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WESTERN CAPE

The duty to disclose personal financial interest and its implications on good corporate governance and company efficiency with specific reference to SOC's

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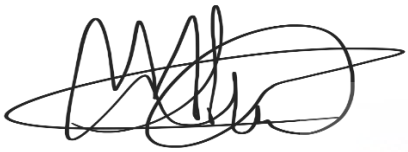
Declaration

I, **Sindiswa Cynthia Jonas**, declare that ***The duty to disclose personal financial interest and its implications on good corporate governance and company efficiency with specific reference to SOC's***, is my original work (except where acknowledgments indicate otherwise) and that neither the whole work nor any part of it has been, is being or is to be submitted for another degree or examination in any other University or academic institution. All sources and materials used are duly acknowledged and properly referenced. I authorise the University of the Western Cape to reproduce for the purpose of research only, either the whole or any portion of the contents in any manner whatsoever.



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Dedication

To God be the glory for his unfailing love.

This mini thesis is dedicated to my sister Lindelwa Jonas whom I lost through her battle with cancer. I have found strength in situations unimaginable.

To my children Kutloano and Avuzwa, my angels whom the Lord Jesus Christ has granted me the privilege to love and nurture.

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To God be the Glory, without you Lord I can do nothing but with you by my side I can do all things through Christ who strengthens me.

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To my mother, my prayer warrior, I feel and hear your prayers that carry me through tough and rosy times, you have been my backbone in all things. Your presence is always felt. Thank you for being my prayer warrior, you are the best mom that anyone can ever ask for.

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I am motivated to pursue even greater heights in my career as I advance further.

JONAS SC

KEY WORDS

Auditor General

Companies Act

Conflict of Interest

Constitution

Corporate Governance

Director

Duties of directors

Eskom

Fiduciary

State

King III report

King IV report

Personal Financial Interest

Parliament

PFMA

PRASA

Public Protector

SABC

SCA

LIST OF ABBREVIATIONS

Auditor General	AG
Companies Act 61 of 1973	1973 Act
Companies Act 71 of 2008	2008 Act
Constitution of the Republic of South Africa	Constitution
Department of Trade and Industry	DTI
Eskom Pension and Provident Fund	EPPF
Group Chief Executive Officer	GCEO
Institute of Directors South Africa	IoDSA
Interim Group Chief Executive	IGCE
Judicial Commission of Inquiry into Allegations of State Capture	Zondo Commission of Enquiry
King report on Corporate Governance for South Africa,	*King III report*
King report on Corporate Governance for South Africa	*King IV report*
Organisation for Economic Co-operation and Development	OECD
Organisation Undoing Tax Abuse	OUTA
Passenger Rail Agency of South Africa	PRASA
Public Finance Management Act	PFMA
Public Protector	PP
South Africa Airways	SAA
South African Broadcasting Corporation	SABC
Supreme Court of Appeal	SCA
State Owned Companies	SOCs
State of the Nation Address	SONA

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ABSTRACT

The common law duties have been preserved by the partial codification of the duties of directors in terms of the Companies Act of 2008 ('2008 Act'). One such duty is the duty to disclose personal financial interest in terms of s 75 of the 2008 Act. The need for directors to disclose personal financial interest has become more necessary than ever before in South African companies, particularly State-Owned Companies ('SOCs'), due to their role in the South African economy. The injury caused by the breach of this duty is not only to the company, but more harm is caused to the economy and the beneficiaries who are the recipients of services rendered by SOCs. There has been a plethora of media reports of poor corporate governance in SOCs which is attributed to conflict of interest due to failure of directors to disclose their personal financial interests in proposed transactions or approved agreements. The imperative of the directors' disclosure is to avoid a conflict between the director's personal interests and the interests of the company. Breach of this duty has a propensity of collapsing companies and in the midst of this breach lies financial and or economic benefit to a director or his/her related person to the detriment of the company.

The central focus or research question to this thesis is the question whether the standards contained in the statutory duty to disclose personal financial interest contained in s 75 of the 2008 Act, are clear and whether they are effectively enforced in South Africa especially with respect to SOCs. In order to answer the central research question, it is not only necessary to analyse s 75 of the 2008 Act but also considered important to examine s 50(3) of the Public Finance Management Act of 1999 ('PFMA') to which SOCs also need to comply. A related enquiry to be answered by this study is what the implications of non-disclosure are to good governance and company efficiency? The tension between or divergence of standards between s 50(3) of the PFMA and s 75(5) of the 2008 Act is noted with concern and suggestions are proffered to correct the anomaly. The study has also revealed the poor enforcement of the duty. This study proposes the establishment of an independent enforcement body that will administer the statutory duties of directors to improve accountability and promote good governance. This approach is similar to approaches adopted by other jurisdictions such as Australia.

CHAPTER 1: INTRODUCTION TO STUDY

1.1 INTRODUCTION AND BACKGROUND

A director's duty to disclose personal financial interest is a common law duty and one of the paramount duties of directors. The focus of this study is to examine the duty of a director to disclose personal financial interest and its implications on good governance and company efficiency with reference to SOCs. In South Africa, the duty to disclose personal financial interest has predominantly been regulated by common law. It has been a common law position that 'where a director has concluded a contract with the company such a contract will be voidable at the instance of the company and the director was compelled to disclose such interest including profits made'.[1] This position excluded a shareholder ratification of the contract. This common law duty was later incorporated in s 234(1) the Companies Act of 1973 (hereafter the '1973 Act').[2] For more than three decades company law was governed by the 1973 Act and there was a need to reform company law and strengthen corporate governance in South Africa. The Minister of the Department of Trade and Industry ('DTI')[3] at that time through various experts developed a policy document the *South African Company Law for the 21st Century: Guidelines for Corporate Law Reform*[4] meant to reengineer company law and draw best practices locally through the *King Reports*[5] and international practices. There are three important components of the policy document namely '(1) shareholders and investor protection (2) the responsibilities of the board of directors and (3) disclosure'.[6] With the reengineering of the company law one of the issues to be given

[1] Cassim F (ed), Cassim M & Cassim R et al *Contemporary Company Law* 2 ed (2012) 567.

[2] Section 234 of the Companies Act of 1973 states that 'a director of a company who is in any way, whether directly or indirectly, materially interested in a contract or proposed contract … which has been or is to be entered into by the company or who so becomes interested in any such contract after it has been entered into, shall declare his interest and full particulars thereof as provided in this Act'.

[3] Minister Mandisa Mpahlwa.

[4] The policy document is entitled the *South African Company Law for the 21st Century: Guidelines for Corporate Law Reform* (GN 1183 in GG 26493 of 23 June 2004).

[5] *King Report on Corporate Governance for South Africa*, 2002 (*King II*), *King III report* in 2009 and *King IV report* in 2016.

[6] *South African Company Law for the 21st Century: Guidelines for Corporate Law Reform* GN 1183 in GG 26493 of 23 June 2004 available at http://www.gov.za/sites/www.gov.za/files/26493_gen1183a.pdf (accessed on 10 October 2017).

attention in the promotion of the development of the South African economy and its competitiveness is 'encouraging transparency and high standards of corporate governance recognising the broader social role of enterprises'.[7] This was a clear demonstration that South Africa was on a path of aligning its company laws to international standards in a manner that ensures transparency in the management of companies.

