on Public Enterprises (2018) 74.

The Chief Financial Officer (CFO) assured Trillian that they will be awarded contracts, even though no bidding took place, which represented a governance breach and risk to Eskom in terms of proper approval processes which must have been followed against the delegation of authority.[366] It was also confirmed that there were conflicts of interests between the CFO and Trillian in that contracts were agreed on verbally without any submission to the board or subcommittees of the SOE[367]

Eskom did not receive value for money from Trillian nor McKinsey, as it was submitted that the work could have been done by the staff of Eskom themselves.[368] There were *prima facie* evidence that the payments to Trillian were criminal in nature, which included possible fraud and money laundering.[369] The corporate culture at Eskom was such that verbal instructions from executives and senior manager superseded documented regulations and rules within the SOE.[370]

4.4.3 Failure by the Eskom Board to take action

On 29 September 2017, the board took remedial action by suspending the CFO and other senior officials of the SOE who were identified in the various stakeholder reports.[371] However, while the governance breaches were taking place, there was no evidence that the board intervened in the SCM irregularities, including the false media statements.[372] It was noted that the board allowed the Trillian matter to take place for several months before they considered to act against the irregularities.[373] The Board Tender Committee, as well as the Audit and Risk Subcommittee were presented with numerous forensic reports which highlighted the irregularities, but chose not to act on

[366] Budlender, G (2017) 31; Portfolio Committee on Public Enterprises (2018) 74.
[367] Parliamentary Monitoring Group 'Eskom Inquiry: G9 Consulting Services' available at https://pmg.org.za/page/G9Consulting (accessed 18 November 2021).
[368] Budlender, G (2017) 30; Portfolio Committee on Public Enterprises (2018) 83.
[369] Parliamentary Monitoring Group 'Eskom Inquiry: G9 Consulting Services' available at https://pmg.org.za/page/G9Consulting (accessed 18 November 2021).
Mr Rajie Mugrugan, one of the directors at G9 Group forensic investigation company that was commissioned to investigate the Eskom payments made to McKinsey and Trillian, indicated in a briefing to the National Parliament on 27 February 2018 that he was of the opinion that possible fraudulent and money laundering activities would be unearthed, hence the reason why the board stopped his company's forensic investigation into governance irregularities in Eskom abruptly and without reason.
[370] Portfolio Committee on Public Enterprises (2018) 99.
[371] Portfolio Committee on Public Enterprises (2018) 82.
[372] Portfolio Committee on Public Enterprises (2018) 84.
[373] Portfolio Committee on Public Enterprises (2018) 84.

these. Instead, the Audit and Risk Committee suspended one of the ongoing forensic investigations.[374]

Furthermore, to the above, it was submitted that the Board Tender Committee approved the McKinsey tender, making it culpable? and derelict to its fiduciary duties.[375] Another internal control weakness and governance risk was that the minutes of the BTC were not signed by that Chairperson.[376]

4.4.4 Failure by the Minister to take action

Advocate Budlender opines that the information that the Minister provided in her parliamentary reply was either false or seriously misleading.[377] This is because the CFO drafted her response, which the Minister read.[378] However, the Portfolio Committee submitted that because of the false information that was supplied to the Minister, the executives of Eskom deliberately falsified information on the matter and, thus, lied to her.[379] The Minister also did not take action against the CFO when it was established that the information he supplied her was indeed incorrect and contrary to what was currently happening at that time, which was the governance irregularities in which the CFO played a central role.[380]

4.4.5 Corporate Governance gaps identified in the Trillian matter

The Minister was misled by the CFO of Eskom when she answered a parliamentary question in the House.[381] SCM processes were ignored when the CFO entered into unofficial dealings and gave business assurances to the SMT of Trillian.[382] Eskom paid Trillian, but there were no proof of payments which indicated financial management and audit risk.[383] Although the board suspended the CFO when the irregularities where highlighted, the board had the authority but was slow and failed to implement immediate consequence management into the flawed financial management process

