

Pathological Corporate Governance Deficiencies in South Africa's State-Owned Companies: A Critical Reflection



T Thabane and E Snyman-Van Deventer*

P·E·R

Pioneer in peer-reviewed,
open access online law publications

Authors

Tebello Thabane
Elizabeth Snyman van Deventer

Affiliation

University of Cape Town
University of the Free State
South Africa

Email

Tebello.thabane@uct.ac.za
snymane@ufs.ac.za

Date of submission

2 May 2017

Date published

8 January 2018

Editor Prof O Fuo

How to cite this article

Thabane T and Snyman-Van
Deventer E "Pathological
Corporate Governance
Deficiencies in South Africa's
State-Owned Companies: A Critical
Reflection" *PER / PELJ* 2018(21) -
DOI
<http://dx.doi.org/10.17159/1727-3781/2018/v21i0a2345>

Copyright



DOI

<http://dx.doi.org/10.17159/1727-3781/2018/v21i0a2345>

Abstract

Globally, states use state-owned companies (SOCs) or public corporations to provide public goods, limit private and foreign control of the domestic economy, generate public funds for the fiscus, increase service delivery and encourage economic development and industrialisation. Particularly given its unique socio-political and economic dynamics, a country such as South Africa clearly needs this type of strategic enterprise. Yet, that does not mean that everything at our SOCs is as it should be. The beleaguered South African Broadcasting Corporation (SABC) has recently seen the resignation of board members, shareholder interference in its operational affairs, and a high turnover of chief accounting officers and other executive management members. Due to non-performance, it has also received several cash injections from its shareholder to enable it to continue to deliver its services. In addition, the shareholder minister took it upon herself to amend the SABC's memorandum of incorporation, conferring upon herself the authority to appoint, suspend or even dismiss key executive members. South African Airways (SAA), in turn, has had seven CEOs in less than four years, has had to be bailed out at a cost of R550 million, and has in addition been granted a R5 billion guarantee by the shareholder for a restructuring exercise. Other SOCs such as Eskom, the Post Office and Telkom have also experienced high board and executive management turnover, perennial underperformance necessitating regular bailouts, and challenges regarding the division of power between their boards and the various shareholder ministers. Another issue that seems to plague South Africa's SOCs is the appointment of board members and executive officials with questionable qualifications. By critically examining the corporate governance challenges besetting the SABC, SAA and Eskom in particular, this article seeks to explore the root causes of the corporate governance deficiencies of SOCs, and how their corporate governance can be enhanced. It is concluded that the challenges faced by the country's SOCs are twofold: firstly, the SOCs boards' lack of appreciation of the cardinal corporate governance rules, and secondly, the role of government as a single or dominant shareholder, which results in substantial political interference in the running of the SOCs. This dual problem requires a dual solution. To arrest the problem of poor corporate governance in SOCs, government as the shareholder should firstly appoint fit and proper directors, having followed a sound due-diligence process. Once it has established such properly skilled and competent boards, however, government should adopt an arm's-length approach to the affairs of the SOCs as a way of insulating these corporations from political interference.

Keywords

State-owned companies; corporate governance; deficiencies; South Africa; SAA; SABC; Eskom

.....

1 Introduction

In 2014, the office of the South African Public Protector in a published report found developments at the South African Broadcasting Corporation (SABC), a state-owned company, to be "symptomatic of pathological corporate governance deficiencies".¹ In addition, the Public Protector found that the SABC board had failed "to provide strategic oversight to the national broadcaster as provided for in the SABC Board Charter and King III Report".²

Of course, failure of corporate governance is in no way unique to the SABC. Within the South African context, other examples where failed corporate governance has led to reduced shareholder value or even the total collapse of companies include Masterbond, CNA, Unifer, Tollgate and Leisurenet.³ This contribution, however, will focus specifically on corporate governance at the country's state-owned companies (SOCs), for a few reasons. Firstly, SOCs play a significant part in the growth, development and stability of the South African economy, with key SOCs being the Development Bank of Southern Africa, South African Airways (SAA), Eskom, Telkom and Transnet.⁴ Secondly, good corporate governance in SOCs also serves to incentivise other companies to embrace corporate governance principles, which may ultimately see an improvement in the country's global market power and ability to attract foreign investment.⁵ Thirdly, SOCs generally provide basic services to society, which means that in most instances the

* Tebello Thabane. BA Law LLB (Lesotho) LLM (Pretoria) LLM (Free State). Lecturer in Commercial Law, University of Cape Town, PhD Candidate (UCT), South Africa. Email: tebello.thabane@uct.ac.za.

** Elizabeth Snyman-Van Deventer. BLuris LLB LLM LLD (Free State). Professor in Mercantile Law, University of the Free State, South Africa. Email: snymane@ufs.ac.za.

¹ Office of the Public Protector 2014 http://www.pprotect.org/sites/default/files/Legislation_report/SABC%20FINAL%20REPORT%2017%20FEBRUARY%202014.pdf 20.

² Office of the Public Protector 2014 http://www.pprotect.org/sites/default/files/Legislation_report/SABC%20FINAL%20REPORT%2017%20FEBRUARY%202014.pdf 21.

³ Ahunwan *Globalisation and Corporate Governance* 13; Nancy *et al Enron and other Corporate Fiascos*.

⁴ Others include Denel, Airports Company South Africa, the Public Investment Corporation, the Government Employees Medical Scheme, the Government Employees Pension Fund and the SA Post Office.

⁵ Makuta 2009 *Malawi LJ* 55, 60.

very fabric of our lives depends on whether or not these companies are successfully governed.⁶

Following the inception of democracy, the new South African government was faced with the problem of having inherited many underperforming SOCs from the previous dispensation, some of which the Mandela administration subsequently tried to "offload" through privatisation.⁷ Today, there are several opposing views regarding the country's SOCs. There are those who call for the privatisation of non-performing SOCs; others argue that South Africa cannot become a fully developed state without strategic government intervention in the economy; while some continue to seek the nationalisation of all strategically important companies to assist the poor. Calls to privatise some SOCs due to their poor governance and non-performance are particularly prevalent in the media.⁸ These conflicting opinions even culminated in a study commissioned by the president to investigate the role of SOCs in a developmental state.⁹

1.1 Defining corporate governance in the SOC setting

Although no standard definition of corporate governance exists, the United Kingdom's so-called Cadbury Report and the first King Report¹⁰ both view corporate governance as "the system by which companies are directed and controlled". However, as this Cadbury/King definition has been criticised for being deceptively simple and lacking nuance,¹¹ this article uses the more comprehensive and nuanced definition offered by Du Plessis and colleagues, who regard corporate governance as:

... the process of controlling management and of balancing the interests of all internal stakeholders and other parties who can be affected by the corporation's conduct in order to ensure responsible behaviour by corporations and to achieve the maximum level of efficiency and profitability for a corporation.¹²

In the SOC setting, therefore, corporate governance refers to the process of governing SOCs with the same sound corporate controls and management as other, profit-seeking companies, even though SOCs may

⁶ McGregor 2015 *The Thinker* 67.

⁷ Afeikhena "Privatisation and Regulation in SA".

⁸ Afeikhena "Privatisation and Regulation in SA".

⁹ PRC 2010 *The Role of State-Owned Enterprises in the Developmental State* (on file with the authors).

¹⁰ Cadbury Report of Committee on Financial Aspects para 2.5; IoDSA King Report I.

¹¹ Jordan Cadbury *Twenty Years On* 6.

¹² Du Plessis, Hargovan and Bagaric *Principles of Contemporary Corporate Governance* 6-7.

have social or public goals that profit-seeking companies potentially do not. SOCs must be actively owned and managed so as to achieve their stated objectives in an efficient, effective and socially responsible way, while also ensuring that they fulfil their social responsibilities to government as a shareholder, other stakeholders, and the country's citizens generally.¹³

1.2 Setting the scene: How are our SOCs?

Studies¹⁴ reveal that states worldwide use SOCs, or public corporations, for many strategic reasons, *inter alia* to provide "public" as opposed to "private" goods. Governments may also run public corporations to improve labour relations in strategic economic sectors, limit private and foreign control of the domestic economy, generate public funds for the fiscus, increase service delivery, and encourage economic development and industrialisation.¹⁵ Clearly, therefore, a country such as South Africa needs this type of strategic enterprise, particularly given its unique socio-political and economic dynamics characterised by a legacy of societal segregation. So, despite renewed calls for the privatisation of SOCs in South Africa, these corporations are likely to, and indeed must, remain under state ownership for the foreseeable future. Yet that does not mean that everything at our SOCs is as it should be.