The coming into effect of the 2008 Act saw more focus on how SOCs are controlled and managed. Section 1 of the 2008 Act defines an SOC as 'an enterprise that is registered in terms of this Act as a company, and either (a) is listed as a public entity in Schedule 2 or 3 of the PFMA'.[8] Therefore, companies must comply with the purpose of the Act encapsulated in s 7*(b)* of the 2008 Act amongst others to:

> *(b)* promote the development of the South African economy by- (i) encourage … enterprise efficiency; and (iii) encouraging transparency and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation.[9]

This signifies the importance of the role of SOCs in the South African economy and the importance of upholding good corporate governance and company efficiency hence the study of the duty to disclose personal financial interest.

1.2 PROBLEM STATEMENT

SOCs have been at the heart of deleterious publicity concerning breach of the director's fiduciary duties and poor corporate governance. The duty to disclose personal financial interest is at the heart of the challenges faced by SOCs. SOCs subscribe to the principles of good corporate governance such as ethical leadership, accountability, transparency and disclosure. The scourge of non-compliance in SOCs continues without tangible consequences to these directors, for that matter, this scourge cuts across various spheres of government. The expectations in the stated objectives of the 2008 Act have not been met insofar as 'encouraging … enterprise efficiency'[10] and 'encouraging transparency and high standards of corporate governance as appropriate, given

[7] the *South African Company Law for the 21st Century: Guidelines for Corporate Law Reform* (GN 1183 in GG 26493 of 23 June 2004).
[8] S7*(b)* of the Companies Act 71 of 2008.
[9] S7*(b)* of the Companies Act 71 of 2008.
[10] See s7*(b)*(i) the Purpose of the Act.

the significant role of enterprises within the social and economic life of the nation'.[11] Warning signs of ailing SOCs has been evident in credit rating downgrades, poor governance and government bailouts[12] and at the heart of these problems is the breach of the director's duty to disclose personal financial interest. Recently, the Special Investigating Unit ('SIU') report to Standing Committee on Public Account ('SCOPA') revealed that

> the extent of 5,452 staffers failing to disclose their financial interests equates to almost one in 10 employees at Eskom, with its total workforce of just over 46,600, from the lowest-ranking blue collar worker to top executives. Of those, the SIU confirmed that 324 employees were linked to entities on Eskom's vendor list. And 135 employees were doing business with the power utility to the tune of more than R6-billion.[13]

This reveals a far deeper problem prevalent in both public and private sector and the partial codification of the directors' fiduciary duties has brought more attention to the director's observance of this duty and the role of the enforcement bodies. The recent scandals pertaining to COVID-19 PPE tenders[14] has revealed the extent of the problem of failure to disclose personal financial interest. This begs the questions whether the standards contained in the statutory duty to disclose personal financial interest, contained in s75 of the 2008 Act, are clear and whether they are effectively enforced in South Africa, particularly, against SOCs.[15] While the 2008 Act has been praised for partially codifying the director's fiduciary duties, it has also been criticised in this study for lack of clarity in the key definitions of s75. A further issue are the enforcement agencies, who enforces the duty and hold director's to account for non-observance of the duty to disclose personal financial interest. These questions will be answered in this study and reflect on case laws particularly in chapter 3 below which include cases in SOCs such as Eskom Holdings SOC Limited

[11] See s7*(b)*(iii) the Purpose of the Act.
[12] 'Treasury sets out stringent conditions for Eskom's R59bn bailout' EWN 9 October 2019 available at *https://ewn.co.za/2019/10/09/treasury-sets-out-stringent-conditions-for-eskom-s-r59bn-bailout* (accessed on 15 October 2019).
[13] Merten M 'Thousands of Eskom officials failed to declare financial interests, SIU verifies' Daily Maverick 14 October 2020 available at https://www.dailymaverick.co.za/article/2020-10-14-thousands-of-eskom-officials-failed-to-declare-financial-interests-siu-verifies/ (accessed on 21 October 2020).
[14] Mokone T 'SIU guns for Correctional Services over Covid PPE tenders', Times Live 20 October 2020 available at https://www.timeslive.co.za/politics/2020-10-20-siu-guns-for-correctional-services-over-covid-ppe-tenders/ (accessed on 21 October 2020).
[15] Such as Eskom, Prasa, SAA, SABC, Denel to mention a few.

(hereafter 'Eskom')[16] and Passenger Rail Agency of South Africa (hereafter 'PRASA')[17], where relevant.

Even though s 75 of the 2008 Act requires directors to disclose personal financial interest and recuse themselves from a matter to be discussed by the board, there are still reports that suggest otherwise. Eskom's former Group Chief Executive Officer ('GCEO')[18] did not recuse himself in deliberations by the people and governance committee on executive director's early retirement benefit. The former GCEO unduly benefiting more than R30 million as a pay out when he took early retirement from Eskom.[19] This questions the effectiveness of the role of the shareholder in bringing director's to account and providing oversight to the enterprise. This question will be dealt with as part of this study in chapter 3 and 4. With the partial codification of the fiduciary duties of directors, expectancy of acting more cautiously by directors in the exercise of their powers and performance of their functions is an imperative. Section 75(5) of the 2008 Act similarly to s 50(3)*(b)* of the PFMA requires that a director who has an interest in a matter to be decided by the board recuse himself/herself and not be part of any deliberations unless required by the board to provide information. The disparity in the two sections is that though s 75(5) requires a director not to participate in the board meeting, to the contrary in s 50(3)*(b)* of the PFMA allows a director to participate in the proceeding of the meeting if the accounting authority decides that the member's direct or indirect interest is trivial. This could be deemed as one of the serious challenges with s 50(3)*(b)* as boards have a discretion to exercise the presence or absence of a conflicted director where a matter is deemed insignificant by the board. The danger with the use of the word trivial may cause casual application of the duty to disclose personal financial interest or deliberate disregard of the law. Hence this study examines the standards of disclosure and

[16] Eskom Holding Limited was converted from a statutory body into a public company with effect from 1 July2002 in terms of the Eskom Conversion Act, 13 of 2001.
[17] Passenger Rail Agency of South Africa 'is a public entity established in terms of section 22 of the Legal Succession to the South African Transport Services Act of 1989, as amended'. It is a public entity wholly-owned by Government and reports to the Minister of Transport.
[18] Brian Molefe was a Group Chief Executive Officer of Eskom from 1 October 2015.
[19] *Democratic Alliance v Minister of Public Enterprise and Others, Economic Freedom Fighters v Eskom Holdings Limited and Others; Solidarity Trade Union v Molefe and Others* (33051/2017; 34568/2017; 34042/2017) [2018] ZAGPPHC 1 (25 January 2018) para 27, 'Brian Molefe scores 'R30 m payout' from Eskom' Times Live 16 April 2017 available at *https://www.timeslive.co.za/sunday-times/news/2017-04-16-brian-molefe-scores-r30m-payout-from-eskom/* (accessed on 5 August 2017).

whether they are enforced to ensure that South Africa has accountable and ethical board of directors.

