

**A legal analysis of the application of corporate governance
principles in Musina Local Municipality.**

By

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ABSTRACT

This mini-dissertation discusses the application of the principles of corporate governance in the Musina Local Municipality. It further discusses the legislative framework and the institutions of government which are responsible for the effective implementation of corporate governance in the local government sphere. It further discusses the challenges faced by Musina Local Municipality which are ranging from fraud and corruption and poor financial management and this result in poor service delivery.

DECLARATION BY SUPERVISOR

I, **Adv. Lufuno Tokyo Nevondwe**, hereby declare that this mini-dissertation by Ms. **Cynthia Jose Merrill Masingita Mkhabele** for the degree of Master of Laws (LLM) in Labour Law be accepted for examination.

.....

Adv. Lufuno Tokyo Nevondwe

2014

DECLARATION BY STUDENT

I, Ms. **Cynthia Jose Merrill Masingita Mkhabele** declare that this mini-dissertation submitted to the University of Limpopo (Turffloop Campus) for the degree of Masters of Laws (LLM) in Labour Law has not been previously submitted by me for a degree at this university or any other university, that it is my own work and in design and execution all material contain herein has been duly acknowledged.

.....

Cynthia Jose Merrill Masingita Mkhabele

2014

DEDICATION

This mini-dissertation is dedicated to my late father Ndhima Adolf Mkhabele and my uncle Morris Gezani Ngobeni and Mr. Andries Tatane, who was killed by the members of the South African Police Service (SAPS) during service delivery protests in Ficksburg. May their soul rest in peace.

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LIST OF ABBREVIATIONS

ADRS	Alternative Dispute Resolution
AG	Auditor General
CEO	Chief Executive Officer
IoDSA	Institute of Directors of South Africa
IT	Information Technology
PP	Public Protector
PSC	Public Service Commission
SABC	South African Broadcasting Corporation
SOE	State owned Entity
SCOPA	Standing Committee on Public Accounts
JSE	Johannesburg Stock Exchange
NT	National Treasury
MM	Municipal Manager
MFMA	Municipal Finance Management Act
MLM	Musina Local Municipality

TABLE OF STATUTES

1. The Constitution of the Republic of South Africa 108 of 1996.
2. Municipal Finance Management Act 56 of 2003.
3. Municipal System Act 32 of 2000.
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CHAPTER ONE: INTRODUCTION

1.1 Historical background to the study

The history of corporate governance¹ is traced back to 1961, when South Africa was banished from participating in the global economy because of its apartheid policies. Prior to 1990, the South African economy was almost entirely isolated due to sanctions enforced during the Apartheid era. Most large corporations were family owned conglomerates, operating within a culture of cronyism and a general lack of accountability.²

Post 1994, the African National Congress (ANC) won the general election and became a democratically elected government. The new Constitution abolished all apartheid policies and this paved a way for the re-admission of South Africa into the world of economy.³The fall of Masterbond, Tollgate, Leisurenet, Unifer, Saambou and CNA raised a need for corporate governance in South Africa and to reduce future corporate failures.

Between 1993 and 1994, the Commission led by Judge Mervyn E King was set up. In 1994, South African government published the *King Report on Corporate Governance* under the patronage of the Institute of Directors of Southern Africa (IDOSA). At that particular period the South African government was still responding to social and political transformation from apartheid government. The purpose of the King Report 1994 was, and remains, to promote the highest standards of corporate governance in South Africa.⁴The King Committee issued the first report in 1994 (King Report I), 2002 (King Report II) and 2009 (King Report III). The recommendations made by

¹Corporate governance embodies processes and systems by which corporate enterprises are directed, controlled and held to account.

²Schulschenk J, Corporate Governance Research Programme, Albert Luthuli Centre for Responsible Leadership, August 2012, p.1.

³South African Constitution Act, 108 of 1996

⁴King Report II, Para 3, p.7.

King Committee were incorporated into law in the New Companies Act⁵ to enhance good governance in South Africa.

According to Nevondwe, King Report III and the code apply to all entities incorporated in and resident in South Africa, while the King Report II only applied to certain categories of business enterprises, namely listed companies, financial institutions and public sector, while companies falling outside these categories were merely required to consider the application of the King Report II insofar as it was applicable.⁶ King Report III and the code apply to all companies listed on JSE and all other entities do not have any obligation to comply with it. This report is highly recommended and has considerable persuasive force for those entities that are not forced to apply it.

Internationally, the USA codified a significant part of its corporate governance provisions in the Sarbanes-Oxley Act, 2002 and legal sanctions are applied for non-compliance with this Act. These principles of corporate governance if they are applied successfully, they can assist to fulfil the purposes of the Act, promote compliance with the Bill of Rights as provided for in the Constitution, in the application of company law, promote innovation and investment in South African markets and lastly promote the development of economy by encouraging transparency and high standards of corporate governance.⁷

The King Report 1994 went beyond the financial and regulatory aspects of the corporate governance in advocating an integrated approach to corporate governance in the interest of a wide range of stakeholders having

⁵Act, 61 of 2008.

⁶Nevondwe L, A critical discussion of corporate governance principles in the public sector, 5th International SPMA Conference, 16-17 November 2012, University of Pretoria, South Africa.

⁷Nevondwe L, The principles of corporate governance with specific reference to the case of *South African Broadcasting Corporation (SABC) Ltd v Mpofu* [2009] 4 ALL SA 169 (GSJ), Value 2012 Conference, 28 May 2012, Champagne Sports Resort, KwaZulu-Natal Province. See also Nevondwe L, The principles of corporate governance in the local government sphere, South African Association of Public Administration and Management conference, 3-5 April 2013, Cape Peninsula University of Technology, Cape Town.

regard to the fundamental principles of good financial, social, ethical and environmental practice.⁸ The King Commission adopted a participative corporate governance system led the company with integrity. The companies will no longer do as they please, they have to account to the society and protect the environment.

The ethics of corporate governance requires all deliberations, decisions and actions of the board and executive management to be based on the following four ethical values underpinning good corporate governance:⁹

- (a) *Responsibility*: The board should assume responsibility for the assets and actions of the company and be willing to take corrective actions to keep the company on a strategic path that is ethical and sustainable.
- (b) *Accountability*: The board should be able to justify its decisions and actions to shareholder and other stakeholders.
- (c) *Fairness*: The board should ensure that it gives fair consideration to the legitimate interests and expectations of all stakeholders of the company.
- (d) *Transparency*: The board should disclose information in a manner that enables stakeholders to make an informed analysis of the company's performance, and sustainability.

According to Cassim et al "corporate governance is concerned with the structures and processes associated with management, decision-making and control in organisations."¹⁰ Cassim et al further states that one of the most commonly cited definitions of corporate governance emanates from the Cadbury Report, which defines corporate governance as the system by which companies are directed and controlled. Corporate governance is based on principles such as conducting the business with all integrity and fairness, being transparent with regard to all transactions, making all the

⁸King Report II,Para 4, p.7

⁹Principle 1.1.14 of the King Report III Report.

