



LEGAL FRAMEWORK OF SOE BOARDS



APPOINTMENT AND DISMISSAL OF BOARD MEMBERS AND EXECUTIVES OF ESKOM, PRASA AND THE SABC

A.

ABOUT THE PROJECT

The Dullah Omar Institute is conducting research and advocacy on the framework for the appointment and dismissal of Board members to state-owned enterprises (SOEs). This is informed by a need for greater transparency and quality in these appointments.

The overall purpose is an improved functioning of SOEs that have a service delivery mandate or a mandate that impacts on a constitutional right. In particular, we want to see an improved accountability structure for the executive leadership of, legislative oversight over and public engagement with those SOEs.

SOEs are enterprises where the state has significant control through full, majority, or significant minority ownership. The research focuses on two key flaws in the appointment and dismissal of SOE board members. The first relates to procedural issues but is embedded in bigger questions surrounding the role and position of SOEs. In practice, board members are appointed by the relevant shareholder Minister in processes that are not transparent. Partly as a result of the conflicting legislative framework, procedures for the appointment of SOE board members often lack integrity, do not provide for adequate public engagement and take place without any communication to the South African public about the role of SOEs and the importance of the appointment processes. The second flaw relates to substantive criteria for appointment. Too often, there is a disjuncture between the fiduciary duties of SOE board members and the profile, skills and expertise of incumbents, pointing to inadequate criteria for appointment and dismissal or inadequate application of those.

Our aim is to suggest options for law reform, criteria for board membership and criteria for appointment processes that recognise the role of the public in these appointments. Our objective is to complement the existing activities of other civil society organisations in this space.

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THE LEGAL FRAMEWORK

GOVERNING THE APPOINTMENT AND DISMISSAL OF BOARD MEMBERS AND EXECUTIVES OF ESKOM, PRASA AND THE SABC

'Given the dire situation in which some of these SOEs are, we need capable and morally upright [individuals] that we can parachute into SOEs for stabilisation, but we should not search for heroes we can drop behind enemy lines without applying our minds to the institutional frameworks that will help secure long-term futures.'²

Prof R Wandrag¹

ABSTRACT

Scandals surrounding prominent state-owned entities (SOEs) such as Eskom, the SABC, Prasa, Denel and others continue to make news headlines almost daily. Rather than serving as a driving force in the economy, these entities have featured prominently instead in reports and hearings on state capture, with rating agencies citing their financial instability as part of the reason for the repeated downgrades of South Africa's credit rating.

Much of the controversy relates to governance issues, particularly ones concerning the appointment and dismissal of board members and executives. It has become clear that many of the problems in this regard stem from the conflicting regulatory framework applicable to such appointments and dismissals. A number of these conflicts have resulted in court cases, but the courts have not been uniform in their interpretation of overlapping or contradictory legislation.

Accordingly, this paper examines the regulatory framework governing board and executive appointments, dismissals and duties at three major national SOEs, namely Eskom, Prasa and the SABC. The relevant legislation is analysed to highlight conflicts and overlaps and, in some cases, lack of regulation. The paper then recommends ways in which regulation could be streamlined to clarify the appointment and dismissal of board members and executives of national SOEs and thus strengthen the governance, operation and performance of these entities.

¹ Associate Professor at the Department of Mercantile and Labour Law, Faculty of Law, University of the Western Cape. This paper was written as part of a project, conducted by the University's Dullah Omar Institute in partnership with the Open Society Foundation South Africa, to contribute to the development of a more appropriate and transparent framework for the appointment of board members to state-owned entities in South Africa.

² Arnoldi, M 'Nene unpacks SOE failures, remedial measures' Engineering News 22 August 2018 http://www.engineeringnews.co.za/article/nene-unpacks-soe-failures-remedial-measures-2018-08-22/rep_id:4136 [accessed 23 August 2018]

01 INTRODUCTION

By now, it is hardly necessary to describe the dire state in which many of South Africa's most prominent state-owned entities (SOEs) find themselves³. Among others, the electricity utility Eskom, the South African Broadcasting Corporation (SABC) and the Passenger Rail Agency of South Africa (Prasa) have not only made headlines regularly over the last decade but been heavily implicated in the findings of the Public Protector's 'State of Capture' report published in November 2016, with Eskom alone mentioned 193 times⁴.

As Corruption Watch has aptly stated, by their nature SOEs should drive a government's socio-economic goals by fulfilling commercial as well as developmental mandates.⁵ Unfortunately, in South Africa the opposite has been the case, with its SOEs having been labelled 'one of the most glaring risks to fiscal stability' and rating agencies having cited their financial instability as among the reasons for the country's repeated credit-rating downgrades.⁶

Much of the controversy surrounding the corruption and state capture of SOEs relates to the appointment and dismissal of board members and executives, which has resulted in ineffective, and often non-functioning, boards of directors.

Between 2010 and January 2018, Eskom had seven different CEOs or acting CEOs, along with numerous changes in the rest of its board membership. Some stability was finally achieved with the appointment of Jabu Mabuza as Chairman of the Board in 2018⁷. In the case of the SABC, disputes around board appointments and dismissals have led to a parliamentary enquiry and court challenges.⁸ The SABC board consists of 12 non-executive directors (board members).⁹ In October 2017, 11 board members were appointed, three of whom resigned by July 2018. In December 2018, four more board members resigned, leaving the board inquorate with only four

³ In this paper, 'state-owned entities' (SOEs) is used to refer to SOEs in general, unless it be that a quoted source specifically uses the alternative term 'state-owned enterprises'. The terms 'entity' and 'enterprise' in this context do not signify any difference in legal form and are often used interchangeably. 'State-owned companies' (SOCs), on the other hand, refer only to those SOEs that are incorporated in terms of the Companies Act 71 of 2008. The term 'SOCs' is thus used to refer to such companies in the context of the application of the 2008 Companies Act.

⁴ Eberhard, A and Godinho, C (2017) Eskom Inquiry Reference Book University of Cape Town Graduate School of Business

⁵ 'SOE shake-up on the cards – SA waits for action' Corruption Watch 28 February 2018 <https://www.corruptionwatch.org.za/soe-shake-cards-sa-waits-action> [accessed 24 April 2018]

⁶ Peyper, L 'State firms most glaring risk to SA fiscal stability – Budget Office' Fin24 24 October 2017 <https://www.fin24.com/Budget/Budget-and-Economy/state-firms-most-glaring-risk-to-sa-fiscal-stability-budget-office-20171024> [accessed 24 April 2018]

⁷ 'SPOTLIGHT: Eskom's new chairman, Jabu Mabuza' IOL 22 January 2018 <https://www.iol.co.za/business-report/careers/spotlight-eskoms-new-chairman-jabu-mabuza-12850476> [accessed 24 April 2018]

⁸ As discussed below.

⁹ Section 12 of the Broadcasting Act 1999.

members.¹⁰ Parliament at last took action and announced a short-list of 24 candidates to fill these positions, something it hoped to finalise before the end of the March 2019 session.¹¹

As for Prasa, its board of control has not fared much better. Between August 2014 and April 2018, there were seven changes in the position of Board Chair.¹² The position of Prasa Chief Executive Officer (CEO) has proven equally controversial, with the previous acting CEO having been removed by the board in April 2018 amid allegations of corruption and sexual harassment. Sibusiso Sithole was appointed as interim CEO in June 2018 – and he too has resigned recently, after only nine months in the position.¹³

One way to curb corruption is to change the way in which SOE boards are appointed,¹⁴ and the government finally appears to be taking action in this regard. In his first state of the nation address, made in February 2018, President Ramaphosa prioritised the overhaul of SOE board appointments, saying, 'We will change the way that boards are appointed so that only people with expertise, experience and integrity serve in these vital positions.'¹⁵

Since then, board appointments have been made in various departments in a bid to expunge corrupt officials from SOEs. This has been particularly evident in the Department of Public Enterprises, where Minister Pravin Gordhan has made several such appointments.¹⁶ Yet although these efforts are laudable in the short term, they remain executive appointments that do not address the underlying problem of a government department playing a triplicate role in SOEs – that of sole or majority shareholder as well a policy-maker and regulator.

It is a problem that can be addressed only at the level of the regulatory framework governing board and executive appointments, dismissals and duties. As such, this paper examines how that framework applies to three major national SOEs, namely Eskom, the SABC and Prasa, and recommends measures that can be adopted as way forward in resolving the crisis in South Africa's ailing SOEs and their faltering – even retrograde – role in national development

¹⁰ Cowan, K 'Analysis: 5 things you need to know about the SABC board chaos' News24 6 December 2018 <https://www.news24.com/SouthAfrica/News/analysis-5-things-you-need-to-know-about-the-sabc-board-chaos-20181206> [accessed 20 February 2019]

¹¹ Pijoo, I 'Parliament shortlists 24 candidates to fill spots for new SABC board' Times Live 28 February 2019 <https://www.timeslive.co.za/news/south-africa/2019-02-28-parliament-shortlists-24-candidates-to-fill-spots-for-new-sabc-board/> [accessed 28 February 2019]

¹² PRASA Annual Report and Financial Statements 2017/2018 p 47

¹³ Mailovich, C 'Interim Prasa group CEO resigns after nine months on the job' Business Live 28 February 2019 <https://www.businesslive.co.za/bd/national/2019-02-28-interim-prasa-group-ceo-resigns-after-nine-months-on-the-job/> [accessed 28 Feb 2019]

¹⁴ Natesan, P 'One way to curb corruption is to change how we appoint parastatal boards' City Press 25 July 2017 <https://city-press.news24.com/Voices/one-way-to-curb-corruption-is-to-change-how-we-appoint-parastatal-boards-20170724> [accessed 24 April 2018]

¹⁵ Mokone, T (2017) 'Ramaphosa focuses on the economy, announces SOE clean-up' Times Live 16 February 2018 <https://www.timeslive.co.za/politics/2018-02-16-ramaphosa-focuses-on-the-economy-announces-soe-clean-up/> [accessed 24 April 2018]

¹⁶ Omarjee, L 'Pravin Gordhan to announce board changes to SOEs' Fin24 24 May 2018 <https://www.fin24.com/Economy/pravin-gordhan-to-announce-board-changes-to-soes-20180524> [accessed 24 August 2018]. The Department of Public Enterprises exercises oversight over six major SOEs: Eskom, Transnet, Denel, SA Express, Alexkor and Safcol.

02

OVERVIEW OF RELEVANT LEGAL FRAMEWORK

One of the biggest stumbling blocks in the governance of SOEs is the lack of a clear, uniform legal framework that governs all of them, or at least all national SOEs. Each of these entities is governed by at least two¹⁷– but, in most instances, three – different pieces of legislation,¹⁸ plus two sets of corporate governance codes and its own constitutive documents. In the discussion that follows, the national legislative framework applicable to these SOEs will be outlined in general terms, after which the focus shifts in turn to the specific founding legislation and constitutive documents governing each of the three selected SOEs.

At the outset, it should be noted that while the Constitution of South Africa 1996 does not directly govern SOEs, it does set out the parliamentary oversight processes governing the activities of these entities.¹⁹ The question of whether this oversight role should be strengthened is examined further below.

2.1 Public Finance Management Act 1 of 1999

The Public Finance Management Act (PFMA) governs all public entities listed in Schedules 2 or 3 to the Act. A national public entity is primarily defined in section 1 of the Act as 'a national government business enterprise'. This in turn is an entity which is a juristic person under the *ownership control* of the national executive; is carrying on a business activity on ordinary business principles; and is largely or fully funded from sources other than from government funds²⁰.

All three of the entities under examination in this paper are governed by the PFMA. Eskom and the SABC are listed as major public entities under Schedule 2 to the Act, with Prasa listed as a National Government Business Enterprise under Schedule 3, Part B.

¹⁷ The PFMA and their own SOE founding legislation.

¹⁸ The PFMA, founding legislation, and the Companies Act of 2008. These are SOEs that are also incorporated in terms of the Companies Act and are thus termed SOC's.

¹⁹ Section 55(2) requires the National Assembly (NA) to provide for a mechanism to ensure that all national executives are accountable to it and to maintain oversight over such national executive authorities. The importance of this oversight role was highlighted in the case of *SOS Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation SOC Limited and Others*; *SOS Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation SOC Limited and Others* (81056/14) [2017] ZAGPJHC 289 (17 October 2017) para 127.

²⁰ The powers that such 'ownership control' gives the executive as shareholder is the cause of much of the controversy around board appointments and dismissals and the general lack of distinction between the different roles that government plays in SOEs. This is discussed further below.

2.1.1 Board and executive appointments and dismissals in terms of the PFMA

The stated objective of the PFMA is to 'secure transparency, accountability, and sound management of the revenue, expenditure, assets and liabilities' of the institutions to which it applies.²¹ Accordingly, the PFMA focuses largely on the financial regulation of SOEs and the financial reporting duties of SOE boards. Section 49 of the PFMA requires each SOE to have an accounting authority which must be accountable for the purposes of the Act; where the SOE has a board of directors, that board serves as the relevant accounting authority for the purposes of the PFMA.

The PFMA delineates the accounting and other duties of the board as accounting authority, but does not deal directly or in any detail with the appointment and dismissal of board members or executives. Nevertheless, it has been the cause indirectly of many of the governance problems in SOEs by opening the door for political appointments and incidents of state capture – all because of the definition of 'ownership control' in section 1.