The SABC, for instance, has recently seen the resignation of board members, *inter alia* due to shareholder or, to be more precise, ministerial interference in its operational affairs, which led to a board/shareholder fallout. The corporation has had a high turnover of chief accounting officers and other executive management members. Due to non-performance, it has also received several cash injections from its shareholder to continue to deliver its services. In its 2014/15 financial statements the SABC reported a loss of approximately R395 million; at the same time, however, its embattled chief operating officer's salary increased from R2,8 million to R3,7 million.¹⁶ Poor corporate governance at the SABC is also evident in the amendment of the memorandum of incorporation by the minister, as shareholder, conferring upon herself the authority to appoint, suspend or even dismiss the chief executive officer (CEO), chief operating officer (COO) and chief

¹³ PwC 2015 <https://www.pwc.com/gx/en/psrc/publications/assets/pwc-state-owned-enterprise-psrc.pdf> 42.

¹⁴ OECD *OECD Comparative Report*, World Bank *Held by the Visible Hand*.

¹⁵ PwC 2015 <https://www.pwc.com/gx/en/psrc/publications/assets/pwc-state-owned-enterprise-psrc.pdf> 4.

¹⁶ SABC 2015 <http://www.sabc.co.za/sabc/annual-reports>.

finance officer (CFO).¹⁷ This raises questions about the division of power between the SABC board and shareholder.¹⁸

South African Airways (SAA), in turn, has had seven CEOs in less than four years.¹⁹ In the same period the corporation received a bailout of R550 million to cover fuel costs and has been granted a R5 billion guarantee by the shareholder for a restructuring exercise. This proves that the state-owned carrier is neither managed nor owned appropriately, running at a huge loss that costs taxpayers dearly.

Other SOCs such as Eskom, the Post Office and Telkom have also experienced high board and executive management turnover, perennial underperformance necessitating regular bailouts, and challenges regarding the division of power between their boards and the various shareholder ministers. Most of these boards fail to function in accordance with the requirements of the *Companies Act*.²⁰ This appears from the warning by the Companies and Intellectual Property Commission (CIPC) issued to the boards of five SOCs that they are running the risk of being declared delinquent or being placed under probation in terms of section 162 of the *Companies Act* for failing to adhere to the concerns that the Auditor-General raised in their respective annual financial reports.²¹

Another issue that seems to plague South Africa's SOCs is controversy surrounding the appointment of board members and executive officials with questionable qualifications. For good governance, board members and executive managers or officials must have the qualifications, experience and integrity to lead SOCs. If they do not, this casts doubt on the reasons for their appointment by the shareholder ministers and boards respectively.

As corporate governance in many SOCs is seemingly suspect, this article seeks to explore the root causes of these corporate governance deficiencies, the specific governance challenges involved, and how corporate governance can be enhanced. To this end, once the theoretical

¹⁷ Gqirana 2015 <https://www.news24.com/SouthAfrica/News/sabc-take-over-unconstitutional-da-20151206>.

¹⁸ Section 66 of the *Companies Act* 71 of 2008 gives the board authority to run the corporation, including appointing executive managers, while s 68 gives shareholders the power to appoint the board, but not managers.

¹⁹ Hill and Bowker 2015 <https://www.biznews.com/sa-investing/2015/11/18/poisoned-chalice-saa-gets-7th-ceo-in-4yrs-hr-turnaround-not-strategy/>.

²⁰ *Companies Act* 71 of 2008.

²¹ CIPC 2014 http://www.cipc.co.za/files/6514/1933/0901/Media_Statement_2_of_2014.pdf.

and legislative framework pertaining to SOCs has been established, the article critically examines the specific corporate governance challenges besetting a selection of South African SOCs, namely the SABC, SAA and Eskom. The fact that these SOCs have different shareholder ministries²² offers a good basis for comparison of how the role of the shareholder in particular affects corporate governance at these entities.

2 Anchoring corporate governance of SOCs in a theoretical and legislative framework

2.1 Theoretical framework

In general, corporate governance may be understood in terms of five theories, namely the agency theory, the stewardship theory, the enlightened shareholder theory, the new corporate governance theory and Wong's three pillars of SOC reform. In order to understand the peculiar agency problems inflicted on SOCs by both boards and shareholder ministers, who are not the SOC owners and whose vigilance in directing and overseeing SOCs is thus often questionable, a relevant theory would be the agency theory, supplemented with elements from Wong's theory for SOC reform. Given the nature of SOCs, being public corporations with public funding and a myriad of stakeholders, the stewardship theory may also shed more light on how the relationship between these many stakeholders affects corporate governance at the selected SOCs.

2.1.1 Agency theory, supplemented with Wong's three pillars of SOC reform

The agency problem has been aptly encapsulated as follows:

The directors of companies, being managers of other people's money, cannot be expected to watch over it with the same vigilance with which they watch over their own.²³

At the heart of the agency problem, therefore, is the self-serving or self-seeking nature of human beings.²⁴ In corporate governance, the agency dilemma arises where the governance relationship between the shareholders (the principals) and the directors (the agents) is such that the latter seek to maximise their own personal benefit through actions beneficial

²² Communications, Treasury and Public Enterprises respectively.

²³ Smith in Tricker *Corporate Governance* 58.

²⁴ Chang *State-Owned Enterprises Reform* 14.

to themselves, but detrimental to the shareholders.²⁵ This is even more pronounced when there is a separation of ownership and control, with management developing a tendency to act in this self-serving manner because it receives only a tiny fraction of the profits generated by its activities, rarely owning a substantial number of shares in such companies.

Since SOCs are run by directors and managers who do not and, by definition, cannot own the corporations, as they are owned by the state and, therefore, the citizenry, agency problems may be acute due to this divergence of interests. In fact, in SOCs, agency has two layers: the directors who serve on behalf of the shareholder, and the shareholder who represents the actual owners, namely the public. Therefore, in the same way that the directors cannot be expected to watch over the SOC's interests as vigilantly as they would watch over their own, the shareholder minister may also lack the required vigilance.²⁶ This problem of "double agency" unique to SOCs implies that corporate governance issues in these corporations centre on both agency costs and political costs. This, then, overlaps and ties in with Wong's three pillars for SOC reform, namely political interference, a lack of clear mandates and a lack of transparency.²⁷ Clearly, therefore, any assessment of corporate governance in SOCs should address those areas where agency costs, political costs (interference/meddling), a lack of transparency or a lack of clear mandates may have an influence. These would include the appointment and composition of boards, board compensation and executive remuneration, board authority in relation to the shareholder, the division and delegation of power within SOCs, ethics and integrity, the multifaceted role of government as the shareholder, regulator, financier and customer, and its impact on corporate governance, and, finally, the ownership model of SOCs, and its impact on corporate governance.

The agency problem may in turn lead to the free rider problem, which confronts SOCs in a unique way. Citizens, it is argued, do not have the means or incentive to monitor the shareholder minister and directors' performance; they lack the information and institutional capacity to negotiate management's employment or to monitor and control management's

²⁵ Chang *State-Owned Enterprises Reform* 14.

²⁶ Lin 2012 *Asian Bus Law* 115-135, which comprehensively deals with the problems of agency facing China's SOEs; Chiu and Lewis *Reforming China's State-Owned Enterprises* 140; Menozzi and Gutiérrez 2008 https://www.webssa.net/files/Gutierrez-Menozzi_Board_composition_in_SOEs.pdf.