¹⁰Cassim FHI, Cassim MF, Cassim R, Jooste R, Shev J, and Yeats J, Contemporary Company Law (2013), p472-473.

necessary disclosures and decisions, complying with all the laws of the land, accountability and responsibility towards the stakeholders and commitment to conducting business in an ethical manner.¹¹

From the above explanation, it can be said that corporate governance had been originally associated with the companies and having a domain in the company law.¹²

Koma asserts that the concept of corporate governance is not solely confined to private sector setting and as such it is incumbent upon public sector organisations to embrace corporate governance with a view to improve their efficiency, effectiveness, accountability and reputation.¹³ Senator Abetz correctly pointed out that:

“while corporate governance concepts and terminology may have originated in the private sector, ‘its impact has deepened and broadened ...[and] is no longer reserved for the private sector, but also applies to other areas of society – the education sector, the not-for-profit sector, and of course, the public sector.”¹⁴

It is clear that corporate governance plays a crucial role in the public sector.

1.2. Statement of the research problem

¹¹Thomson L.M, what is corporate governance? 18 January 2009, available at: http://articles.economictimes.indiatimes.com/2009-01-18/news/28462497_1_corporate-governance-satyam-founder, accessed 1 December 2012.

¹²Company law is essentially concerned with: first, making available the corporate form to facilitate and regulate the process of raising capital (corporate finance or capitalisation of a company); and, secondly, imposing controls on persons whose power is derived from the finance that the users of the corporate form have put at their disposal (i.e. corporate governance), see Nevondwe L, Corporate governance principles: lessons to be learnt, *The Thinker Political Journal*, Vol.44 October 2012, p16.

¹³Koma “Conceptualisation and contextualisation of Corporate Governance in the South African Public Sector: Issues, Trends and Prospects” 2009 *Journal of Public Administration* (44) 451- 454.

¹⁴Abetz, Senator “The Role of Corporate Governance in improving transparency and accountability in the public sector” 2003 Speech prepared for the International Quality Productivity Centre Conference 11 June 2003 www.dofa.gov.au/scripts/media (accessed 18 January 2013).

Generally in South Africa, there is no proper implementation of corporate governance in the municipalities including Musina Local municipality. In Musina Local Municipality, there are challenges of vacancies which are not filled at senior management level. In the financial years 2011-2012 and 2012-2013, the report of the Auditor-General on the financial statements of the 286 municipalities were shocking and it is rocked by bad audit reports, disclaimer, and qualified audits.

The state of the corporate governance at Musina Local Municipality is at zero level. Since 1994, the municipality never received clean audit and this presents challenges to service delivery which is at poor state.

There are national challenges on the structure of the municipal council which also affect Musina Local Municipality. Councils at municipality level are comprised of ward councillors who are voted during local government elections. These officials more often are not properly qualified since there is no requirement to be a councillor; you need only to be chosen by your respective political party. The municipal councils are entrusted with millions and billions of budgets to provide basic services to the communities they serve. According to AG report of 2011-2012, the Musina Local Municipality committed an unauthorised, irregular, fruitless and wasteful expenditure amounting to R22 716 710 which was not accounted for. There are challenges when municipal councils are not skilled since this will affect the management of the budgets.

The South African municipalities has been heavily criticised for its poor administration which results in the poor delivery of services to the public. The fraud and corruption in the local government sphere and public service in general remains a huge challenge for good governance in the public sector where huge sums of state funds go missing without being accounted for and

state resources being utilised for personal gain. It is therefore evident that the public sector lacks adequate reporting system to support good governance.

The principles of good governance as provided by the King III report are equally applicable to the public sector as they are applicable to the private sector. These principles provide profound guidelines that should be followed in order to improve effectiveness and accountability in the public sector. However these principles seem to be disregarded and this contributes significantly to the corruption and the effectiveness of the public sector to deliver services to the public.

It is also noted that the implementation of sound corporate governance and financial management in the municipalities is hindered due to various managerial shortcomings.¹⁵ This includes *inter alia*, the lack of understanding of King Reports and the provisions of the Municipal Finance Management Act¹⁶ and Public Finance Management Act (PFMA).¹⁷

1.3. Literature review

It is evident that corporate governance is often associated more with the private sector than the public sector.¹⁸ The cardinal question is whether corporate governance is only confined to the private sector. From the definitions of corporate governance stated above, it can be deduced that corporate governance describes the overall management of an institution including municipalities.

¹⁵Van Wyk H.A, Perspectives of effective financial management in the public sector, Journal of Public Administration Vol. 39 No 3 September 2004, 414.

¹⁶Act, 56 of 2003.

¹⁷Act, 1 of 1999.

¹⁸ See also Van Wyk H.A, Perspectives of effective financial management in the public sector, Journal of Public Administration Vol. 39 No 3 September 2004, p413.

The term “Corporate” refers to a body or institution, and the use of the term corporate in “corporate governance” can be extended beyond companies and business corporations in the private sector.¹⁹ Corporate governance has, therefore, a broader application and should also form the base of financial management in the public sector.²⁰ We therefore agree that the overall management of an institution under corporate governance is not restricted to private sector but is also applicable to the public sector entities.

The governance in the public sector has a political dimension because the roles of the stakeholders in governing the public sector are important. The stakeholders will be represented by a governing body, for example Parliament, who has, through elected representatives the responsibility for appraising performance.²¹ The stakeholders also include providers of resources (taxpayers, lenders, bondholders, and creditors), service provider/partners (employees, contractors, and joint venture partners and other government entities), users of services (individuals and businesses who benefit from the services that the entity provides), interest groups, analysts/statistic gatherers (policy analysts, economists, financial analysts, rating agencies), media and the wider community.²²

The main objective of corporate governance in the public sector is to ensure that the government deliver services in a way that is equitable, efficient, effective and affordable, and consistent with the principles of service delivery such as universal coverage and environmental sustainability.²³ All these aspects are in harmony with the principles of corporate governance and indicate that corporate governance is just as applicable to the public sector as it is to the private sector.²⁴

¹⁹*Ibid.*

²⁰*Ibid.*

²¹*Ibid.*

²²*Ibid.*, at page 413-414.

²³*Ibid.*, at page 414.

²⁴*Ibid.*, at page 414.

I opine that corporate governance principles should be vigorously enforced both in the national and provincial governments for effective financial management. These principles involve openness, integrity and accountability, which can also be subdivided into features like independence, honesty, fairness, objectivity, discipline and responsibility.²⁵

The implementation of sound corporate governance and financial management in the public sector is hindered due to various managerial shortcomings.²⁶This includes *inter alia*, the lack of understanding of King Reports and the provisions of the Municipal Finance Management Act and Public Finance Management Act (PFMA).²⁷

According to Nevondwe and Matotoka the local sphere of government is characterized by poor financial controls thus opening an avenue for fraudulent activities.²⁸This is despite the existence of MFMA. The object of MFMA)is to secure sound and sustainable management of the fiscal and financial affairs of municipalities and municipal entities by establishing norms and standards and other requirements for ensuring transparency, accountability and appropriate lines of responsibility in the fiscal and financial affairs of municipalities and municipal entities; the management of their revenues, expenditures, assets and liabilities and the handling of their financial dealings; budgetary and financial planning processes and the co-ordination of those processes with the processes of organs of state in other spheres of government; borrowing; the handling of financial problems in municipalities; supply chain management; and other financial matters.

Nevondwe et al further stated that The MFMA aims to improve accountability by placing responsibility for decisions in the hands of each accounting officer

²⁵*Ibid*,at page 414.

²⁶*Ibid*,at page 414.

²⁷Act, 1 of 1999.