As mentioned, Eskom, Prasa and the SABC are national public entities and, therefore, national government business enterprises, which, in terms of the PFMA definition, means that they are juristic persons under the 'ownership control' of the national executive. Ownership control, under the PFMA, refers to the ability of the national executive (that is, the minister of the relevant department)

- to appoint or remove all or the majority of the members of the SOE's board of directors;
- to appoint or remove that entity's CEO;
- to cast all, or the majority of, the votes at meetings of that board of directors; or
- to control all, or the majority of, voting rights at a general meeting (AGM) of the SOE.

Section 63 of the PFMA provides that the executive authority (cabinet minister) responsible for such a SOE under national ownership control must exercise these ownership control powers to ensure that the SOE complies with the PFMA and the financial policies of that executive.²²

²¹ S 2 of the PFMA.

²² This definition of control is reflective of the position of a sole or majority shareholder in a public company, but it does not take into account the complexities of the government's triplicate role in SOEs. This is explained further below.

This definition of ownership control, along with the duty of the executive (minister) to exercise the powers associated with such control, has been interpreted as mandating the relevant cabinet minister to appoint and remove the CEO and board members of each SOE under his or her control, as stated during the PRC process: 'Board and CEO appointments are the responsibility of the Government as a shareholder'.²³ This power has been used time and again by ministers to unilaterally appoint and dismiss executives and board members in key SOEs such as the SABC.²⁴

Granting the government, as the sole or majority shareholder of the SOE, the unfettered power to appoint and remove executives such as the CEO, as well as board members (non-executive directors), dis-empowers the board as the body responsible for the overall strategic governance of the SOE. For a corporate governance structure to be effective, there must be a division of power between shareholders (as stakeholders), the board and the executive. The executives (who run the day-to-day business of the SOE) must be accountable to the board, and in order for that to happen, they must be appointed by the board, not the shareholder. Executives appointed directly by the shareholder will be beholden to the shareholder, rendering the board ineffective and unable to perform its function of governing the business of the SOE, exercising oversight over the executive, and providing strategic direction.

Board members, on the other hand, are appointed by the shareholder majority in normal corporate business structures, but in these instances shareholders are direct stakeholders in the well-being of the company, with minority shareholders being able to 'vote with their feet' and sell their shares if they are unhappy with board governance. In SOEs, the government is the only shareholder and represents the interest of the public as stakeholders; however, given that the government as shareholder has sole responsibility for board appointments, the public as stakeholders lack the power to exercise influence over SOE governance. The typical corporate structure in which shareholders have the unfettered power to appoint and remove board members is therefore also not suited to the governance of SOEs.

A further problem with the PFMA is that while it ostensibly grants ministers the power to appoint and remove both the CEO and board members of SOEs, it provides no procedures or criteria for such appointments or removals.

²³ PRC 'G&O Discussion paper: Oversight' 22 March 2012

²⁴ See case studies below.

2.2 Companies Act 71 of 2008

It was in the 2008 Companies Act that state-owned companies (SOCs)²⁵ were identified for the first time as a distinct form of company. Prior to this Act, SOEs were often simply incorporated as public companies in terms of the 1973 Companies Act.

Section 1 of the 2008 Companies Act defines an SOC as an enterprise that is registered as a company in terms of the Act, and which is either owned by a municipality or listed as a public entity in Schedule 2 or 3 of the PFMA. As such, Eskom and the SABC qualify as SOCs in that they were registered as companies in terms of the 1973 Companies Act and are now deemed to resort under the 2008 Companies Act. Prasa is not included, however, as it is not registered in terms of the Companies Act. Thus, while all three of the SOEs in question are governed by the PFMA, only Eskom and the SABC are governed by the Companies Act as well.

In terms of section 8 of the Companies Act, SOCs are classified as profit companies, which means that an SOC is 'incorporated for the purpose of financial gain for its shareholders'. By definition, the shareholder, or at least the majority shareholder, in an SOC is the government, and, as per the PFMA, shareholding rights and powers are exercised by the cabinet minister responsible for the relevant department to which the SOC reports.

In terms of section 9 of the 2008 Act, any provision applicable to public companies also applies to SOCs, unless the minister has granted an exemption on the ground of an overlap or duplication of regulation; such exemptions should be granted only if the same result is being achieved by way of other legislation. Furthermore, unlike the PFMA, the Companies Act does contain detailed provisions for the appointment and removal of directors as board members.

²⁵ As explained above, the term 'SOC' is used in this paper in relation to the specific requirements of the 2008 Companies Act as applicable to registered SOCs. The term will continue to be used for more general reference as well, including references to national public entities in terms of the PFMA.

2.2.1 Procedures for appointment and dismissal of boards and executives

In terms of section 66 of the 2008 Companies Act, the business of an SOC must be managed by or under the direction of its board, which must comprise of at least three directors. The board has the authority to exercise all the powers, and perform any of the functions, of the company. The Act's provisions relating to the appointment, duties, removal and liability of directors apply to the boards of SOCs to the extent that they are not inconsistent with the provisions of the PFMA or the SOE's founding legislation.²⁶

Directors of SOCs as profit companies shall be elected by way of voting at the AGM, unless the Memorandum of Incorporation (MOI)²⁷ provides otherwise. Contrary to other profit companies, there is no requirement that at least 50 per cent of the directors must be elected by shareholders. The MOI of the company may provide for the direct appointment and removal of one or more directors by any person named or determined in the MOI. As indicated above, the sole or majority shareholder of SOCs is the government, represented by a specific cabinet minister under whose portfolio the SOC resorts. The rights and powers associated with such shareholding are thus assigned to and exercised by the relevant minister in relation to a specific SOC. In practice, the relevant minister will thus exercise these voting rights and elect all board members (directors), barring any additional legislative requirements in the founding legislation or specifications in the MOI.

This provision, as already noted, suits the nature of shareholding in typical profit companies, where the role of shareholders is limited to exercising voting rights in general meetings. In business companies, this is the only way in which shareholders can protect their interests and hold the board accountable – it gives shareholders in business companies the right to appoint (that is, elect) directors, yet by the same token does not entitle them to any input in the appointment of executives.

However, simply replicating the same board appointment provisions in the case of SOCs does not take into account the triplicate role that the government plays in relation to SOCs.

In addition to being the only or majority shareholder in the company, the relevant government department is also the policy-maker concerned with the implementation of service delivery. At the same time, it serves too as regulator and exercises oversight in as much as it is the entity responsible for reporting on the SOCs' activities to the National Assembly. A fourth dimension must be added to this description: the government as shareholder should also represent the stakeholder interests of the public in the SOC.

²⁶ The rules relating to conflict between the different Acts will be discussed below.

²⁷ The MOI is the constituting document of the SOC and filed with the Companies and Intellectual Property Commission (CIPC) at incorporation. This document sets out the rights, duties and responsibilities of shareholders, directors and others within and in relation to the company, as well as addressing other matters contemplated in section 15 of the Act. These may include matters not regulated in the Act; restrictions on the company or directors; more onerous requirements than the Act itself contains in relation to certain decisions of the company; and a prohibition on amendments of the MOI. The MOI may not contain provisions contrary to the Act itself.

The Companies Act does not deal directly with the appointment of executives such as the CEO, a title which indeed is not mentioned or described in it. The appointment of such executives will typically resort, however, with the board as part of its function of running the business of the company in terms of section 66; the executives in question will thus report to the board, which exercises oversight over their activities.

Where the government as shareholder in the SOC appoints both the board and the executives (as per the definition of ownership control in the PFMA), such executives will tend to be accountable to the government shareholder, with the board consequently being sidelined and becoming ineffective (as numerous examples have shown). An excess of power corrupts – or at least creates the opportunity for corruption by removing the checks and balances required for ensuring proper governance.

The removal of directors is provided for in section 71 of the 2008 Companies Act. Irrespective of any stipulation in the MOI or any other agreements reached, any director can be removed from the board by way of an ordinary majority shareholder vote, provided that the director has been given due notice of the meeting and the resolution, and has been afforded a reasonable opportunity to make a presentation in his or her defence.

Again, in terms of the typical structure of the SOC, this arrangement gives the minister, as the representative of the government shareholder, the power to remove or dismiss members of the board by way of exercising a majority vote. Practice has shown that this is not suitable either in the SOC context, since it leaves board members open to the will of a minister without there being any oversight over his or her decisions – as the 'State of Capture' report attests, boards are then vulnerable to political interference. Section 71, on the removal of board members, may also conflict or overlap with the requirements of the SOC's founding legislation.²⁸

It should be noted that in its MOI, an SOC may provide for further, more detailed procedures for the appointment and dismissal of its board members and executives, subject to the condition that these procedures are not in conflict with the 2008 Companies Act or the SOC's founding legislation, as happened in the case of the SABC.²⁹

Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation SOC Limited and Others, (81056/14) [2017] ZAGPJHC 289 (17 October 2017).
²⁸ *SOS Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation SOC Limited and Others; SOS Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation SOC Limited and Others*, (81056/14) [2017] ZAGPJHC 289 (17 October 2017). This is discussed in detail further below.

2.2.2 Criteria for appointment and dismissal of boards and executives

There are no provisions in the Companies Act stipulating minimum criteria or qualifications for board members or executives. Any such criteria or qualifications could, and should, be written into the MOI of the company. There are, however, provisions in the Companies Act detailing the disqualification or ineligibility of directors.

It should be noted that although the Companies Act does not mention positions such as CEO, these positions fall under the definition of a 'prescribed officer' in terms of the Act. A 'prescribed officer' is deemed to resort under the definition of director for the purposes of various sections of the Act, among them section 69, which regulates the disqualification of certain people as candidates for directorship.

In terms of section 69, categories of persons who are ineligible for board and executive appointments include juristic persons, minors, and persons who do not qualify in terms of any of the requirements in the MOI. Likewise, certain categories of persons are disqualified from serving as directors (and CEO): unrehabilitated insolvents; persons prohibited from being directors by public regulation; and persons removed from an office of trust (for example, trustee or executor) for dishonest misconduct, or persons who have been convicted and sentenced to prison without an option of a fine for theft, fraud, forgery or crimes related to fraud, dishonesty and misrepresentation in relation to company management. The disqualifications related to removal from an office of trust or convictions for fraud and dishonesty will expire five years after the removal or completion of the sentence imposed, unless a court has extended the disqualification.³⁰

Disqualification will also apply if a person has been prohibited from being a director in terms of section 69 or has been declared delinquent by a court. In terms of section 162, a court can declare a person delinquent for misconduct and abuse of his or her position while serving as director; for serving as director while being ineligible; and for inflicting harm on the company intentionally or with gross negligence, or acting with gross negligence in the performance of his or her duties as director.

³⁰ In terms of section 69(10), the Companies Commission may apply to court to have such disqualification extended. The Commission must also keep a register of all disqualified persons and inform companies accordingly. Note that the mere fact that a person has a criminal record does not disqualify him or her from an appointment as director or CEO – only the specific convictions mentioned are relevant in this regard.

The boards of a number of SOCs have indeed faced the risk of being declared delinquent or placed under probation. On 16 September 2014, the Companies and Intellectual Property Commission (CIPC) informed the boards of SA Express Airways SOC Ltd, South African Forestry Company SOC Ltd (SACOL), the SABC SOC Ltd, the South African Post Office SOC Ltd, and CEF SOC Ltd that they had to submit to the CIPC the mechanisms they had put in place to address concerns raised by the Auditor-General or independent auditors in their 2012/13 annual reports. They were also informed that, should the CIPC not be satisfied with their progress, the CIPC would consider approaching the courts to have any or all of the respective boards declared delinquent and placed under probation.³¹

Once again, these provisions are suited to the typical profit company, but they are not enough to safeguard SOCs from inappropriate board appointments. Nothing in the Companies Act deals with the possible appointment of members of the judiciary, Members of Parliament, or government officials to SOC boards, nor, as mentioned, is there anything that prevents the appointment of persons with criminal records, other than provisions related to the listed convictions. Unless such parties are prohibited from appointment by 'public regulation', the only way to prevent their appointment would be by means of disqualifications set out in the SOC's MOI or potential disqualifications in its founding legislation.

Moreover, board appointments in typical profit companies do not involve the public per se, whereas the public is most certainly a stakeholder in SOCs and should therefore have some input in SOC board appointments. This could be prescribed in SOCs' MOIs or founding legislation, in the absence of a uniform legislative framework providing for public input. It is thus important as well to consult the founding legislation of all three of the SOEs under discussion and the MOIs of relevant SOCs (Eskom and the SABC) to make a full determination of the regulatory framework governing the procedures and criteria for board and executive appointments and dismissals. This exercise will be carried out in the following section.

³¹ 'Media Statement No 2 of 214' 16 September 2014 http://www.cipc.co.za/files/6514/1933/0901/Media_Statement_2_of_2014.pdf [accessed 25 April 2018]

2.3 SOE founding legislation

The majority of national SOEs were created by their own constitutive legislation, such as the Broadcasting Act 4 of 1999 (in the case of the SABC), the South African Airways Act 5 of 2007 (SAA), the Legal Succession to the South African Transport Services Act 9 of 1989 (Prasa), and the Eskom Conversion Act 13 of 2001 (Eskom). One of the few exceptions is Denel SOC Ltd, which was not created by founding legislation but, in terms of the Companies Act 61 of 1973, simply incorporated in 1992 as a private company with the government as its only shareholder.

