The Interpretation and Application of Principles of Corporate Governance in the South African Airways

By

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TABLE OF CONTENTS

ABSTRACT

Corporate Governance refers to the manner in which companies are directed and controlled. It is concerned with striking a balance between economic and social goals and between individuals and communal goals. The South African Airways (SAA) has recently become one of the worst underperformers amongst the existing State-Owned Companies (SOCs). It has become evident that there was an extensive meddling in SAA's day to day operations by its chairlady, who has been placing orders and making contractual commitments on the SAA's behalf, as well as involving herself in managerial decisions in quite inappropriate ways. The Chief Executive Officers (CEOs) of the SAA were changed within a period of four years. It had at some stage developed eight strategies within six years but implemented none of those strategies. The SAA also experienced board infightings which led to the firing of the entire board by the shareholders. The cause of these challenges, as argued in this paper, is poor interpretation and application of corporate governance principles in the SAA. This paper is intended to interpret the principles regulating corporate governance and the application thereof within the context of the SAA. In addition, the paper discusses the comparative analysis with reference to the corporate governance of South Africa and the United Kingdom (UK).

DECLARATION BY SUPERVISOR

I, **Adv. Jeffrey Mafanywa Mangammbi**, do hereby declare that this mini-dissertation of Mr. Ntene Ntswinyane Semi for the degree of Masters of Laws (LLM) in Development and Management Law be accepted for examination.

Adv. Jeffrey Mafanywa Mangammbi

March 2019

DECLARATION BY STUDENT

I, **Mr. Ntswinyane Semi Ntene**, do hereby declare that this work in its entirety is my own original work, and I further declare that all the work which is not mine has been duly acknowledged and further that I have never submitted this work or part thereof anywhere for obtaining any qualification in any university.

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Ntene Ntswinyane Semi

March 2019

DEDICATION

I dedicate this whole work to my daughter, Bohlale Ntene and siblings, Faith and William Ntene. I pray that this work may serve as an encouragement to them that education is the greatest weapon that can change the world.

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My special thanks to both my biological and spiritual family members for whatever contribution they have made to ensure that I complete this work.

LIST OF ABREVIATIONS

ADR- Alternative Dispute Resolution.

BOD- Board of Directors.

CEO- Chief Executive Officer.

CFO- Chief Financial Officer.

CIO- Chief Information Officer.

CO- Compliance Officer.

GDP- Gross Domestic Product.

IT- Information Technology.

JSE- Johannesburg Stock Exchange.

LSE- London Stock Exchange.

PFMA-Public Finance Management Act.

RSA- Republic of South Africa.

SAA Act- South African Airways Act.

SAA- South African Airways.

SABC-South African Broadcasting Corporations.

SOCs- State Owned Companies.

UK- United Kingdom.

CA- Companies Act No. 71 of 2008.

OECD- Organization for Economic Cooperation and Development.

ABA- American Bar Association.

AG- Auditor General.

PSC- Public Service Commission.

NT- National Treasury.

LIST OF INTERNATIONAL INSTRUMENTS

American Sarbanes-Oxley Act 2002 (USA).

Companies Act of 2006 (UK)

Corporate Governance Code (UK).

The Cadbury Report 1992.

The Greenbury Report 1995.

The Hampel Report 1998.

The Higgs Report 2003.

The Smith Report 2003.

The Turnbull Report 1999.

TABLE OF STATUTES

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5. Public Entities Act No. 93 of 1992.
6. Public Finance Management Act No. 1 of 1999.
7. South African Airways Act No: 5 of 2007.

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3. *Boulting v Association of Cinematograph, Television and Allied Technicians* [1963] 1 ALL ER 716 (W) 651*.*
4. *Charterbridge Corporation Ltd V Lloyd's Bank* [1970] Ch. 62 at 74.
5. *Da Silva V DH Chemicals [*2008] (8) SA 620 SCA 620 Para 18.
6. *Darvall v North Sydney Brick & Tile Co Ltd* [1989] 15 ACLR 230 SC (NSW*).*
7. *Extra Sure Travel Insurance Ltd v Scattergood* [2003] 1 BCLR 598 (CHD*).*
8. *Extra sure Travel Insurance Ltd v Scattergood* [2003] 1 BCLR 598.
9. *Fulham Football Club Ltd v Cabra Estate Plc* [1994] 1 BCLC363 (Ch and CA).
10. *Guinness Plc v Saunders* [1990] 2 AC 663.
11. *Hogg v Cramphorn Ltd* [1967] Ch 254 at 268.
12. *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd* [2006] (5) SA 333 (w).
13. *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co LTD* [2006] (5) SA 333 (W).
14. *Phillips v Fieldstone Africa (Pty) Ltd* [2004] SA (3) 465 (SCA).

15. *Polly Peck International Plc v Asil Nadir* [1992] 2 Lloyd's Rep. 238.

16. R V Byrnes [1995]183 CLR 501.

17. Re Smith & Fawcett Ltd [1942] Ch 304 at 306.

18. *Regal (Hastings) LTD V Gulliver* [1942] 1 All ER 378.

19. *Regentcrest Plc v Cohen* [2001] 1 BLC 80 at 104.

20. *Robison v Randfontein Estate Gold Mining Co Ltd* [1921] AD 168 at 178-9.

21. *South Africa Broadcasting Corporation Ltd Mpofu* [2009] (4) ALL 169 (GST).

22. *South African Broadcasting Corporations Ltd v Mpofu* [2009] (4) ALL 169 (GST).

23. *Teck Cop Ltd v Millar* [1972] 33 DLR (3rd) 288 (BCSC).

24. *Thorby v Goldberg* [1964]112 CLR

CHAPTER ONE

1.1 Introduction

Corporate governance is one of the important aspects which may assist a State Owned Company (SOC) to attract both domestic and foreign investors and enhance the benefits of investment to society. Should an SOC such as the South African Airways (SAA) decides to harvest all benefits of the global capital market and to attract long-term patient capital, there has to be good corporate governance structures and arrangements which must be trustworthy, well interpreted and applied in such an SOC. Such corporate governance structures and arrangements must match and or adhere to internationally accepted principles and standards of corporate governance.

The SAA has recently become one of the worst underperformers amongst the State Owned Companies (SOCs) in the Republic of South Africa (RSA). This was as a result of the challenges faced by the SAA which were arguably emanating from poor interpretation and application of corporate governance principles.[1] It is submitted that there is currently a high level of non-compliance with corporate governance in the SAA. It is against this backdrop that it is argued in this research that in order to root out and arrest poor corporate governance in the SAA, the principles of corporate governance have to be properly interpreted and applied. For this reason, this study is intended to discuss the interpretation and application of principles of corporate governance in the SAA.

1.2 Historical background to the study

In 1992, as South Africa was embarking on the path to democracy, the former president Nelson Mandela saw the great need of new system of governance and approached

[1] Thabane and Snyman-Van Deventer *"Pathological Corporate Governance Deficiencies in South Africa's State-Owned Companies: A Critical Reflection"* (2018) PER / PELJ - DOI http://dx.doi.org/10.17159/1727-3781/2018/v21i0a2345.

Mervyn King SC to spread the creation of this new system.[2] Mervyn King was a veteran corporate lawyer and a former Supreme Court Judge. The principles of corporate governance of South African SOCs were then initially contained in the King I Report on Corporate Governance.[3] In 1994, the King Committee on Corporate Governance headed by the said Mervyn King, published the King Report on Corporate Governance, which contained a code of Corporate Practices and Conducts.[4] It established the recommended standards of conduct for boards and directors of listed companies, banks and certain SOCs. It included not only financial and regulatory aspects, but also advocated an integrated approach that involved all stakeholders.[5]

The King I Report was applicable to all companies listed in the Johannesburg Stock Exchange, large Public Entities as defined in the Public Entities Act[6], banks, financial and Insurance Companies and other unlisted companies.

The key principles from the King I Report on Corporate Governance covered the following:

- Board of directors makeup and mandate, including the role of the non-executive directors and guidance on the categories of people who should make up non-executive directors;
- Appointment to the Board and guidance on the maximum term of the executive directors;
- Determination and disclosure of executive and non-executive directors remuneration;
- Board meeting frequency;
- Balanced annual reporting;
- The requirement for effective auditing; and

[2] http://www.irmagazine.com/articles/case-studies/16371/audience-mervyn-king,(visted on 0-3 of August 2018).
[3] Hendrikse, John, Kendrikse & Leigh *"Business Governance Handbook: Principles and Practice"* (2004) Vol 1 Juta Academic page 339.
[4] Ibid.
[5] Cliff Dekker Attorneys *"King Report on Corporate Governance for South Africa*, 2002, What it Means to You*"* (2002), Retrieved 3 March 2015.
[6] Act No: 93 of 1992.

- Affirmative action programs.[7]

In 2002, the Earth Summit was convened in the Johannesburg for a discussion on suitable developments by the United Nations. It was then that a revision on the King Report was made and as a result the King II Report on Corporate Governance was published which included the sections on sustainability[8], the role of the corporate board[9] and Risk management.[10] This revised work was to be applicable from March 2002.

The King II, in addition to the types of organizations listed in the King I Report, was applicable to the State Departments or national, provincial or local government administration falling under the Local Government: Municipal Finance Management Act[11], and public institution or functionary exercising a power or performing a function in terms of the Constitution, or exercising a public power or performing a public function in terms of any legislation, excluding courts or judicial officers. As before, it encouraged all companies to adopt the applicable principles from the code.[12]

The key principles from the King II Report covered the following areas:

- Directors and their Responsibility;
- Risk management;
- Internal audit;
- Integrated sustainability reporting; and
- Accounting audit.[13]

[7]The Institute of Directors of Southern Africa "*The Code of Corporate Practices and Conduct; an Extract from the King Report on Corporate Governance*" (1994), Retrieved on 3 March 2015.
[8]Sterward & Neil "*An audience with the GRI's King*". Investor Relations, Retrieved on 27 March 2015.
[9]Monks, Robert, Minow & Nell (2003) "*Corporate Governance*" Wiley Blackwell ISBN 1-4051-1698-6 at page 298.
[10] Berwick & Graeme "*The Executive Guide to Insurance and Risk Management"* (Quality Results Pty Ltd, 2007) at page 17.
[11]Act No: 56 of 2003.
[12]Institute of Directors in Southern Africa "*King Report on Corporate Governance for South Africa 2002*" (2002), Retrieved 27 March 2015.
[13]Ibid.

The code was not enforced through an Act of Parliament. However, it co-existed with a number of laws that applied to companies and directors, including the old Companies Act.[14]

The next version of the King Report on Corporate Governance was introduced in 2009.[15] The introduction of the King III Report was necessitated by the promulgation of the new Companies Act[16]. The purpose of this Act, as seen in the Act itself[17], is to encourage transparency and high standard of corporate governance as a means of prompting the development of the South African economy. This purpose encourages an interaction between the King III Report and the Act.[18]

The Report recommends that the organizations must produce an integrated Report in place of an annual financial report and that companies create sustainability reports according to the Global Reporting Initiatives Sustainability Reporting Guidelines.[19] In contrast to the King I and the King II Reports on Corporate Governance, the King III Report applies to all entities, public, private and non-private companies. It encourages all entities to adopt the King III Report principles and explains how these have been applied and or are not applicable. The Code on Corporate Governance was applicable since March 2010.[20]

The Report provides the following principles as guidelines for Corporate Governance:

- Ethical leadership and corporate citizenship;
- Boards and directors;
- Audit committee;
- The governance of risk;

[14]Act No: 61 of 1973.
[15] Visser, Wayne, Matten, Dirk, Pohl, Manfred, Tolhurst & Nick "*The A to Z of Corporate Social Responsibility*" ISBN 978-0-470-68650-80.
[16]Act No: 71 of 2008.
[17]Section 7 (b) of Act No: 71 of 2008.
[18]Mervyn King "*The syrnegies and interaction between King III and the Companies Act 71 of 2008"* (2010) Acta *Juridica* at page 447.
[19]South African Institute of Chartered Accountants "*An Integrated Report is a New Requirement for listed Companies*" (2010), Retrieved 27 March 2015.
[20]Institute of Directors in Southern Africa "*King Report on Corporate Governance for South Africa 2009"* (2009), Retrieved 27 March 2015.

- The use of information technology;
- Compliance with laws, codes, rules and standards;
- Internal audit;
- Governance stakeholders relationship;
- Integrated reporting and disclosure.

The Report is divided into nine chapters. Each of the principles contained in the Report is set out in the code, together with recommended practices relating to each principle.[21]

The King IV Report was adopted recently in 2016 and its fourfold objective is arguably not departing from the underpinning principles of the King III Report. However the King III principles have been refined in the King IV report. Upon close observation of the King III and IV Reports it is submitted that they do not differ in substance.

The SAA was previously a subsidiary of Transnet until it was independently established in 2007 in terms of the provisions of the South African Airways Act[22] (SAA Act). The SAA Act provides for the transfer of the SAA shares in Transnet to the State and the conversion of the SAA into a SOC with a share capital incorporated in terms of the provisions of the Companies Act.[23] In terms of section 2 (c) of the SAA Act, the SAA is listed as a major public entity in schedule 2 of the Public Finance Management Act[24] (PFMA) which means that the PFMA is applicable to the SAA. Furthermore, although the SAA Act does not specifically contain governance principles, the Companies Act[25] and the King III and IV Reports are as well applicable to the SAA.[26] For this reason this study also analyzes and interprets the application of principles of Corporate Governance as outlined in the King III and IV Reports, PFMA, Companies Act and other regulatory frameworks versus corporate governance challenges faced by the South African Airways as a SOC.