[374] Portfolio Committee on Public Enterprises (2018) 103.
[375] Parliamentary Monitoring Group 'Eskom Inquiry: G9 Consulting Services' available at https://pmg.org.za/page/G9Consulting (accessed 18 November 2021).
[376] Parliamentary Monitoring Group 'Eskom Inquiry: G9 Consulting Services' available at https://pmg.org.za/page/G9Consulting (accessed 18 November 2021).
[377] Budlender, G (2017) 26.
[378] Portfolio Committee on Public Enterprises (2018) 101.
[379] Portfolio Committee on Public Enterprises (2018) 101.
[380] Portfolio Committee on Public Enterprises (2018) 101.
[381] See part 4.4.1 of Chapter 4.
[382] See part 4.4.2 of Chapter 4.
[383] See part 4.4.1 of Chapter 4.

in order to avoid a similar type of future irregular occurrence.[384] The Minister failed to take action against the CFO who was in contravention of his fiduciary duty of care, proper purpose and acting in the best interest of the SOE.[385]

4.5 ESKOM HOLDINGS SOC LIMITED V MCKINSEY AND COMPANY AFRICA (PTY) LTD AND OTHERS

In 2019, the 'new board' that was appointed in 2018 approached the High Court in order to set aside the unlawful decisions of the previous board in the McKinsey and Trillian matter, to set aside the two contracts that were entered into between Eskom and McKinsey; including to request that Trillian pays back the money Eskom paid to it.[386] The court held the following:

- The previous board acted unlawfully in terms of its resolutions, including payments authorised by it, while senior personnel at Eskom deliberately attempted to prevent the application by the new board to succeed;[387]
- Relevant information was deliberately withheld from the new board by the senior Eskom personnel, while some documents were not found or destroyed;[388]
- Senior officials displayed egregious conduct and not in line with their expected fiduciary duties;[389]
- Trillian conducted no work for Eskom that was worth being invoiced, which was also not value for money;[390]
- Trillian was not entitled to receive any money from Eskom;[391]
- The payments by Eskom were neither through contract, nor on legal premise;[392]

[384] See part 4.4.3 of Chapter 4.
[385] See part 4.4.4 of Chapter 4.
[386] *Eskom Holdings SOC Limited v McKinsey and Company Africa (Pty) Ltd and Others* (22877/2018) [2019] ZAGPPHC 185 (18 June 2019) paras 2 & 3.
[387] *Eskom Holdings SOC Limited v McKinsey and Company Africa (Pty) Ltd and Others* (22877/2018) [2019] ZAGPPHC 185 (18 June 2019) para 6.
[388] *Eskom Holdings SOC Limited v McKinsey and Company Africa (Pty) Ltd and Others* (22877/2018) [2019] ZAGPPHC 185 (18 June 2019) para 7.
[389] *Eskom Holdings SOC Limited v McKinsey and Company Africa (Pty) Ltd and Others* (22877/2018) [2019] ZAGPPHC 185 (18 June 2019) para 10.
[390] *Eskom Holdings SOC Limited v McKinsey and Company Africa (Pty) Ltd and Others* (22877/2018) [2019] ZAGPPHC 185 (18 June 2019) paras 13 & 18.
[391] *Eskom Holdings SOC Limited v McKinsey and Company Africa (Pty) Ltd and Others* (22877/2018) [2019] ZAGPPHC 185 (18 June 2019) para 23.
[392] *Eskom Holdings SOC Limited v McKinsey and Company Africa (Pty) Ltd and Others* (22877/2018) [2019] ZAGPPHC 185 (18 June 2019) para 55.8.

- Payments made by Eskom transgressed its own SCM processes in terms of approving payments for release;[393]
- The interaction between senior Eskom and Trillian personnel was for the benefit of Trillian and fraudulent in nature;[394]
- Senior personnel leaked confidential information to Trillian;[395] and
- The BTC's decision to approve payment to Trillian be set aside.[396]

4.6 BRIAN MOLEFE RESIGNATION AND PENSION MATTER

4.6.1 Introduction

Mr Brian Molefe was employed as the CEO of Eskom from 2014 until he was implicated by the Public Protector for being embroiled in state capture activities, where after he announced his resignation on 11 November 2016. However, on 24 November 2016, Mr Molefe submitted a request for early retirement from the SOE. On 1 January 2017 Mr Molefe resigned from Eskom.[397] One of the allegations against Mr Molefe included that he played a role in the facilitation of the irregular Tegeta contract which contributed to the governance and financial deterioration of Eskom.[398]