1.3 KEY RESEARCH QUESTIONS AND RESEARCH OBJECTIVES

The research is centred on two primary questions that are interrelated to the rest of the questions.

The central research question which this thesis proposes to pursue is whether the standards contained in the statutory duty to disclose personal financial interest, contained in s 75 of the 2008 Act, are clear and whether they are effectively enforced in South Africa especially against SOCs. A related inquiry is what the implications of non-disclosure of personal financial interest are to good corporate governance and company efficiency.

Related questions or sub-inquiries are as follows:

- What must be disclosed, by whom, to whom, and when?
- What is the legislative framework relevant to disclosure of personal financial interest?
- Who enforces the duty and holds directors to account?
- What is the liability for breach of disclosure of personal financial interest?
- How have the courts dealt with the non-disclosure of personal financial interest?
- How effective are oversight bodies in taking appropriate steps against transgressors of this duty?
- How can governance relating to disclosure of personal financial interest be improved in SOCs?

This study aims to:

- Analyse the duty to disclose personal financial interest in terms of the Companies Act of 2008;
- Determine any gaps both in s75 of the 2008 Act and s50(3) of the PFMA;
- Assess implications of non-disclosure of personal financial interest to good corporate governance and company efficiency;
- Examine the role of the shareholder in holding board of directors to account;
- Draw findings and make recommendations.

1.4 CHAPTER OUTLINE

The structure of this study is based on the below mentioned chapters:

1.4.1 **Chapter 1: Introduction to Study**

This chapter introduces the topic, the problem statement, lays out the central research question and related enquiries. It further outlines the research methodology used to conduct this study and significance to the research incorporating its aims.

1.4.2 **Chapter 2: Conceptual framework: disclosure of financial interest**

This chapter seeks to provide a conceptual framework to the relationship between a director and a company to which a director is engaged to serve. A theoretical framework provides the context within which a director's duty is performed, and that context is the director – company relationship. This chapter also seeks to establish who is a director and explain the nature of a director-company relationship and its implications to corporate governance and enterprise efficiency.

1.4.3 **Chapter 3: The legislative and regulatory framework: An overview**

This chapter provides for an overview of the legislative and regulatory frameworks of disclosure of personal financial interest, the meaning of key terms, the context in which disclosure happens, exception to the duty and how this duty impacts on other fiduciary duties. Gaps will be identified, and solutions proposed. In this chapter the Constitution, Companies Act, PFMA and its regulations, *King IV* report, Organisation for Economic Co-operation and Development ('OECD') principles on corporate governance and Regulations on public entities will be discussed. Through case law this chapter will examine the trends that are prevalent in directors allowing their personal interests to conflict with the interests of the company to the extent that manifests a breach in terms of s 75 of the 2008 Act.

1.4.4 **Chapter 4: Liability of directors and enforcement of the duty**

The purpose of this chapter is to examine the statutory liability of directors' in terms of s 77(2) of the 2008 Act as well as s 83(1)*(a)* and s 86(2) of the PFMA. This chapter will deal with the question regarding who enforces the duty and whether the duty is effectively enforced particularly in SOCs. The role of oversight bodies such as the Minister as the shareholder representative, Portfolio Committee on Public Enterprises, the role of Standing Committee on Public Accounts (SCOPA) and Public Protector ('PP'), whether they have been effective in holding directors accountable in the exercise of their powers and performance of their functions.

This chapter will also make specific proposals with regards to how the State can deal with the identified gaps. Comparative analysis of enforcement agencies from other jurisdiction fall outside of scope of this study and will be explored in future studies.

1.4.5 **Chapter 5: Conclusion and recommendations**

This chapter will conclude on whether the standards are clear and enforced by directors of companies. Further, this chapter will recommend amendments to the 2008 Act and company policies by broadening the types of relationship affected by s 75 and further recommend that the State considers an enforcement agency that will enforce compliance and have the power to prosecute cases of breach of director's duties.

1.5 RESEARCH METHODOLOGY

This study will rely on the following sources:

Primary sources

South African legislation and regulations, gazetted government documents and position papers, reports such as *King IV* report, *Auditor General report*, *Public Protector report*, Guidelines on the

governance of State-Owned Enterprises in Southern Africa ('OECD'), case law and any other relevant primary source.

Secondary sources

Textbooks, academic or journal articles, conference papers, reports, newspaper articles and internet sources will also be used.

The next chapter will focus on the conceptual framework of this study wherein the legal nature of the company, the fiduciary relationship of the director to the company and governance challenges in SOCs will be explored.

CHAPTER 2: CONCEPTUAL FRAMEWORK: DISCLOSURE OF FINANCIAL INTEREST

2.1 INTRODUCTION

The duty to disclose personal financial interest of a director is closely connected to and even encapsulated in the paramount duty that is owed by a fiduciary to the company as the principal.[20] This chapter will provide a conceptual framework to the relationship between a director and a company to which a director is engaged to serve. A theoretical framework provides the context within which a director's duty is performed, and that context is the director – company relationship. Thus, a good number of interrelated concepts need to be explained/ elucidated. For example, it is vital to establish what a company is and why it requires a natural person to act on its behalf. This chapter will also seek to explain the nature of a director-company relationship and its implications to corporate governance and enterprise efficiency; who is regarded as a director in terms of the 2008 Act; and why the law imposes fiduciary duties on directors.

2.2 LEGAL NATURE OF A COMPANY

A company is described as a juristic person in terms of the Act.[21] It is described as such because a company is a creation of the law, and it has to be distinguished from a natural person in terms of its nature. Lord Richard Burdon Haldane described a company in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd*[22] as an abstraction which has no mind of its own any more than it has a body of its own. He went on to state that the directing will of the company should be sought in the person of an agent whom we call a director today.[23] The director/agent will have to act on behalf of the corporation for the reason that the corporation/company cannot otherwise act on its own without the instrumentality of a natural person. To enable this natural person to act as an

[20] The paramount duty of a director has been said to be the duty of loyalty, good faith and acting in the best interest of the company. See Mupangavanhu BM *Directors' Standards of Care, Skill, Diligence and the Business Judgment Rule in View of South Africa's Companies Act 71 of 2008: Future Implications for Corporate Governance* (Published PhD thesis, University of Cape Town, 2016) 7.
[21] S 19(1) *(a)* of the Act defines a company as a juristic person which exists continuously until its name has been removed from the companies register in accordance with the Act.
[22] *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* (1915) AC 705.
[23] *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* (1915) AC 713.

agent of the juristic person (a company), the Act now confirms that this agent (director), acting as part of a collective called a company board, 'has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the Memorandum of Incorporation provides otherwise'.[24] It is vital to note that the exercise of power, should as of necessity, be constrained by the need to be accountable. The mechanism put in place by the law to ensure that directors account for the exercise of power and the performance of their duties, is the imposition of fiduciary duties and the duty of care. The focus of this thesis is one such fiduciary duty – the duty to disclose personal financial interest.