²⁷ Wong 2004 *Corp Gov* 6.

activities.²⁸ Judging by the corporate governance challenges facing South Africa's SOCs, there seems to be some credence to the free rider argument. However, since shareholder ministers and boards account for SOCs' performance before parliament, which represents the public, it cannot be argued that there is no public monitoring. Probably closer to the truth is that parliament lacks effectiveness in monitoring the SOCs. A thorough assessment of the sufficiency of the present arrangement of ownership and control of SOCs through various ministries and the role of parliament may therefore prove useful.

2.1.2 *Stewardship theory*

It is true, however, that the underpinning assumptions of the agency theory may not apply to all directors and at all times,²⁹ and in effect ignore the complexities associated with running companies – hence the need for the stewardship theory. Unlike the agency theory, the stewardship theory largely views governance from the legal perspective of the corporation. Put simply, upon incorporation a company becomes a separate legal entity, distinct from its shareholders. The shareholders appoint directors to run the company and act as stewards for shareholder interests. The directors' report to shareholders on the results of their stewardship is usually accompanied by an independent auditor's report verifying the company's financial health.³⁰ Stewardship is also grounded in the many duties that directors owe to the company and, by extension, the shareholders, such as fiduciary duties and the duty to exercise care, skill and diligence, which are now entrenched in the *Companies Act*.³¹ Thus, there is an inherent belief that the directors will not conduct the corporation's affairs in a self-serving manner and can be trusted to operate the business in shareholders' interest.³²

The stewardship theory has come under heavy criticism in recent times, however, with the trust owing by directors having been eroded by corporate scandals involving risky trading, obscene directors' remuneration, non-disclosure and general manipulation of company books to reflect non-existent profits.³³ This underlines the need for corporate governance principles to guide boards' operations. In the SOC context, shareholder

²⁸ Victor 1985 *Colum L Rev* 1403-1444.

²⁹ Tricker *Corporate Governance* 65.

³⁰ Tricker *Corporate Governance* 65.

³¹ Section 76 of *Companies Act* 71 of 2008.

³² Donaldson and Davis 1991 *Aust J Manag* 49-64.

³³ Tricker *Corporate Governance* 66.

ministers must be very vigilant to ensure that boards act in the interest of the company and are true stewards of the state's interests.

2.2 *Legislative framework*

SOCs are legal creatures. They fall squarely within the ambit of the *Companies Act*,³⁴ and being state-owned, they are also run subject to the dictates of the *Public Finance Management Act* (PFMA).³⁵ In addition, SOC's have their own founding legislation that determines their specific public mandates. Being companies in their own right, they also have to implement the recommendations of King III.³⁶ Finally, as public-sector corporations they are expected to implement the Protocol on Corporate Governance in the Public Sector.³⁷ The following paragraphs briefly explore some of the key corporate governance issues addressed in this legislative framework, including the centrality of the board in governance issues, the division of power among corporate organs, the delegation of power by the board to the executive management, the board's appointment and composition, the board's accountability, the standards of directors' conduct, and conflict of interest.³⁸

2.2.1 *The 2008 Companies Act*

In terms of the *Companies Act*, an SOC must have a board, which is charged with the primary responsibility of exercising all the powers and performing any of the functions of the SOC, except where limited by the Act itself or the memorandum of incorporation.³⁹ This is an important provision, considering the political meddling sometimes experienced by the boards of SOC's from their shareholder ministers, with a case in point being the communications minister who sought to arrogate the power to appoint, suspend and dismiss key officers of the SABC.⁴⁰ An SOC board should

³⁴ *Companies Act* 71 of 2008, as amended by the *Companies Amendment Act* 3 of 2011, read with the *Companies Regulations*, 2011 (GN R351 in GG 34239 of 26 April 2011).

³⁵ *Public Finance Management Act* 1 of 1999 (the PFMA).

³⁶ IoDSA *King Report III*.

³⁷ Department of Public Enterprises *Protocol on Corporate Governance*.

³⁸ For a comprehensive comparison of the PFMA, *Companies Act* and King III, see PwC 2012 <https://www.pwc.co.za/en/assets/pdf/companies-act-steering-point-4.pdf>.

³⁹ Section 66(1)(2) of *Companies Act* 71 of 2008.

⁴⁰ Gqirana 2015 Gqirana 2015 <https://www.news24.com/SouthAfrica/News/sabc-take-over-unconstitutional-da-20151206>.

consist of at least three directors and must establish a social and ethics committee.⁴¹

SOC directors must act in good faith and for proper purpose. They must also act in the best interest of the SOC, and with the degree of care, skill and diligence that may reasonably be expected of similarly situated and able persons.⁴² The obligations of acting in the best interest of the SOC and of care, skill and diligence are considered discharged when a director takes reasonable, diligent steps to familiarise him/herself with a matter, has no material personal interest in any matter under deliberation, and makes rational decisions.⁴³ Given the laxity displayed by some SOC directors in the recent past, it is arguable whether these crucial provisions are observed.⁴⁴

2.2.2 *The Public Finance Management Act*

The PFMA establishes the accountability of the SOC board and requires directors to exercise the duty of utmost care so as to ensure reasonable protection of the SOC's assets and records. To this end, the directors must act with fidelity, honesty, integrity and in the best interest of the SOC in managing its financial affairs, and must on request disclose to the minister responsible for that SOC, or to the legislature to which the SOC is accountable, all material facts, including those reasonably discoverable, which may in any way influence the minister's or legislature's decisions or actions. Furthermore, directors must, within the board's sphere of influence, seek to prevent any prejudice to the SOC's financial interests.⁴⁵

Yet, despite this elaborate exposition of the duties of SOC directors to diligently manage SOC finances and disclose the necessary information to the minister shareholder and the legislature, recklessness in the financial management of SOCs such as SAA, Eskom and the SABC is rife to such an extent that they have frequently to be bailed out by the state.

In terms of section 50(2) of the PFMA, an SOC director may not act in a way that is inconsistent with the responsibilities assigned to the board, or use the position or privileges of, or confidential information obtained as, a

⁴¹ Section 72(4) of *Companies Act 71 of 2008*, read with Reg 43 of the *Companies Regulations*, 2011.

⁴² Section 76 of *Companies Act 71 of 2008*.

⁴³ Sections 76(3)(b) and (c) of *Companies Act 71 of 2008*.

⁴⁴ CIPC 2014 http://www.cipc.co.za/files/6514/1933/0901/Media_Statement_2_of_2014.pdf. The CPIC threatened to apply for an order declaring the boards of some SOCs delinquent for failure to comply with the Auditor-General's directions.

⁴⁵ Section 49 read with s 50 of the PFMA.

director for personal gain or to improperly benefit another person. To curb the abuse or misuse of information, SOC directors must disclose their interests to the board, whether direct or indirect, and withdraw from board proceedings when any matter in which they have such interest is considered, unless the board decides that the member's direct or indirect interest in the matter is inconsequential or irrelevant.⁴⁶

Section 51 requires the SOC board to maintain effective, efficient and transparent systems of financial and risk management as well as internal control; an internal audit system under the control and direction of an audit committee that complies with and operates in accordance with the Treasury regulations and the PFMA itself, and an appropriate procurement and provisioning system that is fair, equitable, transparent, competitive and cost-effective.

However, notwithstanding these clear provisions of the PFMA, some SOC directors have been implicated in meddling in the awarding of lucrative tenders.⁴⁷ Arguably, therefore, PFMA compliance in some SOC is questionable.

2.2.3 *Founding legislation of SOCs*

SOCs owe their existence to their founding legislation, which typically provides for their establishment, control, powers, functions and funding. The founding legislation is entity-specific.

The SABC, for instance, is established by the *Broadcasting Act*.⁴⁸ The objects of the Act include to establish and develop a broadcasting policy in South Africa in the public interest and, for that purpose, to establish a strong and committed public broadcasting service that will serve the needs of the South African society.⁴⁹ Part 5 of the Act deals specifically with issues of governance of the SABC. It provides that the board shall consist of two executive directors and 12 non-executive directors appointed by the president on the National Assembly's advice. It also provides for the auditing of the SABC's financial books.

SAA, in turn, used to be a subsidiary of Transnet. In 2007, however, it was independently established in terms of the SAA Act, which provided for the

⁴⁶ PwC 2012 <https://www.pwc.co.za/en/assets/pdf/companies-act-steering-point-4.pdf> 8.