The issue of contention is where confusion arose as to whether Mr Molefe resigned or retired when he left the employ of Eskom. This is because the Chairperson of the Board, as well as Eskom itself indicated that Mr Molefe retired, while the regulations which guides the Eskom Pension and Provident Fund (EPPF) does not allow retiree benefits for individuals being in the employ of the SOE less than 10 years, which was the case of Mr Molefe who was appointed on a 5-year contract. When Mr Molefe left the employ of Eskom, he received a pension payout of R30,1 million, which was

[393] *Eskom Holdings SOC Limited v McKinsey and Company Africa (Pty) Ltd and Others* (22877/2018) [2019] ZAGPPHC 185 (18 June 2019) para 57.5.
[394] *Eskom Holdings SOC Limited v McKinsey and Company Africa (Pty) Ltd and Others* (22877/2018) [2019] ZAGPPHC 185 (18 June 2019) para 16.
[395] *Eskom Holdings SOC Limited v McKinsey and Company Africa (Pty) Ltd and Others* (22877/2018) [2019] ZAGPPHC 185 (18 June 2019) para 67.
[396] *Eskom Holdings SOC Limited v McKinsey and Company Africa (Pty) Ltd and Others* (22877/2018) [2019] ZAGPPHC 185 (18 June 2019) paras 70.3 & 70.6.
[397] Portfolio Committee on Public Enterprises (2018) 128.
[398] Public Protector of South Africa (2016) 17, 86, 121 & 345.

opposed by various political and civil organisation stakeholders.[399] [400]Thereafter, the board through consulting the Minister, resolved to rescind its decision to accept the retirement of Mr Molefe and instead re-instate Mr Molefe back into the employ of Eskom as CEO as it made more financial sense for the SOE to pursue this avenue.[401]

After the furore caused by the stakeholders, including approaching the Pretoria High Court to set aside the pension payout and decision by the board, the Court made a scathing finding against the SOE, the Minister, the board and Mr Molefe which will be discussed hereunder.

4.6.2 Supply Chain Management irregularities

Mr Anton Minnaar, the Executive Support Manager at Eskom, contacted the EPPF to calculate the benefits of early retirement should Mr Molefe decide to retire from Eskom. When the irregular application was made for the retirement of the CEO to the EPPF, a code had to be entered onto the Personal and Salary System (PERSAL), the Basic Accounting System (BAS) and electronic database of the EPPF to validate the employment status of the CEO by the SOE. An incorrect code was deliberately inserted to indicate that the CEO was a permanent employee of the SOE, instead of inserting a code to indicate that the CEO was a 5-year contracting employee.[402]

It was determined that Mr Molefe was never eligible for a pension payout by the EPPF, which means that the regulations which governs the payout of such a pension was contravened and deemed as a fraudulent and unlawful transaction that was executed by Mr Minnaar and the Chairperson of the board.[403] From a governance point of view,

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[399] *Democratic Alliance v Minister of Public Enterprise and Others; Economic Freedom Fighters v Eskom Holdings Limited and Others; Solidarity Trade Union v Molefe and Others* (33051/2017; 34568/2017; 34042/2017) [2018] ZAGPPHC 1 (25 January 2018) paragraph 82. Portfolio Committee on Public Enterprises (2018) 1-2. The matter was opposed by the Democratic Alliance, Economic Freedom Fighters and Solidarity Trade Union.

[400] Organisation Undoing Tax Abuse 'Unplugging corruption at Eskom: A report by the Organisation Undoing Tax Abuse (OUTA) to the Portfolio Committee on Public Enterprises' available at https://pmg.org.za/files/171018OUTA_report.pdf (accessed 20 November 2021).

[401] Public Protector of South Africa (2016) 147.

[402] South African Government departments and SOEs uses PERSAL and BAS numbers (or codes) which are typed into the governmental computer system of what line item is to be paid out, including what amounts in monetary value. For example, the code that is used for a permanent employee will be different on the system as for a contracting employee. All payouts are against codes on the system and monies cannot be paid if a code is not entered against the details of a permanent or contracting employee or any other line items, such as any goods to be supplied or services to be rendered.