Section 1 of the 2008 Act defines a company as a juristic person established in accordance with the provisions of the 2008 Act.[25] By definition of the company being a juristic person it means that the company can sue and be sued in any legal proceedings, this suggests that the company has a distinct legal personality. Even though it has this distinct legal personality there are things a company cannot do which are inherently human in nature 'such as entering into a marriage, occupying land, appearing in court in person … '[26] The legal status of a company is defined in s 19 of the 2008 Act[27] that it being a juristic person it continues to exist unless or until the company is de-registered. Just like a natural person a company as a juristic person has its separate legal personality and has the same legal status as a person as it has 'all of the legal powers and capacity of an individual' unless the company's memorandum of incorporation provides otherwise. The SOCs are unique in that they are public entities with the main shareholder being the government and must not only adhere to the government legislation such as the PFMA by virtue of being an SOC but also adhere to the Companies Act by incorporation. There must be high alertness of these

[24] See s 66(1) of the Companies Act of 2008.

[25] S 1 of the Companies Act of 2008 defines a company as a juristic person incorporated in term of this Act, a domesticated company, or a juristic person that, immediately before the effective date-(a)was registered in terms of the- (i) Companies Act, 1973 (Act 61 of 1973), other than as an external company as defined in that Act; or (ii) Close Corporation Act, 1984 (Act 69 of 1984), if it has subsequently been converted in terms of Schedule 2; (b)was in existence and recognized as an 'existing company' in terms of the Companies Act, 1973 (Act 61 of 1973); or
was deregistered in terms of the Companies Act, 1973 (Act 61 of 1973), and has subsequently been re-registered in terms of this Act.

[26] Cassim F (ed), Cassim M & Cassim R et al *The Law of Business Structures* (2012) 62.

[27] In terms of s 19 of the Companies Act 71 of 2008 (1) From the date and time that the incorporation of a company is registered, as stated in its registration certificate, the company –(a) is a juristic person, which exists continuously until its name is removed from the companies register in accordance with this Act; (b) has all of the legal powers and capacity of an individual, except to the extent that-(i) a juristic person is incapable of exercising any such power or having any such capacity; or (ii) the company's Memorandum of Incorporation provides otherwise.

legislative requirements and the directors must act prudently in dealing with the affairs of the company.

2.3 A DIRECTOR AND THE FIDUCIARY RELATIONSHIP

A fiduciary relationship is a relationship where one party places its trust and confidence in another party who has more power and authority over the other. Within the context of a company it is a director - company relationship wherein the director acts as an agent and the company as a principal who places its trust and confidence in the agent who is a director / fiduciary. Cassim describes a fiduciary relationship as having three elements where a director has discretion, exercises power in a unilateral manner and the company being vulnerable to the agent (the director).[28] Hence it is imperative that the fiduciary exercises the power and performs its functions in a prudent manner which underpins an acceptable standard of a director's conduct towards the company. Therefore, the fiduciary relationship does not exist in a vacuum. It is as a result of the trust, care and confidence that a company places in a director as its representative. Lord J Millet in *Bristol and West Building Society v Mothew*[29] describes a fiduciary as:

> Someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary.[30]

Therefore, a director, as a fiduciary, owes a duty of serving the best interests of the company and the director's interests cannot compete with that of the company it serves[31]. A fiduciary's interests must be distinctly separate from the interests of the company, hence the duty of the director to disclose personal financial interest is paramount and at the heart of this study. A director owes the company its honesty, good faith and loyalty as contemplated in s 76(3) of the Act and anything contrary and which does not resemble this standard of conduct of directors will not be in the best

[28] Cassim F (ed), Cassim M & Cassim R et al *The Law of Business Structures* (2012) 466: namely (a) a fiduciary has some discretion or power, (b) a fiduciary is ab le to unilaterally exercise that power or discretion so as to affect the beneficiaries legal or practical interests, and (c) the beneficiary is vulnerable to or at the mercy of the fiduciary.
[29] *Bristol and West Building Society v Mothew* (1996) EWCA Civ.
[30] *Bristol and West Building Society v Mothew* (1996) EWCA Civ 533.
[31] Cassim F (ed), Cassim M & Cassim R et al *The Law of Business Structures* (2012) 287.

interest of the company but rather will be seen as self-serving interests of a director. The fiduciary relationship exists to advance and protect the interests of the company as the principal. Where the director is disengaged in its fiduciary relationship to the company and neglects its fiduciary duties the efficiency of the company and good governance suffer. As stated by Cassim 'a fiduciary has a special opportunity to exercise power or discretion to the detriment of another, who is vulnerable to abuse by the fiduciary.'[32] Therefore, the rational of the duty is to ensure that the director is accountable for its actions. Where this lacks the results are devastating for the principal who is dependent on its fiduciary for leadership. Lord Russell stated in *Regal (Hastings) Ltd v Gulliver*[33] that:

> In the result I am of opinion that the directors standing in a fiduciary relationship to Regal in regard to the exercise of their powers as directors, and having obtained these shares by reason and only by reason of the fact that they were directors of Regal and in the course of the execution of that office, are accountable for the profits which they have made out of them.[34]

The House of the Lord clarified that there was indeed a breach of the fiduciary duty by virtue of the director's failure to disclose profits made. Hence Cassim argues that 'this aspect of the no-conflict rule and the self-dealing rule is clearly an important one that requires statutory regulation'.[35] The fiduciary duties that the director must comply with on behalf of the company were well articulated by Margo J in *Fisheries Development Corporation v AWJ Investments*[36] as follows:

> The director's duty is to observe the utmost good faith towards the company, and in discharging that duty he is required to exercise an independent judgment and to take decisions according to the best interests of the company as his principal. He may in fact be representing the interests of the person who nominated him,- and he may even be the servant or agent of that person, but in carrying out his duties and functions as a director, he is in law obliged to serve the interests of the company to the exclusion of the interests of any such nominator, employer or principal.[37]

[32] Cassim F (ed), Cassim M & Cassim R et al *Contemporary Company Law* 2 ed (2012) 466.
[33] *Regal (Hastings) Ltd v Gulliver* (1942) 1 ALL ER.
[34] *Regal (Hastings) Ltd v Gulliver* (1942) 1 ALL ER 13.
[35] Cassim F (ed), Cassim M & Cassim R et al *The Law of Business Structures* (2012) 312.
[36] *Fisheries Development Corporation v AWJ Investments* 1980 (4) SA 156 (WLD) 163D-H.
[37] *Fisheries Development Corporation v AWJ Investments* 1980 (4) SA 156 (WLD) 163.

The fiduciary relationship is of utmost importance between the principal and the director as the principal places reliance of acting in good faith and in the best interest of the company onto a director. It is therefore imperative that the director knows and understands to whom he owes fiduciary duties, regardless of the nominator, employer or principal as indicated in the above-mentioned case. There must not be any confusion as to whom a director owes fiduciary duties regardless of the multiplicity of directorship roles held by a director as each role must be performed distinctly and independently of each other.