²⁸Nevondwe and Matotoka M, The role of the audit committees towards achieving a clean audit in 2014 in the local government sphere, 2nd Annual Conference, SAAPAM Limpopo Chapter,15-16 August 2013.The legacy of Rivonia Trial and its contribution to judicial activism

and by ensuring that there is a framework of support from National Treasury, for example, in the form of 'best practice' guidelines, to assist managers in delivering services to communities as efficiently and effectively as possible (National Treasury, Supply Chain Management, 2005: 9). This therefore begs the question of whether MFMA is applied adequately in the municipalities. Are those entrusted with responsibility held accountable when they neglect to comply with the provisions of MFMA? According to Mle and Maclean (2011:1373) lack of controls, mismanagement and lack of governance principle are the key reasons for the state of despair in municipalities.

1.4. Aims and objectives of the study

This study is aimed at conducting a concrete analysis of the current laws, policies, regulations and guidelines dealing with the application of corporate governance in Musina Local Municipality. This study will also evaluate the role played by relevant stakeholders including National departments and provincial departments, Auditor General, Public Service Commission, National Treasury and Public Protector in terms of initiating the passing of laws which are in favour of good corporate governance in the local government sphere.

This study aims to assist and it will also be beneficial to government through the Department of National Treasury, civil society organizations and members of the public. Lastly, this study will also assist young and emerging academics who are intending to study in the similar topic to bring insight into their programmes. It will also benefit students who are studying Company Law, Business Entities, Business Law and Corporate Law.

1.5. Research Methodology

Basically, the research methodology to be adopted in this study is qualitative. Consequently, a combination of legal comparative and legal historical methods, based on jurisprudential analysis, is employed. Legal comparative

method will be applied to find solutions, especially the application of corporate governance in Musina Local Municipality.

The purpose of historical research method on the other hand, will be to establish the development of legal rules, the interaction between law and social justice, and also to propose solutions or amendments to the existing law or constitutional arrangement, based on practical or empirical and historical facts. Concepts will be analysed, arguments based on discourse analysis and developed. A literature and case law survey of the constitutional prescriptions and interpretation of statute will be made. This research is library based and reliance is made of library materials like textbooks, reports, legislations, regulations, case laws, articles and papers presented on the subject in conferences. The study had also done the interviews and questionnaires with officials of the Musina Local Municipality and members of the public.

1.6. Scope and Limitation of the Study

This mini dissertation consists of four chapters. Chapter one is an introductory chapter which lays down the foundation. Chapter two discusses the principles of corporate governance. Chapter three discusses the legislative framework governing corporate governance in the municipalities. Chapter four deals with conclusion drawn from the whole study and make recommendations.

CHAPTER TWO: THE PRINCIPLES OF CORPORATE GOVERNANCE

2.1. Principles of corporate governance

The following are the principles of corporate governance as provided by the King III Report and code, namely:

- ethical leadership and corporate citizenship;
- boards and directors;
- audit committees;
- the governance of risk;
- the use of information technology;
- compliance with the laws, codes, rules and standards;
- internal audit;
- governing stakeholder relationships; and
- Integrated reporting and disclosure.

2.1.1. Ethical leadership and corporate citizenship

The underlying philosophy of the King III Report revolves around leadership, sustainability and corporate citizenship. On the issue of leadership, the King III Report requires the municipal councils, Municipal Managers, senior management and board of directors in case of municipal entity to provide effective leadership based on an ethical foundation.²⁹ Ethics or integrity is the foundation of and very reason for corporate governance. An ethical corporate culture constitutes more than social philanthropy or charitable donations.³⁰ The reasoning behind the ethics of corporate governance, which requires the board of directors to ensure that the company is run

²⁹Principle 1.1 of the King III Report. See also Nevondwe L, *opcit* at page 17. See further Nevondwe L, A critical discussion of Corporate Governance principles in the public sector, a paper presented at 5th International SPMA Conference, University of Pretoria, 16-17 November 2012.

³⁰King III Report, Para 9 p 20. See also Nevondwe L, *opcit* at page 17. See further Nevondwe L, A critical discussion of Corporate Governance principles in the public sector, a paper presented at 5th International SPMA Conference, University of Pretoria, 16-17 November 2012.

ethically, is that, as this is achieved, the company earns the respect and approval of those affected by and affecting its operations.³¹The Constitution concur with King III Report that that public the administration should promoted and maintained a high standard of professional ethics.³²

2.1.2. Municipal Councils/ Boards and Directors

The King III Report places greater emphasis on the leadership, integrity and responsibility of the board. The board constitutes a fundamental base of corporate governance in the State-Owned Entities (SOE's). Accordingly, each SOE should be headed and controlled by an effective and efficient board, comprising of executive and non-executive directors of whom, preferably, the majority should be non-executive directors in order to ensure independence and objectivity in decision making.³³

The King III Report differentiates between executive and non-executive directors. An executive director is involved with the day today management of the SOE. He or she is in the full- time salaried employee of the SOE³⁴ and is generally under a contract of service with the company. A non- executive director, on the other hand, is a part-time director. He or she is not involved in the management of the SOE, but plays an important role in providing objective judgment, independent of management, on issues facing the SOE.³⁵Generally, non-executive directors contribute to the development of management strategies and monitor the activities of the executive

³¹King III Report, Para 12 p 21. See also Nevondwe L, *opcit* at page 17. See further Nevondwe L, A critical discussion of Corporate Governance principles in the public sector, a paper presented at 5th International SPMA Conference, University of Pretoria, 16-17 November 2012.

³²White Paper on Transforming Public Service Delivery,1997, p.7.

³³Department of Public Enterprises, protocol on corporate governance in the public sector,2002, p9.

³⁴Annex 2.2 of the King III Report. See also Nevondwe L, *opcit* at page 17.

³⁵Annex 2.3 of the King III Report. See *Fisheries Development Corporation of SA Ltd v Jorgenses, Fisheries Development Corporation of SA Ltd v AWJ Investment (Pty) Ltd* 1980 (4) SA156 (W) 165.

directors.³⁶ A non-executive director must not be biased and must always rescue himself where conflict of interests arises.³⁷

In *Fisheries Development Corporation of SA Ltd v Jorgensesand Fisheries Development Corporation of SA Ltd v AWJ Investment (Pty) Ltd*³⁸, the court stated that non-executive directors are not bound to give continuous attention to the affairs of the company. Their duties are of an intermittent nature, to be performed at periodical board meetings and at any other meetings that may require their attention. Non-executive directors are expected to attend board and relevant board committee meetings and to acquire and maintain a broad knowledge of the economic environment, industry and business of the company.³⁹ The role of non-executive directors and the independence that they are believed to bring to the board of directors has been a consistent theme of corporate governance theories, policies and programmes.⁴⁰

An independent non-executive director is a director who is required to be independent in character and judgment.⁴¹ There should be no relationships or circumstances that are likely to affect, or could appear to affect, their independence. In this context, 'independence' means the absence of undue influence and bias that could be affected by the intensity of the relationship between the director and the company, rather than any particular fact such as length of service or age. Not only should the director be independent in fact, but he or she should also appear to be independent in the perception of a reasonably informed outsider.⁴²

³⁶Haupt A and Malange J, *Corporate Law for Commercial Students* (2010), p 63.

³⁷Nevondwe L, A critical discussion of Corporate Governance principles in the public sector, a paper presented at 5th International SPMA Conference, University of Pretoria, 16-17 November 2012.

³⁸In *Fisheries Development Corporation of SA Ltd v Jorgensesand Fisheries Development Corporation of SA Ltd v AWJ Investment (Pty) Ltd* (1980, 4 SA156).

³⁹Nevondwe L, *opcit* at page 17.