⁴⁷ Brümmer and Sole 2008 *Mail & Guardian*.

⁴⁸ *Broadcasting Act* 4 of 1999.

⁴⁹ Section 2 of the *Broadcasting Act* 4 of 1999.

transfer of Transnet shares in SAA to the state, and the conversion of SAA into a public company having a share capital incorporated in terms of the *Companies Act*.⁵⁰ Section 2(c) of the SAA Act provides for the listing of SAA as a major public entity in schedule 2 to the PFMA, thus bringing SAA within the ambit of the latter Act. Although the SAA Act does not contain specific governance provisions, the company is subject to the governance provisions in the PFMA, the *Companies Act* and King III.

Similar to the SAA Act, Eskom's founding legislation – the *Eskom Conversion Act* – is not elaborate, stating as its main objective the conversion of Eskom from a statutory body into a public company, Eskom Holdings.⁵¹ In terms of the PFMA, the accounting authority of the corporation is its board of directors, which is largely responsible for mapping the strategic direction and leadership of the corporation and ensuring that corporate governance and ethics are observed. The principles of corporate governance applicable to Eskom are therefore not necessarily found in its founding legislation, but in the *Companies Act*, the PFMA, King III and the Protocol on Corporate Governance in the Public Sector collectively.

2.2.4 King III

In terms of King III, the board should act as the focal point for and custodian of corporate governance.⁵² It should comprise a balance of power, with a majority of non-executive directors, the majority of whom should be independent.⁵³ Similar to the *Companies Act* and the PFMA, King III requires SOC directors to always act in the best interest of the company.⁵⁴

More specifically, King III directs SOC boards to appreciate that strategy, risk, performance and sustainability are inseparable; to provide effective leadership based on an ethical foundation; to ensure that the SOC is, and is seen to be, a responsible corporate citizen; to ensure that the SOC's ethics are managed effectively; to ensure that the SOC has an effective and independent audit committee, and to be responsible for the governance of risk.⁵⁵ All these requirements are meant to bolster SOC governance and complement the provisions of the *Companies Act* and the PFMA.

⁵⁰ *South African Airways Act* 5 of 2007 (SAA Act).

⁵¹ *Eskom Conversion Act* 13 of 2001.

⁵² IoDSA *King Report III* Principle 2.1.

⁵³ IoDSA *King Report III* Principle 2.18.

⁵⁴ IoDSA *King Report III* Principle 2.14.

⁵⁵ IoDSA *King Report III* Principle 2.

The balance of power within the SOC board is vital. King III provides that the board itself should elect a chairman who is an independent non-executive director. For obvious reasons, the CEO of the SOC may not double up as the chairman of the board.⁵⁶ The board should also appoint the CEO and establish a framework for the delegation of authority.⁵⁷ Yet in some SOCs, the shareholder minister appoints the CEO, which probably does not auger well for corporate governance. As will be argued later, evidence exists that where a shareholder minister appoints a CEO, the latter does not believe him/herself accountable to the board, but instead to the minister who made the appointment, which renders the board powerless against the executive management. Such a board will struggle to act as a custodian of corporate governance.

2.3.5 *Protocol on Corporate Governance in the Public Sector*

The Protocol on Corporate Governance in the Public Sector ("the Protocol") provides guidance to various public entities, including SOCs,⁵⁸ taking into account SOCs' unique mandate, which includes the achievement of government's socio-politico-economic objectives. The Protocol was developed because of the realisation that the King Code, being of general application, does not cover governance issues specific to the public sector. However, the principles of the Protocol seek only to amplify and not to supersede (or contradict) those in the King Code, which is why the two should in fact be read together.⁵⁹

The Protocol recognises that SOCs face serious financial, reputational, political and operational risks,⁶⁰ and consequently have to adhere to the highest standards of corporate governance. Similar to King III, the Protocol provides that an SOC board, being a fundamental basis of corporate governance, must effectively and efficiently control and head the corporation. To this end, the Protocol requires boards to comprise both executive and non-executive directors, with the latter being in the majority to safeguard independent and objective decision-making.⁶¹

The Protocol goes on to state that the SOC board is charged with absolute responsibility for the SOC's performance, for which the board is fully

⁵⁶ IoDSA *King Report III* Principle 2.16.

⁵⁷ IoDSA *King Report III* Principle 2.17.

⁵⁸ Department of Public Enterprises *Protocol on Corporate Governance*; Koma 2009 *J Publ Adm* 451-459.

⁵⁹ Department of Public Enterprises *Protocol on Corporate Governance* para 2.2.

⁶⁰ Department of Public Enterprises *Protocol on Corporate Governance* para 2.3.

⁶¹ Department of Public Enterprises *Protocol on Corporate Governance* para 5.1.

accountable to the shareholder.⁶² It also recommends that the board should appoint one of its members, preferably an independent non-executive director (unless otherwise agreed by the shareholder), as board chairperson.⁶³

Interestingly, the Protocol acknowledges that an SOC's performance depends on its board's capabilities and performance, and recommends that the shareholder should therefore ensure that the board is properly constituted with individuals who possess integrity and accountability, competence, relevant and complementary skills, experience and expertise.⁶⁴ Despite this clear recommendation, media reports abound of SOC boards comprising some individuals of questionable integrity and character, who have been implicated in falsifying their qualifications and meddling in tenders. This raises questions as to the prudence with which the relevant shareholder ministers made those specific board appointments. Therefore, it can be concluded that the Protocol replicates the King Code in material respects, although its implementation is inadequate.

3 A detailed assessment of the state of corporate governance in SAA, the SABC and Eskom

Despite the well-established theoretical and legislative frameworks within which SOCs are understood and operated, the corporate governance challenges within many of these companies seem endless. This leads one to conclude that the problem may not necessarily be the frameworks,⁶⁵ but instead their implementation.

The poor state of corporate governance was recognised as far back as 2002, when the Protocol on Corporate Governance in the Public Sector was passed, yet the problem has remained unabated. Severe underperformance, frequent bailouts, high board and CEO turnovers and shareholder interference in board matters continue to characterise most of the country's SOCs. The National Assembly, the Presidency and many other stakeholders all agree that urgent improvement is needed. To this end the Presidency commissioned studies on SOC governance and ownership, and the National Assembly urged the Department of Public Enterprises to urgently table a bill addressing the governance of these companies. In seeking possible solutions, the following paragraphs explore the specific

⁶² Department of Public Enterprises *Protocol on Corporate Governance* para 5.1.1.1.

⁶³ Department of Public Enterprises *Protocol on Corporate Governance* para 5.1.2.1.

⁶⁴ Department of Public Enterprises *Protocol on Corporate Governance* para 5.1.6.1.

⁶⁵ Lipton and Lorsch 1992 *Bus Law* 59-77.

corporate governance challenges confronting SAA, the SABC and Eskom, speculating on the reasons for the challenges, with the ultimate aim of making recommendations for improvement.

3.1 South African Airways

Of the government SOC portfolio, the national carrier, SAA, is arguably one of the worst underperformers. At one stage the corporation developed eight turnaround strategies within a period of six years but implemented none.⁶⁶ SAA has had seven CEOs within a period of four years.⁶⁷ The corporation has also underperformed financially, necessitating a capital injection by the shareholder on numerous occasions.⁶⁸ This, accompanied by board infighting, has often led to the shareholder firing the entire board.⁶⁹ Scandals that faced SAA include tender irregularities implicating both executive managers and some board members, and board members and executive managers' bogus and/or lack of qualifications. Emanating from these issues are a number of corporate governance concerns:

- a) The fact that the qualifications ascribed to some board members are allegedly false or non-existent clearly shows that SAA board composition may be a problem. As the shareholder, the government has not taken care to appoint the best-qualified individuals to the board. Due diligence has not been followed to ensure that board members are fit and proper. King III and the Protocol on Corporate Governance in the Public Sector emphasise the need for a majority of independent directors. Granted, the majority of the members of the SOC boards, including SAA's, are "independent". Yet, due to the growing commercialisation of SOCs, directors must also have the qualifications, commercial experience and acumen to lead their corporations in a globally competitive environment – in SAA's case, the airline business. As some board members allegedly lack appropriate qualifications and commercial experience, it is thus tempting to argue that some SAA board members are political

⁶⁶ Landu 2013 Public Enterprises Committee Unhappy with SAA http://www.parliament.gov.za/live/content.php?Item_ID=2872.