2.3.1 Director of a company

A director is an important agent of a the principal (company) and the 2008 Act has broadened the definition of a director to include persons acting in that capacity and goes further to also include an alternate director[38] regardless of the designation.[39] Three categories of directors in terms of the Act become relevant, these are members that are appointed to serve on the board of directors and these directors can be the Chief Executive Officer ('CEO') of the company, chairperson, company secretary and auditor. Sub-committees of the board such as audit committee and ethics committee which are mandatory, its members are deemed directors in terms of the Act. Alternate directors are also known as 'temporary directors as they are not permanent but are holding a position until such time 'as the vacancy has been filled by a director who has been elected by the shareholders.[40] It is imperative that these categories of directors be briefly discussed within the context of the duty to disclose personal financial interest. The breath and the length of the definition of a director in the 2008 Act which also includes members of the board of directors previously not included in the 1973 Act is evidence enough of the reasons why there is a need to expand the definition. The board of directors are tasked with a responsibility of managing the affairs of the company by

[38] Section 1 of the Companies Act of 2008 defines an alternate director as a person elected or appointed to serve, as the occasion requires, as a member of the board of a company in substitution for a particular elected or appointed director of that company.

[39] S 1 of the Companies Act of 2008 defines a director as a member of the board of a company, as contemplated in section 66, or an alternate director of a company and includes any person occupying the position of a director or alternate director, by whatever name designated

[40] Cassim F (ed), Cassim M & Cassim R et al *The Law of Business Structures* (2012) 238.

'exercising all of the powers and perform any of the functions of the company unless the Act or the company's Memorandum of Incorporation provides otherwise'.[41]

The board of directors are charged with 'a legal duty and the responsibility to manage the affairs of a company'[42], the law puts these mechanisms in place to curb any potential abuse of power and ensure accountability of the use of power by directors. Mupangavanhu states in his thesis that 'by defining directors in singular terms the crafters of the Act probably sought to ensure that individuals tasked with the responsibility of managing the affairs of a company are held accountable in terms of their conduct when fulfilling directorial functions'.[43] Furthermore, the role of board of directors in a company is a very strategic role and requires that members of the board occupying that position maintain high ethical standards and fully understand their fiduciary duties as the representatives of the company. The 2008 Act further makes no distinction between executive and non-executive directors like its predecessor such that both executive and non-executive directors are charged with the same fiduciary duties. The *King IV* report places emphasis that 'all members of the governing body, whether they are categorised as executive or non-executive or independent non-executive have, as a matter of law, a duty to act with independence of mind in the best interest of the organisation'.[44] Directors should not allow to be influenced nor place their interests above the interests of the company in any way and must act objectively in pursued of the strategic objectives of the principal.

Due to the fact that the definition of a director is not exhaustive but rather inclusive, in *Corporate Affairs Commission v Drysdale*[45] Aickin J confirms that by virtue of the secretary of the company acting as a *de factor* director of the company regardless of not holding the 'title' or 'office' of a director has a responsibility to '"act honestly and use reasonable diligence" in the discharge of those duties'.[46] It is therefore expected that a director must uphold its fiduciary duties as long as that director acts within the confines of being a director regardless of whatever name the director

[41] See s 66(1) of the Companies Act of 2008.
[42] Cassim F (ed), Cassim M & Cassim R et al *Contemporary Company Law* (2012) 375.
[43] Mupangavanhu B *Directors' Standards of Care, Skill, Diligence and the Business Judgment Rule in view of South Africa's Companies Act 71 of 2008: Future Implications for Corporate Governance* (published LLD thesis, University of Cape Town, (2016) 22.
[44] *King IV Report* on Corporate Governance for South Africa 2016.
[45] *Corporate Affairs Commission v Drysdale* (1978) 141 CLR 236.
[46] See para 243 of *Corporate Affairs Commission v Drysdale* (1978) 141 CLR.

is called. The fact that the 2008 Act describes a director 'by whatever name designated' is indicative of the importance of the job performed and not the title, whether permanent or in an acting capacity, whether lawful or unlawful, the director remains accountable. Mupangavanhu B also states that 'Of greater importance than the title is the substance of that person's activities, or in other words the power exercised or function performed'.[47] Whether a director neglects its duties such conduct is done at its own peril as a director cannot be exonerated by virtue of not being a permanent director regardless of not directly participating in the affairs of the company. Wallis JA held in *Gihwala and Others v Grancy Property Ltd and Others*[48] categorically that the absence of the director in the daily affairs of the company will not necessarily exonerate the director of wrongdoing as was the case with Mr Manala, who was a director equally to Mr Gihwala. Wallis JA described this in relation to Mr Manala as follows:

> He owed the same fiduciary duty to SMI and to Grancy and was aware of what was being done in his name. He was also a director of Ngatana and party to those matters concerning Ngatana. He was equally responsible for what happened and must bear the same consequences.[49]

It follows that the consequences of the directors' commission or omission attracts joint and several liability and the director cannot escape such liability on the grounds that he was an absent director. There are also other types of directors recognised in our law such as nominee director,[50] a puppet director,[51] a de facto director,[52] and a shadow director.[53] Other directors can be classified as executive director which are ordinarily deemed employees of the company with salary and benefits of an employee whereas non-executive director is not in the employ of the company and is a part time director who will usually be a member of the board of directors only. The non-executive or

[47] Mupangavanhu B (2016) 22.
[48] *Gihwala and Others v Grancy Property Ltd and Others* 2017 (2) SA 337 (SCA).
[49] *Gihwala and Others v Grancy Property Ltd and Others* 2017 (2) SA 337 (SCA) 133.
[50] Cassim F (ed), Cassim M & Cassim R et al *The Law of Business Structures* (2012) 238 describes 'a nominee director as an appointee of a shareholder who controls sufficient voting power in the company to represent the shareholder'.
[51] Cassim F (ed), Cassim M & Cassim R et al *The Law of Business Structures* (2012) 238 'a puppet director by its very name suggests that the director is a puppet of his or her controller (the puppet master) and follows the instructions of the person he/she represents without asking questions therefore blindly'.
[52] Cassim F (ed), Cassim M & Cassim R et al *The Law of Business Structures* (2012) 239 a de facto director is a person who claims to act and purports to act as a director without so being appointed'.
[53] Cassim F (ed), Cassim M & Cassim R et al *The Law of Business Structures* (2012) 239 'a shadow director is a director behind the scenes who will provide direction and instructions to the directors of the company pretending not to be a director of a company and therefore sheltering behind others'.

so called 'independent' director has no other relationship with the company save for the directorship he/she holds. Even though the Companies Act does not 'distinguish between executive, non-executive and independent directors, but an important distinction is made between these types of directors in practice as well as in the *King Report* on Governance for South Africa 2009 ('*King III Report'*) and the King Code of Governance for South Africa 2009 ('Code')'.[54] Goldstone JA stated in *Howard v Herrigel*[55] that 'Howard clearly had a duty to the company to check on its financial affairs and in particular the manner in which the moneys of investors were being handled. That duty he had from the inception'.[56] Ignorance of the law is no excuse and the director would be deemed to have breached its fiduciary duties of good faith and acting in the best interest of the company by reason of being negligent in those duties. Importantly and relevant for this study is a duty to disclose personal financial interest by a director of a company which requires the director to act ethically by making known his interests in order to prevent any conflict that might arise between the director's interest and the interest of the company. The view expressed by the court in *Ganes and Another v Telecom Namibia Ltd*[57] was that Ganes was not allowed to make a secret profit as the gains or commission made by him was made without the company's knowledge and hence deemed a secret profit. The court held that 'the court a quo found that in accepting these payments the first appellant acted in breach of a fiduciary duty owed by him to the respondent which rendered him liable to account to the respondent for the gain which accrued to him as a result thereof'.[58] It is without a doubt that directors who have a competing interest with a company and obtain a secret profit must disclose such an interest failing which the company can demand that a director pays such profits back which could have benefited the company.