⁴⁰*Ibid.*

⁴¹*Ibid.*

⁴²*Ibid.*

The following are the roles of the Board in the SOE:

- The board of the SOE has absolute responsibility for the performance of the SOE and is fully accountable to the shareholder for such performance. As a result, the board should give strategic direction to the SOE, and in concurrence with the Executive Authority appoint the chief executive officer and ensure that an effective succession plan for all directors and key executives is in place and adhered to.⁴³
- In the SOE, the board of directors are responsible for submission of all reports, returns, notices and other information to parliament, the executive authority, National Treasury, as may be required by the statutes.⁴⁴
- The board is also responsible for the management, including the safeguarding, of the assets and for the management of the revenue, expenditure and liabilities of SOE.⁴⁵
- The board must ensure that SOE has an Affirmative Action Plan in place to advance members of the groups historically discriminated against, including on the grounds of race, colour, origin, gender and disability.⁴⁶
- The directors shall, in the exercise of their powers, use their best endeavours to achieve the objectives of the SOE as set out in the Memorandum of Association of the SOE and as conveyed to them by the Executive Authority.⁴⁷
- If the board is unable to comply with any of the responsibilities determined for it in the PFMA, it must promptly report the inability, together with reasons, to the Executive Authority and the National Treasury.⁴⁸
- The board of an SOE in terms of section 55 of the PFMA

⁴³Department of Public Enterprises, protocol on corporate governance in the public sector,2002, p10.

⁴⁴Nevondwe L, A critical discussion of Corporate Governance principles in the public sector, a paper presented at 5th International SPMA Conference, University of Pretoria, 16-17 November 2012.

⁴⁵*Ibid.*

⁴⁶*Ibid.*

⁴⁷*Ibid.*

⁴⁸*Ibid.*

- 1) Must keep full and proper records of the financial affairs of the SOE;
- 2) Prepare financial statements for each year in accordance with GAAP
- 3) Must submit the draft financial statements within two months after year-end of the treasury and auditors for auditing; and
- 4) Must submit the audited statements within 5 months after the financial year-end to the Executive Authority, National Treasury and the Auditor-General (AG)

The board must annually in consultation with its Executive Authority conclude a shareholder's compact. The Shareholder's compact must document the mandated key performance measures and indicators to be attained by the SOE as agreed between the parties. The board of an SOE must also establish procedures for quarterly reporting to the Executive Authority to facilitate effective performance monitoring, calculation and corrective action.⁴⁹

2.1.3. Audit committees

The King III Report requires the board of directors to ensure that the company has an effective and independent audit committee. An independent audit committee plays central role in corporate governance and is vital to ensure the integrity of integrated reporting and financial controls and to identify and manage financial risks.⁵⁰

The PFMA and MFMA also require public sector institutions to establish independent audit committees and internal audit committees. The report requires listed companies and SOEs to establish an audit committee. The shareholders must elect the members at each annual general meeting.

⁴⁹*Ibid.*

⁵⁰*Ibid.* See also Van der Nest D.P, Thornhill C. and De Jager J, *Journal of Public Administration* Vol. 43 no 4 December 2008,p548 -549.

Private companies, non-profit companies and personal liabilities companies may voluntarily appoint an audit committee and define its composition, purpose and duties in the memorandum of incorporation.⁵¹

The audit committee should comprise of at least three members who should be suitably skilled and experienced non-executive director. The Companies Act also prescribes further requirements. The chairperson of the board of directors should not be chairperson or member of the audit. The chairperson must only attend meeting upon invitation.⁵²

The appointment of audit committee members in state-owned entities is governed by the PFMA and MFMA. Members of the audit committee must meet at least four times in a year. They should also meet with internal and external auditors at least once a year without the management being present.⁵³

The mismanagement of public funds has led to public officials being required to demonstrate how the public funds are being utilised. These accountability requirements and the requirement for sound financial management have brought public sector managers in contact with accountability instruments such as internal audit and the audit committee of the institution.⁵⁴ In essence, audit committees promote accountability which is one of the important elements of corporate governance.

PFMA also touches on the element accountability in the public sector through section 38. Section 38 requires the accounting officer therein to ensure that the department has and maintains a system of financial and risk management and internal control. This system of internal control must be monitored by an internal audit function, under the control and direction of

⁵¹*Ibid.*

⁵²*Ibid.*

⁵³*Ibid.*

⁵⁴Van der Nest D.P, *et al*, p546.

an audit committee. It can be seen that the audit committee has been built into the legislative framework as an accountability instrument.⁵⁵

2.1.4. The governance of information technology (IT)

The governance of IT is dealt with for the first time in the King III Report.⁵⁶As acknowledged by the King III Report, IT has become an integral part of doing business and is fundamental to support, sustain and grow the business. The King III Report states that IT governance is not an isolated discipline, but an integral part of overall corporate governance. Information technology governance can be considered as a framework that supports the effective and efficient management of IT resources to facilitate the achievement of a company's strategic objectives.⁵⁷

The IT governance framework should include the relevant structures, processes and mechanisms to enable IT to deliver value to the business and to mitigate IT risks. It should focus on the governance of the information as well as the governance of technology.⁵⁸The King III Report requires the board of directors to be responsible for IT governance. The board may appoint an IT steering committee or similar forum to assist with its governance of IT. It is recommended that the Chief Executive Officer (CEO) appoints a Chief Information Officer (CIO) to be responsible for the management of IT. There is an increased risk to organisations that embrace IT and its directors should ensure that the reasonable steps have been taken to govern IT.⁵⁹

In exercising their duty of care, directors should ensure that prudent and reasonable steps have been taken in regard to IT governance. To address this by legislation alone is not the answer. International guidelines have been

⁵⁵Van der Nest D.P *et al* ,p547-548

⁵⁶Chapter 5 of King III Report.

⁵⁷Nevondwe L, *opcit* at page 18.

⁵⁸*Ibid.*

⁵⁹*Ibid.*

developed through organisations such as ITGI and ISACA (COBIT and Val IT), the ISO authorities (eg: ISO 38500) and various other organisations such as OCEG. These may be used as a framework or audit for the adequacy of the company's information governance for instance, but it is not possible to have one size fits all. However, companies should keep abreast of the rapidly expanding regulatory requirements pertaining to information.⁶⁰

2.1.5. The Governance of risk

The King III Report requires that the board of directors be responsible for the governance of risk and determine the levels of risk tolerance that the company is able to bear in the pursuit of its objectives. Risk is defined as the taking of risk for reward. The board of directors should determine the levels of risk tolerance at least once a year. It should review these limits during periods of increased uncertainty or any adverse changes in the business environment.

It is recommended that the board's responsibility for risk governance be expressed in the board charter in addition, the board's responsibility for risk governance should manifest in a documented risk management policy and plan, which should be widely distributed throughout the company and reviewed by the board at least once a year. The board should also comment in the integrated report on the effectiveness of the system and process of risk management.⁶¹

A risk committee or audit committee should assist the board in carrying out its risk responsibilities.⁶² The risk committee should have at least three members and should include executive and non-executive directors.⁶³

⁶⁰Corporate and Commercial/King Report on Governance for South Africa – 2009, available at: <http://www.library.up.ac.za/law/docs/king111report.pdf>, accessed 3 December 2012.

⁶¹*Ibid.*

⁶²Principle 4.3 of the King III Report.

⁶³Principle 4.3.2.2 and 4.3.2.4 of the King III Report.