Denel thus functions purely as an SOC governed by the PFMA and 2008 Companies Act. By contrast, the selected entities, namely Eskom, Prasa and the SABC, are governed by their founding legislation as well as the PFMA; as incorporated SOCs, Eskom and the SABC are, in addition, governed by the Companies Act.

Founding legislation typically provides for the establishment of the SOE and determines its mandate, functions and funding mechanisms. Some of the founding legislation, such as the Broadcasting Act 4 of 1999, contains detailed provisions on board appointments and processes; in the case of Eskom, however, the Eskom Conversion Act 13 of 2001 provides for its conversion into a public company in terms of the Companies Act 61 of 1973, but contains no reference at all to the board of directors.

Founding legislation is, in other words, entity-specific, and accordingly the founding legislation of each of the three selected SOEs is discussed separately below.

2.3.1 Prasa: Legal Succession to the South African Transport Services Act 9 of 1989

The Passenger Rail Agency of South Africa (Prasa) is an SOE created in terms of section 22 of the Legal Succession to the South African Transport Services Act 9 of 1989 (Legal Succession Act). The main difference in this context between Prasa and the other two SOEs is that, as a legal entity, it is purely a creation of the Legal Succession Act and is not incorporated in terms of the Companies Act: section 31(2) of the Legal Succession Act specifically excludes Prasa from the application of the Companies Act (1973, now read as 2008). Prasa is thus governed only by the Legal Succession Act and the PFMA (as a national government business enterprise listed under Schedule 3 of the PFMA).³²

³²This leaves the possibility open for the Minister of Transport to declare any specific provisions of the Companies Act as applicable to Prasa.

2.3.1.1 Procedures for the appointment and dismissal of boards and executives

Section 24 of the Legal Succession Act provides that the affairs of Prasa shall be managed by a board of control consisting of a maximum of 11 members, including the chairman. The section also clearly states that these board members shall be appointed and dismissed by the minister (confirming the power granted to the minister in the PFMA). It goes on to stipulate categories of appointment for at least seven of the members of the board, creating the impression that the minimum required number of board members is, indeed, seven. The Act contains no further provisions regarding procedures for either the appointment or dismissal of board members. No provision is made for any public participation or nomination processes in relation to the appointment of board members, nor are any procedures provided for dismissals.

The Legal Succession Act is supplemented by a number of internal Prasa documents and policies. These include the Board Charter and Delegation of Authority, as well as the Shareholder's Compact concluded between the board and the executive authority. The Shareholder's Compact 2016/2017 confirms the position in section 24 of the Act – namely that the board shall be appointed and dismissed by the minister – but no further procedures are provided for. The Delegation of Authority likewise confirms that the board requires the approval of the shareholder for the appointment of directors.³³

With regard to executives such as the CEO, the Legal Succession Act provides neither for such positions nor for appointment to, or dismissal from them. The default legislative position in this regard is thus the PFMA, which grants the relevant minister the power to appoint the CEO and without any input of the board. The result would be that the CEO of Prasa is beholden to the Minister of Transport, rather than to the board of control mandated in terms of section 24 to manage the affairs of Prasa.³⁴ However, the Board Charter stipulates in article 15 that the Prasa board of control has reserved certain powers for itself, including 'recommending to the Executive Authority, the appointment and removal of the chief executive officer'.³⁵ No specific procedures are prescribed as to how the board would exercise this power. It appears that in practice, in the absence of any explicit framework governing the procedures for the appointment of the CEO and other executives, Prasa usually follows a recruitment process in which the board is represented in interviews with candidates.

³³ The document creates the impression that the board may be entitled to make some input in the appointment of directors, but since no procedures are provided for, it is not clear how this would be accomplished.

³⁴ Note cases such as the SOS cases (81056/14) [2017] ZAGPJHC 289 (17 October 2017) as well as *Maroga v Eskom Holdings Ltd and Others* (A5021/11) [2011] ZAGPJHC 171 (16 November 2011), where it was confirmed that managing and controlling the affairs of an entity includes the power to appoint and contract with executives and that, as such, this power resorts with the board.

³⁵ PRASA Board Charter article 15(8).

In this regard, the Minister of Transport, Blade Nzimande, appointed Dr Simo Lushaba in April 2018 as Prasa's new acting group CEO, at the same time as appointing a new interim board.³⁶ Reports indicate, however, that the board itself too has exercised the power to appoint and dismiss CEOs. The appointment of Dr Lushaba was preceded by the board serving a letter to the previous acting CEO, Mthuthuzeli Swartz, that informed him of his removal from the position on the ground that the board deemed his leadership too great a risk, given that its insurers excluded him from liability cover.³⁷ On 5 June that year, Prasa issued a press release indicating that Sibusiso Sithole had been appointed as the new group CEO for a period of 12 months.³⁸

With regard to the last CEO appointment, that of Sibusiso Sithole, the board recommended him as interim CEO, with Minister Nzimande formalising his appointment as mentioned above. These conflicting reports reflect the lack of a proper legislative framework for the appointment and dismissal of board members and executives, a situation which may have contributed to the governance challenges Prasa has faced in recent years.³⁹

2.3.1.2 Criteria for appointment and dismissal of boards and executives

As mentioned, the Legal Succession Act does not provide for the appointment of executives. Section 24 stipulates specific criteria for the appointment of at least seven members of the board of control. One member must be appointed from the ranks of officers of the departments of Transport, Finance and State Expenditure; one further member must be nominated by the South African Local Government Association; and three further members must be persons with 'expertise and experience in the management of a private sector enterprise'. No further details are provided as to the required level of experience, or the size and scope or nature of the private business enterprise referred to.

³⁶ Liedtke, S 'Nzimande appoints new PRASA board, acting CEO' 13 April 2018 Engineering News http://www.engineeringnews.co.za/article/nzimande-appoints-new-prasa-board-acting-ceo-2018-04-13/rep_id:4136 [accessed 28 August 2018]

³⁷ Jones, A 'CORRECTION Prasa Rail acting CEO removed from his post' Times Live 13 April 2018 <https://www.timeslive.co.za/news/south-africa/2018-04-13-prasa-rail-acting-ceo-suspended-pending-investigations/> [accessed 28 August 2018]

³⁸ 'PRASA appoints new group CEO Mr Sibusiso Sithole' PRASA 5 June 2018 www.prasa.com/News%2019.html [accessed 28 August 2018]

³⁹ See case study below.

2.3.1.3 Prasa case study

Prasa has been the subject of so many corruption investigations that 'government could not keep track [of them]', as the then Minister of Transport, Joe Maswanganyi, put it in November 2017.⁴⁰ Parliament finalised the terms of reference for the latest investigation only as recently as March 2018.⁴¹ At that stage, the 2016/2017 annual report was already more than five months late, seeing as it should have been submitted at the end of September 2017. The annual report was eventually submitted to Parliament on 10 September 2018, arriving not only almost 12 months late but laden with less than welcome news. Prasa, it indicated, was on the brink of financial collapse, was losing commuters, who no longer had confidence in the agency,⁴² and had once again received a qualified audit report from the Auditor-General.

These levels of under-performance could be explained in part by years of governance instability. It is a diagnosis which was as much as confirmed by the interim CEO Sibusiso Sithole when, on 13 September 2018, he described Prasa as 'an organisation that is in ICU' and ascribed its challenges largely to governance issues and dysfunctional internal controls.⁴³ This is hardly surprising, given that it had eight interim boards between August 2014 and April 2018 and seven acting CEOs between 2014 and June 2018. As noted, the most recent interim CEO had been appointed for a 12-month term but resigned after only nine months in the position.⁴⁴

Adding to the instability that comes from an ever-changing board is the fact that neither the PFMA nor the Legal Succession Act provides for the appointment of interim board members. The legality of all these interim appointments, including those of the current interim board, can thus be questioned, as has been pointed out by #Unite Behind.

The current interim board was appointed for a period of 12 months in April 2018, with the objective of bringing stability to Prasa. When he made the appointments, Minister Nzi- mande stated that, as the shareholder, he 'ensured that only people with expertise, experience and integrity serve in these vital positions'.⁴⁵ Barely two months later, however, he appointed the controversial former Prasa group CEO Collins Letsoalo as a member of the interim board – this after Letsoala's term as acting CEO had been terminated by the then Prasa board in 2017 when he increased his salary by 350 per cent.⁴⁶

⁴⁰ Presence, C 'So many probes into Prasa, government can't keep track' IOL Business Report 14 November 2017 <https://www.iol.co.za/business-report/so-many-probes-into-prasa-government-cant-keep-track-11998198> [accessed 28 August 2018]

⁴¹ 'Prasa to face the music, as Parly finalises terms of reference for investigation' SA Breaking News 6 March 2018 <https://www.sabreakingnews.co.za/2018/03/06/prasa-face-music-parly-finalises-terms-reference-investigation/> [accessed 28 August 2018]

⁴² Makinana, A 'Prasa on brink of financial collapse, annual report shows' Times Live 10 September 2018 <https://www.timeslive.co.za/news/south-africa/2018-09-10-prasa-on-brink-of-financial-collapse-annual-report-shows/> [accessed 14 September 2018]

⁴³ Khumalo, S "'Bleeding Prasa" not just broken, but in ICU, says interim CEO' Fin 24 13 September 2018 <https://www.fin24.com/Companies/Industrial/bleeding-prasa-not-just-broken-but-in-icu-says-interim-ceo-20180913> [accessed 14 September 2018]

⁴⁴ Payne, S 'MPs hope that "Madam Fix It" can mend outstanding issues at Prasa' Daily Maverick 6 June 2018 <https://www.dailymaverick.co.za/article/2018-06-06-fixing-issues-at-prasa/> [accessed 28 August 2018]

⁴⁵ Liedtke, S 'Nzimande appoints new PRASA board, acting CEO' 13 April 2018 Engineering News http://www.engineeringnews.co.za/article/nzimande-appoints-new-prasa-board-acting-ceo-2018-04-13/rep_id:4136 [accessed 28 August 2018]

⁴⁶ Seale, L 'Outrage over fired Prasa chief's return to board' Sunday Independent 3 June 2018 <https://www.iol.co.za/sundayindependent/news/outrage-over-fired-prasa-chiefs-return-to-board-15285170> [accessed 28 August 2018]

The appointment not only appears to contradict Minister Nzimande's statement about the integrity of board members, but also raised concerns within the interim board, albeit that its members acknowledged that the prerogative of board appointments rests entirely with the Minister.⁴⁷ This situation might have been entirely different had there been public participation in and scrutiny of board appointments.

In 2017, the apparently random board shuffles made at the behest of the Minister of Transport reached the courts in *Molefe and Others v Minister of Transport and Others*.⁴⁸ The case concerned the decision taken on 8 March 2017 by the then Minister of Transport, Dipuo Peters, to dissolve the Prasa board of control by removing the board members. The minister removed the board members by sending notices to each of them, unilaterally terminating their board membership with immediate effect.

As previously noted, the PFMA does not contain any stipulations regarding board appointments. Section 24 of the Legal Succession Act requires the affairs of Prasa to be managed by a board of control, to be appointed and dismissed by the minister. This Act does not stipulate any specific procedures to be followed in such appointment or dismissal, and neither do the additional Prasa documents and policies.

Judge Mabusa thus confirmed that the minister had the power to dismiss the board members, but found that it is an unalienable principle of South African law that everyone is entitled to present his or her case (the *audi alterim partem* rule). In this instance, the minister did not afford the board members the opportunity of a fair hearing: Judge Mabusa found her actions to have been unlawful, unreasonable, and so disproportionate as to be arbitrary and irrational.⁴⁹ He therefore ordered the reinstatement of the board members who had been removed and set aside the appointments of the interim board members.

It should be noted that this dismissal of the Prasa board took place about two weeks after the board terminated the services of Collins Letsoalo as CEO. He had been deployed to Prasa by Minister Peters in June 2016 with instructions to 'keep an eye on the board'. This reportedly contributed, unsurprisingly so, to a breakdown in relations with the board and raised questions about who was accountable to whom.⁵⁰ Judge Mabusa noted that Minister Peters had confirmed the termination of Letsoalo's position as CEO, thereby tacitly agreeing with the board's decision, yet had used the dispute as the springboard for the board's dismissal. According to the judge, this spoke to the irrationality of the Minister's actions.⁵¹

⁴⁷ Jones, A and De Greef, K 'Prasa board will deliver – Khanyisile Kweyama' Daily Maverick 7 June 2018 <https://www.dailymaverick.co.za/article/2018-06-07-interview-prasa-board-will-deliver-khanyisile-kweyama/> [accessed 28 August 2018]

⁴⁸ *Molefe and Others v Minister of Transport and Others* (17748/17) [2017] ZAGPPHC 120 (10 April 2017).

⁴⁹ See paras 55 and 56.

⁵⁰ Gernetzky, K 'Judge orders reinstatement of axed board of Prasa' Business Live 10 April 2017 <https://www.businesslive.co.za/bd/national/2017-04-10-court-orders-that-prasa-board-be-reinstated/> [accessed 5 May 2017]

⁵¹ *Molefe and Others v Minister of Transport and Others* (17748/17) [2017] ZAGPPHC 120 (10 April 2017) para 55.