Similarly, the directors of SOCs have equally the same responsibilities towards the accounting authority as prescribed by s 49(1) of the PFMA which requires that 'every public entity must have an authority which must be accountable'.[59] The shareholder plays a pivotal role in holding directors to account therefore the performance of the company is dependent on how directors exercise their power and perform their functions in particular their fiduciary duties. Directors must ensure that

[54] Cassim F (ed), Cassim M & Cassim R et al *The Law of Business Structures* (2012) 240.
[55] *Howard v Herrigel* 1991 (2) SA 660 (A).
[56] *Howard v Herrigel* 1991 (2) SA 660 (A) 60.
[57] *Ganes and Another v Telecom Namibia Ltd* 2004 (2) All SA 609 (SCA).
[58] *Ganes and Another v Telecom Namibia Ltd* 2004 (2) All SA 609 (SCA) 16.
[59] S 49(1) of the Public Finance Management Act, 1999.

their interests do not conflict with the interests of the company and that there is adherence to s 50(3) of the PFMA[60] Therefore, the accounting authority is held accountable, by the shareholder, who has a vested interest in the exercise of the power and the performance of the functions of the accounting authority. It is therefore important that when a director or any other name he may be called exercises its powers and perform its duties it places the interest of the company above its own and its power be constrained to prevent conduct which is detrimental to the life of a company. Therefore, s 75 is part of the paramount duty to avoid a conflict between the interest of the company and those of the director as stated in s 76(2)*(a)*(i) and (ii) of the 2008 Act.

2.3.2 Governance challenges in SOCs today

The disintegration of good governance in SOCs has propelled the writer to examine the duty to disclose personal financial interest and its impact on good corporate governance and enterprise efficiency. Eskom among other SOCs[61] have been at the heart of these deleterious publicity due to unethical conduct of its directors and poor governance which affects enterprise efficiency of the SOCs. PRASA's board dismissed its Acting CEO 'following allegations that he raised his remuneration by more than 350%'.[62] This raised serious governance concerns and raises pertinent questions regarding the policies of PRASA regarding how an Acting CEO increase his salary without board approval. This clearly demonstrates weak internal controls which if not addressed may lead to total collapse of governance in the SOCs and other state owned entities such as PRASA. The Minister of Transport[63] took a decision in term of s 24(1) of the Legal Succession to the South African Transport Services Act[64], to dissolve the Board of PRASA with immediate

[60] S 50(3) of the PFMA states that: 'A member of an accounting authority must – (a) disclose to the accounting authority any direct or indirect personal or private business interest that that member or any spouse, partner, or close family member may have in any matter before the accounting authority; and (b) withdraw from the proceedings of the accounting authority when that matter is considered, unless the accounting authority decides that the member's direct or indirect interest in the matter is trivial or irrelevant'.
[61] Such as SABC, SAA and Denel to mention a few.
[62] Skae J 'How governance failures messed up Prasa'Fin24 15 March 2017 available at *http://www.fin24.com/Companies/Industrial/how-governance-failures-messed-up-prasa-20170315* (accessed on 5 November 2017).
[63] Dipuo Peters was the Minister of Transport at the time.
[64] Legal Succession to the South African Transport Services Act No 9 of 1989.

effect after the Acting CEO was dismissed.[65] Portfolio Committee chairperson[66] indicated that 'as things are now, there is no sense that the board is in control of anything. It does not seem that there are controls at the entity to ensure good governance in line with legislation'.[67] A dismissal of a board demonstrates failure of governance by the board who ought to act with independent mind and in the best interest of the company and this indicated that the board was operating outside of the legislative parameters giving rise to violation of processes and rules by senior officials.

The duty to disclose personal financial interests imposes an obligation on the director not to engage in a conflict of interest. The importance of the fiduciary relationship that a director owes to the company and the effect when such a relationship has irretrievably broken down became evident in the resignation of the former GCEO of Eskom[68] where the conduct of the former GCEO was adjudged to have been harmful to the company to an extent that it warranted his resignation. The reasons advanced for the resignation of the former GCEO was that 'he was doing so voluntarily as that would be in the interest of good governance at Eskom'.[69] The consequence of the former GCEO of not recusing himself resulted in a conflict between his own interests and the interests of the company. A reasonable director in the position of the GCEO ought to have known what the committee was to deliberate and resolve and thus recuse himself[70] to avoid placing himself in a position where he gains an advantage[71] resulting in a conflict of interest. It can be deduced that the former GCEO interest in the matter was personal and financial in nature as he benefited 30 million rand when he took early retirement thus breaching the duty to disclose personal financial

[65] Liesl Peyper 'Prasa board dissolved with immediate effect' Fin24 08 March 2017 available at *https://www.fin24.com/Companies/Industrial/prasa-board-dissolved-with-immediate-effect-20170308* (accessed on 5 November 2017).
[66] Ms Dikeledi Magadzi.
[67] Liesl Peyper 'Prasa board dissolved with immediate effect' Fin24 08 March 2017 available at *https://www.fin24.com/Companies/Industrial/prasa-board-dissolved-with-immediate-effect-20170308* (accessed on 5 November 2017).
[68] *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).
[69] *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) 3.
[70] S 75(5)*(d)* requires a director who is present at the meeting to leave the meeting after making the disclosure.
[71] S 76(2)*(a)*(i) 'A director of a company must *(a)* not use the position of director, or any information obtained while acting in the capacity of a director- (i) to gain an advantage for the director, or for another person other than the company or a wholly-owned subsidiary of the company'.

interest and duty to avoid a conflict of interest. In *Aberdeen Railway Co v Blaikie Bros*[72] Lord Cranworth held that:

> It is a rule of universal application, that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect.[73]

Directors, as fiduciaries, are under a fiduciary duty to avoid placing themselves in a position in which their duties to the company conflict with their personal interests. A director stands to lose all profits made as he/she is prohibited from pocketing any gains from such transactions as failure to disclose any personal financial interests is a breach of s 75 of the 2008 Act. A breach of s 75 could also amount to breach of duties found in s 76(3)*(a) – (b)*, that is, the duty to act in good faith and for a proper purpose and the duty to act in the best interest of the company. This conduct cripples the functioning of the director - company relationship.