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[21] Nevondwe "*Corporate Governance Principles: Lessons to be learned*" (2012) The Thinker Political Journal (44) at page 16-21.
[22] Act No: 5 of 2007.
[23] South African Airways Act No: 5 of 2007.
[24] Act No: 1 of 1999.
[25] Act 71 of 2008.
[26] Ibid.

1.3 Statement of the Research Problem

The SAA has recently become one of the worst underperformers amongst the existing SOCs. In the year 2016, evidence emerged where there was an extensive meddling in the SAA's day to day operations by its chairlady, who has been placing orders and making contractual commitments on the SAA's behalf, as well as involving herself in managerial decisions in quite inappropriate ways. This is so because it has had about seven Chief Executive Officers (CEOs) within a period of four years. At some stage it had to be bailed out in the amount of R550 million and was in addition to that granted R5 billion guarantee by the shareholders for restructuring purposes. It had at some stage developed eight strategies within six years but implemented none of those strategies.[27] The SAA also experienced board infightings which led to the firing of the entire board by the shareholders.[28] There are other scandals in the SAA which include tender irregularities implicating the executive and some board members and the appointment of the directors lacking the necessary required qualifications. The aforesaid issues demonstrate a fivefold challenges in as far as the interpretation and application of corporate governance in the SAA is concerned.

Firstly, the appointment of unqualified persons to the position of directors of the board reveals that the board of directors in the SAA may be problematic in that the corporate governance principle of due diligence in appointing the board of directors is either not properly interpreted or applied. This could also serve as a confirmation that some board members are being politically appointed from the political ranks.[29] A situation where you find political aspects involved in and or influencing board appointments had a negative effect in the interpretation and application of corporate governance within SAA.

Secondly, the challenge of tender irregularities is sufficient proof that corporate governance principles in respect of delegation of powers by the board to the executive management is as well not being properly interpreted or applied. This tempts one to

[27] Landu *"Public Enterprise Committee Unhappy with SAA"* (2013), Retrieved from http:www://parliament.gov.za/live/content.php?Item_ID=284.
[28] See also footnote 1.
[29] See also Howard & Seith-Purdie (2005) Aust J Publ Admin at page 56-58.

conclude that another principle underpinning corporate governance, namely ethics and integrity is normally violated in the SAA.

Thirdly, failure to implement eight turnaround strategies developed within a period of six years is a sign of failure by the board in the SAA to provide strategic guidance and monitoring. Needless to say that this is a sign of the board's failure to discharge its fiduciary duty and duty of care, skill and diligence towards the SAA.

Fourthly, the challenge of board infightings shows that there is an internal governance problem of poor leadership or ignorance in the SAA which leads to board instability.

Lastly, the financial crisis often faced by the SAA is a result of the board's failure to act as focal point for and custodian of corporate governance and thereby casting aspersions that the board and executive management lack the continuity, stability and institutional memory to resolve difficult governance issues in the SAA.

It is argued in this paper that these challenges resulted from poor interpretation and application of corporate governance principles. This study seeks to address the question whether the corporate governance reforms properly interpreted and applied in South Africa, are sufficient to meet the internationally accepted standards and whether internationally standards are good or too good for South Africa to study further and analyze codes, the duty of directors and their liabilities versus legislating corporate governance principle in determining the best approach for South Africa.

1.4 Literature Review

The focus of this paper is basically on the upholding of the application of corporate governance principles in the SAA. It is argued that studies undertaken internationally indicate that adopting good corporate governance practices at SOCs usually results in measurable economic benefits. Be that as it may there is a crisis in corporate governance which occurred because the roles, tasks, and accountabilities of the board of directors are not clearly understood by politicians, business executives themselves or the general public[30].

Mervyn King, chairman: King report say good corporate governance is about intellectual's honesty and not just sticking to rules and regulations, capital flowed towards companies that practiced this type of good governance, and it is clear that good corporate governance makes good sense.

Charles has indicated that the capacity to support the implementation of good corporate governance in many African countries is usually undermined by the existence of ineffective and weak monitoring organizations.[31]

Botha has highlighted that government departments and independent regulators responsible for actively monitoring SOCs boards, do not as yet fulfill their role as overseers.[32]

Holiday CO, Schmidheing S, and Watts P, have argued that corporate failures resulted in serious economic consequences with grave socio economic implications of job losses, loss of revenue by Inland Revenue, erosion pension reserves and loss of investor confidence.[33]

Having said that, Nevondwe has said that "there is no doubt that corporate governance is a key element in improving economic efficiency and growth, as well as enhancing investor confidence".[34]

Solomon argued that despite all corporate governance structures developments and implementation initiatives, corporate failures still continue today.[35]

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[30]Garratt *"Thin on Top –Why Corporate Governance Matters and How to Measure and Improve Board Performance"* (2007) Nicholas Brealey, London.
[31]Charles, Okeahalam & Akinboade "*Global Corporate Governance Forum"* (2003)
[32]Botha *"Corporate governance"*, Retrieved 12 March 2015.
[33]Holiday, Schmidheiny & Watts *"Walking the Talk: The business case for sustainable development"* (2002) Sherifield, UK: Greenleaf Publishing Ltd.
[34]Nevondwe "*Corporate Governance Principles: lessons to be learnt" (2012)* The Thinker Political Journal (44) at page 16-21.
[35] Solomon *"Corporate Governance and accountability"* (2007) West Sussex, UK: John Wiley and Sons.

Naidoo argued that properly governed companies with a reputation for being good corporate citizens are also more easily able to attract better caliber employees.[36]

A greater accountability is been demanded by the shareholders and not the general public. Good corporate governance matters more in times of crisis, as it helps companies withstand economic shock.[37] Bankruptcies in companies are cynical occurrence failures, and all corporate failures can be laid at the door of poor corporate governance.[38]

Having said that, it has been argued that issues of proper corporate governance, accountability and transparency remain at the heart and center-stage, and are fundamental to a company for a sustainable future.[39]

A study to examine the relationship between a company's corporate governance behavior and its market value was made by the Standford Law School. The study showed that the institutions looking to invest money in emerging economies were much likely to invest in companies that had sound corporate governance practices. Upon the release of the King III Report in 2009, South Africa has undeniably one of the best corporate governance frameworks worldwide, but this country, and indeed much of Africa, still lag far behind other emerging markets in its ability to attract foreign direct investment.[40]

Though many scholars have written a lot on corporate governance, the question of implementation, interpretation, application and enforcement in SOCs, particularly in the SAA, have not been adequately addressed. The aforesaid guidelines can ensure that proper application of corporate governance in SAA is upheld and thereby leading towards an effective and accountable SAA.

1.5 Aims and Objectives of the Study

[36]Ramani & Naidoo *"Corporate Governance: An essential guide for South African Companies"* (2009) 2ed.
[37]Tom, Wixley, Geoff & Everigham *"Corporate Governance"* (2010) 3rded at page 2.
[38]Ibid.
[39]Du Plessis, McCnovill & Bargaric *"Principles of Contemporary Corporate Governance"* (2007) at page 3-6.
[40]Birds, IinMacneil, McCormack, Twiggflesher, Villiers & Boyle *"Boyle and Birds' Company Law*" (2011) 8ed at page 363.

The objectives of this paper are fourfold. Firstly, this paper analyzes and interprets the laws regulating corporate governance in the SAA by defining corporate governance and looking at the benefits and regulatory frameworks in respect of corporate governance in SOCs. Secondly it interprets and evaluates the application of principles of corporate governance as contained in the King III and IV Reports particularly in the SAA. Thirdly, the UK corporate governance is being examined in this study to obtain an overall on the implementation and execution of these principles to serve as a context for the SAA and other SOCs in South Africa. Lastly, it argues that the only way the SAA and other SOCs are going to overcome their current corporate governance challenges and reach a state of effectiveness and accountability is when the principles of corporate governance are properly interpreted, applied and adhered to.

This paper assists in identifying the gabs that are limiting factors to the effective SOCs mechanisms that ensure corporate governance enforcement in SOCs.

The study contributes to the debate regarding good corporate governance in South African SOCs. It benefits board of directors in SOCs by making them aware of the importance and relevance of practicing good corporate governance. The paper also benefits students, other legal academics studying business law at various universities and the emerging politicians.

1.6 Research Methodology

The research methodology adopted in this paper is qualitative in nature. A combination of the legal comparative and the legal historical methods, based on the jurisprudential analysis will be employed. The legal imperative method is employed for the purpose of finding solutions, more particularly, interpretation of corporate governance and its application in the SAA. The legal historical research method is employed to establish the developments of the legal rules, the interaction between law and social justice, and also to propose solutions or amendments to the existing law or the constitutional arrangement, based on practical facts.

An analysis of concepts, arguments based on discourse is made. The literature and case law is being surveyed. This paper is based on library materials such as textbooks, reports, legislations, regulations, case laws, articles and papers presented on the subject in conferences and recent changes on the internet, based on the everyday consistent changes.

1.7 Scope and Limitation of the Study

This work consists of five chapters that are related to each other and have been arranged as follows:

Chapter One: Introduction

The introduction is discussed by dealing with the historical background and development of corporate governance in the King Reports and establishment of the SAA as a SOC. The statement of the research problem and aims and objectives of the paper are set out. This chapter deals also with literature review, research methodology and scope and limitation of the study.

Chapter Two: The Legal Frameworks

This chapter discusses the role played by legislative frameworks such as the PFMA and the new Companies Act in as far as corporate governance in the SAA is concerned. It further examines the role of the King III Report on Corporate Governance and public structures in support of corporate governance such as the National and Provincial Departments, the Auditor General, the Public Service Commission, the National Treasury and the Public Protector.

Chapter Three: Interpretation and Application of Principles of Corporate Governance

The nine principles of corporate governance, namely: ethical leadership and corporate citizenship, boards and directors, the governance of information technology, the governance of risk, compliance with laws, rules and standards, internal audit, governing stakeholder relationship, integrated reporting and disclosure and audit committees, as contained in the King III Report are discussed in this chapter.

Chapter Four: Comparative Study

This chapter analyses a comparison of corporate governance in South Africa and the United Kingdom, as one of the influential countries in as far as corporate governance is concerned in South Africa.

Chapter Five: Conclusions and Recommendations

This chapter deals with the summary conclusion drawn from the whole study and makes some recommendations.

CHAPTER TWO: THE LEGAL FRAMEWORKS

2.1 Introduction

There is no standard definition of corporate governance in South Africa. Since the adoption of corporate governance in South Africa, a lot of literature has been written in an attempt to define corporate governance. The South African Airways (SAA) is a State Owned Company (SOC) established in terms of the South African Airways Act[41] (SAA Act). The fact that it is an SOC means that it is subjected to the application of the Public Finance Management Act[42] (PFMA) and the Companies Act[43] (CA). Furthermore, the SAA is expected to implement the recommendations of the King Reports on Corporate Governance and implement the Protocol on Corporate Governance in the Public Sector because it is a company by its own right and a public sector corporation. Finally the SAA is also subjected to constitutional institutions and structures which support corporate governance such as the National and Provincial Departments, the Auditor General, the Public Service Commission, the National Treasury and Public Protector. The following paragraphs explores on the definition and benefits of corporate governance and the legal frameworks thereof within the context of the SAA.

2.2 The Concept and Benefits of Corporate Governance

Corporate governance was defined in the Cadbury Report as the system by which the companies are directed and controlled.[44] This definition was acknowledged by Horn in his *"The Legal Regulation of Corporate Governance with Reference to International Trends"*.[45] This definition is centered on internal structures and operation of decision-

[41]Ibid.
[42]Ibid.
[43]Ibid.
[44] Sir Cadbury *"Committee on Financial Aspects of Corporate Governance, Final Report and Code of Best Practice"* (December 1992) at para 2.5.
[45] Horn "*The Legal Regulation of Corporate Governance with Reference to International Trends*", Published LLM Thesis (University of Stellemborsh 2005) at page 9.

making process by the corporation.[46] It is therefore premised from the notion that gives effect to the relationship between the company, its board, its shareholders and other stakeholders. This is so because, in the first place, it is intended to set out the structures giving effect to the objectives and purposes of the company.[47] One may therefore not talk about corporate governance at the exclusion of duties of directors, financial accounting and how various stakeholders of a company are protected.

The Securities and Exchange Board of India Report (SEBI) expanded the definition of corporate governance by defining it as the acceptance by management of the inalienable rights of shareholders as the true owners of the corporation and their own role as the trustees on behalf of the shareholders. It is about the commitment values, ethical business conduct and about making a distinction between personal corporate funds in the management of a company.[48] This definition by the SEBI is more focused on ethical conduct in a company since it revolves around a code of values and the principles that constrain a person's conduct within the parameters of the stakeholders' expectations.[49]

The Organization for Economic Cooperation and Development (OECD) Task Force, in its work *"Principles of Corporate Governance"*, defined corporate governance as a set of relationship between the company and its management, board, shareholders and other stakeholders. Corporate governance is interested in providing the structures that set the objectives of the company and a means through which such objectives are accomplished and monitored.[50] This definition by the OECD is intended to establish a relationship between the stakeholders and the company.