⁶⁷ Landu 2013 Public Enterprises Committee Unhappy with SAA http://www.parliament.gov.za/live/content.php?Item_ID=2872.

⁶⁸ This was the subject of litigation in *Comair Limited v Minister of Public Enterprises* 2016 1 SA 1 (GP), where SAA's shareholder and SAA were accused of uncompetitive behaviour after the shareholder provided SAA with a R5 billion guarantee due to its poor financial position.

⁶⁹ Maqutu *Financial Mail*.

appointees deployed from the ranks of political parties in an insidious system of political patronage.⁷⁰

- b) The SAA board's implication in tender irregularities suggests that the established governance principle of delegation of power by the board to the executive management has not been properly followed. Although the board is supposed to govern the corporation by delegating the responsibility of managing the day-to-day affairs to the executive management, SAA's board, or at least some of its members, has been implicated in meddling in day-to-day business matters such as tenders. This not only violates the principle of power delegation, but also raises the important corporate governance issue of ethics and integrity.
- c) That the corporation developed eight turnaround strategies within six years but implemented none shows that the board has failed in its primary duty of providing strategic guidance and monitoring. It may also be argued that the board failed to discharge both its fiduciary duty and the duty of care, skill and diligence towards SAA.
- d) The reported board infighting points to an internal governance problem of poor leadership, which results in board instability – this in spite of board stability's being a *sine quo non* for any corporation's corporate governance and good performance.
- e) Finally, sound corporate governance at SAA is further impeded by the high board and CEO turnover. In terms of King III and the Protocol, the board should act as the focal point for and custodian of corporate governance.⁷¹ A high turnover means that, at any given time, the board and executive management lack the stability, continuity and institutional memory to resolve the complex governance issues confronting the organisation.

3.2 South African Broadcasting Corporation

Under the previous dispensation, the SABC was a strategic SOC due to its role as a government mouthpiece. With the dawn of democracy, the mandate of the corporation had to be extended to include the values of the

⁷⁰ A similar view is held by Howard and Seith-Purdie 2005 *Aust J Publ Adm* 56-68 commenting on governance issues in Australian public entities.

⁷¹ IoDSA *King Report III* Principle 2.1.

new *Constitution*, which resulted in the "public broadcaster" mandate.⁷² This mandate prevents the corporation from being used as a mouthpiece for a particular political party or section of society. Instead, it has to serve the entire nation in an open and transparent manner. Yet, since the business of news and the modes of relaying information are of particular importance to politicians, with the media often shaping a society's political outlook, the SABC has been exposed to considerable political intrusion from across the political spectrum. Controversy surrounding board and executive appointments and removal, executive remuneration, content and editorial policy as well as tenders, to mention only a few issues, has plagued the broadcaster in recent times.

Like other SOCs, the SABC has had an unhealthy turnover of both board and executive management members, having at times experienced a mass exodus as a result of resignations or dismissals. The broadcaster has also financially underperformed and failed to meet key targets – a fact that becomes glaringly obvious from its reported loss of some R395 million according to 2014/15 financial statements. Yet, as mentioned earlier, the corporation still managed to secure the resources to boost its embattled COO's salary with nearly R1 million.⁷³

Irregular SABC appointments of seemingly unqualified top executives abound. A prime example is the scandalous issue involving the qualifications of the former board chairperson of the public broadcaster, which, it emerged in an inquiry by the parliamentary oversight committee on communications, had been falsified.⁷⁴ In investigating the issue of the now former COO's qualifications, the former Public Protector produced a damning report disturbingly titled *When Governance and Ethics Fail*, in which she made the following startling findings on the general state of corporate governance at the SABC:

All the above findings are symptomatic of pathological corporate governance deficiencies at the SABC, including failure by the SABC Board to provide strategic oversight to the National Broadcaster as provided for in the SABC Board Charter and King III Report. The Executive Directors (principally the GCEO, COO and CFO) failed to provide the necessary support, information and guidance to help the Board discharge its fiduciary responsibilities effectively and that, by his own admission Mr Motsoeneng caused the Board to make irregular and unlawful decisions. The Board was dysfunctional and on its watch, allowed Dr Ngubane to effectively perform the function of an Executive Chairperson by authorizing numerous salary increments for Mr

⁷² See s 2 of *Broadcasting Act* 44 of 1999, as amended.

⁷³ SABC 2015 <http://www.sabc.co.za/sabc/annual-reports>.

⁷⁴ Makinana 2014 *Mail & Guardian*.

Motsoeneng. Mr Motsoeneng has been allowed by successive Boards to operate above the law, undermining the GCEO among others, and causing the staff, particularly in the Human Resources and Financial Departments to engage in unlawful conduct.⁷⁵

In a further shocking development, the shareholder minister amended the memorandum of incorporation of the SABC, putting herself in charge of the appointment, suspension and dismissal of the CEO, COO and CFO.⁷⁶ She then went on to introduce the *Broadcasting Amendment Bill*, which if passed, will bestow upon her the power to directly recommend names of board candidates to the president for appointment, thereby removing the process from the purview of the National Assembly.⁷⁷

These developments point to very specific internal and external corporate governance issues at the SABC:

- a) King III, the *Companies Act* and the Protocol on Corporate Governance in the Public Sector emphatically place the governance and management of all SOCs in their respective boards' hands. The recent move by the SABC shareholder to amend the memorandum of incorporation, arrogating to itself the power to directly appoint executives, is a clear usurpation of the board's powers. It may be argued that the usurpation is legal, as it is done by an amendment of the memorandum of incorporation, which the shareholder minister is entitled to do.⁷⁸ However, although probably legal, it is to the detriment of corporate governance, as it renders the board redundant and weakens it in relation to executive management. After all, one of the key functions of the board is executive appointments, performance monitoring and succession planning. Arrogation of this power by the shareholder minister clearly encroaches on the domain of the board, which King III forbids.
- b) From the perspective of the agency theory, the board's sanction of exorbitant executive remuneration despite the broadcaster's reported loss of R395 million in the 2014/15 financial year is a sign of mismanagement and borders on a breach of both the fiduciary duties and the duty of skill, care and diligence that the board owes to the

⁷⁵ Office of the Public Protector 2014 http://www.pprotect.org/sites/default/files/Legislation_report/SABC%20FINAL%20REPORT%2017%20FEBRUARY%202014.pdf 20.

⁷⁶ Gqirana 2015 <https://www.news24.com/SouthAfrica/News/sabc-take-over-unconstitutional-da-20151206>.

⁷⁷ *Broadcasting Amendment Bill* B39 of 2015.

⁷⁸ Section 16 of *Companies Act* 71 of 2008.

corporation. It also casts doubt on whether the board is fulfilling its stewardship role as diligently as it should.

- c) The Public Protector's report tellingly indicates that the SABC executive directors failed to provide the non-executive directors with the necessary information about the workings of the corporation. One of the reasons why King III and other corporate governance codes recommend a mix of executive and non-executive directors on boards is precisely because the latter may not have all the information required to make informed decisions in the corporation's interest.⁷⁹ Thus, where executive directors fail to provide such information, they fail in their fiduciary duty towards the corporation.
- d) In casting a vote of no confidence against one of its members in 2015, the SABC board cited

... fraudulent conduct, raising matters of the board externally without a mandate and non-disclosure of conflict of interest.⁸⁰

This further attests to the poor calibre of some of the board members; that they are unable to uphold corporate ethics and integrity, which are key corporate governance principles.