The case highlights the consequences of vesting the power to appoint the board and CEO in the relevant minister, as per the combination of the Legal Succession Act and the PFMA. As previously noted, this is likely to interfere with the proper structures of accountability within the SOE. In addition, as the case confirms, vesting unilateral appointment powers in the minister – and doing so, furthermore, without any proper prescribed procedures, let alone public participation – is cause for concern.

In Prasa, the position is even more uncertain, seeing as there appears to be no formal framework governing the appointment of executives. Although it seems that in practice the board is indeed involved in executive appointments (based on the Board Charter), it would be better if this were part of a legally regulated process. The lack of such a formal, transparent appointment process for both board members and executives has undoubtedly contributed to the governance challenges Prasa is facing.

2.3.2 ESKOM: Eskom Conversion Act 13 of 2001

Eskom was converted into a public company called Eskom Holdings Ltd in terms of the 1973 Companies Act by way of the Eskom Conversion Act 13 of 2001 (Eskom Act). Eskom is currently governed as an SOC by the 2008 Companies Act, as well as by the PFMA (as a Schedule 2 public entity) and the Eskom Act.

Sections 3 and 4 of the Eskom Act specifically preclude Eskom from the application of certain sections of the Companies Act. None of this relates, however, to board appointments or dismissals.

2.3.2.1 Procedures for appointment and dismissal of boards and executives

The Eskom Act does not contain any provisions relating to the appointment and dismissal of board members or executives. Eskom is governed by the PFMA, which vests the power to appoint and dismiss board members and the CEO in the relevant minister, who in this instance is the Minister of Public Enterprises, currently Pravin Gordhan.

As an SOC, Eskom is also governed by the 2008 Companies Act, which does not provide for the appointment or dismissal of executives, but vests the power to appoint board members (directors) in the minister as shareholder, barring any alternative stipulations in the Eskom MOI. The 2008 Companies Act allows as well for the removal (dismissal) of board members by way of a shareholder resolution, provided that the relevant directors have been notified and given an opportunity to state their case.

The latest Eskom MOI was lodged in July 2016. The previous MOI, dated 2014, vested the power to appoint the CEO in the board, without the input of the minister. This was changed in the 2016 MOI. The 2016 MOI confirms the 'ownership control' powers of the minister to appoint and dismiss board members and executives as per the PFMA in clause 1(2)(40). This is confirmed in clause 14(1) that vests the 'exclusive power' to appoint directors in the shareholder (the Minister of Public Enterprises).

The MOI also provides, in clause 14(11), for the dismissal of directors as the sole prerogative of the shareholder minister. With regard to the procedures to be followed, the MOI echoes the procedural requirements for the removal of directors set out in section 71 of the Companies Act.

Clause 14(1)(2) of the MOI provides for a board consisting of a minimum of three (as per the Companies Act) and a maximum of fifteen directors, the majority of whom must be non-executive directors. These directors are appointed by the shareholder minister for a period of three years, renewable annually, but for a maximum of three consecutive terms. In terms of clause 14(3)(1) of the MOI, the shareholder minister also has the exclusive power to appoint and remove the group CEO. Under clause 14(3)(2) of the MOI, the minister may request that the board identify, nominate and evaluate potential candidates for appointment as group CEO and submit a shortlist of candidates to him or her. However, the minister's appointment of the group CEO binds Eskom to the exclusion of the board. In seeming contradiction to the appointment and removal process, clause 14(3)(5) stipulates that the CEO shall report to the board – the difficulty here being that if the shareholder minister wields the sword that could end the CEO's appointment, one may question where his or her actual loyalties and allegiances will lie.

The Chief Financial Officer (CFO), on the other hand, is appointed by the board,⁵² subject to the minister's written approval. If the minister does not approve, he or she has to issue a written substantive motivation for the lack of approval. In this event, the board will proceed to appoint another candidate. Group executives are recommended by the group CEO and appointed by the People and Governance Committee (a board committee) as permanent employees of the company.

As seen with Prasa, having the board and CEO appointed by the shareholder minister raises governance concerns, as it blurs the lines of accountability even in a case such as this where the MOI requires the CEO to report to the board.

⁵² Article 14(4) of the MOI.

2.3.2.2 Criteria for appointment and dismissal of boards and executives

As noted, the Eskom Act does not provide in any way for the appointment of board members or executives. The PFMA does not provide for appointment or dismissal procedures or criteria, and although the 2008 Companies Act does provide for appointment and dismissal procedures for board members (not executives), it does not prescribe any criteria or qualifications that prospective board members would have to meet. These are among the matters that registered companies may regulate in the MOI.

In terms of clause 14(1)(5) of the 2016 Eskom MOI, the minister must consider age, independence and skills as well as racial and gender diversity when appointing board members. The combined knowledge and experience of the directors should 'enable the Board to attain the objects of the Company'. The appointment process includes vetting of board candidates, which in turn includes conducting criminal checks and verifying qualifications and directorships.

The Eskom MOI also provides for the ineligibility and disqualification of directors in clause 14(13), which echoes section 69 of the Companies Act discussed above. Clause 14(12) provides for additional instances in which directors would vacate their offices. These include incapacity and knowingly failing to declare an interest in a contract with the company.

2.3.2.3 Eskom case study

Eskom has faced governance instability in much the same fashion as Prasa. Between 2010 and January 2018, it had seven different CEOs or acting CEOs, in addition to which it underwent numerous changes in the rest of its board membership – none of which inspired confidence. Notably, in 2017, the then Minister of Public Enterprises, Lynne Brown, blocked a R30-million pension pay-out to former CEO Brian Molefe, asking for a report on the legality and justification of the pay-out. Later, in January 2018, a full bench of the High Court in Pretoria ruled that the payment had been unlawful and ordered Molefe to pay back the money.⁵³

The case is pertinent in that it revolved around the appointment, ostensible early retirement and consequent reinstatement of Brian Molefe as Eskom group CEO. His original appointment was made by the board in terms of the 2014 MOI, whereas the purported reinstatement by the board took place in 2017, at which point the 2016 MOI had taken effect. In terms of the latter, the power to appoint or dismiss the Eskom group CEO vests exclusively in the shareholder (Minister Brown at the time), to the exclusion of the board. The 2016 MOI, in clause 14(3)(4), also requires the minister to be noted as a party to any employment contract between the company and the group CEO.

⁵³ *Democratic Alliance v Minister of Public Enterprise and Others; Economic Freedom Fighters v Eskom Holdings Limited and Others; Solidarity Trade Union v Molefe and Others* (33051/2017; 34568/2017; 34042/2017) [2018] ZAGPPHC 1 (25 January 2018).

Judge Matojane thus found the decision of the Eskom board to accept the early retirement of Molefe, as well as his purported reinstatement, to be ultra vires and unlawful. Both of these actions constituted contracts to which the minister should have been noted as a party and which only she, as shareholder representative, had the power to conclude. She was party to neither of these agreements, rendering them contrary to the MOI and invalid.⁵⁴

Furthermore, once faced with the possibilities of costly pay-outs, the minister accepted the rescission of the early retirement agreement and the restoration of the status quo ante (reinstatement), as it was a better 'value proposition for the South African fiscus'.⁵⁵ Judge Matojane found this decision irrational, as Molefe was not entitled to the so-called pension pay-out and it could thus not be a burden on the fiscus. The minister's decision to appoint and reinstate Molefe as Group Chief Executive at Eskom was thus also set aside, with Molefe being ordered to repay any money received in terms of the purported pension agreement.

While Minister Brown was playing musical chairs with the CEO and board of Eskom, the SOC spiralled into debt, and by December 2017 it no longer appeared to be a going concern – it lacked the resources to pay salaries and suppliers beyond the end of that month, and was not in a position to release its interim results. By January 2018, the Johannesburg Stock Exchange (JSE) threatened to suspend Eskom's bonds if the results were not published by the end of that month. Local banks had already stopped lending to Eskom in October 2017 due to governance concerns, so the SOC faced the prospect of having to source refinance from international markets provided that its bonds were not suspended.⁵⁶

An intervention at presidential level brought new hope, however, with the announcement on 20 January 2018 of the appointment of Phakamani Hadebe as acting group CEO and the businessman Jabu Mabuza as chairman of the Eskom board – Mabuza is credited with having rescued Telkom from the brink of disaster. On 30 January, Eskom finally released its interim results, staving off suspension from the JSE.

The governance fiasco at Eskom offers further evidence of the problems that can arise from a convoluted arrangement in which government is shareholder, policy-maker and regulator alike, especially so where its role extends to the appointment and removal of both the CEO and board members and consequently ends up undermining the oversight role the board is mandated to play in exercising control of the affairs of the SOC.

⁵⁴ See para 67.

⁵⁵ See para 72.

⁵⁶ Paton, C, Mathews, C and Joffe, H 'Eskom is "not a going concern"' Business Day 16 January 2018 <https://www.businesslive.co.za/bd/companies/energy/2018-01-16-exclusive-eskom-is-not-a-going-concern/> [accessed 24 April 2018]

2.3.3 SABC: Broadcasting Act 4 of 1999

The SABC was created by the Broadcasting Act 73 of 1976 and then converted into a limited liability company, with the government as the only shareholder in terms of the Broadcasting Act 4 of 1999, as amended. The Broadcasting Amendment Act 64 of 2002 specifically amended this founding legislation to state that, as from the date of conversion, the Companies Act applied to the SABC as if it were incorporated in terms of the Companies Act. It does, however, exclude specific sections of the Companies Act from applying to the SABC (the sections excluded do not include the section dealing with removal of directors).

The SABC is thus governed by the Broadcasting Act 4 of 1999 (Broadcasting Act) as its founding legislation, the PFMA in respect of its status as a Schedule 2 public entity, and the 2008 Companies Act in respect of its status as a registered SOC.

2.3.3.1 Procedures for appointment and dismissal of boards and executives

The Broadcasting Act contains detailed provisions on the governance of the entity. Section 12 provides for a board consisting of 12 non-executive directors, as well as the group CEO, Chief Operations Officer (COO) and Chief Financial Officer (CFO) as executive members. In turn, section 13 deals in detail with the appointment of non-executive board members (directors).

These 12 non-executive members must be appointed by the President, on the advice of the National Assembly, for a period determined by him or her but not exceeding five years. The President must designate two of these members respectively as chairperson and deputy-chairperson. Section 13 also prescribes an appointment procedure that ensures public participation in the nomination process, transparency and openness, and the publication of a shortlist of candidates.

In the same vein, sections 15 and 15A provide in detail for the dismissal (removal) of non-executive board members, the dissolution of the board, and the appointment of an interim board. In terms of section 15, the President, as appointing body in terms of section 13, may remove a board member after due enquiry and upon a recommendation by the board, but must remove a board member if so found by a committee of the National Assembly and the adoption by the National Assembly of a resolution to that effect as dictated by section 15A.

Such a resolution by the National Assembly may follow as a result of misconduct, inability to perform the duties of director efficiently, continued absence from board meetings (missing three consecutive meetings without permission), a failure to disclose interest in a matter to be voted on by the board, or disqualification in terms of section 16.

Disqualification in terms of section 16 will befall anyone who is not a citizen of, and permanently resident in, South Africa; anyone declared mentally ill or disordered by a court; anyone convicted (after the commencement of the Broadcasting Act) of any offence leading to a sentence of imprisonment without the option of a fine; anyone convicted at any time of theft, fraud, forgery, corruption or any other offence involving dishonesty; or, lastly, anyone convicted of an offence in terms of the Broadcasting Act. Contrary to the Companies Act, section 16 of the Broadcasting Act does not give any indication that such disqualifications may lapse at any point.

While the Broadcasting Act deals with board appointments and dismissals in greater detail than the other founding acts discussed, it does not deal at all with the appointment and dismissal processes and criteria for executives (the CEO, COO and CFO).

As mentioned, the SABC is governed by the PFMA, the 2008 Companies Act and the Broadcasting Act. With reference to the power to appoint board members (non-executive directors), all three acts provide differently in some respects.

In terms of the PFMA and 2008 Companies Act, the power of appointment rests with the shareholder minister. Neither of the Acts provides for detailed or public appointment processes to be followed. The Broadcasting Act, on the other hand, vests the power to appoint board members in the President, on the advice of the National Assembly, and requires public participation and openness and transparency in the appointment process. In addition to these already conflicting provisions, the SABC, as an SOC, has also registered an MOI, which too provides in detail for the appointment and dismissal of board members.

The last-registered (valid) version of the SABC's MOI was signed and lodged by Minister Carrim in 2013. This MOI confirms the position as set out in terms of section 13 of the Broadcasting Act in relation to the appointment of board members (non-executive directors).

Clause 14(1) of the 2013 MOI provides in detail for persons disqualified from being appointed as board members. They include those mentioned in the Broadcasting Act, but so too members of Parliament, provincial legislatures or municipal council, as well as persons precluded from being an SABC director by any applicable legislation. Clause 14(2) details the circumstances in which directors would cease to hold office, including directors removed in terms of the Broadcasting Act.

Importantly, clauses 14(3) and 14(4) provide for the removal (dismissal) of board members. In terms of clause 14(3), the minister may at any time remove a director appointed by him or her in terms of section 66(4)(a)(i) of the Companies Act. This clause refers to instances where a specific person is given the power to appoint a director, rather than to the usual power of the minister as shareholder to appoint directors.