[403] *Democratic Alliance v Minister of Public Enterprise and Others; Economic Freedom Fighters v Eskom Holdings Limited and Others; Solidarity Trade Union v Molefe and Others* (33051/2017;

it was opined by the Portfolio Committee that the SOE's executives misled the board, as well as the EPPF.[404] Matojane J made the following telling remark:[405]

> What is most disturbing is the total lack of dignity and shame by people in leadership positions who abuse public funds with naked greed for their own benefit without a moment's consideration of the circumstances of fellow citizens who live in absolute squalor throughout the country with no basic services

4.6.3 Governance decisions of, and failures by, the Eskom Board

The Chairperson of the Board, Mr Ben Nugubane, assisted by Mr Molefe, directed a letter to the Minister towards the end of 2015 to motivate for retirement benefits of the CEO, even though he did not qualify for such benefits. Eskom would be financially liable for any penalties and waivers connected thereto. Thereafter, the Chairperson of the board proceeded to secure a favourable resolution from the board in support of his recommendation.[406] The board acceded to the motivation of the Chairperson on 21 November 2016. However, as aforementioned, the resolution of the board contravened the regulations of the EPPF, which indicates that a retiree must be a member of the Fund to receive a pension benefit payout. Mr Molefe was not a member of the EPPF based on his employment status.

It was submitted by the Portfolio Committee that the board had not acted in the best interests of the SOE. This was in contravention of the PFMA which states that a director, including the board itself "must act in the best interest of the public entity".[407] Moreover, Matojane J implicated the board in contributing towards governance irregularities in the SOE on the matter by indicating that its decision to approve the CEO's retirement package, as well as his later reinstatement as CEO, was *ultra vires* and non-compliant to the 2016 MOI of Eskom.[408] Another governance weakness and irregularity was that the board did not communicate with the Minister on its decision

34568/2017; 34042/2017) [2018] ZAGPPHC 1 (25 January 2018) para 82. Portfolio Committee on Public Enterprises (2018) 136.

[404] Portfolio Committee on Public Enterprises (2018) 136.

[405] *Democratic Alliance v Minister of Public Enterprise and Others; Economic Freedom Fighters v Eskom Holdings Limited and Others; Solidarity Trade Union v Molefe and Others* (33051/2017; 34568/2017; 34042/2017) [2018] ZAGPPHC 1 (25 January 2018) paragraph 39.

[406] Portfolio Committee on Public Enterprises (2018) 136-137.

[407] The Public Finance Management Act 1 of 1999 s50(1)(*b*) read specifically together with the Companies Act 71 of 2008 s76(3)(*b*).

[408] *Democratic Alliance v Minister of Public Enterprise and Others; Economic Freedom Fighters v Eskom Holdings Limited and Others; Solidarity Trade Union v Molefe and Others* (33051/2017; 34568/2017; 34042/2017) [2018] ZAGPPHC 1 (25 January 2018) paras 45 & 67.

regarding the reinstatement agreement, including that legal and factual background of that decision which left the Minister uninformed on the matter.[409] Another irregularity was that approval was not sought from the Minister on the resolution, which was in contravention of section 14.3.4 of the 2016 MOI which directed that: "The Minister shall be noted as a party to any contract of employment between the Company and the Group Chief Executive". [410]

Moreover, a governance breach that was not detected nor reported on by the various stakeholders was that the People and Governance Committee, which is a subcommittee of the board, is alleged to have never approved the recommendation to pay a pension to Mr Molefe. The resolution of the subcommittee on the matter reads:[411]

> the Eskom rules to be amended in respect of executive directors with fixed term contracts to make up for shortfall in years waive the penalties and refund the pension and provident fund the actual cost relating to additional services

In addition, it is common knowledge that a subcommittee clearly resolves on a matter before the matter is escalated to the overall board for further deliberation and ultimately agreeing and formulating a binding resolution on it. This did not occur, which renders the resolution of the board irregular in nature. It is submitted that the board should have sent the matter and its resolution back to the subcommittee to rescind its resolution in order to reformulate a clearer resolution on the matter.

4.6.4 The failure of the Minister to take action

It was submitted by the Portfolio Committee that the Minister acted irrationally by ignoring the allegations that were made by the Public Protector on the matter.[412] In addition, the Minister relied on a 2014 MOI which was replaced by a newer 2016 MOI, when she decided on the recommendation of the board to reappoint Mr Molefe as the CEO of Eskom.