In *Robinson v Randfontein Estates Gold Mining* the court held that 'where one man stands to another in a position of confidence involving a duty to protect the interest of that other, he is not allowed to place himself in a position where his interests conflict with his duty'.[74] Robinson's secret profit resulted in a conflict of interest between his interests and the interests of the company. A director standing in a fiduciary relationship cannot make profit out of his position as a director of a company, he has an obligation towards the company to disclose any interests and cannot benefit from such profits when in fact it would have been the company that profits from the transaction this being called a no conflict rule. The blurring of the lines between the director's duty to prevent a conflict between his interests and the interests of the company result in a director advancing his own interests and in the process, disadvantages the company. The SOCs have fallen foul of the duty to avoid a conflict of interest and a case in point is that of Interim Group Chief Executive (hereafter 'IGCE')[75] where a charge was laid against him for failing to disclose to the board personal financial interest in that his stepdaughter was appointed as a non-executive director

[72] *Aberdeen Railway Co v Blaikie Bros* (1854) 1 Macq 461.
[73] *Aberdeen Railway Co v Blaikie Bros* (1854) 1 Macq 471
[74] *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 177 http://uir.unisa.ac.za/bitstream/handle/10500/18274/18274/1SAfrMercantileLJ1221.pdf (accessed on 20 August 2017).
[75] *Eskom Integrated Report* 31 March 2017, page 96 refers to the Appointment of Mr Matshela Koko as an Interim Group Chief Executive of Eskom with effect from 01 December 2016.

of Impulse International (Pty) Ltd where she had acquired shareholding. This is the company that was awarded contracts by Eskom during the time the IGCE was an executive director.[76] This demonstrated an infectious trend of conflict of interests prescribed by s 76(2)*(a)* and failure to disclose personal financial interests as prescribed by s 75(5) and as a result has led to poor governance in the SOC.

Non-adherence to good corporate governance has a direct impact on enterprise efficiency which is evident in the credit ratings, poor governance and government bailouts[77]. The PIC indicated in the 2018 business report that it will provide Eskom with a R5 billion loan due to 'enormous liquidity constraints which were threatening the company's going concern status.'[78] It can be deduced that there is a correlation between s75 of the 2008 Act and good corporate governance and enterprise efficiency as illustrated above, the Eskom cases demonstrate that the breach of these legal principles affect good governance and threatens the solvency and liquidity of the company which in turn impedes on the efficiency of the company. The State is the sole or majority shareholder in SOCs and the board of directors are appointed by the Minister who is a political head of a department. The Minister must ensure to it that the shareholder interest is protected by appointing suitably skilled board and the Institute of Directors South Africa ('IoDSA') in its news and press stated that:

> According to the *King IV* report on corporate governance, the board should consider the collective knowledge, skills and experience required by the board, the diversity of the board, whether the candidate meets the appropriate fit and proper criteria before nominating a candidate for appointment. This thorough consideration is sometimes lacking in the public sector, in favour of political pressure.[79]

[76] 'Koko did not follow correct procedure to declare interest – witness' fin24 23 November 2017 available at http://www.fin24.com/Economy/Eskom/live-koko-hearing-resumes-after-one-month-break-20171123 (accessed on 30 September 2018).
[77] 'Treasury sets out stringent conditions for Eskom's R59bn bailout' EWN 9 October 2019 available at *https://ewn.co.za/2019/10/09/treasury-sets-out-stringent-conditions-for-eskom-s-r59bn-bailout* (accessed on 15 October 2019).
[78] 'PIC will bail out Eskom with a R5 billion loan' 5 February 2018 available at *https://www.iol.co.za/business-report/energy/pic-will-bail-out-eskom-with-a-r5-billion-loan-13113950* (accessed on 05 February 2019).
[79] 'SOE boards: It matters who gets appointed and how they get appointed' available at *https://www.iodsa.co.za/news/459327/SOE-boards-It-matters-who-gets-appointed-and-how-they-get-appointed.htm* (accessed on 13 August 2019).

Governance challenges within SOCs are prevalent and this was demonstrated in the *Public Protector's report*[80] on maladministration and improper conduct in SOCs which had an adverse effect on the health of the company as directors lacked independence in the decision making by no longer promoting the best interest of the company but rather promoting the interest which accrues to a natural person. These challenges which relate to non-disclosure of personal financial interest and governance challenges require directors uphold the rule of law and governance principles in the companies they serve as this will easily translate to directors being legally compliant to the fiduciary duties owed to the principal.

2.4 CONCLUSION

This chapter two has achieved to provide context of a director – company relationship as the company being an incapacitated person solely depends on the director acting in a manner that protects the interests of the company which has no mind of its own. This chapter has further demonstrated the need of a director in a fiduciary relationship to be accountable primarily to avoid a conflict between the director's interests and the interests of the company. Therefore, directors cannot allow themselves to be corrupted by dishonesty and greed to the detriment of the company and failing to act independently as these failures lead to liability in term of s 77(2)*(a)* and can also lead to criminal liability. The duty to disclose personal financial interest imposes an obligation on the director not to engage in a conflict of interest. Non observance of this duty cause poor governance and affects enterprise efficiency as changes in boards become inevitable.

The next chapter will deal in-depth with the overview of the legislative and regulatory frameworks of disclosure of personal financial interest, the meaning of key terms, the context in which disclosure happens, exception to the duty and how this duty impacts on other fiduciary duties. In this chapter the Constitution, Companies Act, PFMA and its regulations, *King IV* report, OECD principles on corporate governance and Regulations on public entities will be discussed.

[80] State of Capture: '*Report on an investigation into alleged improper and unethical conduct by the President and other state functionaries relating to alleged improper relationships and involvement of the Gupta family in the removal and appointment of Ministers and Directors of State-Owned Enterprises resulting in improper and possibly corrupt award of state contracts and benefits to the Gupta family's businesses'* Report No: 6 of 2016/17.

CHAPTER 3: THE LEGISLATIVE AND REGULATORY FRAMEWORK: AN OVERVIEW

3.1 INTRODUCTION

SOCs are largely public entities that are highly regulated and governed by legislative prescripts. The compliance requirements for SOCs of adhering to legislative prescripts are two pronged, in that there must be compliance with legislation that applies to government departments, institutions and public entities and further compliance with company laws and regulatory framework. The PFMA classifies Eskom as a major public entity[81] and PRASA as a State Owned Enterprise (SOE) is categorised as national government business enterprise.[82] This classification is only relevant insofar as that 'schedule 3B public entities are generally more dependent on national revenue fund, tax or statutory money'.[83]

This chapter seeks to layout an overview of the legislative framework that companies must comply with, in particular, SOCs. The Constitution, PFMA and its regulations, the Companies Act of 2008, voluntary prescripts such as *King IV report* and OECD guidelines on the governance of SOE's in Southern Africa will be discussed. Of paramount importance, this chapter will respond to the question whether the standards contained in the statutory duty to disclose personal financial interest, encapsulated in s 75 of the 2008 Act, are clear and whether there is synergy between the duty to disclose personal financial interest in s 75(5) and s 50(3) of the PFMA? Therefore, this chapter will critically analyse the legislative framework to the extent relevant to the duty to disclose personal financial interest and respond to the above questions.