Clause 14(4) confirms the removal of board members (directors) in terms of section 71 of the 2008 Companies Act. It stipulates that upon a director becoming ineligible or disqualified, or incapacitated, or derelict in performance, the board must take a decision and may remove the director. This can be done only after the director concerned has been given notice of the meeting and the proposed resolution, with reasons, and a reasonable chance to make a presentation.

Thus, in relation to the appointment of board members, the 2013 MOI confirms the position as per the Broadcasting Act, vesting the power of appointment in the President on the advice of the National Assembly. However, whereas the Broadcasting Act also vests the power to remove (dismiss) board members in the President on the advice of the board or National Assembly, the MOI vests this power in the board, according to the procedures prescribed by section 71 of the Companies Act. Clause 1(2)(4) of the MOI stipulates that if any provision therein conflicts with the Companies Act, the Act will prevail. It does not indicate in any way what the position is in the event of a conflict between the MOI and the Broadcasting Act. This may be understandable, as the MOI is primarily a document drafted in relation to the Companies Act. The SOS cases, discussed below, dealt with the conflict between the SABC's MOI and the Broadcasting Act, with the judge finding clearly in favour of the Broadcasting Act.

Contrary to the Broadcasting Act, the 2013 MOI also provides for the appointment of the group CEO, the COO and the CFO. According to clause 13(5), these executives must be confirmed by the minister and thereafter appointed by the board once it has followed a prescribed process. The board must first obtain the approval of the minister for the employment contract before advertising and sourcing potential candidates. It must then conduct interviews and compile a shortlist of at least three preferred and suitable candidates, or a shorter list, with the permission of the minister.

However, the minister shall be entitled to reject any such shortlisted candidates, with reason, but neither the board, nor any other interested person, shall be entitled to challenge the minister on the given reasons. The minister can thus effectively veto any candidate(s) proposed by the board, without challenge, causing the process to be started afresh. The MOI does not specifically provide for public participation in this executive appointment process, and places the balance of power in the hands of the minister. This corresponds with the position under the PFMA. As noted before, both the Broadcasting Act and 2008 Companies Act are silent on the appointment of executives.

2.3.3.2 Criteria for appointment and dismissal of boards and executives

Section 13(4) of the Broadcasting Act stipulates that the members of the board as a whole must be suitable for appointment on the basis of their qualifications, expertise and experience in the fields of broadcasting policy and technology, broadcasting regulation, media law, business practice and finance, marketing, journalism, entertainment, and education, social and labour issues. They must also be committed to fairness, freedom of expression,

the right of the public to be informed, and openness and accountability of public officials. They must represent a broad cross-section of the population of South Africa and be committed to the objects and principles of the SABC Charter. No further clarification is provided for the evaluation of these criteria.

No specific criteria are stated for the appointment of executives.

The 2013 SABC MOI does not contain any specific criteria for the appointment of board members or executives. As indicated above, neither do the PFMA or the 2008 Companies Act.

2.3.3.3 SABC case study

The web of partly conflicting and party overlapping measures governing the appointment of board members and executives in the SABC has caused a number of problems in the recent past and prepared the way for political interference by the relevant minister. As mentioned, the PFMA does not provide for processes relating to the appointment or removal of board members. The Companies Act does provide for procedures to remove directors in terms of section 71, placing the power in the hands of the majority shareholding, which in this instance means the minister responsible for the SABC. The 2013 SABC MOI provides for removal procedures similar to those in section 71, but by decision of the board, not of the shareholder. Section 15 of the Broadcasting Act stipulates that the appointing body, which is the President on the advice of the National Assembly, may remove a board member upon a recommendation of the board, and must remove a board member upon a finding of a committee of the National Assembly and the adoption of such resolution.

The then Minister of Communications, Faith Muthambi, representing the shareholding department, maintained that the Companies Act was the overriding legislation governing the removal of directors, giving her as shareholder representative the power to remove directors. She also contended that the SABC's MOI had been revised in 2014 to provide her, as shareholder, with the power to remove board members in terms of the Companies Act. This purported 2014 amendment retains the basic provision in clause 14(4) mentioned above, but prescribes that the decision to remove the director can be taken by the board or the minister, instead of just the board.

This led to an investigation by an ad hoc committee established by the National Assembly and the adoption of the committee's report by Parliament in March 2017. The committee found that the supposed amended 2014 MOI was never registered with the CIPC and hence was not valid. All actions taken on the basis of this supposed amended 2014 MOI were therefore invalid, including the removal of some board members.⁵⁷

⁵⁷ Final report of the ad hoc committee on the SABC board Inquiry into the fitness of the SABC board, dated 24 February 2017 <https://pmg.org.za/committee-meeting/24503/> [accessed 24 April 2018]

The committee also differed from the minister in its interpretation of the applicable legislation, finding that general principles of law determine that in the event of conflict the more specific legislation (Broadcasting Act) trumps the more general (Companies Act). The committee thus found that the removal of directors resides under the Broadcasting Act and remains the prerogative of the President, upon the recommendation of the board or the National Assembly. The committee recommended that the board be dissolved and an interim board appointed.

The matter did not end there, however, but went to court in October 2017. In *SOS Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation SOC Limited and Others; SOS Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation SOC Limited and Others*,⁵⁸ the court dealt with two applications regarding improper ministerial interference in the SABC board. It focused on the constitutionality and lawfulness of the powers the minister exercises in respect of the appointment, discipline, suspension and removal of directors.

The first application (SABC 1) concerned the MOI of the SABC. In 2013, the then Minister of Communications, Minister Carrim, had properly filed and registered changes to the SABC's MOI (that version is referred to in this discussion as the 2013 MOI). Then, in 2014, Minister Muthambi signed a new, amended MOI (the 2014 MOI), granting her even more extensive powers in the appointment of executive officers, including the power to waive the requirements for advertisement and sourcing of candidates. The 2013 MOI, on the other hand, too required the minister's approval for executive appointments, but required that the board advertise for and source candidates.

SABC 1 thus focused on the 2014 MOI and the extensive powers it confers on the minister in respect of the appointment of the three SABC executive officers (the Group CEO, COO and CFO). In terms of the 2014 MOI, the minister has the power to veto these appointments as well as exercise unfettered discretion in manipulating the interview and shortlisting processes so as to appoint his or her preferred candidates without advertising (as was done by former Minister Muthambi).⁵⁹ It was said in the press that the 2014 MOI also granted the minister power over the operations and administration of the SABC board in that it required it to seek the approval of the minister if it wished to make rules relating to the governance of the SABC. In truth, this provision is contained as well in the 2013 MOI.

Whereas section 13 of the Broadcasting Act specifies that the non-executive members of the board must be appointed by the President on the advice of the National Assembly, it is silent on the appointment of the executive directors. The court addressed this, with Judge Matojane making it clear that section 13(11) of the Broadcasting Act stipulates that '[t]he Board controls the affairs of the Corporation'. He emphasised that the power to control the 'affairs' of the corporation implies a wider power than merely controlling the 'busi-

⁵⁸ 81056/14 [2017] ZAGPJHC 289 (17 October 2017)

⁵⁹ It should be noted that the 2013 MOI likewise granted the minister the power to veto any candidates proposed by the board and to do so without challenge.

ness' of the corporation; in turn, this power to control the affairs of the corporation resorts with the board, not with the minister as shareholder. Judge Matojane observed that [t]he effect of section 13(11) therefore is to confer on the Board the exclusive power to control the affairs of the SABC. The Minister is accordingly precluded from exercising any powers by which she may control the Directors in how they control the affairs of the SABC.

Judge Matojane also examined the constitutional framework, stating that the extensive powers the 2014 MOI gave the minister to intervene in the broadcaster's operations undermine the independence required of it in terms of the right to freedom of expression (including the freedom of the media) in section 16 of the Constitution of South Africa 1996. The clauses of the 2014 MOI conferring power on the minister in relation to the executives of the SABC were declared to be inconsistent with the Broadcasting Act of 1999 and thus invalid. The court order specified that 'the executive members of the Board are to be appointed solely by the non-executive members of the board and without any requirement of approval by the Minister'.⁶⁰ Such appointments are to be effected through a process that ensures transparency and openness, including by way of public advertisements.

The second application (SABC 2) concerned the power of the minister to remove the directors of the SABC. In this instance (as also discussed by the parliamentary committee mentioned above), the Minister of Communications contended that, as shareholder, she had the power to remove the directors in terms of section 71 of the Companies Act. The court agreed with the interpretation of the parliamentary committee in finding that the removal of directors of the SABC is governed by sections 15 and 15A of the Broadcasting Act and not by the Companies Act. As discussed above, in terms of the Broadcasting Act, the power to remove directors rests with the National Assembly.

Judge Matojane thus agreed with the interpretation that the Broadcasting Act, as the specific legislation enacted to govern the SABC, overrides the more general Companies Act. The judge noted that the Broadcasting Act is not listed under section 5(4)(b)(i) of the Companies Act (which lists legislation that would override the Companies Act in the event of conflict), and that, accordingly, none of the provisions of the Broadcasting Act is made applicable in the event of inconsistency with the Companies Act. He found this to undermine the independence of the SABC required by the Constitution, and thus declared the relevant provision of the Companies Act (section 71) to be invalid in relation to the SABC. Members of the SABC board can be removed only in compliance with sections 15(1) and (2) and 15A of the Broadcasting Act.

What is difficult to understand is that the judgment in SABC 1 is based on the 2014 MOI, which (as established by the parliamentary committee) was never lodged with the CIPC and was therefore never valid or in force to begin with. In November 2017, Minister Kuyibi-Ngubane noted her dissatisfaction with the judgment, indicating that, although she

⁶⁰SOS Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation SOC Limited and Others; SOS Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation SOC Limited and Others, (81056/14) [2017] ZAGPJHC 289 (17 October 2017); Phakathi, B 'Minister accepts ruling on SABC' Business Day 20 June 2018 <http://tisobg.pressreader.com/business-day/20180620/281629600989996> [accessed 20 June 2018]

did not 'necessarily' oppose the ruling that the board should appoint executives, the board should at least consult with the minister.⁶¹ On 6 December 2017, she lodged an application for the rescission of the judgment, since it was 'discovered that an incorrect MOI had been placed before the court'⁶² in that the court based its judgment on the 2014 MOI, which was never filed (and was therefore not in effect). The minister contended that the SABC is in fact following the validly registered 2013 MOI.

As it happens, numerous of the relevant provisions of this, the validly registered 2013 MOI, are exactly the same as that of the invalid 2014 MOI. Many of the amendments, the judge noted, were amendments from the previous articles of association (in terms of the 1973 Companies Act) and not amendments from the 2013 registered MOI. The essence of the judgment thus applies with equal validity to the content of the current validly registered 2013 MOI.

An out-of-court settlement was reached in December 2017, in which the minister agreed to certain terms relating to the appointment of SABC executives that would safeguard the independence of the board. The interim court order thus stipulates that only the non-executive members of the board are permitted to appoint the executive members (COO, CFO and group CEO). The interim order also states that the minister has no right to veto any decision of the board relating to the appointment, interim or permanent, of an executive member.

The final condition is that any such appointment must be done only after consultation with the Minister of Communications – therein lay the Minister's bone of contention. The order even specifies the type of consultation required, referring to *The Premier, Western Cape v President of the Republic of South Africa*.⁶³ The consultation referred to in this case entails that the SABC board would consult with the minister in its decision-making but not be bound by her views, given that she has no veto power.

Minister Kubayi-Ngubane, however, remained of the opinion that she has to be consulted on the appointment of executives. In January 2018, news reports claimed that Chris Maroleng had been appointed as COO by the SABC board and that the Minister indicated this had been done without consulting with her.⁶⁴ It appeared that, at that time, the appointment process had not been concluded and that while the board therefore still had time to 'consult' with her, it would not be bound by her opinion. On 30 January 2018, the SABC board officially announced the appointment of Chris Maroleng as the new COO with effect from 1 February 2018.⁶⁵ The SABC appointed Phathiswa Magopeni as the Group Executive: News and Current Affairs, effective from 1 March 2018.⁶⁶

⁶¹ 'New legal battle looms over SABC' Business Live 8 November 2017 <https://www.businesslive.co.za/bd/national/media/2017-11-08-new-legal-battle-looms-over-sabc/> [accessed 20 June 2018]

⁶² Briefing on the Memorandum of Incorporation (MOI) of the SABC Presentation to Portfolio Committee in Parliament 20 February 2018.

⁶³ 1999 (3) SA657 CC.