The committee should comprise people with adequate risk management skills and experience to equip the committee to perform its functions, and may invite independent risk management experts to attend its meetings, if necessary.⁶⁴ It should convene at least twice a year.⁶⁵

Regarding risk disclosure, the King III Report recommends that the board of directors should ensure that there are processes in place that enable complete, timely, relevant, accurate and accessible risk disclosure to stakeholders.⁶⁶ Undue, unexpected or unusual risks should be disclosed in the integrated report.⁶⁷

In the public sector, risk management involves identifying risks that may prevent a department from achieving its objectives, analysing those risks, avoiding certain risks and managing those that remain. It has been suggested that audit committees should fulfil the role of assisting to assess risks facing the government department.⁶⁸

In the premise, directors should keep the executive authority informed of risk management strategies by outlining them in corporate plans and progress reports, and other reports when necessary.⁶⁹ In addition, and unless otherwise qualified because of circumstances applying to a particular SOE, corporate plans and progress reports should contain a statement from the board that the board has appropriate risk management policies and practices in place and that adequate systems and expertise are being applied to achieve compliance with those policies and procedures.⁷⁰

2.1.6. Compliance with laws, rules, codes and standards.

⁶⁴King III Report Para 20 p 75.

⁶⁵Principle 4.3.2.4 of the King III Report.

⁶⁶Principle 4.10 of the King III Report.

⁶⁷Principle 4.10.2 of the King III Report.

⁶⁸Van der Nest D.P *et al*, p550.

⁶⁹Department of Public Enterprises, protocol on corporate governance in the public sector,2002,p47.

⁷⁰*Ibid.*

The King III Report requires the board of directors to ensure that the company complies with all applicable and relevant laws and that it considers adherence to non-binding rules, codes and standards.⁷¹A compliance culture should be encourage through leadership, establishing the appropriate structures, education and training, communication and the measurement of key performance indicators relevant to compliance.⁷²The board has a duty to take necessary steps to ensure the identification of laws, rules, codes and standards that apply to the company.⁷³Details must be disclosed by the board in its integral report on how it has discharged its responsibility to establish an effective compliance framework and process.⁷⁴

The King III Report goes as far as to require the board and each individual director to have a working understanding of the effect of the applicable laws, rules, codes and standards on the company and its business.⁷⁵Directors should sufficiently familiarize themselves with the general content applicable laws, rules, codes and standards to be able to adequately discharge their fiduciary duties and their duty of care, skill and diligence in the best interest of the company.⁷⁶

Compliance risk, which is the of damage arising from non-adherence to the law and regulations, to the company's business model, objectives, reputation, going concern, stakeholders relationships or sustainability, should form integral part of the company's risk management process.⁷⁷

⁷¹Principle 6.1 of the King III Report. See also Nevondwe L, *opcit* at page 19.

⁷²King III Report Para 21 p 91.

⁷³*Ibid* Para 11 p 90.

⁷⁴Principle 6.1.2 of the King III Report.

⁷⁵Principle 6.2 of the King III Report.

⁷⁶Principle 6.2.2 of the King III Report.

⁷⁷Principle 6.3 and King III Report Para 14 p 90.

The King III Report suggests that the board delegates to management the implementation of an effective compliance framework and process.⁷⁸ An independent, suitably skilled compliance officer may be appointed.⁷⁹ He or she should have access to, and interact regularly on, strategies compliance matters the board and/or appropriate board committee and executive management.⁸⁰ Although the chief executive officer may appoint a compliance officer to assist in the execution of the compliance function, note that accountability to the board of directors remains with the chief executive officer.⁸¹

2.1.7. Internal audit

The King III Report requires the board of directors to ensure that there is an effective risk based internal audit.⁸² An internal audit should evaluate business processes, perform an objective assessment of the effectiveness of risk management and the internal control framework, systematically analyse and evaluate business processes and associated controls, and provide a source of information, as appropriate, regarding instances of fraud, corruption, unethical behaviour and irregularities.⁸³ An internal audit plays an important role in providing assurance to the board regarding the effectiveness of the system of internal controls and risk management of the company.⁸⁴

It is suggested that an internal audit charter be formally defined and approved by the board of directors,⁸⁵ and that at a minimum the internal audit Professional Practice of Internal Auditing and Code of Ethics.⁸⁶

⁷⁸Principle 6.4 of the King III Report.

⁷⁹Principle 6.4.6 of the King III Report.

⁸⁰Principle 6.4.7 of the King III Report.

⁸¹King III Report Para 23 p 91.

⁸²Principle 7.1 of the King III Report.

⁸³Principle 7.1.2 of the King III Report.

⁸⁴King III Report Para 12 p 25.

⁸⁵Principle 7.1.3 of the King III Report.

⁸⁶Principle 7.1.4 of the King III Report.

The King III Report recommends further that the internal audit should provide a written assessment of the effectiveness of the company's system of internal control and risk management.⁸⁷ It is the audit committee that should be responsible for overseeing the internal audit.⁸⁸

2.1.8. Governing stakeholder relationships

The King III Report adheres to the 'triple context' or integrated approach, which acknowledges that companies should act with economic, social, and environmental responsibility.⁸⁹ Directors should consider economic, should be created where shareholders are not mere speculators, but owners concerned with the well-being of the company in which they hold shares, constantly checking whether the directors are practising good corporate governance.⁹⁰

2.1.9. Integrated reporting and disclosure

The board of directors should ensure the integrity of the company's integrated report. An integrated report means a holistic and integrated representation of the company's performance in terms of both its finances and its sustainability.⁹¹ The integrated report should be prepared every year. Sustainability reporting and disclosure should be integrated with the company's financial reporting. The annual financial statements should be included in the integrated report, and the board should include a commentary on the company's financial results.⁹² This commentary should include information to enable stakeholder to make an informed assessment of the company's economic value.⁹³ The board should ensure that positive

⁸⁷Principle 7.3 of the King III Report.

⁸⁸Principle 7.4 of the King III Report.

⁸⁹King III Report Paragraph 18, p 22.

⁹⁰Nevondwe L, *opcit* at page 19.

⁹¹King III Report Para 1, p108.

⁹²Nevondwe L, *opcit* at page 19.

⁹³*Ibid.*

and negative impacts of the company's operations, together with plans to improve the positives and eradicate or ameliorate the negatives in the financial year ahead are conveyed in the integrated report.⁹⁴

2.2. Lessons to be learned from South African Broadcasting Corporation (SABC) Ltd v Mpofu⁹⁵

The appeal by the SABC against the judgment of Tsoka J was dismissed with costs. The full bench of the South Gauteng High Court found that the suspension of Mr Dali Mpofu as Group Chief Executive Officer of the SABC at a meeting of 6 May 2008 was not in accordance with the Articles of Association or good corporate governance. The court found that the board was not properly constituted as three of the directors of the board were excluded from a board meeting at a time a decision to suspend Mr Mpofu was taken.

The court also found there was insufficient notice for the three directors to attend the board meeting, that their failure to object when they were sent from the meeting did not amount to acquiescence in that decision. The court also found that Mpofu did have the necessary *locus standi* to seek reinstatement since he was acting in his own personal capacity and not on behalf of the company. Jajbhay J found that *Ubuntu-botho*(Humanity) is deeply rooted in our society. These values should assist in informing corporate decisions made by directors in state owned enterprises. Proper and constructive dialogue would enable better outcomes in the decision making process. This form of governance is underpinned by the philosophy of *ubuntu-botho*. The time is right to incorporate the views of *umuntungumuntungabantu* in the King code of good governance.