Van Der Merwe defines corporate governance as a way in which directors comply with the provisions of the company law and laws regulating and giving effect to reliable

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[46]See also Salacuse *"Corporate Governance in the New Century"* (2004) The Company Lawyer at page 69-83.
[47]Du Plessis *"Corporate Governance and the Cadbury Report"* (1994) Vol 6 South African Mercantile Law Journal at page 81-82.
[48] Report of the SEBI Committee on Corporate Governance, (2003) at page 1.
[49] See also Moyo *"South African Principles of Corporate Governace: Legal and Regulatory Restraints on Powers Remuneration of Executive Directors"* Published LLM Thesis (University of South Africa 2010) at page 6.
[50] OECD *"Principles of Corporate Governance"* (OECD April 1999) Retrieved from www.oecd.org/dataoecd.132/181/31557724.pdf.

management in the company[51] whereas O'Donovan limits his definition only to controls, structures and operations of a company which are intended to achieve goals that satisfy shareholders, employees, creditors and suppliers.[52]

This work adopts a more comprehensive definition of corporate governance by Du Plessis and colleagues who defines corporate governance as the "process of controlling management and balancing the interests of all internal stakeholders and other parties who can be affected by the corporation's conduct in order to ensure responsible behavior by corporations and to achieve the maximum level of efficiency and profitability for a corporation".[53]

From the aforesaid definitions, one may conclude that if the SAA properly interprets and apply corporate governance principles: firstly, the supervision and controlling management of the SAA will be dealt with according to the shareholders' interests, which is the government through the relevant Minister.[54] Secondly, the overall direction of the SAA will function properly.[55] Thirdly, the leadership of the SAA will run the corporation responsibly, ethically and with integrity.[56]

The benefit of corporate governance was adequately indicated by Lipman by saying that: "Good corporate governance helps to prevent corporate scandals, fraud and potential civil and criminal liability of the organization. A good corporate governance image enhances the reputation of the organization and makes it attractive to customers, investors, suppliers, and in the case of non-profit organizations, contribution."[57]

It has been submitted above that the SAA has recently been found to have many corporate scandals such as misappropriation of funds, corporate failures, and that the

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[51] Van Der Merwe, Appleton, Delport, Furney, Mohory & Koen *"South African Corporate Governance Business Administration"* (Juta & Co Ltd 2009) at page 15.1-15.32).
[52] See O'Donovan *"Board Culture of Corporate Governance"* (2003) Vol 613 Corporate Governance International Journal at page 22-30.
[53] Du Plessis, Hargovan & Bagaric "Principles of Contemporary Corporate Governance" at page 6-7.
[54]See also Parkinson *"Corporate Power and Responsibility"* (1994) Oxford University Press.
[55] See also Tricker "Coprporate Governance in State-OWNED Enterprises" (2006) Washington DC: Mckinsey & Company.
[56] See also *South African Broadcasting Corporation Ltd v Mpofu [2009] 4 All SA 169 (GSJ)* at para 64.
[57]Lipman & Lipman *"Corporate Governance Best Practices: Strategies for Public, Private, and Non-profit Organizations"* (2006) New Jersey: John Wiley & Sons at page 3.

alleged cause of these is poor interpretation and application of corporate governance.[58] This work shares the same sentiments of Lipman that corporate governance helps avoid problems such as these. For argument' sake, one of the principles of corporate governance is ethical leadership as it will be seen below.[59] It is submitted beyond the shadow of doubt that had it been that there were ethical leaders in the SAA. Therefore corporate governance helps avoid problems of corporate scandals indeed.

Corporate governance if well interpreted, applied and adhered to; may cause different individuals involved in company management structure to be accountable.[60]The modern business arrangement, which establishes the principal-agent relationship, portrays the need for corporate governance in that separation of management and ownership normally, leads to conflict of interest between shareholders and directors.[61] The American Bar Association (ABA) submitted that the directors normally fall in the temptation of pursuing their own interests by manipulating corporate information.[62] This tempts one to conclude that should the directors not adhere to the principles of corporate governance, they may in the process of their management conceal their mistakes and thereby misreport to the shareholders on the affairs of the company.

Having said that, the United Securities and Exchange Commissioner argued that: "If a country does not have a reputation for strong corporate practices, capital will flow elsewhere. If the investors are not confident with the level of disclosure, capital will flow elsewhere. If a country opts for lax accounting and reporting standards, capital will flow elsewhere. All enterprises in that country regardless of how steadfast a particular company's practices may be, suffer the consequences. Markets exist by the grace of investors and it is today's more empowered investors who will determine which companies and which markets will stand the test of time and endure the weight of greater

[58]See Abstract above.
[59]See Chapter four below.
[60]Emery, Finnerty & Stowel *"Corporate Financial Management"* (2002) 2nd ed Upper Saddler River at page 374-381.
[61]Jensen & Meckling *"Theory of Firm: Managerial Behaviour, Agency Costs and Ownership Structure"* (2006) Journal of Economics 3 (4) at page 305 – 360.
[62]American Bar Association (ABA), Report of the Task Force on Corporate Responsibility, February 2002, from http://www.abanet.org/businesslaw/corporateresponsibility/financialreport/pdf, retrieved on 08 August 2015.

competition. It serves as well to remember no market has divine right to the investors' capital."[63]

Corporate governance principles if well interpreted and applied in the SAA may, firstly attract investors and lead it to sustainability in an intensive manner. Secondly, as Horn argued, adherence to good corporate governance may lead to judicious use of resources by enabling an organization to maximize the opportunities available for it and managing risk better. Therefore corporate governance maximizes a company's chances of success in the market place and sustainable long-term growth.[64] Thirdly, the procedures for corporate governance will lead the SAA to a firm management by assisting directors and managers with sound company strategy. This avoids the abuse of power by directors and or the interference by shareholders into directors' duties. Finally, good corporate governance may lead the SAA to distribution of rights and responsibilities between the corporation participants such as the board, managers, shareholders, and other stakeholders.[65]

2.3 Legislative Frameworks

2.3.1 The South African Airways Act[66] (SAA Act)

The South African Airways Act (SAA Act) is the one in terms of which the South African Airways (SAA) is established.It was enacted to give effect to the SAA after it was transferred from Transnet. In terms of the said Act the SAA is converted into a public company which has a share capital in terms of the Companies Act No: 71 of 2008.[67] The SAA is strictly governed by the Act and it is further subjected to the application of the Public Finance Management Act[68] (PFMA). The SAA Act provides that its objects are

[63]See Introduction to the King III Report.
[64]Horn *"The Legal Regulation of Corporate Governance with Reference to International Trends"* (2005) at page 15-17.
[65]Report of the SEBI Committee on Corporate Governance (2003) at page 1.
[66]Ibid.
[67] See section 4 of the SAA Act.
[68]Ibid.

amongst others to provide for the listing of the SAA as a major public entity in Schedule 2 of the PFMA.[69] For this reason the Companies Act and PFMA are applicable to the SAA and specifically contain governance provisions which are applicable to the SAA. Furthermore the King Reports on Corporate Governance are as well applicable to the SAA.

2.3.2 The Public Finance Management Act[70] (PFMA)

In terms of the PFMA the SAA board is expected to be accountable and its directors must exercise the duty of utmost care in as far as the SAA assets, finances and records are concerned. When managing the finances of the corporation, the SAA directors must act with fidelity, honesty, integrity and in the best interest of the SAA. The legislature to which the SAA is accountable and relevant minister have the powers to request the SAA to disclose all relevant facts which may influence ministers or legislature's decisions or actions. Furthermore the directors of the SAA must exercise their duties in such a way that will avoid any prejudice to the SAA's financial interests.[71] Sections 46 to 86 are relevant for the purpose of corporate governance in as far as finances are concerned although the whole of the PFMA should nevertheless be considered. For this reason few of those sections are discussed below in order to highlight the relevance of the PFMA in the SAA corporate governance.

Section 49 of the PFMA deals with accounting authorities which are essential for the SAA together with other SOCs and it provides that:

"(1) Every public entity must have an authority which must be accountable for the purposes of this Act.

(2) If the public entity-

[69]See section 2 of the SAA Act.
[70]Ibid
[71]See sections 49 and 50 of the PFMA.

(a) has a board or other controlling body, that board or controlling body is the accounting authority for that entity; or

(b) does not have a controlling body, the chief executive officer or the other person in charge of the public entity is the accounting authority for that public entity unless specific legislation applicable to that public entity designates another person as the accounting authority.

(3) The treasury, in exceptional circumstances, may approve or instruct that another functionary of a public entity must be the accounting authority for that public entity.

(4) The relevant treasury may at any time withdraw an approval or instruction in terms of subsection (3).

(5) A public entity must inform the Auditor-General promptly and in writing of any approval or instruction in terms of subsection (3) and any withdrawal of an approval or instruction in terms of subsection (4)."

In terms of the aforesaid provision the board is the accounting body of the corporation and has the power and authority to manage and guide the corporation. This means that the SAA board must ensure that it complies with this provision in order to ensure that the SAA is accountable, transparent and sustainable. It ensures that there is separation of powers between the shareholders, board of directors and management. The accounting duties are therefore vested in the board of directors and not the shareholders or management.

The fiduciary duties of the accounting authority are stipulated in section 50 of the PFMA which provides that:

"(1) The accounting authority for a public entity must-

(a) exercise the duty of utmost care to ensure reasonable protection of the assets and records of the public entity;

(b) act with fidelity, honesty, integrity and in the best interests of the public entity in managing the financial affairs of the public entity;

(c) on request, disclose to the executive authority responsible for that public entity or the legislature to which the public entity is accountable, all material facts, including those reasonably discoverable, which in any way may influence the decisions or actions of the executive authority or that legislature; and

(d) seek, within the sphere of influence of that accounting authority, to prevent any prejudice to the financial interests of the state.

(2) A member of an accounting authority or, if the accounting authority is not a board or other body, the individual who is the accounting authority, may not-

(a) act in a way that is inconsistent with the responsibilities assigned to an accounting authority in terms of this Act; or

(b) use the position or privileges of, or confidential information obtained as, accounting authority or a member of an accounting authority, for personal gain or to improperly benefit another person.

(3) A member of an accounting authority must-

(a) disclose to the accounting authority any direct or indirect personal or private business interest that that member or any spouse, partner or close family member may have in any matter before the accounting; and

(b) withdraw from the proceedings of the accounting authority when that matter is considered, unless the accounting authority decides that the member's direct or indirect interest in the matter is trivial or irrelevant."

This provision sets out a manner in which the board of directors is supposed to act, behave and react. It provides for the qualities which the director of the board must possess in order to give effect to the interest of the shareholders.[72] The section serves as a guideline as to what qualities should be considered when the directors are recruited, selected or appointed by the shareholders or whichever responsible body in this regard.

[72]Cassim *"Contemporary Company Law"* (Juta, 2011) at page 36.

The potential directors with qualities provided for in the section should then be preferred so that there may be compliance with the PFMA. The section should be read in conjunction with the provisions of section 76 of the Companies Act[73] which provides for the qualities which a director must be acquainted with in the performance of his/her duties. The fact that the SAA was at some stage reported to have appointed unqualified persons to the position of directorship is a direct evidence of violation of this section.

Section 51 of the PFMA provides for the general responsibilities of accounting authorities and it provides that:

"(1) An accounting authority of a public entity—

(a) must ensure that that public entity has and maintains—

(i) effective, efficient and transparent systems of financial and risk management and internal control; 48

(ii) a system of internal audit under the control and direction of an audit committee complying with and operating in accordance with regulations and instructions prescribed in terms of sections 76 and 77; and

(iii) an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective;

(iv) a system for properly evaluating all major capital projects prior to a final decision on the project;

(b) must take effective and appropriate steps to—

(i) collect all revenue due to the public entity concerned; and

[73]Ibid.

(ii) prevent irregular expenditure, fruitless and wasteful expenditure, losses resulting from criminal conduct, and expenditure not complying with the operational policies of the public entity; and

(iii) manage available working capital efficiently and economically;

(c) is responsible for the management, including the safe-guarding, of the assets and for the management of the revenue, expenditure and liabilities of the public entity; …"

The section emphasizes firstly that the SAA board must maintain effective, efficient and transparent systems of financial and risk management. Secondly, the board must ensure that there is an internal audit system under the control and direction of an audit committee and that audit committee must comply with the treasury regulations and the PFMA itself. Lastly it must make sure that there is an appropriate procurement and provisioning system that is fair, equitable, transparent, competitive and cost effective. The section supports the application of corporate governance in the SAA in that it requires the board to exercise its duties in a way that will enhance reporting profits and fewer losses and manage the capital efficiently and economically. This paper argues that the SAA is guilty of non-compliance with the aforesaid section given the fact that it was bailed out by the State on numerous occasions and the issue of tender irregularities implicating its directors.

The principles with regard to annual reporting and financial statements are set out in section 55 of the PFMA which provides that:

"(1) The accounting authority for a public entity—

(a) must keep full and proper records of the financial affairs of the public entity;

(b) prepare financial statements for each financial year in accordance with generally accepted accounting practice, unless the Accounting Standards Board approves the application of generally recognized accounting practice for that public entity;

(c) must submit those financial statements within two months after the end of the financial year—

(i) to the auditors of the public entity for auditing; and

(ii) if it is a business enterprise or other public entity under the ownership control of the national or a provincial government, to the relevant treasury; and

(d) must submit within five months of the end of a financial year to the relevant treasury, to the executive authority responsible for that public entity and, if the Auditor-General did not perform the audit of the financial statements, to the Auditor-General—

(i) an annual report on the activities of that public entity during that financial year;

(ii) the financial statements for that financial year after the statements have been audited; and

(iii) the report of the auditors on those statements.