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[409] *Democratic Alliance v Minister of Public Enterprise and Others; Economic Freedom Fighters v Eskom Holdings Limited and Others; Solidarity Trade Union v Molefe and Others* (33051/2017; 34568/2017; 34042/2017) [2018] ZAGPPHC 1 (25 January 2018) para 75.

[410] *Democratic Alliance v Minister of Public Enterprise and Others; Economic Freedom Fighters v Eskom Holdings Limited and Others; Solidarity Trade Union v Molefe and Others* (33051/2017; 34568/2017; 34042/2017) [2018] ZAGPPHC 1 (25 January 2018) paras 67 & 75.

[411] Portfolio Committee on Public Enterprises (2018) 144.

[412] Portfolio Committee on Public Enterprises (2018) 137.

Motajane J further ruled that the Minister indeed acted irrationally by ignoring and not acting decisively on the findings and recommendations of the Public Protector on the matter.[413]

4.7 OBSERVATIONS BY MATOJANE J ON THE PENSION PAYOUT MATTER

Matojane J made incriminating findings against Eskom, thereby exposing the governance weaknesses within the entity. Firstly, the court in its judgment, noted that the CEO attended a meeting of the People and Governance Committee of the SOE, where the subject matter of early retirement was discussed which would impact on his planned retirement.[414] The CEO did not recuse himself when the matter was discussed at subcommittee meeting, which is in contravention of section 75 of the Companies Act, which provides as follows:

> (5) If a director of a company …, has a personal financial interest in respect of a matter to be considered at a meeting of the board, or knows that a related person has a personal financial interest in the matter, the director—
>
> (a) must disclose the interest and its general nature before the matter is considered at the meeting;
>
> (b) must disclose to the meeting any material information relating to the matter, and known to the director.
>
> (6) If a director of a company acquires a personal financial interest in an agreement or other matter in which the company has a material interest, or knows that a related person has acquired a personal financial interest in the matter, after the agreement or other matter has been approved by the company, the director must promptly disclose to the board, or to the shareholders in the case of a company contemplated in subsection (3), the nature and extent of that interest, and the material circumstances relating to the director or related person's acquisition of that interest.

Pinnock argues in this regard that if such a situation arises such as aforementioned, it could be deemed a failure to comply with section 75 of the Act and could potentially

[413] *Democratic Alliance v Minister of Public Enterprise and Others; Economic Freedom Fighters v Eskom Holdings Limited and Others; Solidarity Trade Union v Molefe and Others* (33051/2017; 34568/2017; 34042/2017) [2018] ZAGPPHC 1 (25 January 2018) para 80.

[414] *Democratic Alliance v Minister of Public Enterprise and Others; Economic Freedom Fighters v Eskom Holdings Limited and Others; Solidarity Trade Union v Molefe and Others* (33051/2017; 34568/2017; 34042/2017) [2018] ZAGPPHC 1 (25 January 2018) para 27.

lead to the invalidity of the board resolution, and possibly even the entire transaction.[415]

Matojane J noted corporate governance challenges in the decision of the Eskom board on the matter of the pension pay out to Mr Molefe in the following important remarks:[416]

> There is a strong inference to be drawn from the above factors that the early retirement agreement was a deliberate scheme devised by Eskom with the involvement of Mr. Molefe to afford him pension benefits he was not entitled to. The scheme permitted Mr. Molefe to proceed to early retirement at age 50 by buying him extra pensionable service. The scheme was started soon after Mr. Molefe's permanent employment and was deployed after he had publicly stated that he was voluntarily leaving Eskom's employ.

4.8 CONCLUSION

This chapter focused on the governance weaknesses and failures within Eskom since 2015, which negatively impacted on the enterprise efficiency of the SOE. Of importance was to understand how the SCM processes of Eskom were impeded, including the non-responsiveness of the board and the Minister.