⁶⁴ "'Conditional offer' made to Chris Maroleng, SABC board confirms' News24 23 January 2018 <https://www.news24.com/SouthAfrica/News/conditional-offer-made-to-chris-maroleng-sabc-board-confirms-20180123> [accessed 10 March 2018]

⁶⁵ 'Chris Maroleng officially appointed as SABC COO' News24 30 January 2018 <https://www.news24.com/SouthAfrica/News/chris-maroleng-officially-appointed-as-sabc-coo-20180130> [accessed 10 March 2018]

⁶⁶ 'SABC appoints GE for News and Current Affairs' SABC News 12 February 2018 <http://www.sabnews.com/sabnews/sabc-appoints-ge-news-current-affairs/> [accessed 25 April 2018]

On 19 June 2018, the High Court in Pretoria affirmed Judge Matojane's ruling of in October 2017, which in effect limits the power of the Communications minister to appoint the SABC's executives and clarifies the supremacy of the Broadcasting Act as well as the independence of the SABC board. This decision followed the failure of the counsel for the minister to appear in the High Court on the date of the application for leave to appeal. Justice Matojane dismissed the application with costs.⁶⁷ The minister has indicated that the ministry is currently working on another amendment of the MOI, one that purportedly enjoys favour with the SABC. This is yet to be tabled or registered.⁶⁸

The SABC board shambles and continued meddling by various Ministers of Communication are a clear consequence of the conflicting legal framework that govern the appointment and dismissal of board members and executives. In regard to the SABC, these include the Broadcasting Act, the Companies Act and the company's MOI, with the PFMA added to the mix. It should be noted that Judge Matojane never referred to the potential application of the PFMA's granting of sole appointment powers to the minister. Based on his judgement, this too would have been seen as interference with the constitutional independence of the SABC board and found inapplicable to the SABC, as happened with section 71 of the Companies Act. Although such an interpretation would be welcome, it has to be noted that it was premised on the SABC's constitutionally guaranteed independence, which is not something that each and every SOE has.

2.4 Public participation in appointment and dismissal of board members and executives

As noted at the outset, the Constitution of South Africa 1996 does not directly regulate the activities of SOEs but provides the overarching framework in which these entities operate. Section 195(1) requires that public administration be governed by the democratic values and principles enshrined in the Constitution, including transparency, accountability and public participation. Section 195(2)(c) stipulates clearly that these principles also apply to public enterprises.

Neither the PFMA nor the 2008 Companies Act provide for any form of public participation in the appointment of SOE board members or executives. The same applies to the Eskom Conversion Act. The Eskom 2016 MOI vests the powers of appointing both the group CEO and the board members in the minister and gives no indication of providing for public participation. The MOI does provide, however, for input by the board in the appointment of the group CEO and other executives.

⁶⁷ 'Nomvula Mokonyane's no show means she has no say in SABC appointments' Times Live 19 June 2018 <https://www.timeslive.co.za/politics/2018-06-19-nomvula-mokonyanes-no-show-means-she-has-no-say-in-sabc-appointments/> [accessed 20 June 2018]

⁶⁸ Maqhina, M 'SABC tunes into MOI with Minister' Pretoria News 21 February 2018 <https://www.iol.co.za/pretoria-news/sabc-tunes-into-moi-with-minister-13395870> [accessed 28 August 2018]

As for Prasa, its founding legislation, the Legal Succession Act, vests appointment powers of board members in the minister and does not provide for any procedures in regard to this or to public participation. The legislation does not provide at all for the appointment or dismissal of executives, though, as has been seen, in practice (based on the Board Charter) the board recommends a preferred CEO candidate to the minister. Board members are also involved in the recruitment and interview processes for other executives, but there is no prescribed public participation.

The only legislative framework that clearly provides for public participation in the appointment of board members is the Broadcasting Act. Section 13, as stated above, requires SABC board members to be appointed in a manner that ensures public participation in a nomination process, transparency and openness, and the publication of a shortlist of candidates. This is confirmed by the validly registered 2013 MOI, which requires board members (non-executive directors) to be appointed subject to the requirements of section 13 of the Broadcasting Act.⁶⁹

No public participation is required in the dismissal of any of the board members or executives, not even in the case of the SABC. The Broadcasting Act does vest dismissal powers in the President on the advice of the National Assembly, which can be seen as representative of the public. Due process, in the form of directors' being given the chance to state their case, is provided for in the Companies Act and Eskom MOI.

It is submitted that the lack of public participation in the appointment of board members specifically is a shortcoming that must be addressed. There may be equally valid reasons, too, for the public to have oversight of the dismissal of directors, given that unilateral dismissals by the minister may allow for political interference. The public is clearly a stakeholder in the sustainability and financial well-being of SOEs, especially so of Eskom and Prasa. As the South African corporate governance regime is based on a stakeholder-inclusive approach, provision should be made for the public as stakeholder to play a larger role than it currently does.

2.5 Parliamentary involvement in appointment and dismissal of board members and executives

The position with regard to Parliament's involvement in appointments and dismissals is similar to that regarding the public. The only legislation that provides for direct parliamentary oversight of SOE board appointments is, again, the Broadcasting Act. In terms of section 13 of the Act, the President, on the advice of the National Assembly, must appoint board members. This is confirmed by clause 13(2) of the 2013 SABC MOI. Equally so, the President, on the advice of the National Assembly, has the power to remove or dismiss board mem-

⁶⁹Clause 13(2).

bers in terms of sections 15 and 15A.

The Minister of Communication has nevertheless attempted to circumvent such parliamentary oversight as there is by formulating the MOI according to the provisions of the 2008 Companies Act relating to the removal of board members, which would grant these powers to the board (or the minister as per the unregistered, 2014 MOI), contrary to the provisions of the Broadcasting Act. The SOS judgements have clarified the latter position, clearly stipulating that the appointment and dismissal of SABC board members is governed by the Broadcasting Act.

Direct parliamentary oversight is not provided for in relation to the appointment and dismissal of executives. This power is most often granted to the shareholder minister, with potential scope for some input by the board. The only point at which these appointments appear to be scrutinised by Parliament is when a particular entity is under investigation.

Again, in relation to board appointments, the National Assembly represents the interest of the public as SOE stakeholder, and should therefore play a role in these appointment processes.

03

THE LEGAL FRAMEWORK GOVERNING THE DUTIES, RESPONSIBILITIES AND LIABILITIES OF SOE BOARDS

3.1 Public Finance Management Act 4 of 1999

Section 49 of the PFMA requires the existence of an accounting authority or board in every SOE. Section 50 proceeds to detail the fiduciary duties of such accounting authorities or boards of directors or control. The provisions in section 50 largely correspond with the common law fiduciary duties of directors in company law. These duties include:

- the duty of utmost care to ensure reasonable protection of the assets and records of the SOE;
- acting with fidelity, honesty, integrity and in the best interests of the SOE entity in managing its financial affairs;
- disclosing, on request, all material facts, including those reasonably discoverable, which in any way may influence the decisions or actions of the executive authority or legislature;
- the requirement that board members may not act in a way that is inconsistent with the responsibilities assigned to the board in terms of the PFMA, or use the position or privileges of, or confidential information obtained as, board members, for personal gain or to improperly benefit another person;

- the requirement that board members must disclose to the board any direct or indirect personal or private business interest that they, or any spouse, partner or close family member, may have in any matter before the board; and
- the requirement that, in such instance above, they may not participate in the proceedings of the board when that matter is considered, unless the board decides that their direct or indirect interest in the matter is trivial or irrelevant.

Section 51 of the PFMA sets out the general duties of the board in managing the business of the entity in much more detail than the equivalent requirement in section 66 of the Companies Act. These include ensuring effective risk management systems, the submission of returns and reports, and compliance with tax and other laws.

Section 52 requires the submission of annual budgets and corporate plans to the relevant executive authority. Section 55 stipulates the submission of annual financial statements to the auditors within two months of the end of the financial year, and the submission of an annual report, plus audited annual financial statements and the auditor's report, to the executive authority (and Auditor-General if this office did not perform the audit) within five months of the end of the financial year.⁷¹ As per the constitutional requirements mentioned above, section 65 requires the relevant executive authority to table these annual reports and financial statements before the National Assembly.

Section 83 labels the wilful or negligent failure to comply with any requirement of sections 50–55 as an 'act of financial misconduct' by SOE boards. The same applies to making or permitting irregular or fruitless and wasteful expenditure. Where the SOE has a board, every member (director) is liable individually for any such financial misconduct of the accounting authority.⁷²

Such financial misconduct is a ground for dismissal or suspension of, or other sanction against, a member of the board. In addition to dismissal or suspension, section 86 also provides for criminal sanctions, and stipulates that a board is guilty of an offence and liable on conviction to a fine, or to imprisonment for a period not exceeding five years, if that board wilfully or in a grossly negligent way fails to comply with a provision of sections 50, 51 or 55.

⁷⁰ A prime example of a breach of these duties are the actions of the former Eskom executive Matshela Koko in relation to contracts awarded to a company in which his stepdaughter was involved. See Mazonne, N 'Go, go Koko' The Messenger 16 February 2018 <http://www.themessenger.global/2018/02/16/go-go-koko/> [accessed 10 March 2018]

⁷¹ A number of SOEs have been guilty of not submitting these returns on time, among them SAA and Prasa. For instance, the latter submitted its 2016/2017 annual report almost 12 months late. See Makinana, A 'Prasa on brink of financial collapse, annual report shows' Times Live 10 September 2018 <https://www.timeslive.co.za/news/south-africa/2018-09-10-prasa-on-brink-of-financial-collapse-annual-report-shows/> [accessed 14 September 2018]. See also PFMA 2016-2017 Consolidated General Report <http://www.agsa.co.za/Reporting/PFMAReports/PFMA2016-2017.aspx> [accessed 25 April 2018]; Merten, M '2017 Auditor-General Report: Financial health of state-owned entities flails amid ballooning irregular expenditure' Daily Maverick 1 November 2017 <https://www.dailymaverick.co.za/article/2017-11-01-2017-auditor-general-report-financial-health-of-State-owned-entities-flails-amid-ballooning-irreg%E2%80%A6WukgCy5ubgw> [accessed 25 April 2018].

⁷² Irregular expenditure is one of the main reasons for qualified SOE audits. The Auditor-General reported R687 million in irregular expenditure by the SABC alone in the 2016-17 financial year, with the South African Post Office incurring R719 million in irregular expenditure – in both cases due largely to improper procurement and bidding processes. See Merten, M 2017.

The Act does not provide any guidance on the interpretation of the tests for wilful actions by the board. Section 86 refers only to the board (accounting authority) as a whole, and thus it is not clear whether individual board members could be held criminally liable for breaches of their duties. It is equally unclear how a 'board' could be sentenced to imprisonment – would this mean that all board members will be imprisoned for up to five years?

Although the fiduciary duties of board members in terms of section 50 of the PFMA correspond in the main to the common law duties of company directors, they do not correspond in all instances to the now partially codified duties of directors as set out in section 76 of the 2008 Companies Act. In view of the supremacy of the PFMA, this is a point of caution to note in the event of inconsistencies between the two pieces of legislation that cannot be applied concurrently – for example, the PFMA does not contain any provision similar to the so-called⁷³ business judgment rule in section 76(4) of the Companies Act.

This rule prevents courts from second-guessing the decisions of directors who took reasonable steps to inform themselves of the matter, who either had no financial interest in the matter, or who declared any financial interest, and who had a rational basis for believing, and did believe, that the decision was in the best interests of the company. Such directors would be deemed to have fulfilled their duties of care, skill and diligence, and would not be liable for any damages resulting from their decisions.

Should it be found that the provisions in the two Acts regarding duties of directors cannot be applied concurrently, the PFMA will apply and the directors of the SOC will not enjoy the protection of the business judgment rule. In terms of possible concurrent application, directors of SOCs who are in breach of their duties of care, skill and diligence, yet who comply with the requirements of section 76(4) (the business judgment rule), may escape personal liability for damages caused due to breach of these duties, but still may be held liable for financial misconduct in terms of the PFMA for breach of the fiduciary duty of good faith (fidelity, honesty and integrity, acting in the best interest of the SOE) and other duties listed in section 50 of the PFMA.

Board members of SOEs that are not registered companies (such as Prasa) would not have any option of protection in terms of the business judgment rule and would face the consequences of section 83 of the PFMA for breaches of their duties. However, it is the practice at Prasa to indemnify directors against liability by taking out insurance cover for 'negligent decisions that can arise in the execution of a decision'.⁷⁴

⁷³The modifier 'so-called' is used because the section resembles the American Business Judgement Rule but it is not termed as the 'business judgment rule' in the 2008 Companies Act.

⁷⁴Jones, A 'CORRECTION: Prasa Rail acting CEO removed from his post' Times Live 13 April 2018 <https://www.timeslive.co.za/news/south-africa/2018-04-13-prasa-rail-acting-ceo-suspended-pending-investigations/> [accessed 28 August 2018]

3.2 Companies Act 71 of 2008

The common law fiduciary duties of directors and the duty of care and skill were partially codified in the Companies Act 2008, in that the Act stipulates the duties as found in the common law yet without specifically replacing the common law. These include the duties to act in good faith and for a proper purpose in the best interest of the company, and with the degree of care, skill and diligence that may reasonably be expected of a person carrying out the same functions in relation to the company as those carried out by that director, and having the general knowledge, skill and experience of that director.

A new addition in this regard is the so-called business judgment rule in section 76(4). As mentioned, it provides protection to directors if in any decision they exercised the required care, skill and diligence; took steps to inform themselves; had no personal interest in the decision; and had a rational reason to believe, and did believe, that the decision was in the best interests of the company.

This protection, as noted above, is not available to members of the board in terms of the PFMA. SOC Board members may still face extensive liability in terms of section 77 of the Companies Act for breach of fiduciary duties and a number of other duties. This includes liability for being in agreement to carry on with the business of the company in contravention of section 22 of the Act. Section 22 prohibits the 'reckless carrying on' of the business of the company. Carrying on with the business of the company while knowing that it is no longer a 'going concern' may well lead to such liability. A number of SOCs are, in fact, no longer 'going concerns', and their boards may therefore face liability in terms of sections 22 and 77.⁷⁵

As stated previously, the Companies Act does not deal specifically with the positions of CEO or CFO, which resort instead under the description of a 'prescribed officer' in sections 76 and 77. As such, the CEO and CFO would share the same fiduciary duties, duties of care and skill and potential liabilities as that of board members.