(2) The annual report and financial statements referred to in subsection (1) (d) must—

(a) fairly present the state of affairs of the public entity, its business, its financial results, its performance against predetermined objectives and its financial position as at the end of the financial year concerned;

(b) include particulars of—

(i) any material losses through criminal conduct and any irregular expenditure and fruitless and wasteful expenditure that occurred during the financial year:

(ii) any criminal or disciplinary steps taken as a consequence of such losses or irregular expenditure or fruitless and wasteful expenditure;

(iii) any losses recovered or written off;

(iv) any financial assistance received from the state and commitments made by the state on its behalf; and

(v) any other matters that may be prescribed; and

(c) include the financial statements of any subsidiaries.

(3) An accounting authority must submit the report and statements referred to in subsection (1) (d), for tabling in Parliament or the provincial legislature, to the relevant executive authority through the accounting officer of a department designated by the executive authority.

(4) The relevant treasury may direct that, instead of a separate report, the audited financial statements of a Schedule 3 public entity which is not a government business enterprise must be incorporated in those of a department designated by that treasury."

This section concurs with the provisions of the King III and King IV Reports on financial reporting. It imposes a duty on the board of directors to keep full and proper records of its financial affairs and to prepare financial statements which must be submitted to the auditors of the corporation. It further provides what details should be contained in the financial statements and how the financial reports and financial statements should be submitted to the relevant executive authority for tabling in Parliament.

However, despite these clear provisions of the PFMA requiring the SAA board to manage the SAA finances diligently and to disclose the relevant information to the Minister and the legislature, recklessness with regard to the interpretation and application of the aforesaid is so rife in the SAA to the extent that the SAA had to be bailed out at the expense of taxpayers by the State. The directors of the SAA have been implicated in meddling in the awarding of lucrative tenders. For this reason compliance with the PFMA in SAA is a problem. Arguably, there will not be proper compliance with the PFMA in the SAA if the PFMA is not properly interpreted and applied.

2.3.3 The Companies Act[74] (CA)

(a) General Application of the Companies Act

The Companies Act (CA) is applicable to the State Owned Companies (SOCs) including the SAA. The Act deals with many aspects of corporate governance including provisions with regard to record keeping, appointment of directors, directors' conduct, powers and duties of the board of directors so as to give effect to good corporate governance. It provides that a public company or an SOC must also comply with the extended accountability requirements set out in Chapter 3 of the CA.[75]

Section 66 of the CA provides for principles of corporate governance with regard to the board of directors, directors and other prescribed officers. Section 66 (1) of the CA reads thus:

> "(1) The business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise."

As discussed above, corporate governance is about how the company is managed and or controlled.[76] This point is confirmed by the provisions of section 66 (1) of the Act which confers the management and control powers of a company on the directors. This tempts one to assume or draw an inference that the directors have all the necessary powers in terms of the CA to manage and control the company within and up to the limits provided for in the CA or MI. In terms of the aforesaid provision the SOC must have a board of directors which is responsible for the exercise and performance of any functions of the SOC unless otherwise provided for by the CA itself or Memorandum of Incorporation (MI).

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[74]Ibid.
[75]See section 34 (1) of the CA.
[76]See definition of corporate governance above.

The section is crucial especially in SOCs which often experience political meddling by their shareholder ministers.

The board of the SOC must consist of a minimum of three directors and a social and ethics committee must be established.[77] The directors of the SOCs must act in good faith and for proper purpose. The board must act in the best interest of the SOC and with the degree of care, skill and diligence.[78] Section 66 (2) of the Act take this further by prescribing a number of directors to be appointed in order to manage both the private and public companies.[79]

Chapter 2 of the CA read with Part F of the CA provides for the regulatory principles for the governance of companies. It deals with the relationship between the shareholders and directors in shareholders meetings. For instance, the chapter deals with corporate governance issues such as how meetings of shareholders are convened , persons to attend such meetings , notice for the convening of such meetings , how the meetings are conducted , how resolutions are passed , how do directors vote in such meetings. It is only when these provisions have been complied with that it can be said that corporate governance principles on the issue of shareholders' meetings have been adhered to in the SAA. This also closes the doors for challenges on SAA's transactions which resulted from such meetings on account of non-compliance with corporate governance.

The appointment of directors is dealt with in section 66 (4) which provide that a director be appointed and removed by a person named in, or determined in terms of memorandum of incorporation. Section 69 further prescribes the circumstances under which the director of a company may be declared ineligible and disqualified. The CA goes further to even deal with the issues of removal of directors , the procedure to be followed when declaring the directors to delinquent or under a probation order , board committees , resolutions of

[77] See section 72 (4) of the CA.
[78] See section 76 of the CA.
[79]Section 66 (2) of the CA provides as follows:
" The board of a company must comprise-
(a) in the case of a private company, or a personal liability company, at least one director; or
(b) in the case of a public company, or a non-profit company, at least three directors,
in addition to the minimum number of directors that the company must have to satisfy any requirement, whether in terms of this Act or its Memorandum of Incorporation, to appoint an audit committee, or a social and ethics committee as contemplated in section 72(4)."

directors , how directors are remunerated and loans and or financial assistance to directors.

Chapter 3 of the Act provides for the most crucial and pivotal concepts of corporate governance which are transparency and accountability. The public company and state-owned companies are required to have a company secretary, audit committee and external auditors. Section 88 deals with the duties of company secretaries.

(b) Fiduciary Duties of Directors

Sections 75, 76, 77 and 78 of the CA on the other hand, prescribe the common law fiduciary duties of directors. It is arguably submitted that the approach in these sections may be referred to as "a one size fit all approach" and therefore disadvantageous yet enlightening the directors of their fiduciary duties generally. For instance, section 76 (2) and (3) provides for as follows:

"(2) A director of a company must-

(a) not use the position of director, or any information obtained while acting in the capacity of a director-

(i) to gain an advantage for the director, or for another person other than the company or a wholly-owned subsidiary of the company; or

(ii) to knowingly cause harm to the company or a subsidiary of the company; and

(b) communicate to the board at the earliest practicable opportunity any information that comes to the director's attention, unless the director-

(i) reasonably believes that the information is- (aa) immaterial to the company; or (bb) generally available to the public, or known to the other directors; or

(ii) is bound not to disclose that information by a legal or ethical obligation of confidentiality.

(3) Subject to subsections (4) and (5), a director of a company, when acting in that capacity, must exercise the powers and perform the functions of director-

(a) in good faith and for a proper purpose;

(b) in the best interests of the company; and

(c) with the degree of care, skill and diligence that may reasonably be expected of a person-

(i) carrying out the same functions in relation to the company as those carried out by that director; and

(ii) having the general knowledge, skill and experience of that director.

The aforesaid sections as well as other sections of the CA on fiduciary duties of directors are discussed below.

(C) The Duty to Act in Good Faith and in the Best Interest of the Company

Section 76 imposes a duty on the board of directors to act diligently as if they are acting for their own interests and affairs. This requires the board to act in a manner that will further the interests of the business and therefore lead to its sustainability. This duty to act in good faith and in the best interest of the business is a crucial duty from which all other fiduciary duties of the directors are derived.[80] In dealing with the duty of directors to act bona fide, the courts have stressed that the determining factor on whether the board has acted in good faith and in the best interest of the corporation is reasonableness.[81]

[80] Cassim, Cassim & Cassim *"Contemporary Company Law"* (2012) at page 523 – 528.
[81] Extra sure Travel Insurance Ltd v Scattergood (2003) 1 BCLR 598 (CHD).

For instance in *Re Smith & Fawcett Ltd*[82] the court said that directors must act *bona fide* in what they consider is in the best interest of the company not what the court may order. For this reason acting in good faith means that a director must act in a way which he honestly considers to be in the best interest of the company. There needs to be a subjective awareness of wrongdoing before it can be said that this duty was breached. This view was supported in *Darvall v North Sydney Brick & Tile Co Ltd*[83] wherein it was said that the directors have more knowledge, time and expertise at their disposal than judges to assess the best interest of a company. Therefore this paper argues that the main rule of thumb in this regard is the director's state of mind.[84] In *Hogg v Cramphorn Ltd*[85] it was also said that it was not within the powers of the court to review the merits of a decision of the directors honestly arrived at.

The director's decision must of course be reasonable.[86] In *Extrasure Travel Insurance Ltd v Scattergood*[87] it was said that the director's belief that he acted in the best interest of the company must be based on reasonable grounds. The test established in the case of *Charterbridge Corporation Ltd v Lloyd's Bank*[88] was to the effect that the question is whether an intelligent and honest person in the position of the director in question could in the whole circumstances have reasonably believed that he was acting in the best interest of the company.

(d) The Duty to Exercise Independent Judgment

It has been argued by some commentators that section 76 also provides for the directors' duty to exercise an independent judgment and that this duty is part and parcel of the duty to act in good faith in the interest of the company. Generally, a director cannot presently bind himself/herself on how he / she vote will in the future. This principle was confirmed

[82] [1942] Ch 304 at 306.
[83] (1989)15 ACLR 230 SC (NSW).
[84] *Regentcrest plc v Cohen* [2001] 1 BLC 80 at page 104.
[85] [1967] Ch 254 at page 268.
[86] *Teck Corp Ltd v Millar* (1972) 33 DLR (3d) 288 (BCSC).
[87] [2003] 1 BCLC 598 at page 619.
[88] [1970] Ch 62 at page 74.

in *Fulham Football Club Ltd v Cabra Estates Plc*[89] the court denied the directors' future exercise of their powers in a particular way even when the court was convinced that the directors were acting in the interest of the company. This was because the directors of a football club undertook to vote in a particular way in future in return for substantial payment of money. The court in Australian case of *Thorby v Goldberg*[90] followed a similar approach.

This duty to exercise independent judgment is crucial particularly to nominee directors in that the directors who have been nominated (nominee directors) are expected to represent the interests of those who nominated them (nominators). This view was confirmed in the case of *Boulting v Association of Cinematograph, Television and Allied Technicians*[91] wherein the court the court confirmed that there is nothing wrong in finding a nominee director who is left free to exercise his independent judgment in the interest of the company he serves but there is something wrong and even unlawful for a nominee director to be subjected to the terms as to how to act in relation to the affairs of the company.

(e) The Duty to Act within Their Powers

Section 76 also deals with the directors' duty to act within their powers. This duty is also provided for in common law which prescribes that the directors are not supposed to perform their duties in a manner that exceeds their powers or limits of their authority. Therefore the directors could not in common law enter into contracts that were *ultra vires* on behalf of a company or the contracts that were illegal. This rule was applied in the case of *Ashbury Railway Carriage and Iron Co v Riche*[92]*.* Although section 76 of the CA does not explicitly provide for the duty of directors not to exceed their powers, this paper argues that the said duty is part and parcel of the directors' duty to act in good faith for a

[89] [1994] 1 BCLC 363 (Ch and CA).
[90] (1964) 112 CLR 597.
[91] [1963] 1 All ER 716 (W) at page 651.
[92] (1875) LR 7MHL 653.

proper purpose and in the best interest of the company as provided for in section 76 (3) (a) and (b).

For this reason section 77 (2) (a) of the CA holds the directors liable for any loss, damage or costs arising out of a breach of fiduciary duty. It stands to reason that should the directors act outside their powers they may be held liable. Furthermore, section 77 (3) (a) holds the directors liable for any loss, damages or costs arising from the director's direct or indirect acting in the name of the company or purporting to bind the company or authorizing the taking of action by or on behalf of the company despite him knowing that he lacked the authority to do so. Section 20 (6) of the CA is also relevant in this regard in that it entitles each shareholder of a company to claim from any person who by fraud or gross negligence causes a company to do anything contrary to the CA or limitation, restriction or qualification of the powers and activities of the company unless this is ratified by the shareholders of the company through a special resolution. In the Australian case of *R v Byrnes*[93] the court held that where the directors knowingly or negligently entered into unauthorized transactions, they would be said to be improperly using their position as directors.

(f) The Duty to Avoid Conflict of Interest

In terms of section 76 (3) (b) of the CA a director of a company has a duty to act in the best interest of the company and not in his interest. In terms of the case of *Robinson v Randfontein Estate Gold Mining Co Ltd*[94] the Appellate Division as it then was held that this provision means that a director of a company must not place himself in a position in which he has, or may have, a persona interest or a duty to another which conflicts, or may conflict, with the company or with the director's duties to the company. This means that a director of a company cannot in the performance of his duties prefer his own interests that those of the company. It was argued that:

[93] (1995) 183 CLR 501.
[94] 1921 AD 168 at page 178-179.

“A person in a fiduciary position, such as a director, has a legal duty to prevent a conflict between his interests and those of a party which he serves. It follows, therefore, that a director may obtain no other advantage from his office than that to which he is entitled to by way of director’s remuneration.”[95]

The test in deciding whether there has been a breach of this duty is whether a reasonable person assessing the facts and circumstances of the relevant case would think that there was a real possibility of breach.[96] Acting in good faith or lack thereof is irrelevant for this purpose. There are two close related principles in as far as conflict of interest is concerned, namely, (a) a duty to avoid a conflict of personal interest (‘the no-conflict rule’) and (b) the duty not to make a profit from the director’s fiduciary position (‘the no-profit rule’).[97]

The latter principle means that a director should not make profit by reason of his office. If he does, then he must account to the company for such profit. The leading case in this regard is *Regal (Hastings) Ltd v Glliver*[98]*.* The court in *Phillips v Fieldstone Africa (Pty) Ltd*[99] confirmed the *Regal* case by mentioning that the aforesaid rule is a strict rule with no room for exception. The former principle means that the directors cannot engage in transactions in which they have, or can have, a personal interest conflicting, may possibly conflict the interests of those they are supposed to protect. In *Aberdeen Railway Co v Blaikie Brothers*[100] the court applied the principle in a strict manner to the extent that it could not inquire into the fairness or unfairness of the transaction in question.