Regarding the SCM irregularities, senior Eskom officials were at the vanguard of leading irregular activities contrary to the SOE's own delegation of authority. Tenders were approved at CFO or CEO levels without seeking approval at board or ministerial level. Agreements were signed by the senior management of Eskom which was for the benefit of external companies who contracted with Eskom and to the disadvantage of Eskom itself, which goes against the PFMA and the Act.[417] Furthermore, agreements were approved which transcended the medium-term mandate of the board.[418] Companies were paid for work not done, while not having any contracts in

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[415] Pinnock D (2018) 'Director overboarding – conflicts of interest in terms of section 75 of the Companies Act, 2008. available at *https://www.cliffedekkerhofmeyr.com/en/news/publications/2018/Corporate/corporate-and-commercial-alert-31-october-director-overboarding-conflicts-of-interest-in-terms-of-section-75-of-the-companies-act-2008.html*. (accessed on 28 November 2021).

[416] *Democratic Alliance v Minister of Public Enterprise and Others; Economic Freedom Fighters v Eskom Holdings Limited and Others; Solidarity Trade Union v Molefe and Others* (33051/2017; 34568/2017; 34042/2017) [2018] ZAGPPHC 1 (25 January 2018) para 56.

[417] See parts 4.3.2, 4.4.2 & 4.6.2 of Chapter 4.

[418] See part 4.3.2 of Chapter 4.

place for such payments.[419] There were conflicts of interests present between the senior management of Eskom and companies when tender agreements were negotiated and finalised.[420] The board also actively attempted to destroy SCM documentation which highlighted corporate governance irregularities through a forensic investigation.[421] In addition, the corporate culture at Eskom was that the instructions of the senior managers superseded all policies, regulations and legislations.[422]

No action was forthcoming in respect of the resolutions and actions which were taken by the board. The board also failed to investigate matters brought to its attention through investigative reports, even going to the extent of destroying these reports. Board members were conflicted when contracts were dealt with, while the subcommittees were used as rubber-stamps to approve tenders which were already verbally concluded between the senior management of Eskom and the implicated companies.[423] The board was not informed of the resolutions of its subcommittees' in terms of contract approvals.[424]

The Minister was found to be inactive, nor to have an interventionist approach when irregularities were raised at her level. The Minister did not take action when it was recommended to do so by investigative reports. When scenarios arose when the board was in conflict with itself, the Minister did not intervene, despite having the authority to do so. The Minister was given incorrect information on various occasions by the board and by the senior management team of Eskom, however, when the Minister became aware of this, she did not take any disciplinary actions against those individuals. The Minister pleaded ignorance to the operations of the board, as well as the operational enterprise of Eskom.

The cumulative corporate governance breakdowns at the operational-level, and at the directors and ministerial levels had serious negative implications on the enterprise efficiency, overall corporate governance, as well as the financial performance of Eskom.

[419] See part 4.4.1 of Chapter 4.
[420] See part 4.3.5 of Chapter 4.
[421] See part 4.2.1 of Chapter 4.
[422] See part 4.4.2 of Chapter 4.
[423] See part 4.3.3 of Chapter 4.
[424] See part 4.3.3 of Chapter 4.

CHAPTER 5: CONCLUSIONS, FINDINGS AND RECOMMENDATIONS

5.1 INTRODUCTION

The primary objective of this research was to highlight and discuss the corporate governance failures at Eskom, including how these failures impacted on the operational efficiency of that SOE. Moreover, the objectives of this research were to discuss corporate governance challenges at Eskom; including the duties of the directors while also highlighting that SOE inefficiencies which stemmed from deviations from corporate governance practices.

5.2 SUMMARY OF THE SALIENT FEATURES ACROSS KEY CHAPTERS

5.2.1 The research focus and chapters' conclusions

Chapter 1 provided introductory remarks on the definition and purpose of corporate governance, whilst also highlighting the value of corporate governance in a country when properly instituted.[425] The chapter also highlighted the challenges experienced in the implementation of corporate governance in SOEs in South Africa.[426] More importantly, the chapter also highlighted the research question of determining the major corporate governance failures at Eskom which have negatively impacted on enterprise efficiency and the sustainability of its business, and how can the corporate governance practices can be improved to lead to enterprise efficiency.[427]

Chapter 2 contributed to the research question by establishing that SOEs do have separate legal personalities as public companies, which means that they will continue operating as going concerns while carrying all the debts and liabilities.[428] Furthermore, the chapter discusses the theories which reflect on the corporate governance ideals of an SOE includes the agency theory, whereby the board delegates work and specific mandates to management. The board is also accountable for the performance of the SOE to their respective Minister. Some risks presented by the agency theory includes that the management might make decisions in their own interests, while also indicating that the board will not be able to monitor the negative behaviour of management.[429] The communitaire theory postulates that the SOE is the conduit for social and political advancement by the state in delivering services to the citizenry, while also serving as