⁷⁵ 'Exclusive: Eskom is 'not a going concern'' Business Live 16 January 2018 <https://www.businesslive.co.za/bd/companies/energy/2018-01-16-exclusive-eskom-is-not-a-going-concern/> [accessed 10 March 2018]

3.3 SOE founding legislation

3.3.1 Prasa: Legal Succession Act 9 of 1989

Section 24 of the Legal Succession Act stipulates that the affairs of Prasa shall be managed by the board of control. The Act does not provide further detail on the duties, responsibilities and liabilities of the board. The board of control will, however, be deemed to be the accounting authority in terms of the PFMA and is thus subject to the duties and liabilities stipulated in the PFMA, as discussed above. This is confirmed by the Prasa Delegation of Authority, which includes the fiduciary duties listed in section 50 of the PFMA as Appendix 1B.

As noted, it is practice for Prasa to take out indemnity insurance for the board, referred to as the 'Directors' and Officers' liability cover'. This provides cover for negligence that can arise in the course of decision-making. The fact that the insurers refused to cover Mthuthuzeli Swartz, on the ground that he was seen as too great a risk, led to his removal as Prasa's acting CEO.⁷⁶

3.3.2 Eskom: Eskom Conversion Act 13 of 2001

The Eskom Conversion Act does not provide for any specific duties or liabilities of the board. Eskom is, however, governed by both the PFMA as well as the 2008 Companies Act, and boards are thus subject to the combined duties, responsibilities and liabilities as discussed above in terms of these two Acts.

In addition, the Eskom 2016 MOI in clause 16 provides for detailed rules regarding the declaration of personal financial interests by directors, but it does not contain any additional stipulations on the duties and responsibilities of directors.

3.3.3 SABC: Broadcasting Act 4 of 1999

Section 13(11) of the Broadcasting Act stipulates that the board controls the affairs of the SABC, while section 13(13) designates the board as the accounting authority in terms of the PFMA.

Section 11(3) details the financial accounting duties of the board, including the duty to keep proper and accurate books and records of the commercial service division separately from those of the public service division, the duty to procure audited annual financial statements, and the duty to submit their directors' report, audited financial statements and auditor's report to the Minister within four months after the end of the financial year.

⁷⁶ Jones, A 'CORRECTION Prasa Rail acting CEO removed from his post' Times Live 13 April 2018 <https://www.timeslive.co.za/news/south-africa/2018-04-13-prasa-rail-acting-ceo-suspended-pending-investigations/> [accessed 28 August 2018]

The Broadcasting Act does not contain any further details on the duties of board members, but the board will be subject to the duties, responsibilities and liabilities detailed in the PFMA and the 2008 Companies Act.

Furthermore, the current registered 2013 SABC MOI provides for further details. Clause 11(1) provides that the board will manage and control the business of the SABC. The board is required to direct the SABC as to strategy and structure, to use all its powers and duties to ensure that the Executive Committee implements the SABC's approved strategy, and to monitor the activities of the executive and approve the appointment of senior executives, excluding executive directors. It is also required to ensure that proper systems of operational, financial and ethical control are in place.

Clause 16(1) further details the fiduciary duties of the board of directors. These correspond with the common law duties of company directors, and include the duty of utmost good faith, honesty and integrity, care and diligence. Directors must take reasonable steps to inform themselves about the organisation.⁷⁷ Directors must make informed decisions and exercise independent discretion; not make improper use of their position; avoid conflict of interest; act independently; ensure the minister is fully informed of material matters; exercise the care and diligence that can reasonably be expected of persons with their experience; always act in the best interests of the SABC; keep confidentiality; and ensure that the SABC has an affirmative action plan in place.

Clause 20 details the liability of directors, including common law liability for breach of fiduciary duties and delict as detailed in the Companies Act. Directors are liable furthermore for any loss, damages or costs suffered by the SABC due to the director's having acted on behalf of the corporation without authority; having agreed to carrying on the SABC's business knowing that it was conducted recklessly as stipulated in the Companies Act; having participated in actions knowing they were calculated to defraud; having signed or authorised misleading financial statements; or having participated in decisions relating to financial transactions as stipulated in section 77(3)(e) of the Companies Act.

In terms of clause 20(2), the SABC may indemnify directors against such liability, excluding liability relating to lack of authority, to reckless carrying on of business or actions with the intention to defraud, to wilful misconduct or breach of trust, or to any fines imposed on a director for convictions in terms of section 78(3) of the Companies Act. The SABC may also advance directors expenses to defend litigation in proceedings relating to their service, and the SABC may take out indemnity insurance such as typically taken out by Prasa.

⁷⁷ The text of the MOI here refers to the organisation as 'the Post Office' – presumably and consequence of cut an paste.

04

SOFT LAW AND VOLUNTARY CODES OF CONDUCT

The provisions discussed above constitute the enforceable legal framework governing SOE board appointments and dismissals in South Africa. In addition to being subject to this legislative framework, SOEs are guided by codes of best practice. These remain voluntary in nature, with the exception that King IV is binding on companies listed on the JSE, as per the JSE listing rules.⁷⁸

4.1 Protocol on Corporate Governance in the Public Sector

4.1.1 Appointment, dismissal and qualification of boards and executives

The Protocol on Corporate Governance in the Public Sector, as adopted by Cabinet in 2003, emphasises the role of the SOE board and recommends that each SOE should be headed by an 'effective and efficient board' (clause 5). It provides, moreover, that the board has absolute responsibility for the performance of the SOE and that, in concurrence with the relevant minister, it appoints the CEO.

Clause 5(1)(1)(2) stipulates that the 'board must retain full and effective control over the SOE and monitor management closely in implementing board plans and strategies'. In defiance of this bold statement, however, the Protocol proceeds to follow the premise of the PFMA regarding the powers and role of the minister in appointing the board and executives. It grants the executive authority the power to appoint the chairperson of the board as well as the chief executive officer, but in both cases only if not otherwise agreed upon in the shareholders' agreement or shareholder compact.

The Protocol thus leaves open the possibility that someone other than the executive authority could be granted the power to appoint executives. It also provides that the executive authority should consult with the board about its preferred candidate for the position of CEO.

With regard to the appointment of directors, the Protocol simply provides that, 'when appointing directors, the shareholder (Minister) should ensure that the board is properly constituted'. Equally so, the shareholder (minister) is given the power to remove or dismiss directors. The Protocol does stipulate, however, that the minister should establish a nomination committee comprised of the CEO and Chairperson of each SOE to recommend the best qualified people to the Minister for board appointments.

The Protocol stresses the importance of non-executive directors on SOE boards and provides that they should be 'individuals of calibre and credibility with the necessary skill, special expertise and knowledge' to exercise judgment independently of management. It

⁷⁸ Dlamini, S 'JSE makes King IV provisions mandatory for listed entities' Business Report 22 June 2017 <https://www.iol.co.za/business-report/jse-makes-king-iv-provisions-mandatory-for-listed-entities-9915866> [accessed 28 August 2018]

also provides for the possible disqualification of directors on grounds of legal disability, insolvency or misconduct justifying removal from the office of trust, or a criminal record (for example, for theft, fraud and forgery).

Contrary to the legislative framework discussed above, which do not provide for specific terms of office for boards, the Protocol provides for directors to serve a term of three years, after which their appointments expire. Due to the voluntary nature of the Protocol, this provision is not enforceable, however.

4.1.2 Duties and liabilities of board members

The Protocol requires the shareholder minister to conclude a 'performance contract' with the SOE board. This is called a 'shareholder compact' and is defined as an agreement 'regulating the relationship between the shareholder and the board'. In terms of clause 5(1)(12)(1) of the Protocol, this should 'describe in as much detail as is reasonably possible the role and responsibilities of the board as a whole and of individual directors'.

The requirement for the conclusion of the shareholder compact is confirmed by Treasury regulation 29(2)(1).⁷⁹ If executed properly, these compacts can serve as important measures of key performance areas to be achieved by the SOC,⁸⁰ but in practice it often does not have the desired effect.

The reasons for this failure include the fact that the compact is contractual in nature and requires consensus between the executive authority and the SOE boards. The difficulty of obtaining such consensus is closely linked to the unequal relationship between shareholder/owner and entity. Very often these shareholder compacts are not signed on time and make insufficient provision for objectives beyond narrow goals of profitability.⁸¹ There is no evidence of the government ever having taken steps against an SOE board for failing to sign the shareholder compact, largely because it is invariably the government that fails to sign, and not the SOE.⁸² Thus, shareholder compacts have generally fallen short as tools for performance oversight.

This Protocol was never legislated and hence has remained a code of good conduct. It has also never been updated to include the principles and changes embedded in the King III and King IV reports, and thus lags behind key developments in corporate governance.

⁷⁹ Treasury Regulations for departments, constitutional institutions and public entities, issued in terms of the Public Finance Management Act 1999

⁸⁰ The Presidential Review Committee found, however, that these shareholder compacts 'have not been successful in the oversight of SOEs'. PRC 'G&O Discussion paper: Oversight' 22 March 2012 p 35

⁸¹ PRC 'G&O Discussion paper: Oversight' 22 March 2012 p 35

⁸² PRC 'G&O Discussion paper: Oversight' 22 March 2012 p 36

4.2 King Report on Corporate Governance for South Africa 2016 (King IV)

The most recent King Report on Corporate Governance (King IV) was published in November 2016. King IV became effective in respect of financial years commencing on or after 1 April 2017 and replaced King III in its entirety.

As with King III, King IV follows a principle- and outcomes-based approach, but its phraseology has shifted from 'apply or explain' to 'apply and explain'. This approach assumes that all principles, being universal, are a given and have been applied. Companies, including SOEs, are expected to explain the practices they have implemented to give effect to these principles. The focus is on achieving the desired outcomes, not on specific processes.

King IV is based on a number of fundamental concepts, including 'integrated thinking'. This concept underpins the role of the SOC as an integral part of society, its role as a corporate citizen, and the principle of stakeholder inclusivity. Further to this, King IV recommends the establishment of a social and ethics committee for all entities, something which is already a legislative requirement for SOCs residing under the 2008 Companies Act. Section 72(4) of the 2008 Companies Act provides that the minister may prescribe which companies must appoint a social and ethics committee, if this is desirable in the public interest. The number of employees, turnover and nature and extent of the company's activities may determine whether the company would be required to appoint such a committee. Companies Regulation 43 lists SOCs as one of the company forms that has to appoint a social and ethics committee. The functions of this committee include monitoring the SOC's activities in relation to social and economic development, good corporate citizenship, labour, health and public safety, and the environment, and reporting to the shareholders on these matters. King IV, however, recommends extending the role and functions of this committee to include matters pertaining to ethical behaviour and ethics management. It also proposes greater integration between this and other board committees.

One of the most important innovations in King IV is its formal recognition of the fact that different types and forms of enterprises may require different governance framework and that certain aspects of King IV are hence more relevant to specific sectors than others. King IV thus includes sector supplements containing more tailor-made guidelines for organisations from specific sectors, such as municipalities and SOEs.

In introducing the sector supplement for SOEs (including SOCs), King IV emphasises the important role of SOEs in creating the foundation of economic growth, as highlighted by the Presidential Review Committee on SOEs, which declared that the state should 'preside over viable, efficient, effective and competitive SOEs'.

The sector supplement on SOEs applies to all public entities listed in Schedules 2 and 3 of

the PFMA (including those registered as SOCs in terms of the Companies Act and regulated by the MFMA). Those municipal entities are, however, by definition companies, and would therefore reside under King IV in their capacity as companies. All SOCs should still strive to conform with the principles of King IV.

In line with the requirements of the PFMA, the bulk of the governance obligations under King IV reside with the SOE/SOC board as detailed in the relevant principles listed below. In terms of the sector supplement for SOEs, the principles of King IV apply as follows for SOEs (including SOCs):

1. The board should lead ethically and effectively. King IV links this directly with section 195 of the Constitution of South Africa 1996, which requires public administration to be governed by democratic values and principles enshrined in the Constitution, including a high standard of professional ethics.
2. The board should govern the ethics of the SOE in a way that supports the establishment of an ethical culture.
3. The board should ensure that the SOE is and is seen to be a responsible corporate citizen as per the latter's public interest mandates. Corporate citizenship is core to the purpose of an SOC. King IV states that taxpayers fund SOEs and therefore SOEs are accountable to these citizens. Principle 3 should thus be applied by SOEs to give effect to their public interest mandates. As is clear from the legislative framework detailed above, there is in fact no provision for such accountability by SOEs to the citizens that fund them.
4. The board should appreciate that the SOE's core purpose, its risks and opportunities, strategy, business model, performance and sustainable development are all inseparable elements of value creation. SOEs should keep in mind the government's strategic development priorities and the policies of ministries relevant to particular SOEs.
5. The board should ensure that reports issued by the SOE enable stakeholders to make informed assessments of the SOE's performance and its short-, medium- and long-term prospects. Effective communication with stakeholders, such as the executive (shareholding government department) and taxpayers, is important, and reports that are underpinned by integrated thinking play a key role in informing stakeholders.
6. The board should serve as the focal point and custodian of corporate governance in the SOE. The board should comply with the fiduciary and other responsibilities detailed in section 50 of the PFMA and, where relevant, section 75 of the Companies Act.
7. The board should embody an appropriate balance of knowledge, skills, experience, diversity and independence for it to discharge its governance role and responsibilities objectively and effectively. The composition of the board is thus crucial, as is the nomination and appointment process for members of the board, with this process including the role played by the nominations committee. The SOE and the executive authority should be transparent regarding the process followed for the nomination, election and appointment of board members. The executive authority and SOE should also agree on the staggered rotation of board members in order to introduce new skills while maintaining continuity.