⁹⁴*Ibid.*

⁹⁵[2009] 4 ALL SA 169 (GSJ)

The court ruled that a crucial point is whether the board in making the decision to suspend the respondent (Group Chief Executive Officer) was mindful of and indeed applied proper corporate governance principles in coming to their decision. The central issue of corporate governance is the accountability of senior management and the board of a company because of the extensive powers vested in them.⁹⁶

The King Report II on Corporate Governance for South Africa 2002 deals with public sector enterprises. The SABC is a public company and is a public sector enterprise as defined in terms of PFMA. Companies and their boards are required to measure up to the principles set out in the Code. King recommends that public enterprise should try and apply the appropriate principles set out in the Code. The Code sets out principles and does not determine detailed conduct. The conduct of public enterprises must be measured against the relevant principles of the Code and must adhere to best practices. The Code regulates directors and their conduct not only with a view to complying with the minimum statutory standard but also to seek to adhere to the best available practice that may be relevant to the company in its particular circumstances.⁹⁷

The board and its directors are ultimately accountable and responsible for the performance and affairs of the company. King noted that given the synergy which takes place between individuals of different skills, experience and background, the unitary board structure with executive and non-executive directors interacting remains appropriate for a South African company.⁹⁸

In terms of the King Code, board meetings should include mechanisms that are efficient and timely. Board members should be briefed prior to meetings

⁹⁶Para 28 of the judgement.

⁹⁷Para 29 of the judgement.

⁹⁸Para 30 of the judgement.

and board members should take the responsibility of being objectively satisfied that they have been furnished with all the relevant information and facts before making a decision. Although non-executive directors may meet separately the attendance of executive directors at board meetings is of value. The diversity of views is important. The board has a collective responsibility to provide effective corporate governance and should exercise leadership, enterprise, integrity and judgment in directing the company.⁹⁹

The court further ruled that integrity is a key principle underpinning good corporate governance. Good corporate governance is based on a clear code of ethical behaviour and personal integrity exercised by the board, where communications are shared openly. There are no opportunities in this environment for cloaks and daggers. Such important decisions are not made in haste or in anger. There must be ethical behaviour in the exercise of dealings with fellow board members. These dealings must be dealt with in such a manner so as to ensure due process and sensitivity.¹⁰⁰

The Constitution of the Republic of South Africa recognises the importance of good governance. Section 195 deals with basic values and principles governing public administration. In terms of this section there must be a high standard of professional ethics. In fact this standard must be promoted and maintained. These principles apply to organs of state and public enterprises.¹⁰¹

This is not surprising, given our history and the advent of our new democratic era. Our Constitution compels government in all of its forms, both through government departments and organs of state (including state-owned enterprises) to adhere to principles of good governance. State-owned enterprises such as the SABC are included in the definition of "*organ of*

⁹⁹King Report III

¹⁰⁰Para 64 of the judgement.

¹⁰¹Para 55 of the judgement. See also section 195(2) of the Constitution.

state". It is for this reason that the provisions of the Constitution as well as the legislation enacted in terms thereof are applicable to state-owned enterprises.¹⁰² Our Constitution has enshrined certain rights that also have a direct bearing on the corporate governance of state-owned enterprises.

The PFMA was promulgated to give effect to Chapter 13 of the Constitution.¹⁰³ According to the then Minister of Finance, "The aim of this Act is to modernise the system of financial management in the public sector. It represents a fundamental break from the past regime of opaqueness, hierarchical systems of management, poor information and weak accountability. The Act will lay the basis for a more effective corporate governance framework for the public sector."¹⁰⁴

The Constitution imposes a number of general obligations on all organs of state to promote cooperative government. In particular, organs of state involved in intergovernmental disputes are required to make every effort to settle the dispute and exhaust all other remedies before approaching the courts. This does not prevent organs of state seeking relief from the courts and is therefore a workable model."¹⁰⁵

In state-owned enterprises, like other organisations, good corporate governance is ultimately about effective leadership. An organisation depends on its board to provide it with direction, and the directors need to understand what that leadership role entails.¹⁰⁶

2.3 Conclusion

¹⁰²See *Goodman Brothers (Pty) Ltd v Transnet Ltd* 1998 (4) SA 989 (W).

¹⁰³Para 56 of the judgement.

¹⁰⁴Former Minister of Finance, Trevor Manuel, in the foreword to the Public Finance Management Act, 1 of 1999. He is now the Minister in the Office of the President and the Chairperson of the National Planning Commission.

¹⁰⁵Khoza and Adam in *The Power of Governance*, (2005), Pan MacMillan and Business in Africa: Johannesburg.

¹⁰⁶Nevondwe L, *opcit* at page 21.

I recommend that the principles of corporate governance should be incorporated into the MFMA to improve the leadership and good governance in the municipality. It will also improve the service delivery in Musina Local Municipality because the municipal council is failing control and manage the municipal budgets.

CHAPTER THREE: THE LEGISLATIVE FRAMEWORK

3.1. Legislative framework

Corporate governance embodies processes and systems by which corporate enterprises are directed, controlled and held to account. Corporate governance in South Africa was institutionalised by the publication of the King Report on Corporate Governance in November 1994, this report has been superseded by the King Code of 2002 and subsequently by King III. The purpose of the King Reports is to promote the highest standards of corporate governance in South Africa. The Code of Corporate Practices and Conduct contained in the King Report applies *inter alia*, to SOEs and agencies that fall under the PFMA.¹⁰⁷

PFMA is the principal Act promulgated by the Government to stipulate in detail the rules and regulations related to financial management and reporting to be followed and observed by SOE governing bodies and management. The PFMA applies not only to SOE's, but to departments, other public entities, constitutional institutions, Parliament and provincial legislatures, specified in the PFMA.

Every public entity governed by the PFMA must have an accounting authority, which must be accountable for the purposes of the PFMA. This is usually the board. However, if there is no board, the statutory governing body will be considered the 'authority.' In special circumstances, the relevant treasury may approve or instruct that another body serve as the accounting authority for that public entity.

¹⁰⁷See also Koma SB, Conceptualisation and contextualisation of corporate governance in the South African public sector: issues, trends and prospects, *Journal of Public Administration* Vol 44 No 3, September 2009, p452.

The King Code of Corporate Practices and Conduct provides specific guidelines for corporate governance. The report applies to all companies with securities listed on the Johannesburg Stock Exchange (JSE), banks, financial and insurance entities, as well as public sector enterprises and agencies that are subject to the PFMA and the Municipal Finance Management Act (MFMA) ¹⁰⁸ including any department of state or administration in the national, provincial or local sphere of government.

The King Code of Corporate Practices and Conduct and the Protocol on Corporate Governance in the public sector provides particular reference to the following areas:

- Who should be on the board?
- Functions of the board
- Distinction between the chairperson and the chief executive officer
- Role of directors
- Remuneration committee
- Allocation of share options
- Board committees
- Evaluation of directors
- Dealing in securities
- Business ethics and organisational integrity
- Annual reports and general meetings
- The company secretary

The government, as a major shareholder in SOEs, faces a wide range of risks associated with the operations of SOEs, including financial, reputation, political and operational risks.¹⁰⁹ It is the responsibility of each Executive Authority (in whom the primary responsibility for appropriate SOE oversight and accountability to Parliament rests) to ensure that these risks are

¹⁰⁸ Act, 56 of 2003.