[425] See part 1.1 of Chapter 1.
[426] See part 1.2 of Chapter 1.
[427] See part 1.5 of Chapter 1.
[428] See part 2.4 of Chapter 2.
[429] See part 2.3.1 of Chapter 2.

a wealth-maximisation machine for the state.[430] The concession theory similarly encapsulates the wealth-maximisation concept of the communitaire theory, with an additional recognition that private business did not fund the SOE, but the state. The requirement of the concession theory is that the SOE should act as a good corporate citizen in society.[431]

How does the director act in the best interest of the SOE, while maximising shareholder and economic values and investment returns? Chapter 3 contributed to answering the research question by stating that the director of the SOE has been empowered with the non-fiduciary duty of care and skill, as legislated through the partial codification in section 76(3)(*c*) of the Act. This duty was introduced into law to prevent directors from making harmful decisions and to encourage honesty, while ensuring that the SOE and shareholder enjoy positive benefits. The duty was and is activated once the director attends a board meeting.[432] However, judicial emphasis was placed more on the director's honesty than competence, which resulted in a low standard of the duty of care and skill.[433]

The duty of care and skill was regarded as lax and lenient across the commonwealth jurisdictions, through the use of the subjective measures implemented by these judiciaries. This meant that the shareholders were liable for all outcomes of the decisions of the directors they appointed. However, this measure was not adequate to deal with the major corporate governance scandals of the past decade which saw that the ignorance and inexperience of directors were shielded from liability. Thus, a dual standard measure was adopted to include an objective approach whereby the conduct of the director was evaluated through the reasonable person standard, resulting in a more stringent judicial evaluation.[434]

Regarded as a defence for directors in the duty of care and skill, the BJR was developed and introduced in the USA to protect them from liabilities in cases where their decisions resulted in negative company outcomes.[435] The BJR resulted in the judiciary pronouncing that the decisions of the board of directors would not be second-

[430] See part 2.3.2 of Chapter 2.
[431] See part 2.3.3 of Chapter 2.
[432] See part 3.2.1 of Chapter 3.
[433] See part 3.2.5 of Chapter 3.
[434] See part 3.2.2 of Chapter 3.
[435] See part 3.3.1 of Chapter 3.

guessed, where the board could provide evidence that their decisions were reasonable and made from an informed position through either supplied documents or advice obtained from the company's employees.[436] The BJR has been codified under section 76(4) of the Act and is activated when it can be demonstrated that the director attempted to make rational decisions and to act in the best interest of the company vis-à-vis the duty of care and skill by taking steps to become informed on the matter, including having no financial interest in the matter.[437]

There should be no conflicts of interests which could compromise the duty of the director.[438] Besides the latter responsibility, directors have a role to monitor and manage the actions of the senior management of the SOE, including setting the governance tone in the SOE, ensuring financial and operational viability and understanding the legislative and compliance environment wherein the SOE operates.[439]

This Research Paper is an examination of recent corporate governance failures and challenges at a key SOE or SOC, that is Eskom. As a case study of Eskom, Chapter 4 examined specific contracts[440] and in the process demonstrated that there was corporate governance failure at critical governance levels such as at executive level, at board level and at the level of the relevant Minister in charge of the SOE. The governance failures as per Chapter 4's expose`, are to be seen through the windows of irregular expenditure, corruption through procurement, poor contract management, poor revenue collection management and lack of effective consequence management. Chapter 4, correctly so, concludes that the cumulative effect of the poor SCM by the governance structures at Eskom had a negative effect on enterprise efficiency, financial performance and the general sustainability of the business of the SOC.[441]

[436] See part 3.3.3 of Chapter 3.
[437] See part 3.3.2 of Chapter 3. The Companies Act 71 of 2008 S76(3)(*b*)(*c*)(4)(a)*(i)(aa)(iii).*
[438] See part 2.5.1 of Chapter 2.
[439] See part 2.5 of Chapter 2 & part 3.2.3 of Chapter 3.
[440] Contracts such as the New Age Contract, the Tegeta Contract, the Trillian Contract and the Brian Molefe resignation and pension matter. See parts 4.2 to 4.7 of Chapter 4.
[441] See part 4.8 of Chapter 4.