- e) The power-plays at the SABC are not beneficial for corporate governance. Corporate hierarchy puts the board at the helm of the company, with executive management answerable to it. The shareholder's steadfast and very public support of embattled executive managers compromises the board, making it hard for the board to take decisive action against such managers, whom the shareholder openly prefers. This makes for a weak board, which will most likely fail to be a focal point for corporate governance as recommended by King III. A more appropriate approach would be for the shareholder to have confidence in the board and maintain an arm's-length relationship with the corporation. In any event, if, in the shareholder's view, such a board fails the corporation, the shareholder does have the power to remove the board.⁸¹

⁷⁹ See Clarke 2007 *Del J Corp L* 76; Eric *et al* 2007 *Del J Corp L*.

⁸⁰ SAPA 2015 <https://businessstech.co.za/news/media/82433/sabc-board-gives-non-executive-director-the-boot>.

⁸¹ The shareholder's power to remove directors derives from s 71(1) of the *Companies Act* 71 of 2008.

- f) In the final instance, the issue involving the former board chairperson's falsified qualifications directly affects corporate governance: A board chairperson fulfils the important function of ensuring that the board truly becomes a focal point for corporate governance. The chairperson has to take the lead in the corporation's strategic thinking and direction, and provide counsel to the CEO.⁸² If, however, such a chair is a person of questionable character who falsifies his or her qualifications, it follows that neither the board members nor executive management will have confidence in the chair, which lack will in turn compromise the functioning of the board as a coherent whole. Lacking a solid foundation of ethics and integrity, the corporation will suffer on the corporate governance front. Of course, the more recent controversy surrounding the now former COO's qualifications did not put corporate governance at the SABC in a positive light either.

3.3 *Eskom*

This state-owned utility generates about 95% of South Africa's electricity. Yet its ability and capacity to continue providing the country with an uninterrupted power supply was recently questioned when the country experienced prolonged periods of load-shedding due *inter alia* to many years of maintenance neglect and a lack of the expansion needed to keep up with the rapid development of the national economy. After 1994 many black homes and informal settlements were electrified, but the utility failed to expand its power stations accordingly to keep up with the increased demand. In addition, the new power stations Medupi and Kusile were supposed to have both joined the grid in 2014, but as at the beginning of 2017 only one unit of Medupi had gone live. Their delay in joining the grid, along with the inadequate investment in distribution maintenance and refurbishment over time, ultimately saw the country experiencing rolling blackouts, particularly in 2014 and 2015. This has inevitably raised questions as to whether the board of Eskom has over the years served the company with skill, care and diligence.

All things considered, though, Eskom's woes go beyond its (in)ability to keep South Africans' lights on. The challenges the SOC has encountered are also inextricably linked to its weakened ability to raise the necessary capital for more power stations after questionable corporate governance practices had seen the utility receive negative credit ratings. In particular, Standard &

⁸² Redelinghuys 2012 <https://www.dailymaverick.co.za/opinionista/2012-02-01-high-ceo-turnover-and-the-role-of-the-chairman/#.Wi7NaN-WaUk>.

Poor's indicated that the questionable suspension of the company's CEO and three senior executives by the board in early 2015

... led ... [the credit-rating agency] to have less confidence in the company's corporate governance arrangements as well as in its stand-alone credit profile.⁸³

Consequently, Eskom has had to secure loan guarantees from its shareholder, namely government.

Not only did the Eskom board fire senior executives under questionable circumstances, but the shareholder has also chopped and changed the board every time a new minister of public enterprises is appointed.⁸⁴ In addition, the Eskom board has been implicated in meddling in the utility's day-to-day affairs, a case in point being that of the former chairman, who was accused of placing orders and making contractual commitments on Eskom's behalf.⁸⁵ Also, despite being a national utility with multiple stakeholders, Eskom has often faltered in its integrated reporting duties as required by King III.

Again, as with SAA and the SABC, the gloomy picture painted above presents a number of corporate governance challenges at Eskom:

- a) In recent times, the Eskom board seems to have lost sight of the cardinal corporate governance rule of maintaining a distinction between management and governance. Undeniably, the board is legally charged with the responsibility of running the corporation – this much is found in the *Companies Act* and is embraced by both King III and the Protocol on Corporate Governance in the Public Sector.⁸⁶ However, the board is supposed to govern the corporation by delegating day-to-day management responsibilities to the executive management, and monitoring that these responsibilities are discharged as per the strategic direction provided by the board. It is therefore unheard of for the board chairperson, particularly a non-

⁸³ Standard & Poor's 2015 <https://www.biznews.com/wp-content/uploads/2015/03/ESKOM-19-Mar-15.pdf>; SAPA 2015 <https://www.businesslive.co.za/bd/companies/energy/2015-03-19-sampp-downgrades-eskoms-long-term-debt-rating-following-suspensions/>.

⁸⁴ Zibi 2015 <https://www.businesslive.co.za/bd/companies/2015-03-18-bailouts-are-not-enough-for-ailing-parastatals/>.

⁸⁵ Joffe 2015 <https://www.businesslive.co.za/bd/opinion/columnists/2015-03-25-sa-pays-price-of-eskoms-disastrous-governance/>.

⁸⁶ Section 66(1)(2) of *Companies Act* 71 of 2008; Department of Public Enterprises *Protocol on Corporate Governance* para 5.1.1.1.

executive chairperson, to conclude contracts on behalf of the corporation without executive management's knowledge.

- b) Regular changes in shareholder ministers, board members and senior executives rob the corporation of the skill, competencies and institutional memory needed to implement long-term projects, particularly in a corporation such as Eskom that is involved in the complex business of electricity generation. This high turnover at all critical levels of the corporation is indeed problematic. King III also specifically requires the board to evaluate the CEO's performance and ensure a succession plan for the CEO and senior executives. At Eskom, however, the CEO was dismissed in March 2015 after serving only six months in the position, along with another three top executives. Clearly, this does not augur well for the corporation's long-term stability. In fact, it can be argued that the board's actions created further instability and uncertainty within the corporation, as it failed to manage succession within the executive team.
- c) Eskom's failure over a 20-year period to constantly increase capacity to keep pace with demand, and its failure to monitor and ensure that key projects such as Medupi and Kusile are completed on time, bring into question whether the utility's board has discharged its primary duty of acting with care, skill and diligence. This, in turn, casts doubt on the board's composition. Over time, as shareholder ministers come and go, they are likely to have appointed directors lacking the necessary skill, commercial experience and acumen to govern a utility as large and complex as Eskom, which may have compromised corporate governance.
- d) King III urges boards to appreciate the effect of stakeholder perceptions on reputation, and thus cautions them to manage reputation risk.⁸⁷ In the case of Eskom, the board failed to acknowledge this when it chose to suspend the CEO and three other senior executives at once, eliciting a negative credit rating from Standard & Poor's and hampering the utility in its efforts to raise capital in the financial markets. It may be argued that the board's approach to the matter was rather reckless and exposed the utility to negative stakeholder perceptions and risk.

⁸⁷ IoDSA *King Report III* Principle 8.1.

4 Identifying key corporate governance hurdles in SOCs, and recommending possible ways to overcome them

The general thrust of the examination of specific corporate governance issues in the three selected SOCs above is twofold.

On the one hand, many of the corporate governance challenges experienced by SOCs may be ascribed to a lack of appreciation by SOC boards of the cardinal corporate governance rules, particularly the distinction between management and governance, and the principle of board delegation. This is compounded by a general disdain for corporate ethics and integrity. Corporate governance is bound to fail when board members are implicated in scandals relating to tenders and fake qualifications. A board that allows management to develop eight turnaround strategies in six years at a very high cost, but implements none, as was the case with SAA, has clearly failed in its primary responsibility of acting as a fiduciary for the corporation and discharging its duty of care, skill and diligence. Similarly, an SOC board that has failed to provide strategic direction to management over a period of 20 years, resulting in the corporation's having to be frequently bailed out and failing to deliver the public goods on which society relies, has neglected its duty of being the driver of strategy for the corporation. There is therefore consensus that the basics of corporate governance are suspect in many South African SOCs.