Another rule of paramount importance in relation to the duty to avoid conflict of interest is referred to as the corporate opportunity rule. This rule is relevant where a director misappropriates or exploits for himself an economic opportunity of the company. This is

[95]Celliers and Benade *“at al Corporate Law”* at page 141.
[96]Havenga *“Director’s exploitation of corporate opportunities and the Companies Act 71 of 2008”* (2013) 2 Vol 2 TSAR at page 257-268.
[97]Cassim *“et al Contemporary Company Law”* (2011) at page 535.
[98][1942] 1 All ER 378.
[99][2004] SA (3) 465 (SCA).
[100](1894) 1 Macq 461 at page 471.

so because such opportunity is seen as the company's property. The leading case in this regard is that of *Da Silva v DH Chemicals*[101] wherein the court said the following:

"It is a well-established rule of company law that directors have a fiduciary duty to exercise their powers in good faith and in the best interests of the company. They may not make a secret profit or otherwise place themselves in a position where fiduciary duties conflict with their personal interests (Robinson v Randfontein Estates Gold Mining Co Ltd 1921 AD 168 at 177). A consequence of the rule is that a director is in certain circumstances obliged to acquire an economic opportunity for the company, if it is acquired at all. Such an opportunity is said to be a 'corporate opportunity' or one which is the 'property' of the company. If it is acquired by the director, not for the company but for himself, the law will refuse to give effect to the director's intention and will treat the acquisition as having been made for the company. The opportunity may then be claimed by the company from the delinquent director. Where such a claim is no longer possible, the company may in the alternative claim any profits which the director may have made as a result of the breach or damage in respect of any loss it may have suffered thereby."[102]

The directors are therefore under a duty to acquire an opportunity of the company when expressly or impliedly mandated by the company to do so and the company is relying on the director to so.

It may be concluded from the above that the legislature in promulgating the CA, wanted to give effect to the principles of corporate governance in the SOCs including the SAA. This may be seen from the content of section 7 of the CA which provides for the encouraging of corporate governance as one of the purposes of the CA.[103]

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[101] 2008 (8) SA 620 SCA 627 para 18.
[102] See Blackman, Jooste and Everingham *"Commentary on the Comapanies Act"* Vol 2 at page 8-161.
[103] Section 7 of the CA reads as follows:
"The purposes of this Act are to-
(a) promote compliance with the Bill of Rights as provided for in the Constitution, in the application of company law;

2.4 King Reports on Corporate Governance

The history of the development of the King Report on corporate governance was discussed above.[104] This discussion is made simply for the purpose of completeness and or convenience. The King III Report contains nine (9) principles of corporate governance namely: ethical leadership and corporate citizenship; boards and directors; audit committee; the governance of risk; the use of information technology; compliance with laws, codes, rules and standards; internal audit; governance stakeholders relationship; and integrated reporting and disclosure. These principles are discussed in detail below.[105]

The most important fact to note is that the King III Report on Corporate Governance has been drafted on the "comply and or explain" principle.[106] This is to say that although the King III Report is not compulsory, it requires the directors of the SAA to comply with it and or explain their failure to comply with it. Acting in the best interest of the company is usually a good ground for deviating from the principles of corporate governance as outlined in the King III.

(b) promote the development of the South African economy by-
(i) encouraging entrepreneurship and enterprise efficiency;
(ii) creating flexibility and simplicity in the formation and maintenance of companies; and
(iii) encouraging transparency and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation;
(c) promote innovation and investment in the South African markets;
(d) reaffirm the concept of the company as a means of achieving economic and social benefits;
(e) continue to provide for the creation and use of companies, in a manner that enhances the economic welfare of South Africa as a partner within the global economy;
(f) promote the development of companies within all sectors of the economy, and encourage active participation in economic organisation, management and productivity;
(g) create optimum conditions for the aggregation of capital for productive purposes, and for the investment of that capital in enterprises and the spreading of economic risk;
(h) provide for the formation, operation and accountability of non-profit companies in a manner designed to promote, support and enhance the capacity of such companies to perform their functions;
(i) balance the rights and obligations of shareholders and directors within companies;
(j) encourage the efficient and responsible management of companies;
(k) provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders; and
(l) provide a predictable and effective environment for the efficient regulation of companies."

[104] See Chapter 1 above.
[105] See Chapter 3 below.
[106] See Chapter 4 below.

The King IV Report was adopted recently and its fourfold objective is arguably not departing from the underpinning principles of the King III Report. However the King III principles have been refined in the King IV report. The King IV Report defines corporate governance as a process whereby the governing body exercises ethical and effective leadership.

2.5 The Protocol on Corporate Governance in the Public Sector

The Protocol on Corporate Governance in the Public Sector (the Protocol) provides guidance to various SOCs including the SAA.[107] Because the King Report is of general nature and does not address corporate governance in the public sector specifically, the Protocol was published. The Protocol compliments and amplifies the King Report and therefore the two must be read together.[108] The two are not contradictory. It is acknowledged in the Protocol that the SOCs face serious financial, reputational, political and operational risks to the extent that principles of corporate governance ought not to be ignored.[109]

The Protocol provides that the SOC board must control and head the corporation with effectiveness and efficiency.[110] This principle is also provided for in the King Report. The board of SOC must be made of both executive and non-executive directors. The non-executive directors have to be more than the executive directors in order to ensure that the decisions taken are independent and objective. The Protocol provides that absolute responsibility of the performance of the corporation rests on the board which board must in this regard fully account to the shareholders.[111] It provides that the chairperson of the board who is a non-executive director should be preferably appointed for the SOC.[112] The capability and performance of the board determines its performance and therefore the

[107] Department of Public Enterprise Protocol on Corporate Governance; Koma 2009 *J Publ Admin* at page 451 – 459.
[108] See Department of Public Enterprise Protocol on Corporate Governance para 2.2.
[109] See Department of Public Enterprise Protocol on Corporate Governance para 2.3.
[110] See Department of Public Enterprise Protocol on Corporate Governance para 5.1.
[111] See Department of Public Enterprise Protocol on Corporate Governance para 5.1.1.1.
[112] See Department of Public Enterprise Protocol on Corporate Governance para 5.1.2.1.

shareholders must appoint directors who are of integrity, competent, relevant and complementary skills, experience, expertise and accountable.[113]

The Protocol compliments and replicates the King Report although both cannot be said to have been complied with in the SAA in that its directors were at some stage implicated in meddling in tenders and falsifying their qualifications.

2.6 Constitutional Institutions and Structures Supporting Corporate Governance

2.6.1 National and Provincial Departments

These departments are expected to promote the principles of corporate governance including the promotion of accountability, transparency and responsibility. There is a duty on them to ensure that they support corporate governance in the SOCs including the SAA. The Executive must always be held to account for its activities in relation to the SOCs. The executive must also be accountable for the monies of the public and the resources used daily. The SAA is an SOC listed under Schedule 2 of the PFMA and therefore its conduct amounts to conduct in state affairs. This is crucial in that it curbs incidents of fraud and corruption which have been a trend recently in the SAA.

2.6.2 The Auditor General

The office of the Auditor General (AG) is established in terms of the Constitution of the Republic of South Africa.[114] In particular, section 188 of the Constitution provides that:

“(1) The Auditor-General must audit and report on the accounts, financial statements and financial management of –

(a) all national and provincial state departments and administrations;

[113] See Department of Public Enterprise Protocol on Corporate Governance para 5.1.6.1.
[114] See section 188 of the Constitution of the Republic of South Africa.

(b) all municipalities; and

(c) any other institution or accounting entity required by national or provincial legislation to be audited by the Auditor-General.

(2) In addition to the duties prescribed in subsection (1), and subject to any legislation, the Auditor General may audit and report on the accounts, financial statements and financial management of –

(a) any institution funded from the National Revenue Fund or a Provincial Revenue Fund or by a municipality; or

(b) any institution that is authorized in terms of any law to receive money for a public purpose.

(3) The Auditor-General must submit audit reports to any legislature that has a direct interest in the audit, and to any other authority prescribed by national legislation. All reports must be made public.

(4) The Auditor-General has the additional powers and functions prescribed by national legislation."

The SAA as mentioned above is an SOC falling under the PFMA and therefore falling under the application of section 188 (1) (c) of the Constitution. The AG has the power to audit and report on the accounts, financial statements and financial management of the SAA. The reports made by the AG are in terms of the Constitution supposed to be made available to the public.[115] It is clear that the aforesaid section promotes the principles of transparency and accountability which are crucial within the concept of corporate governance. It is submitted that auditing in general should be understood by the managerial leadership of the SAA to avoid situations such as tender irregularities in the SAA. The leadership of the SAA must therefore be acquainted with processes of auditing for the purpose of efficient corporate governance.

[115] See section 188 (3) of the Constitution.

2.6.3 The Public Service Commission

The Public Service Commission (PSC) in South Africa is an independent and impartial body in the exercise of its duties.[116] It is one of those structures which support corporate governance in the SOCs. It is mandated to investigate, monitor and evaluate the organization and administration of the public service.[117] It is also obliged to promote measures which ensure that the public service is effective and efficient. The PSC is tasked to promote the values and principles of the public administration as set out in the Constitution.[118] It can thus be submitted that the PSC was established to promote corporate governance in the public sector through the regulation and promotion of ethical leadership, monitoring and evaluation, management and measurement activities in the public sector. The SAA is a public entity and its affairs are affairs within the scope of the PSC.

2.6.4 The National Treasury

The National Treasury (NT) plays a very important role with regard to corporate governance in SOCs as a protector of National Revenue Fund and sovereign credit rating. The NT must set reporting guidelines to promote and enforce transparency with regard to revenue, expenditure, assets and liabilities of the SOCs. The NT must further oversee the funding/borrowing programmes of the SOCs and control the utilization of contingent liabilities and effective treasury management models. The aforesaid functions are provided by the PFMA. The NT must set reporting guidelines to promote and enforce transparency in respect of revenue, expenditure, assets and liabilities of departments,

[116] See section 196 (1) of the Constitution.
[117] See section 196 (4) of the Consitution.
[118] See also Public Service Commission, available at: http:www.psc.gov.za/,Retrieved 1 August 2015.

public entities and constitutional institutions.[119] It must approve or evaluate the creation of any new corporation which the SOCs intends to establish.[120]

The NT must receive the corporate plans[121] and may prescribe information, returns, documents, explanations and motivations as required by the PFMA.[122] This paper shares the same sentiments of Siswana that the NT was established simply for corporate governance to be at the heart of the public service.[123] The NT encourages accountability, transparency and risk management in the public sector through the drafting of fraud and risk plans to be implemented in order to ensure good governance.

2.6.5 The Public Protector

The Public Protector (PP)'s office is established in terms of the provisions of the Constitutions.[124] The PP is obliged in terms of the 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.[125] It must report on such conduct[126] and take appropriate remedial action.[127] The aforesaid constitutional duties imposed on the PP supports corporate governance in the SAA in that it ensures that rights of the general public are not undermined.

2.7 Conclusion

[119] See section 6 (1) (g) of the PFMA.
[120] See section 51 (1) (g) of the PFMA.
[121] See section 52 of the PFMA.
[122] See section 54 (1) of the PFMA.
[123] Siswana *"Leadership and Governance in South African Public Service: An Overview of the Public Finance Management System"* (2007) Thesis completed at the University of Pretoria, July 2007, at page 195.
[124] See section 182 of the Constitution.
[125] See section 182 (1) (a) of the Constitution.
[126] See section 182 (1) (b) of the Constitution.
[127] See section 182 (1) (c) of the Constitution.

Despite the aforesaid clear legal principles of corporate governance with which the SAA must comply, media reports abound of the SOCs boards. These include the SAA compromising some individuals of questionable integrity and character to the extent that such board members were found to have been meddling in tenders and falsifying their qualifications. This obviously raises a corporate governance concern as to how the relevant shareholder minister made those specific board appointments. It can thus be concluded that corporate governance principles in the aforesaid frameworks, if properly interpreted and applied, can help in rooting out the corporate governance challenges in the SAA. Regardless of all the legislations regulating SAA as government entity this research found that there is a great deal of work to be done in making sure that the is compliance with principle of corporate governance.

CHAPTER THREE: THE INTERPRETATION AND APPLICATION OF PRINCIPLES OF CORPORATE GOVERNANCE

3.1 Introduction

The principles of corporate governance in the RSA were initially contained in the 1994 King Report on corporate governance.[128] This Report was updated and superseded by the 2002 King II Report on corporate which was also superseded by the 2009 King III Report on corporate governance and the King Code of Governance in South Africa ("the Code"). The current and latest report is the King IV Report on corporate governance. The King IV does not differ with the King III in principle. This chapter seeks to analyze the interpretation and application of the nine principles of corporate governance as outlined in the King III Report.