8. The board should ensure that its arrangements for delegation within its own structures promote independent judgement and assist with the balance of power and the effective discharge of its duties.
9. The board should ensure that the evaluation of its own performance and that of its committees, its chair and its individual members, supports continued improvement in its performance and effectiveness.
10. The board should ensure that the appointment of, and delegation to, management contribute to role clarity and the effective exercise of authority and responsibilities. King IV here recognises that in terms of SOE founding legislation and the PFMA, the executive (government department) has the power to appoint the CEO, and not the board. King IV recommends that this should be a robust and transparent process that involves the board to the greatest extent possible. It also recommends that agreement should be reached between the board and the executive shareholder, that the CEO be accountable to the board, and that the latter has primary responsibility for the removal of the CEO.
11. The board should govern risk in a way that supports the SOE in setting and achieving its strategic objectives.
12. The board should govern technology and information in a way that supports the SOE setting and achieving its strategic objectives.
13. The board should govern compliance with applicable laws and adopted, non-binding rules, codes and standards in a way that supports the SOE in being ethical and a good corporate citizen.
14. The board should ensure that the SOE remunerates fairly, responsibly and transparently to promote the achievement of strategic objectives and positive outcomes in the short, medium and long term.
15. The board should ensure that assurance services and functions enable an effective control environment, and that these support the integrity of information for internal decision-making and that of the SOE's external reports.
16. In the execution of its governance role and responsibilities, the board should adopt a stakeholder-inclusive approach that balances the needs, interests and expectations of material stakeholders in the best interests of the SOC over time.

In relation to principle 16, King IV highlights the importance of government as a stakeholder in SOC, but in so doing, it also inadvertently highlights one of the most problematic aspects of the governance of SOC, namely the triplicate stakeholder role of government:

- it is the shareholder (or majority shareholder) concerned with the financial viability of the SOC;
- it is the industry policy-maker overseeing implementation of service delivery; and
- it is the regulator concerned with regulating the industry practices of SOC.

King IV rightly points out that these roles may overlap, and may even conflict with each other. Accordingly, it recommends that the shareholder compact should be used in particular to clarify the roles of the board and the executive authority as shareholder. Generally, the executive authority should provide policy direction to the SOC, while the board should oversee the implementation thereof. King IV recommends furthermore that the shareholder compact should provide for alternative dispute-resolution procedures in the event of a dispute about the interpretation of the compact.

The announcement of sector supplements as part of King IV was welcomed in the hope that it would address some of the pressing concerns plaguing the governance of SOCs. In some instances, such as in relation to principle 16 and the relationship between the SOC and government as stakeholder, King IV rightly recognises the governance problems, making reasonable suggestions as to how these should be addressed, for example, through clear agreement on the roles of the executive and the board in the shareholder compact. As noted previously, however, in practice these shareholder compacts seldom play the role desired of them due to their being signed late and not being forward-thinking enough.

Even though King IV highlights the triplicate role of government in different capacities, and recognises that these capacities may overlap and even be conflict with each other, it does not (and probably could not) provide a solution to what is one of the biggest problems in SOC governance.

Equally so, principles 7 and 10 set out the ideal position in relation to the nomination and appointment of board members as well as the CEO, but is difficult to achieve in reality, given that the nomination and appointment processes for the boards of SOCs are not uniformly regulated. In practice, board members are appointed by the relevant shareholder minister, nominally 'in consultation with cabinet'. There is, however, no clarity on exactly what such consultation entails in terms of process. In the light of some of the controversial board appointments made to prominent SOCs in recent years, this practice is problematic.

In the same vein, the King IV recommendations regarding the 'robust and transparent' process for the appointment of the CEO (which in terms of legislation is made by the executive shareholder) is far removed from the current reality, as is evident from the SABC case study. The practice over the last decade has not provided for transparency or consultation in board and executive appointments; on the contrary, the latter were often used for personal gain, and more egregiously so, to facilitate state capture, as the 'State of Capture' report attests.

4.3 Implementation of voluntary codes

As noted, the Protocol is outdated and its principles seldom applied. King IV is, however, highly relevant and applicable to all organisations, irrespective of their form. In addition, it includes a specific sector supplement which is directly applicable to all SOEs. In terms of the principle of 'apply and explain', entities, including SOEs, are expected to explain the practices they have implemented to give effect to these principles.

In this regard, both Eskom and the SABC have addressed the implementation of King IV principles in their latest annual reports. Eskom's integrated 2018 report acknowledges that its board is responsible for the implementation of King IV, but indicates that, due to the governance lapses of recent years, not all the principles have been implemented effectively. The report does, however, confirm the board's commitment to driving the implementation of King IV. In terms of the 'apply and explain' requirement, the report judges Eskom's overall level of effectiveness in implementing the principles of King IV as 'partially effective'.

The SABC's 2018 annual report begins with a statement declaring that the directors of the SABC regard corporate governance as fundamental to the success of the business and that they are fully committed to ensuring the practice of good corporate governance. It goes on to state that the SABC has applied the King IV principles and practices but that, as it is an SOC, certain of them could not be applied. The report indicates that in other instances alternative practices have been adopted, and provides the required explanations as to how these adhere to the principles of King IV.

Quite a number of King principles are indicated as not being in place yet, including the requirements that the board should elect a chairperson (which is done by the President in terms of the Broadcasting Act); that the board should appoint the CEO (which is done by the minister in conjunction with the board); and that the board should be able to remove any director without shareholder approval (which in terms of Broadcasting Act is done by the President on the advice of the National Assembly).

Prasa's 2017–2018 annual report and financial statement, on the other hand, still refer to adherence to King III.

05

SUGGESTIONS FOR
IMPROVEMENT

The only solution for the muddled practices around the nomination, appointment and removal of board members and executives of SOCs is uniform, overarching legislation that regulates the position in all SOCs, as was recommended too by the Presidential Review Committee (PRC). The PRC also recommends that the government's separate roles as owner (shareholder), policy-maker, regulator and implementer should be clearly delineated.⁸³

This overarching legislation, or 'SOE Act', must provide for clear and unambiguous recruitment and appointment processes for all executives and board members. It should include provisions on disciplinary measures and removal of board members and executives as well. These provisions should be aimed at retaining the independence of the board in governing the affairs of the SOE and preventing undue ministerial interference in governance matters, while keeping intact the policy guidance and general oversight roles of the relevant ministry. These appointments should be made on the basis of a transparent and public process of board nominations.

The recent SOS judgment provides valuable guidance in this regard, as does the stance taken by Eskom's CEO, Jabu Mabuza, in emphasising firm boundaries between the board, management and the government. As per the statement of Judge Matojane in the SOS cases, the board should have full control over the affairs of the SOE, including board and executive appointments and dismissals. Although this judgment may have hinged on the constitutional independence of the SABC, it is submitted that the same should apply to all SOEs in furtherance of the public interest and in compliance with the principles of public administration required by section 196 of the Constitution and applicable to all public enterprises.

Accordingly, while the relevant minister should be consulted on the preferred candidates, final approval of appointments should not be within the power of the minister as shareholder but rest instead with the National Assembly as the representative of the public – a cardinal stakeholder to whom SOEs owe a duty of accountability (as per King IV). In view of the number of SOEs in South Africa, it may be impossible, or at least impractical, for the National Assembly to exercise direct oversight over all their appointments, so in some instances this power could be devolved to portfolio committees.

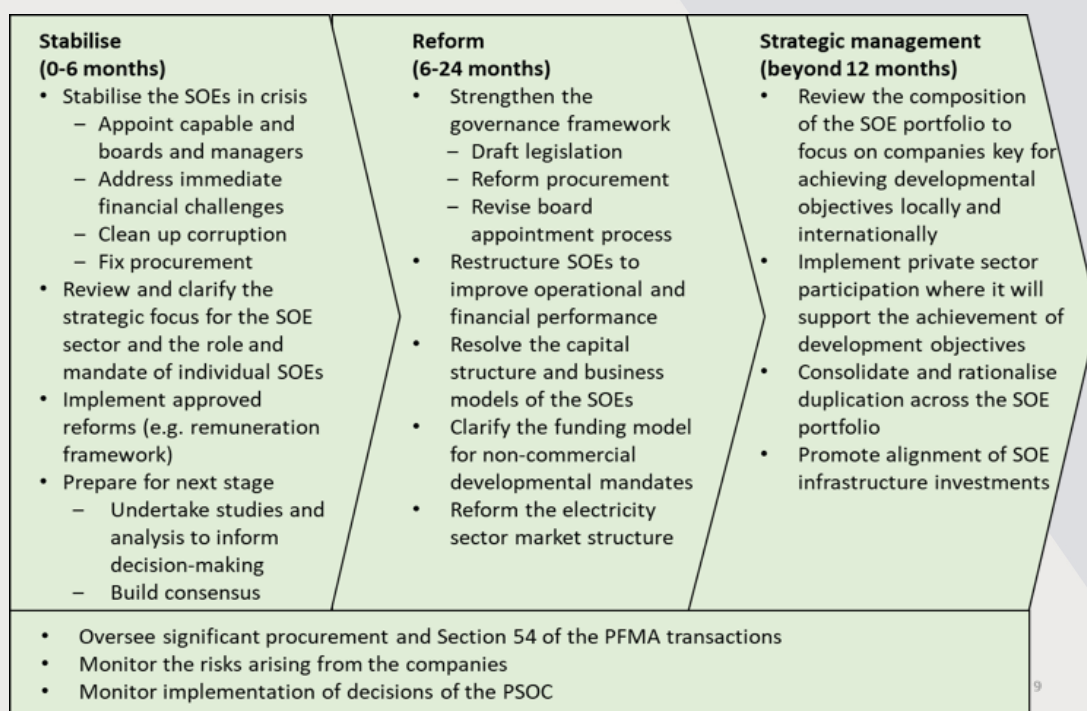
The SOE Act must also clearly provide for its supremacy over other legislation applicable to the relevant SOE. In the case of the PFMA, it does not regulate board appointments, but its definition of 'ownership control' and the exercise of these ownership control powers by

⁸³ Presidential Review Committee on State-owned Entities (2013) Growing the Economy – Bridging the Gap <https://www.gov.za/sites/www.gov.za/files/presreview.pdf> [accessed 16 March 2016]

the executive should be addressed. Some of the SOE founding legislation does provide for the appointment and dismissal of board members and executives. In view of the SOS judgment, then, the SOE Act will have to stipulate clearly its supremacy over founding legislation in this regard.

SOCs are also governed by the provisions in the Companies Act relating to the appointment, or election, and removal of directors. As seen in the case studies, these provisions have been problematic in the SOE context by granting too much power to the minister in the capacity of shareholder. This could be resolved easily by including the SOE Act in section 5(4)(b)(i) in the Companies Act as one of the acts that have supremacy over it in the event of a conflict; the provision should be echoed in the SOE Act (as is the case with the PFMA). Provisions regarding the appointment of board members can also be stipulated in the MOIs of SOC, but, as the SABC debacle illustrates, this could be dangerous.

The August 2018 presentation by Minister Pravin Gordhan to the portfolio committee on Public Enterprises⁸⁴ raised hopes that the government is on the right track in addressing these challenges. Minister Gordhan highlighted the problems that were identified in the PRC report and indicated the interventions to be taken to address them. He also confirmed the issues that were to be addressed by the Presidential SOC Council established by the cabinet in May 2018 to oversee the reform. One of them is the governance framework for managing SOEs. Minister Gordhan's SOC Reform Roadmap is presented below.



⁸⁴ 'Addressing governance challenges facing state owned companies: Progress update' Presentation to Parliament's Portfolio committee on Public Enterprises' 15 August 2018 <https://pmg.org.za/committee-meeting/26819/> [accessed on 28 August 2018]

Corruption Watch's Executive Director, David Lewis, noted that a highlight of the presentation was its holistic approach to SOEs and appreciation of the fundamentals of good governance, namely the division of responsibilities between the shareholder, the board, and executive management. According to this division, the shareholder is responsible for the mandate, the board for developing and enforcing the strategy required to meet the mandate, and executive management for the implementation of that strategy. A key element of the division is that the shareholder should not appoint the CEO or CFO – they should be appointed by the board, in order to be accountable to it. 'Anything else,' Lewis said, 'fatally undermines the critical function of the board by way of compromising its ability to hold the executive accountable'.⁸⁵

These sentiments convey the essence of what has been recommended in this paper – and if the government has come to this realisation, there is indeed light at the end of the dark SOE tunnel.

⁸⁵ Lewis, D 'Gordhan shows the way forward for cleaner public corporations' Business Day 21 August 2018 <https://www.businesslive.co.za/bd/opinion/2018-08-21-gordhan-shows-the-way-forward-for-cleaner-public-corporations/> [accessed 30 August 2018]

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