Importantly, however, on the other hand, it would also seem that at the heart of many challenges facing SOCs is the role of government as a single or dominant shareholder, with political interference in the running of SOCs appearing to be substantial. Political interference in terms of executive managers' appointments, suspensions and dismissals goes against the established rule of the division of power between the board and the shareholder. The result, as has been the case in other countries also, is that executives appointed directly by the shareholder undermine the board, for they have an intimate connection with the ultimate corporate authority, namely the shareholder.⁸⁸ If the board can at any point be undermined by those who are supposed to be its delegates, it cannot be the focal point of corporate governance as recommended by King III. In the same vein, a brazen move by government as a dominant shareholder to amend an SOC's memorandum of incorporation so as to arrogate the power to appoint, suspend and dismiss executives, thus bypassing the board, is ill-conceived. It weakens the board and renders it a rubber stamp, which flies in the face

⁸⁸ Gumede *SA State-Owned Enterprises*.

of the *Companies Act*, King III and the Protocol, all of which regard the board as the primary body charged with running the corporation, appointing executives and mapping their succession.

It may of course be plausible to argue that government merely "intervenes" as opposed to "interferes" in SOCs' affairs, as there is a lot at stake for the country, and that the SOCs cannot simply "be left to collapse" while government remains oblivious, unconcerned and apathetic. Yet this argument in itself would reveal that government makes questionable board appointments in the first place if SOCs are being "run into the ground" to an extent that necessitates shareholder intervention. It would therefore appear that the shareholder intervention argument does not hold water, and that, judging by the detailed assessment in paragraph 3, it is in most instances a clear case of shareholder interference, which brings both agency and political costs.

It is therefore only logical that the seemingly dual problem hampering sound SOC corporate governance requires a dual solution. In order to arrest the problem of poor corporate governance in SOCs, government as shareholder should firstly appoint fit and proper directors, having followed a sound due-diligence process. Having professional boards composed of highly skilled individuals with actual experience and acumen to run complex business operations is at the heart of the solution to improve SOC performance in South Africa, and should be non-negotiable.

5 Conclusion

In his 2016 State of the Nation address, President Jacob Zuma acknowledged the challenges facing the country's SOCs. Indeed, the Presidency, the National Assembly, business, civil society and ordinary citizens have over the years observed SOCs deteriorate.

From a theoretical perspective, this is chiefly attributable to a double dose of agency problems. SOCs are run by directors and managers who do not own the corporations, which causes a divergence of interests between the directors and the shareholders. At the same time, shareholder ministers also do not own the corporations, with the real owners of SOCs being the public. Neither of these parties can therefore be expected to watch over the interests of the SOC with the same vigilance as they would exercise over their own. Compounding this double agency problem is the free rider challenge – the fact that citizens generally do not have the know-how and institutional capacity required to monitor the performance of the shareholder

ministers and the directors. The shocking and debilitating corporate governance issues resulting from this precarious state of affairs have been alluded to in detail in this contribution.

South Africa cannot afford to continue subsidising underperforming SOCs. The country needs to put measures in place to ensure optimal performance of its SOCs so that they can contribute not only to better service delivery but also to the national economy. It is hoped that the proposals made here may be of value to advancing the debate and restoring good governance in South Africa's SOCs.

Bibliography

Literature

Afeikhena "Privatisation and Regulation in SA"

Afeikhena J "Privatisation and Regulation in South Africa: An Evaluation" Paper presented at the *3rd International Conference on Pro-Poor Regulation and Competition: Issues, Policies and Practices* (7-9 September 2004 Cape Town)

Ahunwan *Globalisation and Corporate Governance*

Ahunwan B *Globalisation and Corporate Governance in Developing Countries: A Micro Analysis of Global Corporate Interconnection between African Countries and Developed Countries* (Transnational Publishers Ardsley NY 2003)

Brümmer and Sole 2008 *Mail & Guardian*

Brümmer S and Sole S "Moosa in R38-billion Tender Conflict" *Mail & Guardian* (8 February 2008) <https://mg.co.za/article/2008-02-08-moosa-in-r38-billion-tender-conflict> assessed 22 December 2017.

Cadbury *Report of Committee on Financial Aspects*

Cadbury A *Report of the Committee on the Financial Aspects of Corporate Governance* (Gee London 1992)

Chang *State-Owned Enterprises Reform*

Chang H *State-Owned Enterprises Reform* (United Nations Department for Social and Economic Affairs New York 2007)

Chiu and Lewis *Reforming China's State-Owned Enterprises*

Chiu B and Lewis M *Reforming China's State-Owned Enterprises and Banks* (Edward Elgar Cheltenham 2006)

Clarke 2007 *Del J Corp L*

Clarke D "Three Concepts of the Independent Director" 2007 *Del J Corp L* 73-111

Department of Public Enterprises *Protocol on Corporate Governance*

Department of Public Enterprises *Protocol on Corporate Governance in the Public Sector* (Department of Public Enterprises Pretoria 2002)

Donaldson and Davis 1991 *Aust J Manag*

Donaldson L and Davis JH "Stewardship Theory or Agency Theory: CEO Governance and Shareholder Returns" 1991 *Aust J Manag* 49-64

Du Plessis, Hargovan and Bagaric *Principles of Contemporary Corporate Governance*

Du Plessis JJ, Hargovan A and Bagaric M *Principles of Contemporary Corporate Governance* 2nd ed (Cambridge University Press Port Melbourne 2011)

Eric *et al* 2007 *Del J Corp L*

Eric M *et al* "Strangers in the House: Rethinking Sarbanes-Oxley and the Independent Board of Directors" 2007 *Del J Corp L* 33-72

Gumede SA *State-Owned Enterprises*

Gumede W *South African State-Owned Enterprises: Boards, Executives and Recruitment Report to the South African Presidential Review Committee on State-Owned Enterprises* (University of the Witwatersrand Johannesburg 2012)

Howard and Seith-Purdie 2005 *Aust J Publ Adm*

Howard C and Seith-Purdie R "Governance Issues for Public Sector Boards" 2005 *Aust J Publ Adm* 56-68

IoDSA *King Report I*

Institute of Directors in Southern Africa (IoDSA) *King Report on Corporate Governance and the King Code of Corporate Governance* (IoDSA Parklands 1994)

IoDSA *King Report III*

Institute of Directors in Southern Africa (IoDSA) *King Report on Corporate Governance and the King Code of Corporate Governance* (IoDSA Parklands 2009)

Jordan Cadbury *Twenty Years On*

Jordan C Cadbury *Twenty Years on* (Centre for Transnational Legal Studies London 2012)

Koma 2009 *J Publ Adm*

Koma S "Conceptualisation and Contextualisation of Corporate Governance in the South African Public Sector: Issues, Trends and Prospects" 2009 *J Publ Adm* 451-459

Lin 2012 *Asian Bus Law*

Lin S "Double Agency Costs in China: A Legal Perspective" 2004 *Asian Bus Law* 115-135

Lipton and Lorsch 1992 *Bus Law*

Lipton M and Lorsch W "A Modest Proposal for Improved Corporate Governance" 1992 *Bus Law* 59-77

Makinana 2014 *Mail & Guardian*

Makinana A "Parliament Launches Inquiry into Tshabalala Qualifications" *Mail & Guardian* (9 September 2014) <http://mg.co.za/article/2014-09-09-parliament-launches-inquiry-on-tshabalala-qualifications> assessed on 22 December 2017

Makuta 2009 *Malawi LJ*

Makuta E "Towards Good Corporate Governance in State-Owned Industries: The Accountability of Directors" 2009 *Malawi LJ* 55-60

Maqutu 2015 *Financial Mail*

Maqutu A "SAA Governance: Stormy Weather on Board" *Financial Mail* (20 March 2015) <http://www.financialmail.co.za/coverstory/2015/03/19/saa-governance-stormy-weather-on-board> assessed on 10 November 2015

McGregor 2015 *The Thinker*

McGregor L "Are State-Owned Companies in Africa a Lost Cause?" 2015 *The Thinker* 66-70

Nancy *et al Enron and other Corporate Fiascos*

Nancy B *et al Enron and other Corporate Fiascos: The Corporate Scandal Reader* (Foundation Press New York 2009)

OECD *OECD Comparative Report*
Organisation for Economic Cooperation and Development *OECD Comparative Report on Corporate Governance of State-Owned Enterprises* (OECD Paris 2005)