¹⁰⁹ Department of Public Enterprises, protocol on corporate governance in the public sector (2002), p4.

identified, reduced and managed. In this regard, a key requirement of SOEs is to report and account for their performance to the relevant Executive Authority in respect of financial and non-financial matters, at the same time, however, maintaining independence in the conduct of their duties and free from day to day involvement by the Executive Authority (the line Ministry).¹¹⁰

It is through Protocols, Shareholder Compacts and Policy Framework for SOE released by the relevant Executive Authorities from time to time that the government ensures that there are no actual or perceived conflicts of interest and that SOEs achieve the government's broad policy objectives and ensuring that the SOE's boards operate efficiently and effectively.¹¹¹

SOEs operate within the framework of a variety of legislation including, *inter alia*, PFMA (which is part of Government's broader strategy to improve financial management in the public sector), Companies Act 71 of 2008 and the relevant legislation under which an SOE operates. It is, therefore, important that directors of SOEs develop working knowledge of this framework and ensure that the SOEs comply with their legal obligations.¹¹²

3.2. Application of king reports

King I Report promotes the highest standards of corporate governance. It advocated an integrated and inclusive approach to corporate governance. This approach exhorted companies to widen their focus beyond financial matters and to consider the company's triple bottom line that is its economic, environmental and social impacts.¹¹³ King I Report required that each company pay heed to how these triple bottom-line factors impacted on and

¹¹⁰*Ibid.*

¹¹¹*Ibid.*

¹¹²Department of Public Enterprises, protocol on corporate governance in the public sector (2002), p4-5.

¹¹³Good S, King III review, De rebus August 2009, p17.

affected a wide range of stakeholders with whom the company transacted, rather than simply its shareholders.¹¹⁴

The King III Report and the Code apply to all entities incorporated in and resident in South Africa, regardless of the manner and form of incorporation or establishment and whether that establishment is in the public, private or non-profit sectors. In contrast, the King II Report only applied to certain categories of business enterprises, namely listed companies, financial institutions and sector enterprises, while companies falling out of these categories were merely required to consider the application of the King II Report insofar as it was applicable.¹¹⁵

The USA codified its corporate governance provisions in the Sarbanes- Oxley Act of 2002 and legal sanctions are applied for non-compliance with this Act. In South Africa, compliance with the King III Report and the code is mandatory for the companies listed on the JSE, financial institutions and sector enterprises, but for all other entities there is no statutory obligation to comply with the King III Report and the Code. While corporate governance practices in South Africa may be voluntary, note that they are highly recommended and have considerable persuasive force.¹¹⁶ Commonwealth countries and the European Union Member States have also not legislated their corporate governance practices and have adopted a similar approach to that adopted in South Africa.¹¹⁷

3.3. Institutions and structures of governance in the public sector.

There are various institutions and structures that play a vital role in promoting good governance in the public sector. These institutions must adopt the

¹¹⁴*Ibid.*

¹¹⁵Nevondwe L, Corporate governance principles: lessons to be learnt, The Thinker Political Journal, Vol.44 October 2012,p16.

¹¹⁶*Ibid.*

¹¹⁷*Ibid.*

principles of good governance for the purposes of controlling the activities of organizations that operate as parastatals or public entities and others that function as business units within the broad context of the government sector.

3.3.1. National departments and provincial departments.

The National departments and provincial departments are the most expected structures in the public sector that should promote the elements of good governance and that includes *inter alia* accountability, transparency and responsibility. These structures bear a duty to support governance in the public sector in general.

The Standing Committee on Public Accounts (SCOPA) in particular ensures that the executive is held accountable for all its activities. The Executive has to be accountable for public monies and for all the resources they use on a day to day basis, this is essential especially in the evolving fraud and corruption in South Africa.

3.3.2. Auditor General

The Auditor General (AG) derives its general mandate from the Constitution.¹¹⁸ The AG accordingly has a duty to audit and report on the accounts, financial statements and financial management of-

- all national and provincial state departments and administrations,
- all municipalities; and
- any other institution or accounting entity required by national or provincial legislation to be audited by the Auditor-General.

The AG reports are required to be made available for public domain.¹¹⁹ The availability of these reports to the public promotes transparency and

¹¹⁸Section 188 of the South African Constitution, Act 108 of 1996.

accountability which are the essential to good governance. This discussion is relevant in that the public sector is also subject to auditing. It is submitted that auditing in general must be understood by both the public servants and most importantly, managerial leadership.

The managerial leadership must be well acquainted with the processes of auditing; the lack of understanding of these processes would deprive the managerial leadership the opportunity to use the PFMA as a guiding policy for good governance in the public service. In support of accountability and responsibility, the AG must submit the annual report, financial statement and audit reports of financial statements within six months after the financial year to which they relate to oversight mechanism and to the National Assembly.¹²⁰

3.3.3. Public Service Commission

There is a single Public Service Commission in the Republic of South Africa. This Commission is independent and impartial in the exercise of its duties.¹²¹ The Public Service Commission (PSC) is another structure that promotes the governance of the public sector.

PSC is tasked and empowered to amongst others, investigate, monitor and evaluate the organisation and administration of the public service.¹²² This duty also includes the obligation to promote measures that would ensure effective and efficient performance within the Public Service and to promote the values and principles of public administration as set out in the Constitution, throughout the Public Service.¹²³

¹¹⁹Section 188(3) of the South African Constitution.

¹²⁰Siswana B, Leadership and governance in South African Public Service: An overview of the public finance management system, thesis completed at the University of Pretoria, July 2007, p193-194.

¹²¹Section 196(1) of the South African Constitution.

¹²²Section 196(4) of the South African Constitution.

¹²³*Ibid.* See also Public Service Commission, available at:<http://www.psc.gov.za/>, accessed 1 December 2012.

It can therefore be deduced that the PSC promotes governance in the public sector through the regulation and promotion of ethical leadership, monitoring and evaluation, management and measurement activities in the public service.

3.3.4. National Treasury

National Treasury (NT) seeks to ensure that good governance is at the heart of public service.¹²⁴ It also ensures that financial management in the public service is improved and thus intact. To support its mandate, NT is responsible for the promotion and enforcement of transparency effective management in respect of revenue, expenditure, assets, and liabilities of department, public entities and constitutional entities.¹²⁵

Most importantly, the NT is expected to assess and monitor the implementation of the PFMA, as well as the norms and standards and Treasury regulations so that financial management in the public service is at the optimal level.¹²⁶ NT may also promote good governance by encouraging accountability, transparency and risk management in the public sector. NT may encourage the public sector again through the drafting of risk and fraud plans for the department which may be implemented by the both the departments and officials to promote good governance.¹²⁷

3.3.5. Public Protector

The Public Protector (PP) derives its mandate from the Constitution.¹²⁸ PP has the power,

¹²⁴Siswana B, Leadership and governance in South African Public Service: An overview of the public finance management system, thesis completed at the University of Pretoria, July 2007, p195.

¹²⁵*Ibid.*

¹²⁶*Ibid.*

¹²⁷Siswana B, Leadership and governance in South African Public Service: An overview of the public finance management system, thesis completed at the University of Pretoria, July 2007, p195.

¹²⁸Section 182 of the South African Constitution.

- to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;¹²⁹
- to report on that conduct;¹³⁰ and
- to take appropriate remedial action.¹³¹

From the above constitutional mandate, it can be deduced that the PP is supportive of corporate governance and its processes. It can further be deduced that the government departments are under scrutiny and observed by the public in support of good governance so that the rights of the public are not undermined.¹³² It is within this context that the members of the public are encouraged to lodge complaints against any misuse of public monies by government departments this includes the municipalities. It is therefore essential to ensure that governance is intact.¹³³

3.4 Conclusion

The Chapter 9 institutions such as the Office of the Public Protector, Public Service Commission and Auditor General strengthen democracy and good governance in the municipalities. The office of Auditor General democratise the finances of the municipalities and ensures financial transparency and accountability. These institutions promote the principles of corporate governance in the public sector and constitutional democracy. The challenge now in South Africa the public questions the Public Protector's mandate which is derived from the Constitution on whether or not she is acting within her powers or not.