3.2 Interpretation and Application of Corporate Governance Principles

3.2.1 Ethical leadership and corporate citizenship

According to Mokoena there has been a lot of theories and information in the body of knowledge on the principle of good governance and ethical leadership.[129] Having said that Macdonald defined ethics as a critical, structured examination of how we should behave, in particular, how we should constrain the pursuit of self-interest when our actions affect others.[130] He argued further that ethics means providing reasoned justification for our choices and behavior when it affects others, and reasoned justification for our praise

[128] See Chapter 1 above.
[129]Mokoena LD 2005.The Importance of Corporate Ethics and Values Building a Sustainable Strategy Model for Effective Implementation of Good Corporate Governance Within a State-owned Enterprise in SA.From
http://uir.unisa.ac.za/bitstream/handle/10500/164/2005%20MBL%20Research20%Report%20LD%20Mokoena%20full20Report.pdf?sequence=1. (Retrived 06 July 2015).
[130]MacDonald C 2010.The Business Ethics Blog.From http://businessethicsblog.com/. (Retrieved 06 July 205).

or criticism of other people's behavior. It is therefore clear that ethics seek to address the relationship between right and wrong.[131] It can then be accepted that the SAA needs to address the issue of ethics as part of governance. This is so because the SAA could not have been reported to have had board members meddling in tenders had it been that its leaders were ethical.

In terms of the King III Report, the Board of Directors (BOD) must provide effective leadership based on an ethical foundation.[132]The main reason behind this principle is that as the BOD leads the company ethically, the company will earn the necessary approval of those affected by it.[133] The Companies Act[134] (CA) requires certain companies to establish the so called "social and ethics" committee.[135] The BOD is responsible for the setting of values to which a company must adhere. Such values must be enshrined in a company's code of conduct.[136] The BOD must ensure that the conduct of the management and that of the BOD aligns to the set values.[137] The company's ethical performance must be assessed, monitored, reported and discharged.[138]

On the aspect of corporate citizenship, the King III Report requires the BOD to ensure that a company is, and is seen to be, a responsible corporate citizen. This principle was also recognized in *Minister of Water Affairs and Forestry v Stilforntein and Gold Mining Co Ltd*.[139] There has to be a relationship between the company and the society in which it operates.[140]The BOD must not concentrate only on the financial performance of a company, but also on the impact of the company's operations on society and the

[131]Verlaquez et al, Velasquez, Andre, Shanks, and Meyer (1978). What is meant by the term ethics? From http://www.alzheimereurope.org/ethics/Definition-and-approaches/What-is-meant-by-the-term-ethics. (Retrieved 06 June 2015).
[132] Principle 1.1 of the King III Report.
[133] King III Report at 21 para 12.
[134] Act No. 71 of 2008.
[135] Section 72 (4) of the Act No. 71 of 2008.
[136] Code 1.1.7.
[137] Code 1.1.8.
[138] Code 1.3.8.
[139] 2006 (5) SA 333 (W) at para 16.9.
[140] King III Report at page 22 para 19.

environment.[141] The company is expected to protect, enhance and invest in the well-being of the economy, society and the environment.

3.2.2 Boards and Directors

(a) The executive and non-executive directors

There is a distinction drawn by the King III Report between the executive directors and non-executive directors. The executive directors are directors normally under a contract of service with a company on a full time salaried employ and are involved in the day-to-day management of a company.[142] Whereas on the other hand, directors not involved in the day-to-day management of a company are referred to as the non-executive directors. They are appointed by the BOD to play a role relating to objective judgment, independent management in respect of issues faced by a company.[143] They cannot be expected to pay a continuous attention to the affairs of a company.[144] They must attend the meetings of the BOD, be committed and have good knowledge of the economic investment, industry and business environment. They are not supposed to be related to the executive directors to an extent that their independence is doubted.[145]

The King III Report defines a non-executive director as a director who[146]:

- Is not a representative of a shareholder who has the ability to control or significantly influence management or the BOD;
- Does not have a direct or indirect interest in the company that exceeds 5% of the group's total number of shares in issue;

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[141] Code 1.2.1.
[142] Annex 2.2 of the King III Report.
[143] Annex 2.3 of the King III Report.
[144] Fisheries Development Corporation of SA Ltd v Jorgensen, Fisheries Development Corporation of SA Ltd v AWJ Investments Pty Ltd 1980 (4) SA 156 (W) at page 165.
[145] King III Report at 38 para 66.
[146] King III Report at 38 para 67.

- Does not have a direct or indirect interest in the company that is less than 5% of the group's total number of shares in issue, but is material to his or her personal wealth;
- Has not been employed by the company or the group of which it currently forms part in any executive capacity, or been appointed as the designated auditor or partner in the group's external audit firm, or as senior legal advisor in the preceding three financial years;
- Is not a member of the immediate family of the individual who is, or has, during the preceding three financial years been employed by the company or the group in an executive capacity;
- Is not a professional advisor to the company or the group, other than as a director;
- Is free from any business or other relationship (contractual or statutory) that could be seen by an objective outsider to interfere materially with the individual's capacity to act in an independent manner, such as being a director of material customer of or supplier to the company; and
- Does not receive remuneration contingent upon the performance of the company.

It is recommended that the non-executive directors should undergo an evaluation in every year by the chairperson.

(b) What is expected from the BOD?

The BOD must act as a focal point and custodian of corporate governance.[147] It is recommended that the BOD must have a charter setting out its responsibilities.[148] The BOD must ensure that the company is, and is seen to be, the responsible corporate citizen[149] and it must further discharge its leadership duties based on an ethical foundation. It must direct and control a company in a strategic way.[150] The BOD is

[147] Principle 2.1 of the King III Report.
[148] King III Report at page 29 para 1.
[149] Principle 1.2 of the King III Report.
[150] King III Report at 20 para 7.

expected to act in the best interest of the company[151] and must ensure that there is an integrated report prepared annually in respect of a company's financial and sustainability performance.[152] It has to ensure that the company complies with and adheres to applicable rules, laws, standards and codes.[153] The BOD is expected to discharge a duty on the governance of risk[154], information technology[155] and internal audit.[156] Finally, the BOD must resolve the disputes as effectively, efficiently and expeditiously as possible.[157]

Relating to business rescue, the King III Report recommends that the BOD should:

- Consider business rescue proceedings or other turnaround mechanisms as soon as the company is financially distressed[158];
- On a continuous basis monitor whether the company is able to pay all its debts as they fall due and payable and whether a company is financially stable or distressed;[159]
- Determine the appropriate action to be taken which would reasonably likely avoid or overcome the financial distress of a company;[160]
- Appoint a suitably qualified and independent business rescue practitioner if business rescue proceedings are undertaken[161], who is not seen to be friendly to the BOD;[162] and
- Ensure that the business rescue practitioner furnishes security for the value of the assets of the company.[163]

(c) Composition of the BOD

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151 Principle 2.13 of the King III Report.
152 Principle 9.1 of the King III Report.
153 Principle 6.1 of the King III Report.
154 Principle 4.1 of the King III Report.
155 Principle 5.1 of the King III Report.
156 Principle 2.10 of the King III Report.
157 Principle 8.6 of the King III Report.
158 Principle 2.15 of the King III Report.
159 King III Report at 33 para 27.
160 Ibid.
161 Code 2.15.3.
162 Ibid.
163 Code 2.15.4.

It is suggested that there should be a majority of non-executive directors on the BOD and majority of the non-executive directors should be independent non-executive, as this brings about a reduction in the possibility of conflict of interest and promotes objectivity.[164] There should at least be a minimum of two executive directors, being the Chief Executive Officer (CEO) and the director responsible for the finance function, being the Chief Financial Officer (CFO).[165]

The following factors should be taken into account when determining a number of directors that should serve a company:

- Evolving circumstances, the needs of a company and the nature of its business;
- The need to achieve appropriate mix of executive and independent non-executive directors;
- The need to have sufficient directors to structure board committees appropriately;
- The potential difficulties of raising a quorum with a small board;
- The regulatory requirements; and
- The skill and knowledge needed to make business judgment calls on behalf of the Company.[166]

(d) Appointment of the BOD

The procedures for the appointment of the BOD should be formal and transparent.[167] All information that pertains to every individual must be disclosed to enable the shareholders to make their own assessment of the directors.[168] Prior to the nomination and appointment, there should be checks on the background of each director.[169] The nomination committee should assist in this regard.[170] This principle was not applied in the

[164] King III Report at 38 para 64.
[165] Code 2.18.5.
[166] King III Report at 39 para 70.
[167] Principle 2.19 of the King III Report and at 40 para 80.
[168] Code 2.19.4.
[169] Code 2.19.2.
[170] Code 2.19.1.

SAA since there are members of the SAA board who were found to have falsified their qualifications.

(e) Meetings of the BOD

The meetings of the BOD must be held four times in a year[171] for the sole purpose of the fulfillment of its duties. Non-executive directors are required to meet from time to time in the absence of executive directors to consider actions of the executive directors.[172]

(f) Board Committees

The SAA must appoint an audit committee[173] which is responsible for the overseeing of the internal audit and part of the risk management process.[174] It must have members that are equipped with skills and experience.[175] It must have a majority of non-executive directors who are independent.[176] This committee is crucial in corporate governance since it is expected to play a central role.

(g) Group Boards

The framework of governance should be agreed upon between a group and the BOD of its subsidiaries.[177] Fiduciary duties of directors must be observed and complied with at all times. The directors of subsidiary company must therefore act in the best interest of the company.

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[171] Code 2.1.2.
[172] Annex 2.3 of the King III Report.
[173] Code 2.1.2.
[174] Principle 3.2 of the King III Report.
[175] Principle 3.2 of the King III Report.
[176] Code 2.23.7.
[177] Principle 2.24 of the King III Report.

(h) Formal training and induction

New directors should undergo formal induction program established by the BOD.[178] They should have thorough understanding of any changes to the applicable rules, laws, codes and standards.[179] Experienced directors should mentor and tutor inexperienced directors.[180]

(i)Annual evaluation of performance

The BOD, its committees and individual directors must be subjected to the annual evaluation of performance[181] which evaluation should be performed by the chairperson or an independent provider.[182]

(j) Remuneration of the directors and senior executive directors

The remuneration of directors must be fair and responsible[183] and must be disclosed at the annual remuneration report.[184] Remuneration policies must be explained and disclosed[185] and must be set and administered by the BOD as assisted by the remuneration committee.[186] The remuneration committee must consist of majority of non-executive directors of which a majority has to be independent non-executive directors.[187] The remuneration policy must be approved by the shareholders.[188] The policy must deal

[178] Code 2.20.1 and 2.20.3.
[179] Code 6.2.1.
[180] Code 2.20.2.
[181] Principle 2.22 of the King III Report.
[182] Code 2.22.2.
[183] Principle 2.25 of the King III Report.
[184] Principle 2.26 of the King III Report.
[185] King III Report at 52 para 181.
[186] Code 2.25.6.
[187] Code 2.23.7.
[188] Code 2.27.2.

with base pay, bonuses, employee contracts, severance and retirement benefits and share base and other long-term schemes.[189]

(k) Appointment of a chairperson

A person who is an independent non-executive director may be elected by the board as a chairperson.[190]It is recommended that the CEO should not perform the duties of the chairperson as this might lead to conflict of interest.[191] The chairperson must be elected on annual basis by the BOD.[192] The performance must be assessed and evaluated on an annual basis.[193]

(l) Appointment of the Chief Executive Officer (CEO)

The BOD must elect and appoint the CEO who serves as a chief representative of a company.[194] All the management functions of a company vests in the CEO[195] and may delegate power to others.[196] The powers of the CEO must be distinguished from those performed by the chairperson.[197]

(m) Appointment of a secretary

The BOD must appoint a suitably qualified secretary to assist the BOD in the performance of its duties.[198] Such a secretary should not be a director.[199] The secretary should assist

[189] Code 2.25.3.
[190] Principle 2.16 of the King III Report.
[191] Supra 103.
[192] Code 2.16.1.
[193] Code 2.16.6.
[194] Principle 2.17 of the King III Report.
[195] King III Report at 36 para 48.
[196] Supra 108.
[197] King III Report at 37 para 59.
[198] Principle 2.21 of the King III Report.
[199] Code 2.21.4.

the nomination committee in appointing directors.[200] Section 84 (4) (a) read with section 86 (1) of the CA provides for the appointment of the secretary of the company.

3.2.3Audit committees

The BOD must ensure that a company has an effective and independent audit committee.[201] Such audit committee must play a central role by ensuring that there is integrated reporting and internal financial controls and must identify and manage risk.[202] The SAA and listed companies must establish an audit committee[203] with members appointed by the shareholders at each annual meeting. It is recommended that the audit committee should meet as often as necessary in order to discharge its duties. It is suggested that it should meet twice annually.[204]It may meet with the internal and external auditors in the absence of management once in a year.[205]

It is composed of three members[206] who must be skilled and experienced non-executive independent directors.[207] The chairperson of the BOD is excluded from acting as the chairperson or member of the audit committee.[208]

Its functions includes to:

- Oversee the internal audit;[209]
- Form a crucial component on the company's risk management process;[210]
- Recommend the appointment of the external auditor and supervise the external audit process;[211] and

200 Code 2.21.5-3.
201 Principle 3.1 of the King III Report.
202 King III Report at 56 at 1.
203 See Mervyn King *"The synergies and interaction between the King III and the Companies Act 71 of 2008"* (2010) Acta Juridica at page 446 at 447.
204 Code 3.1.4.
205 Code 3.1.5.
206 Code 3.2.2.
207 Principle 3.2 of the King III Report.
208 Code 3.2.3.
209 Principle 3.7.
210 Principle 3.8 of the King III Report.
211 Principle 3.9 of the King III Report.