Tricker *Corporate Governance*
Tricker B *Corporate Governance: Principles, Policies and Practices* (Oxford University Press Oxford 2012)

Victor 1985 *Colum L Rev*
Victor B "Corporate Governance, Agency Costs, and the Rhetoric of Contract" 1985 *Colum L Rev* 1403-1444

Wong 2004 *Corp Gov*
Wong S "Improving Corporate Governance in SOEs: An Integrated Approach" 2004 *Corp Gov* 5-15

World Bank *Held by the Visible Hand*
World Bank *Held by the Visible Hand – The Challenge of SOE Corporate governance for Emerging Markets* (World Bank Washington DC 2006)

Case law

Comair Limited v Minister of Public Enterprises 2016 1 SA 1 (GP)

Legislation

Broadcasting Act 4 of 1999

Broadcasting Amendment Bill B39 of 2015

Companies Act 71 of 2008

Companies Amendment Act 3 of 2001

Eskom Conversion Act 13 of 2001

Public Finance Management Act 1 of 1999

South African Airways Act 5 of 2007

Government publications

GN R351 in GG 34239 of 26 April 2011 (*Companies Regulations*, 2011)

Internet sources

CIPC 2014 http://www.cipc.co.za/files/6514/1933/0901/Media_Statement_2_of_2014.pdf

Companies and Intellectual Property Commission 2014 *Boards of Directors of State-Owned Companies Face the Risk of being Declared Delinquent or being placed on Probation* http://www.cipc.co.za/files/6514/1933/0901/Media_Statement_2_of_2014.pdf accessed 10 November 2015

Gqirana 2015 <https://www.news24.com/SouthAfrica/News/sabc-take-over-unconstitutional-da-20151206>

Gqirana T 2015 *SABC 'Take-Over' Unconstitutional – DA* <https://www.news24.com/SouthAfrica/News/sabc-take-over-unconstitutional-da-20151206> accessed 4 January 2016

Hill and Bowker 2015 <https://www.biznews.com/sa-investing/2015/11/18/poisoned-chalice-saa-gets-7th-ceo-in-4yrs-hr-turnaround-not-strategy/>

Hill L and Bowker J 2015 *Poisoned Chalice: SAA gets 7th CEO in 4yrs* <https://www.biznews.com/sa-investing/2015/11/18/poisoned-chalice-saa-gets-7th-ceo-in-4yrs-hr-turnaround-not-strategy/> accessed 10 December 2015

Joffe 2015 <https://www.businesslive.co.za/bd/opinion/columnists/2015-03-25-sa-pays-price-of-eskoms-disastrous-governance/>

Joffe H 2015 *SA Pays Price of Eskom's Disastrous Governance* <https://www.businesslive.co.za/bd/opinion/columnists/2015-03-25-sa-pays-price-of-eskoms-disastrous-governance/> accessed 10 December 2015

Landu 2013 <http://www.parliament.gov.za>

Landu Y 2013 *Public Enterprises Committee Unhappy with SAA* <http://www.parliament.gov.za> accessed 2 December 2015

Menziozzi and Gutiérrez 2008 https://www.webssa.net/files/Gutierrez-Menziozzi_Board_composition_in_SOEs.pdf

Menziozzi A and Gutiérrez M 2008 *Board Composition and Performance in State-Owned Enterprises: Evidence from the Italian Public Utilities Sector* https://www.webssa.net/files/Gutierrez-Menziozzi_Board_composition_in_SOEs.pdf

Menziozzi_Board_composition_in_SOEs.pdf accessed 5 November 2015

Office of the Public Protector 2014 http://www.pprotect.org/sites/default/files/Legislation_report/SABC%20FINAL%20REPORT%2017%20FEBRUARY%202014.pdf

Office of the Public Protector 2014 *When Governance and Ethics Fail* http://www.pprotect.org/sites/default/files/Legislation_report/SABC%20FINAL%20REPORT%2017%20FEBRUARY%202014.pdf accessed 15 December 2015

PRC 2010 *The Role of State-Owned Enterprises in the Developmental State*

Presidential Review Commission 2010 *The Role of State-Owned Enterprises in the Developmental State* <http://www.thepresidency.gov.za> accessed 5 November 2015 (on file with the authors)

PwC 2012 <https://www.pwc.co.za/en/assets/pdf/companies-act-steering-point-4.pdf>

PricewaterhouseCoopers 2012 *State-Owned Companies: The New Companies Act, PFMA and King III in Perspective* <https://www.pwc.co.za/en/assets/pdf/companies-act-steering-point-4.pdf> accessed 5 December 2015

PwC 2015 <https://www.pwc.com/gx/en/psrc/publications/assets/pwc-state-owned-enterprise-psrc.pdf>

PricewaterhouseCoopers 2015 *State-owned Enterprises Catalysts for Public Value Creation?* <https://www.pwc.com/gx/en/psrc/publications/assets/pwc-state-owned-enterprise-psrc.pdf> accessed 10 November 2015

Redelinghuys 2012 <https://www.dailymaverick.co.za/opinionista/2012-02-01-high-ceo-turnover-and-the-role-of-the-chairman/#.Wi7NaN-WaUk>

Redelinghuys J 2012 *High CEO Turnover and the Role of the Chairman* <https://www.dailymaverick.co.za/opinionista/2012-02-01-high-ceo-turnover-and-the-role-of-the-chairman/#.Wi7NaN-WaUk> accessed 7 November 2015

SABC 2015 <http://www.sabc.co.za/sabc/annual-reports>

South African Broadcasting Corporation 2015 *Annual Financial Statements* <http://www.sabc.co.za/sabc/annual-reports/> accessed 7 November 2015

SAPA 2015 <https://businesstech.co.za/news/media/82433/sabc-board-gives-non-executive-director-the-boot>

SAPA 2015 *SABC Board Gives Non-Executive Director the Boot* <https://businesstech.co.za/news/media/82433/sabc-board-gives-non-executive-director-the-boot> accessed 7 November 2015

SAPA 2015 <https://www.businesslive.co.za/bd/companies/energy/2015-03-19-sampp-downgrades-eskoms-long-term-debt-rating-following-suspensions/>

SAPA 2015 *S&P Downgrades Eskom's Long-Term Debt Rating Following Suspensions* <https://www.businesslive.co.za/bd/companies/energy/2015-03-19-sampp-downgrades-eskoms-long-term-debt-rating-following-suspensions/> accessed 5 November 2015

Standard & Poor's 2015 <https://www.biznews.com/wp-content/uploads/2015/03/ESKOM-19-Mar-15.pdf>

Standard & Poor's 2015 *Research Update: South African Power Utility ESKOM Holdings SOC Downgraded to 'BB+' Following Management Suspensions; Outlook Negative* <https://www.biznews.com/wp-content/uploads/2015/03/ESKOM-19-Mar-15.pdf> accessed 5 November 2015

Zibi 2015 <https://www.businesslive.co.za/bd/companies/2015-03-18-bailouts-are-not-enough-for-ailing-parastatals/>

Zibi S 2015 *Bailouts are not enough for Ailing Parastatals* <https://www.businesslive.co.za/bd/companies/2015-03-18-bailouts-are-not-enough-for-ailing-parastatals/> accessed 5 December 2015

List of Abbreviations

Asian Bus Law	Asian Business Lawyer
Aust J Manag	Australian Journal of Management
Aust J Publ Adm	Australian Journal of Public Administration
Bus Law	Business Lawyer
CEO	chief executive officer
CFO	chief finance officer
CIPC	Companies and Intellectual Properties Commission
Colum L Rev	Columbia Law Review
COO	chief operating officer
Corp Gov	Corporate Governance
Del J Corp L	Delaware Journal of Corporate Law
IoDSA	Institute of Directors in Southern Africa
J Publ Adm	Journal of Public Administration
Malawi LJ	Malawi Law Journal
OECD	Organisation for Economic Cooperation and Development

PFMA	Public Finance Management Act 1 of 1999
PRC	Presidential Review Commission
PwC	PricewaterhouseCoopers
SAA	South African Airways
SABC	South African Broadcasting Corporation
SOC	state-owned company