¹²⁹Section 182(1)(a) of the South African Constitution.

¹³⁰Section 182(1)(b) of the South African Constitution.

¹³¹Section 182(1)(c) of the South African Constitution.

¹³²Siswana B, *ibid* at page 196.

¹³³*Ibid*.

CHAPTER FOUR: CONCLUSION AND RECOMMENDATIONS

4.1. Conclusion and recommendations

In conclusion, it is evident that municipalities are not exempted from the principles of corporate governance. It is when the municipal officials and employees are held accountable and responsible for the activities of their department/units that governance is improved in the local government sphere. Within this context, it is suggested that a municipality should have a reporting system to support good corporate governance. This would prevent municipal officials from using their positions for personal gain, which normally is monetary gain. Those who allegedly involve in corrupt activities within municipality must face full might of the law. The resignation of municipal councillors should not prevent the municipality from instituting a disciplinary action against them.

The principles of corporate governance should be welcomed in South African municipalities that they ensure that the municipal councils are skilful and able to implement the vision and mission of the municipality. The legal framework also plays a significant contributory role to the lives of ordinary citizens as it lays basis for the corporate governance principles framework for the public.

Whilst the principles and legal framework of corporate governance may be viewed to be intact but what appears to be the determining factor of a successful corporate governance in the local government sphere is the functioning of institutions and structures of governance because governance in general and public finance in particular must be driven and supported by institutions. These institutions must aim to operate within the ambit of the MFMA to avoid poor governance in the municipalities.

It is suggested that workshops should be conducted for municipal officials and employees to ensure that there is always adequate compliance with the MFMA. It is the interpretation, understanding and implementation of the MFMA by officials that determines the potential success of governance in the municipality.

There is no doubt that corporate governance is a key element in improving economic efficiency and growth as well as enhancing investor confidence. The King III report and the Code provide useful guidance to public sector institutions and directors on how to direct and control the business of the company or institutions and make decisions on behalf of the company/institutions.¹³⁴

According to Nevondwe the companies which are not listed in the JSE and which are not state-owned entities must voluntarily consider these principles. These principles will improve their control systems, governance, risk, audit, IT, financial reporting, stakeholder engagement and ethical issues which will contribute to the growth of the company and makes it profitable and sustainable.¹³⁵

Nevondwe went further and recommends that public sector institutions must consider the corporate governance principles since it will assist with the governance in the public sector. Also recommends that the legislations, codes and regulations must make it compulsory for all institutions and companies operating business in South Africa to apply these principles. These principles if applied correctly will assist the local government to achieve its objectives of job creation and alleviating poverty. Finally recommends that these principles must always be adhered to all who are responsible for

¹³⁴Nevondwe L, A critical discussion of Corporate Governance principles in the public sector, a paper presented at 5th International SPMA Conference, University of Pretoria, 16-17 November 2012.

¹³⁵*Ibid.*

running of the SOEs, government departments, government agencies and municipalities.¹³⁶

¹³⁶*Ibid.*

BIBLIOGRAPHY

Books

1. Ferran E, *Company law and Corporate Finance* (1993) University press.
2. Cassim FHI, Cassim MF, Cassim R, Jooste R, Shev J, and Yeats J, *Contemporary Company Law*, Second edition, 2013, Juta Publishers, Cape Town.
3. Haupt A and Malange J, *Corporate Law for Commercial Students*, first edition, 2010, Van Scheneike.
4. Khoza and Adam in *The Power of Governance*, (2005), Pan MacMillan and Business in Africa: Johannesburg.

Articles published in journals

5. Nevondwe L, *Corporate governance principles: lessons to be learnt*, *The Thinker Political Journal*, Vol.44 October 2012.
6. Koma, "Conceptualisation and contextualisation of Corporate Governance in the South African Public Sector: Issues, Trends and Prospects" 2009 *Journal of Public Administration* (44)
7. Van Wyk H.A, *Perspectives of effective financial management in the public sector*, *Journal of Public Administration* Vol. 39 No 3 September 2004, 414.

Paper presented in conferences and other sources

8. Nevondwe L, *A critical discussion of corporate governance principles in the public sector*, 5th International SPMA Conference, 16-17 November 2012, University of Pretoria, South Africa.

9. Nevondwe L, The principles of corporate governance in the local government sphere, South African Association of Public Administration and Management conference, 3-5 April 2013, Cape Peninsula University of Technology, Cape Town.
10. Nevondwe L, The principles of corporate governance with specific reference to the case of *South African Broadcasting Corporation (SABC) Ltd v Mpofu* [2009] 4 ALL SA 169 (GSJ), Value 2012 Conference, 28 May 2012, Champagne Sports Resort, KwaZulu-Natal Province.
11. Nevondwe L, The principles of corporate governance with specific reference to the case of *South African Broadcasting Corporation (SABC) Ltd v Mpofu* [2009] 4 ALL SA 169 (GSJ), Value 2012 Conference, 28 May 2012, Champagne Sports Resort, KwaZulu-Natal Province.
12. Nevondwe and Matotoka M, The role of the audit committees towards achieving a clean audit in 2014 in the local government sphere, 2nd Annual Conference, SAAPAM Limpopo Chapter, 15-16 August 2013.
13. Nevondwe L, A critical discussion of Corporate Governance principles in the public sector, a paper presented at 5th International SPMA Conference, University of Pretoria, 16-17 November 2012.
14. Abetz, Senator "The Role of Corporate Governance in improving transparency and accountability in the public sector" 2003 Speech prepared for the International Quality Productivity Centre Conference 11 June 2003 .
15. Siswana B, Leadership and governance in South African Public Service: An overview of the public finance management system, thesis completed at the University of Pretoria, July 2007.
16. Department of Public Enterprises, protocol on corporate governance in the public sector, 2002.
17. Thomson L.M, what is corporate governance? 18 January 2009.
18. Nevondwe L, The principles of corporate governance in the local government sphere, South African Association of Public Administration

and Management conference, 3-5 April 2013, Cape Peninsula University of Technology, Cape Town.

19. Abetz, Senator "The Role of Corporate Governance in improving transparency and accountability in the public sector" 2003 Speech prepared for the International Quality Productivity Centre Conference 11 June 2003 .
20. Nevondwe and Matotoka M, The role of the audit committees towards achieving a clean audit in 2014 in the local government sphere, 2nd Annual Conference, SAAPAM Limpopo Chapter, 15-16 August 2013. The legacy of Rivonia Trial and its contribution to judicial activism.
21. Siswana B, Leadership and governance in South African Public Service: An overview of the public finance management system, thesis completed at the University of Pretoria, July 2007.
22. Schulschenk J, Corporate Governance Research Programme, Albert Luthuli Centre for Responsible Leadership, August 2012.
23. Department of Public Enterprises, protocol on corporate governance in the public sector, 2002.
24. Thomson L.M, what is corporate governance? 18 January 2009.

International sources

25. Sarbanes-Oxley Act, 2002

King Reports

26. King Report I
27. King Report II
28. King Report III

Websites

29. <http://articles.economicstimes.indiatimes.com>

30. www.dofa.gov.au

31. <http://www.library.up.ac.za>