- Reporting to the BOD and shareholders on the discharge off its duties.[212]

3.2.4 The governance of risk

The BOD is responsible for the governance of risk in the company.[213] The King III Report defines risk as the taking of risk for reward.[214]The responsibilities of the BOD on risk tolerance must be set out in the company's Charter[215] and or be reflected in the management policy and plan[216] which should be distributes to the company as a whole and be subjected to review on an annual basis.[217]

The risk committee must assist the BOD in carrying out its duties in relation to risk management.[218] Such a committee must further review the risk management progress of the company, the effectiveness of the risk management activities and crucial risks facing the company.[219]

The risk committee is composed of three members who may include executive and executive directors.[220] Such members must be equipped with experience and skills. Risk must be assessed continually[221] by identifying, quantifying and evaluating risk.[222] This must be done annually.[223] Great attention and concentration must be paid on risk with the suspected impact on long-term sustainability of a company.[224]

Risk must be disclosed in a manner which is complete, in time, relevant, accurate and accessible.[225]

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[212] Principle 3.10 of the King III Report.
[213] Principle 4.1 and 4.2 of the King III Report.
[214] King III Report at 74 para 11.
[215] Code 4.1.3.
[216] Code 4.1.5.
[217] Code 4.1.7.
[218] Principle 4.3 of the King III Report.
[219] King III Report at page 75 para 16.
[220] Code 4.3.2.2 and 4.3.2.3.
[221] Principle 4.5 of the King III Report.
[222] King III Report at 76 para 31.
[223] Code 4.5.2.
[224] King III Report at 77 para 38.
[225] Principle 4.10 of the King III Report.

3.2.5 The governance of information technology

The BOD must be responsible for the governance of Information Technology (IT)[226] and may appoint IT Steering Committee to assist thereto.[227] The IT risks are dealt with by the risk management.[228] The CEO may appoint the Chief Information Officer (CIO) to manage Information Technology.[229] The BOD must further establish and implement the IT policies and charter[230] and must ensure that the IT investments and expenditures are monitored and evaluated.[231] IT rules, laws, codes and standards must be adhered to by the company.[232]

3.2.6 Compliance with laws, rules, codes and standards

The BOD must ensure that a company complies with and adhere to all the applicable laws, rules, codes and standards.[233] This kind of culture must be encouraged through leadership, establishment of appropriate structures, education and training, and communication.[234] A duty rests on the BOD to identify such relevant principles, laws, rules, codes and standards[235].

An effective compliance framework has to be established by the BOD. The BOD must familiarize themselves with the content of the applicable laws, rules, codes and standards.[236]

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[226] Principle 5.1 of the King III Report.
[227] King III Report at page 83 para 18.
[228] King III Report at page 87 para 43 and 48.
[229] Code 5.3.3.
[230] Code 5.1.2.
[231] Principle 5.4 of the King III Report.
[232] King III Report at page 85 para 33.
[233] Principle 6.1 of the King III Report.
[234] King III Report at page 91 para 21.
[235] King III Report at page 90 para 11.
[236] Code 6.2.2.

A skilled and experienced Compliance Officer (CO) may be appointed[237] to have access to, to interact regularly on, strategic compliance matters with the BOD or appropriate Board committee and or executive management.[238] Though the CEO may appoint the CO, accountability duties to the BOD relating compliance with the relevant laws, rules, codes and standards, rests on the CEO.[239]

3.2.7 Internal audit

The BOD must ensure that there is a risk based internal audit in a company.[240]It plays a crucial role of ensuring that there is an effective system of internal controls and risk management. [241] It evaluates the governance processes; perform an objective assessment of the effectiveness of the risk management and the internal control framework, systematically analyses and evaluate business processes and associated controls, and provide a source of information, as appropriate, regarding instances of fraud, corruption, unethical behavior and irregularities.[242]

The BOD must establish the internal audit charter and formally define and approve it[243] which charter has to comply with the Institute of Internal Auditors' Standards for the Professional Practice of Internal Auditing and Code of Ethics.[244] The internal audit report on the assessment of the effectiveness of the company's system of internal control and risk management should be made regularly.[245] The Audit Committee must oversee the internal audit.[246]

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[237] Code 6.4.7.
[238] Code 6.4.7.
[239] King III Report at page 91 para 23.
[240] Principle 7.1 of the King III Report.
[241] King III Report at page 95 para 12.
[242] Code 7.1.2.
[243] Code 7.1.3.
[244] Code 7.1.4.
[245] Principle 7.3 of the King III Report.
[246] Principle 7.4 of the King III Report.

3.2.8 Governing stakeholder relationship

(a) Stakeholder-inclusive approach

The King III Report complies with the so-called “triple context” or the integrated approach which means that companies should act with social, economic and environmental responsibility.[247] Companies should act with economic, social and environmental responsibility when conducting their business.[248] The BOD in discharging their management duties they must consider the social, economic and environmental factors. The King III Report stresses that the BOD should not only focus on the company’s financial bottom-line, but also on the company’s performance within the triple context in which it operates or carries on business.[249]

There are two main theories in terms of which the question of in whose interest should the company act. The one theory called “the enlightened shareholder value theory” dictates that the BOD must consider the longer term interest of the shareholders as opposed to the immediate term, and must in relevant circumstances consider the need to ensure the productive relationship with all stakeholders. Therefore the shareholder’s interest is preferred over that of the stakeholders. The BOD must priorities on interest of other stakeholders only if this would lead to the success of the company for the benefit of the shareholders in general. Stakeholders are any group that would in any event be affected by the operation of the company or the company would be affected by their operation. This would then include, shareholders, institutional investors, creditors, lenders, suppliers, customers, regulators, employees, trade unions, the media, analyst, consumers, and society in general, communities, auditors and potential investors.

The second theory stresses that the company has got social responsibilities to the society and that shareholders are just but one constituency many. The BOD must consider the interest of all stakeholders in the company. The approach requires the BOD to balance the interest of the shareholders with that of the stakeholders. The interest of stakeholders

[247] King III Report at page 18 para 22.
[248] King III Report at page 22 para 18.
[249] King III Report at page 22 para 16.

whose interests are not dependent to shareholders interest should therefore be preferred. This theory is referred to as "the pluralistic theory". It sacrifices profit other than the "enlightened shareholder value theory" which maximizes theory.

(b) Shareholder activism and shareholder apathy

Rademeyer and Holzhausen argued that an environment should be encouraged in which the shareholders are active. They should not only speculate but actively check whether the BOD complies with corporate governance or not.[250] This is premised from the notion that if the shareholders are passive, then this would result in the undermining of good levels of compliance by the management.

(c) Dispute resolution

The King III Report recognizes Alternative Dispute Resolution (ADR) as one of the vital or crucial trend for resolution of disputes. It acknowledges that ADR is one of the vital elements of corporate governance which has been a most effective and efficient methodology to address the costly and time consuming features of litigation.[251]

The ADR procedures are intended to achieve resolution of disputes in a flexible manner by taking into consideration the needs of both parties and striving maintain and or preserve a relationship between them. Therefore ADR may be used to resolve disputes quickly in a manner that is not costly.

The BOD must ensure that disputes are resolved in an effective, efficient and expeditious manner.[252] It must therefore elect an ADR method that serves the interest of a company.

[250] Rademeyer & Holzhausen *"King II, Corporate Governance and Shareholders' activism"* (2003) 120 SALJ at page 768.
[251] King III Report at page 105 para 39.
[252] Principle 8.6 of the King III Report.

They must take into consideration the costs to be incurred in using a particular ADR method.[253]

The BOD must adopt a formal ADR processes to resolve internal and external disputes.[254] It should elect an individual who will represent the company in ADR processes.[255]Internal disputes may be resolved by recourse to the Act[256] and external disputes may be referred to arbitration.[257]

The King III Report defines mediation as a process where parties in disputes involve the service acceptance impartial and neutral third party to assist them in negotiating resolution to their disputes by way of settlement agreement.[258]A mediator has no authority over the parties and does not decide on their behalf, but parties decide themselves at the assistance of the mediator.[259] Conciliation involves the service of impartial third party who in addition to acting as mediator makes formal recommendations to the parties as to how the dispute can be resolved.[260]

3.2.9 Integrated reporting and disclosure

The BOD must ensure that there is an integrated reporting relating to the affairs of the company.[261] This means that a comprehensive report on the performance of a company relating to the company's finances and sustainability has to be made.[262] This report must be prepared annually and must contain information on the company's performance and financial sustainability.[263] The report must concentrate on the substance other than the form.[264] The financial statements must be included in it. The BOD must bear in mind that

253 King III Report at page 108 para 38.
254 Principle 8.6.1 of the King III Report.
255 Principle 8.6.2 of the King III Report.
256 King III Report at page 105 para 43.
257 King III Report at page 105 para 43.
258 King III Report at page 105 para 50.
259 Supra 176.
260 King III Report at page 105 para 51.
261 Principle 9.1 of the King III Report.
262 King III Report at page 108 para 1.
263 Code 9.1.3 and 9.1.4.
264 Code 9.1.5.

transparency is a rule of thumb in as far as the principle of integrated reporting is concerned.[265]

The BOD must delegate the general oversight to the audit committee, which should assist the BOD in reviewing the integrated reporting and ensuring that the information therein is reliable and does not contradict the financial aspects contained therein.[266]

3.3 Conclusion

With reference to the aforesaid principles of the King III, it is arguably submitted that the King III compliments the SAA Act, CA, PFMA, Protocol on Corporate Governance in the Public Sector, and the Constitutional institutions and structures in support of corporate governance. It is submitted beyond the shadow of doubt that corporate governance is a key element in improving economic efficiency and growth as well as enhancing investor confidence. If the SAA adhered to the King III Report and the Code, it would be successful and experience neither of the challenges articulated above.

[265] King III Report at page 109 para 8-9.
[266] Code 9.3.1.

CHAPTER FOUR: COMPARATIVE STUDY

5.1 Introduction

Section 5 (1) of the Companies Act (CA)[267] provides that the CA must be interpreted in a manner that gives effect to the purposes of the CA in section 7. One of the purposes of the CA in terms of section 7 is to encourage transparency and high standard of corporate governance. In terms of section 5 (2) of the CA, a court interpreting or applying the CA, may consider foreign law. The said section portrays the need for consideration of foreign law when interpreting the CA. This chapter deals with a comparison between the South African and the United Kingdom (UK) corporate governance. For this reason the following paragraphs deal with the UK corporate governance development as entailed in the Cadbury Report, the Greenbury Report, the Hampel Report, the Turnbull Report, the Higgs Report, the Smith Report and recent corporate governance frameworks in the UK and compares same to South African corporate governance legal frameworks.

5.2 Historical Development of Corporate Governance in the UK

5.2.1 The Cases of Guinness Plc. and Polly Peck International Plc.

The UK case of *Guinness Plc v Saunders*[268] paved a way for corporate governance in the UK by highlighting the need for corporate governance reform. The case pertained to payment authorized by the committee of directors to a director in the amount of 5, 2 million pounds in respect of his services for a take-over bid. It was later discovered that the said director had financial interest in the take-over bid. When the court was approached on this corporate governance deficiency, it held that the payment to the director amounted to breach of a fiduciary duty by the directors. This was so because the company's articles of association provided that the board as a whole was supposed to approve the payment

[267] Companies Act No: 71 of 2008.
[268] [1990] 2 AC 663.

and not only the committee of directors. The case therefore exposed a corporate governance risk which could possibly result from the directors receiving large amounts of remunerations without proper guidelines.

In the case of *Polly Peck International Plc v Asil Nadir*[269] it was clear that a CEO of a public company was a signatory of all the branch accounts. The company conducted business as a holding company of a group of more than 200 subsidiaries. The CEO was therefore in direct control of all the funds of the company and from the several subsidiaries. It was clear that the Polly Peck International Plc collapsed due to its board being dominated by the more executive directors other than non-executive directors. This led to the establishment of the committee by the London Stock Exchange (LSE) which was led by Sir Andrian Cadbury and which committee published the Cadbury Report on corporate governance.

5.2.2 The Cadbury Report

The Cadbury Report was published in December 1992.[270] The Report together with its code of best practice recommended the implementation of board committees and independence of non-executive directors. It also recommended the establishment of the audit committees.[271] Its objective was to address the standards of financial reporting, accountability and director's excessive remuneration. It also focused on financial reporting of corporate governance and disclosure.[272] The Report contained the doctrine of compliance with the code or explaining the areas of non-compliance.[273] It also required the companies listed in UK to adhere to the code of best practice as set out in the Report.[274] The companies listed in the London Stock Exchange (LSE) were required to

[269] [1992] 2 Lloyd's Rep. 238.
[270] See Report of the Committee on the Financial Aspects of Corporate Governance, 1992 (Cudbury Report).
[271] See the Cudbury Report.
[272] See the preface of the Cadbury Report.
[273] See paragraph 1.3 of the Cadbury Report.
[274] See paragraph 1.3 of the Cadbury Report.

comply with the code of best practice in order to balance compliance with the standards of corporate governance and the essential spirit of the company.[275]

The code clarified the different responsibilities of the board of directors, shareholders and auditors.[276] This had in the process increased the confidence of investors and support for development. The code also deals with the structures and responsibility of the board of directors as well as those of the auditors and shareholders.[277] The Report emphasizes that the companies should widely use independent non-executive directors and further stresses that the company's independent decision making about its strategies, performance, resources and standards of conduct are of paramount importance.[278]

The Cadbury Report also brought the principle of compulsory establishment of the audit and nominations committees. It recommended an appointment of at least three non-executive directors and two of those directors should be independent. The remuneration committee's and nomination committee's responsibilities were, amongst others, the overseeing of the executive remuneration and proposing suitably qualified new board members respectively.[279]

The independent board had to be strongly independent and this could be achieved only when the chairperson of the board and Chief Executive Officer (CEO) of the board were not the same person. The newly appointed directors had to be taken through an induction process. The Report also supported consultation with legal and financial advisers.[280]

The Cadbury Report formed the basis of corporate governance codes to follow in South Africa. It influenced the establishment of the King Committee in 1992 in South Africa which published the South African corporate governance code known as the King I Report in 1994.[281]

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[275] See paragraph 1.5 of the Cadbury Report.
[276] See paragraph 1.6 of the Cadbury Report.
[277] See paragraph 2.9 of the Cadbury Report.
[278] See paragraphs 4.11 to 5.1 of the Cadbury Report.
[279] See paragraphs 4.11 to 5.1 of the Cadbury Report.
[280] See paragraphs 4.11 to 5.1 of the Cadbury Report.
[281] See Chapter 1 above.