5.3 FINDINGS AND RECOMMENDATIONS

5.3.1 Findings

It was found that the state as owner of the SOE (through the Minister) should be actively involved and informed of the activities of the entity by setting clear objectives, exercising strategic control and being accountable to the Legislature in respect of the operational and financial deliverables of that SOE.[442] On the contrary, it was shown that this has not occurred in the past decade at Eskom. This was because the Minister improperly appointed the board.[443] The Minister also failed to take timeous remedial actions against employees who were identified in various reports to have breached corporate governance processes, while being passive to react to various corporate governance irregularities on various matters.[444] At worst, the Minister was so inactive in Eskom, that the SMT misled and lied to her on responses to parliamentary questions, including the scandalous pension pay-out of a CEO.[445]

Some of the duties of the board were to monitor and manage the outcomes of the SMT, exercise objective judgement and act in the best interest of the company at all times.[446] However, various instances where highlighted which indicated that the board failed to adhere to their fiduciary duties, resulting in the board being in breach of its fiduciary duties and therefore non-compliant to the relevant legislative prescripts.[447]

It was emphasised that in terms of mitigating the risks of the agency theory, that various audit and subcommittees be established on the board level.[448] However, it was proven that the establishment of such a remedy did not support the mitigation of the agency risk. This being that the board, including the subcommittees of Eskom, failed to investigate, ignored and even destroyed forensic reports which highlighted corporate governance irregularities and uncompliant employees at the SOE.[449]

In terms of the concession and communitaire theories, the irregularities which took place at Eskom prevented the SOE from realising the mentioned theories' ideals of

[442] See part 2.2 of Chapter 2.
[443] See part 4.3.3 of Chapter 4.
[444] See parts 4.2.4 & 4.5.4 of Chapter 4.
[445] See part 4.4.4 of Chapter 4.
[446] See part 2.5 of Chapter 2; including part 3.2.3 of Chapter 3.
[447] The Companies Act 71 of 2008 s76(3). See parts 4.2.3, 4.3.3 & 4.4.3 of Chapter 4.
[448] See part 2.3.1 of Chapter 4.
[449] See part 2.3.1 of Chapter 2, including parts 4.2.3 & 4.4.3 of Chapter 4.

adding social value, wealth- maximisation, delivering affordable services and good corporate citizenship in South Africa.[450]

Literature indicated that there was a challenge in the duty of care and skill, in that the dual standard measure cannot be applied universally across the business world due to the varying individual roles of the directors from company to company, which promotes judicial non-clarity when matters are taken on review.[451] In addition, it has been documented that the South African judiciary does not have a record of succeeding against negligent directors in terms of the duty.[452] Another challenge is when a director is liable for decisions that were made which was not in the best interest of the company. Here a successful liability outcome is rare in terms of the law of delict, due to the modified South African Roman- Dutch "*chassis of delict*".

5.3.2 Recommendations

It is recommended, based on the findings of this study, that:—

- a special judicial court be established which would adjudicate on corporate governance irregularities and scandals in South Africa, until a common standard operating procedure, or a set of universally accepted guidelines, are found which would minimise these irregularities; whilst also addressing the challenge which was documented in the literature relating to the duty of care and skill. Such a special court could be dissolved when the public and private corporate governance scandals/ irregularities have been drastically reduced, thereby returning the duties to the judicial services. Such a special court would expedite corporate governance matters and subsequent rulings brought before it, while also taking the pressure of the already-strained judiciary;
- ministers who are found guilty of not providing proper oversight which result in the erring of directors breaching their fiduciary duties, such as in the case of most SOEs in South Africa, be held civilly and/ or criminally liable together with such directors for any damages which might have emanated from such a lack of ministerial oversight; and

[450] See parts 2.3.2 & 2.3.3 of Chapter 2.
[451] See part 3.2.6 of Chapter 3.
[452] See part 3.3.6 of Chapter 3.

- liability clauses be inserted in the PFMA, for the responsible SOE Minister; as there are no such clauses to address circumstances which ensures remedial redress in the event/s of any loss and/ or damages which may arise due to the Minister not properly executing his/ her oversight duty over the board and SOE.

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