5.2.3 The Greenbury Report

In responding to the public and shareholders' concern about the remuneration practices of the directors, the Greenbury Report was published.[282] The Report contained principles on accountability and requirements on full disclosure about directors' remuneration. It also encouraged board remuneration which align directors' interest to that of the shareholders and further enabled the improvement of the company performance.[283] It supported the Cadbury principle of remuneration committee but further added that the committee should comprise of only the independent non-executive directors.[284] It further sets out the duties of the remuneration committee and requires it to publish a broad remuneration policy which it must comply with in remunerating executive directors while striving for improvement of the performance of the company and complying with the code of best practices. The directors' remuneration must be fully disclosed as recommended by the Report.[285]

The Report is a very important part of the UK corporate governance and it provides useful guiding principles on the remuneration of directors.[286] It is included in the UK Combined Code of Corporate Governance of 1998. Its principles are also found in the South African King Reports on corporate governance.

5.2.4 The Hampel Report

The Hampel Committee was established in 1995 in order to review and refine the Cadbury and Greenbury Reports and to promote high standards of corporate governance in protecting the interests of investors and companies listed in the LSE. It recommended corporate governance which includes broad principles other than just detailed

[282] See the preface of the Greenbury Report, 1995.
[283] See preface of the Greenbury Report.
[284] See paragraphs 4.3 to 8.12 of the Greenbury Report.
[285] See paragraphs 4.3 to 8.12 of the Greenbury Report.
[286] See paragraphs 5.5 to 5.24 of the Greenbury Report.

guidelines.[287] The Report recommended guidelines with regard to roles, responsibilities and institutional shareholders' involvement in the companies' governance and it embraced the principles of accountability and audit reporting as part and parcel of corporate governance.[288]

In 1998, the Cadbury, Greenbury and Hampel Reports were conbined in order to form the UK Combined Code of Corporate Governance which was a prescription of the listing in the LSE which was referred to as the Turnbull Report.

5.2.5 The Turnbull Report

The Turnbull Report was issued by the LSE which was comprised of the recommendations of the Cadbury, Greenbury and Hampel Reports.[289] Compliance with the Turnbull Report was not compulsory but the LSE demanded its compliance for the purpose of listing. It comprises of seventeen principles and forty-eight provisions and included in it, is the portion on duties of the directors to review the effectiveness of systems of internal controls. The Report contains sections which deal with the role and responsibilities of the board of directors[290], remuneration of the directors of the board[291], relationship with the shareholders[292] and institutional investors.[293]

5.2.6 The Higgs Report

The Higgs Report was issued in 2003 in order to provide recommendations on the role and effectiveness of the non-executive directors.[294] It recommended that the CEO could not at the same time serve as the chairperson of the board committee.[295] It recommends

[287] See paragraphs 16 to 56 of the Hampel Report, 1998.
[288] See paragraphs 16 to 56 of the Hampel Report.
[289] See the preamble of the Turnbull Report, 1999.
[290] See paragraphs A1 to A6 of the Turnbull Report.
[291] See paragraphs B1 to B3 of the Turnbull Report.
[292] See paragraphs C1 to C3 of the Turnbull Report.
[293] See paragraphs D1 to D3 of the Turnbull Report.
[294] See paragraph 3 of the Higgs Report, 2003.
[295] See paragraph 5 of the Higgs Report.

that the non-executive directors should meet separately from executive directors at least twice a year and reports on such meetings should be incorporated in the annual financial statements.[296] It is recommended in this Report that a company should have independent directors whose responsibilities includes to liaise with the shareholders on their concerns which were not addressed by the CEO and chairperson of the board.[297] The induction of newly appointed directors is still emphasized in this Report and liaising with stakeholders is also enshrined in the Report. The Report was also adopted in the King Reports in South Africa.

5.2.7 The Smith Report

The focus of the Smith Report which was also published in 2003 was the appointment and review of the audit committee. The Report emphasizes the duty and responsibility of the board of directors to act in the best interest of the company and the independence of the audit committee in order to protect the interest of the shareholders.[298] It further provides that the protection of the shareholders can also be achieved when there is mutual relation between the audit committee and board of directors which relationship is frank and open.[299]

5.2.8 Recent Corporate Governance Frameworks in the UK

Currently corporate governance is regulated by the Companies Act of 2006 and the corporate governance Code (The Code) in the UK. The Code is reviewed from time to time by the Financial Reporting Council (FRC) which is an established independent regulatory body. The Code follows the “comply or explain” approach and it consists of the main and supporting corporate governance principles. The code is not compulsory to the UK companies but they are required to apply it or in the event they have not applied it,

[296] See paragraph 5 of the Higgs Report.
[297] See paragraph 5 of the Higgs Report.
[298] See paragraph 3 of the Smith Report, 2003.
[299] See paragraph 4 of the Smith Report.

explain to the shareholders why they have not applied it. A detailed explanation of non-compliance is required in order to allow investors to assess it. The principles contained in the UK Code cover aspects of independence and remuneration, board balance, risk management systems, shareholders relations and maintenance of internal control systems.

In the UK there is also the Corporate Guidance and Principles for Unlisted Companies. It provides fourteen voluntary principles of corporate governance which are applicable to unlisted companies in the UK.[300] There is also the so called UK Stewardship Code promulgated by the FRC which regulates the relationship between the shareholders and directors. Lastly, there is the Small Business, Enterprise and Employment Act which was recently passed into law in the UK. It aimed at regulating transparency in the companies. It further requires the directors of companies to be natural persons and maintenance of a registrar of all persons engaged in the day to day control of the company.

5.2.9 The UK Corporate Governance as a Model for South Africa

The UK Code contains similar principles of corporate governance as the South African King Reports. There is however notable differences which may be summarized as follows. Firstly, whereas the Institute of Directors in Southern Africa is a voluntary body in South Africa, the FRC is a compulsory regulatory body in the UK. Secondly, whereas the UK does not acknowledge other stakeholders, South Africa does. Lastly, whereas the UK put more emphasis on remuneration of directors, South Africa does not emphasize directors' remuneration although it has principles in regard thereto

5.3 Conclusion

It is therefore submitted that South African principles of corporate governance have from time to time been adopted from the UK. Hence the development of corporate governance

[300] See Wiese (JUTA, 2014) 53.

in South Africa is closely related to that of the UK in content and substance. Therefore consideration of and reference to the UK corporate governance and case laws thereof by the SAA and other SOCs would be beneficial in interpretation and application of the South African corporate governance framework.

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

The main objective of this research was to draw attention to the interpretation and application of the principles of corporate governance in the SAA. The SAA challenges may be ascribed to a lack of proper interpretation and application of corporate governance rules, particularly the difference between management and governance, and the principle of board delegation. An analysis of the history of the inception of corporate governance in South African legal system was made. The definition, legal and regulatory framework of corporate governance within the context of the South African Airways was also discussed. The relevance of the most crucial principles of corporate governance in the SAA was also analyzed.

The topics such as shareholder perspectives on corporate governance, complying with legislations, cardinal principles of corporate governance like transparency and disclosure, and the role of the board of directors in the SAA have been explored in this research. The corporate governance structure and the relevance and or role of the state over the SAA within the context of good corporate governance have also been examined. The positive consequences of properly interpreting and applying corporate governance in the SAA were scrutinized. On the other hand negative consequences that could result from non-compliance with corporate governance in the SAA were also scrutinized.

A firm elaboration on the reasons why there are so many challenges in the SAA resulting from poor interpretation and application of corporate governance principles and why the SAA board members were implicated in tender scandals and fake qualifications has been made. Lastly an in-depth comparative analysis on corporate governance between that of the Republic of South Africa (RSA) and that of the United Kingdom (UK) was made.

5.2 Recommendations

Having made deliberations on the interpretation and application of corporate governance principles in the South African Airways in the previous four chapters, the recommendations in respect of this research are as follows:

- It is emphasized that the board of directors in the SAA has to be provided with greater powers and autonomy in the exercise of their duties and in order to enhance board composition. The SAA Board will then be able to properly interpret, apply and comply with the principles of corporate governance. This will also lead the SAA board of directors to be independent and prevent it from being seen as politically influenced. This will help the SAA board to discharge its duties without fear, favour and prejudice.

- The nomination process of the members of the board in the SAA has to be transparent and be based on competencies and experience. The board of directors in the SAA should act in the best interest of the SAA and that of the country as a whole since the SAA is an SOC. Furthermore the decisions taken by its board also affect the taxpayers' money. The SAA board should avoid acting in their interests as individuals since they are in fact representatives of the constituencies that appointed them.

- The establishment and maintenance of a legal and regulatory framework for the governance and management of SOEs such as the SAA can serve as a good environment that is conducive to them in optimizing their performance. This notion and or idea was met with approval by the Minister of Finance Mr Nhlanhla Nene who portrayed his concern that government lacks the legal instrument to properly intervene in the affairs of the SOCs when things go wrong and he also suggested there is a need to explore legislative changes so that the state may be acquainted with power to make such interventions.

- It is imperative that one must consider the nature of law enforcement quality in the Republic of South Africa. The effectiveness of corporate governance legislation and regulations depends on the competence, integrity and forcefulness of the courts and regulatory agencies. The rules and decisions of certain private bodies such as the JSE, professional accounting institutions and industry organizations, also influence good corporate governance. The office of the Registrar of Companies should be equipped to investigate the alleged contravention of the applicable legislation by the SAA and other SOCs.

- There should be the establishment of a specialized institution to monitor the progress of enforcement of corporate governance regulations or guidelines, in addition to the role of civil and criminal courts in company law enforcement.

- Proper interpretation, application and compliance with corporate governance principles as contained in the legal frameworks and supported by foreign law such as the UK corporate governance as discussed in the above chapters, is a solution to challenges faced by the SAA. If the SAA complies with corporate governance principles then that will be the end of corruption, maladministration and financial mismanagement in the SAA. There cannot be any compliance if there is no proper interpretation and application.

- This research recommends that whenever there is non-compliance and absence of good corporate governance in the SAA, sound decisions have to be taken. Such decisions will not be taken if the directors are unqualified or lack the necessary skills and experience. This study recommends that in order to arrest corporate governance challenges in the SAA, the government as the main shareholder must appoint fit and proper persons to the position of directors of the board and through due diligence process having been followed. Having qualified, skilled and experienced directors who strictly interpret and apply the principles of corporate governance in the board of the SAA, will improve the performance of the SAA.

- The basic principle of corporate governance, fairness, transparency and accountability are relevant throughout the world. The doctrine of corporate governance is very effective for as long as it is well interpreted and applied. Compliance with the King Reports on corporate governance by the SAA and other SOCs can help achieve a lot of objectives in SAA and such other SOCs of developed and developing countries.

- Therefore the principles and or structures of corporate governance should be complied with in a wide range of organizations. It should not only be compulsory to listed companies, but to the SAA, all banking sectors, SOCs, cooperatives, and in ever-growing and increasingly important Non-governmental Organizations (NGOs).

- The SAA must address its inherent challenges and meet the international corporate governance standards while paying attention to the needs of the country. Corporate governance should not be replaced with certain regulatory and legislative controls.

- It is evident that corporate governance is a key element in improving economic efficiency as well as enhancing investor confidence. The King Reports and the Codes read in conjunction with foreign law such as that of the UK, provide useful guidance to the Board of Directors on how to direct and control the business of the company. As argued above, section 7 of the CA which encourages transparency and high standard of corporate governance as a means of developing the Republic of South Africa economy, would encourage an interaction between the CA and the King Reports.

- This research recommends that the SAA, SOCs and even unlisted companies, should voluntarily but strictly comply with and adhere to the King Report principles, CA, PFMA, SAA Act and other legal frameworks to overcome the challenges discussed above. These principles will improve their control systems, governance, IT, financial reporting, stakeholder engagement and ethical issues which will contribute to the growth of the company and make it profitable and sustainable.

- The legislations, codes and regulations should be compulsory and applicable to all companies in the Republic of South Africa. They should be obliged to comply with and adhere to these principles. If they are applied and interpreted correctly, they will help the government in its objectives of job creation and alleviation of poverty.

- This work maintains that even though complying with corporate governance may be costly, costs of compliance are outweighed by the benefits gained or benefited from compliance.

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