[81] Schedule 2: Major Public Entity in terms of the PFMA.
[82] Schedule 3: Other Public Entities Part B: National Government Business Enterprise in terms of the PFMA.
[83] Department of Public Enterprise: Current classification page 8 available at *http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/2006/060607coetzee2.pdf* (accessed on 15 October 2017).

3.2 DEVELOPMENT OF THE DUTY PRIOR TO 2008

3.2.1 Common law duty

A duty to avoid a conflict is a duty developed at common law meant to prevent harm to the company from its fiduciary. At common law a fiduciary had to adhere to a duty of honesty, loyalty and good faith. A fiduciary had to comply with a no conflict rule and where there is a potential or known conflict such conflict had to be disclosed and a consent sought by the director where the director engages in activities that would otherwise conflict with the interests of the company. Failure to uphold honesty, loyalty and good faith at common law results in a fiduciary having to pay back whatever secret profit made which would have otherwise been made by the company whose interests are now compromised due to the conflict of interest of a director. In *Robinson v Randfontein Estates Gold Mining* the court in this case 'refused to recognise the separate legal personality of a subsidiary where Robinson had attempted to use the subsidiary as a conduit to evade the fiduciary duties he owed to the holding company as a director.' [84] The conduct of the fiduciary that harms the company was also dealt with in the case of *RP v DP and Others* where by Alkema J confirmed that:

> Under the common law our courts have in certain exceptional circumstances refused to recognise the separate legal existence of a company. This occurred, for instance, where it was held that the separate legal personality of a company was used as a device by a director to evade his or her fiduciary duty.[85]

In these cases, the courts pierce the corporate veil and held the directors accountable for failure to avoid conflict of interest and making secret profits hiding behind a corporate personality of a company. Direct or indirect interest which is personal to a director may lead to a subjective view rather than objective assessment when deciding on a proposed transaction or agreement in whatever form, this leads to a director placing his interests above the interests of a company as such interests will cloud the judgement of a director. Murphy AJA confirmed in *Herholdt v*

[84] *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 available at http://uir.unisa.ac.za/bitstream/handle/10500/18274/18274/1SAfrMercantileLJ1221.pdf (accessed on 20 August 2017).
[85] *RP v DP and Others* 2014 (6) SA 243 ECP 247.

Nedbank Ltd[86] his dismissal was fair and reasonable as his conflict 'compromised the employees ability to perform his duties impartially'.[87] The fact that he was a beneficiary to a will of a client required that he discloses to his employer the personal financial interest and failure thereof resulted in the breach of this duty. In *Novick v Comair Holdings Ltd*[88], Novick's failure to disclose his personal financial interest to the board of directors led to Comair not honouring the letter agreement and the court held that 'if there was any divergence between the interests of Comair and those of Sagit, the duty of Comair's directors was plain, they were to act in the interests of their own company when deciding whether or not to ratify the letter agreement'.[89] This means that a breach of the duty to disclose personal financial interest leads to a breach of a duty to act in good faith and for a proper purpose as required by s 76(3)*(a)* and the duty to act in the best interest of the company as required by s 76(3)*(b)*. A fiduciary has a duty to account for profit made hence secret profits must be paid back to the company to whom the fiduciary owes the duty to avoid conflict interest.

The House of the Lords in *Regal (Hastings) Ltd v Gulliver* ruled that 'the liability to account arises from the mere fact of the profit having been made[90]' such that it is immaterial that there was no fraud or malice from the directors of R Co. The mere fact that they failed to disclose profit made was a breach of their fiduciary duties in particular a duty to disclose profit made and as such avoid a conflict of interest which requires the directors to pay back whatever profits made as a consequence of failure to disclose. Lack of accountability of personal financial interest and profit made by a fiduciary compromises the director's duty of honesty, loyalty and good faith.

3.2.2 The 1973 Act

The duty to avoid a conflict of interest was encapsulated in the 1973 Act, though with its shortcomings. Section 234 of the 1973 Act required that:

[86] *Herholdt v Nedbank Ltd* (701/2012) [2013] ZASCA.
[87] Para 97 of judgment in *Herholdt v Nedbank Ltd* (701/2012) [2013] ZASCA.
[88] *Novick v Comair Holdings Ltd* 1979 (2) SA 116 (W).
[89] Pretorius JT, Delport PA & Havenga M 'et al' *Hahlo's South African Company Law through the cases* (1999) 315
[90] *Regal (Hastings) Ltd v Gulliver* 1942 1 ALL ER para 378.

> a director of a company who is in any way, whether directly or indirectly, materially interested in a contract or proposed contract … which has been or is to be entered into by the company or who so becomes interested in any such contract after it has been entered into, shall declare his interest and full particulars thereof as provided in this Act.[91]

The disclosure in the 1973 Act refers to any person occupying the position of director or alternate director of a company, by whatever name he may be designated. Clearly this definition of a director was restrictive in that a member of an audit committee interested in a contract to be entered into or has been entered into by the company was excluded by the 1973 Act. The requirements of the 1973 Act were that the interest must be of a contract either entered into or to be entered into, must be by a director of a company, must be direct or indirect interest, must be material in nature, and full particulars relating to the interest must be disclosed. The 1973 Act allowed a conflicted director to participate in board of directors' meetings to 'deliberate and vote if the memorandum of incorporation permitted him to do so'.[92] This approach negated the reasoning for the disclosure in the first instance which was to allow a director who is conflicted to recuse himself. The presence of a director in a meeting where he is conflicted, he may be bias towards his as it would be difficult for a director to divorce him/herself from his/her own interest and only do and act to that which is in the best interest of the company. This situation resembled a conflict between the interest of a director and the company and in turn a breach of the fiduciary duties of a director.

Therefore, it is expected of company directors to disclose any material interest in a contract either to be entered into by the company or post commencement of such a contract. In the event of a fiduciary failing to disclose interest prior or after commencement of the contract is a clear breach of the duty and a possible indication of a fiduciary defrauding the company and making a secret profit. This is evident from the plethora of cases 'where conflicted directors have deliberately withheld material information from the rest of the board to the prejudice of the company and its

[91] S 234-241 of the Old Companies Act required directors who are directly or indirectly materially interested in a contract entered into or proposed contract to (1) declare the interest; (2) its full particulars; (3) by written notice indicating the:-nature and extent of his interest and further the extent of the interest after the contract has been entered into; (4) on or before the meeting; (5) disclosure must be recorded in the minutes of the meeting; (6) record of disclosure must be kept; and (7) auditor must be satisfied that the minutes and the recording of disclosure of personal financial interest is kept by the company.

[92] 'Disclosure of Directors Personal Financial Interest: A certain necessity' *VDMA* available at *http://www.vdma.co.za/disclosure-directors-personal -financial-interest-necessity/* (accessed on 3 July 2017).

shareholders'.[93] In *Gardener v State*[94] the appellants had been convicted on a charge of fraud for failure to disclose interest in Dalmore to the Leisurenet board which as a consequence was a breach of their fiduciary duty owed to Leisurenet. The directors of Leisurenet made secret profit, and their actions led to the liquidation of the company in 2001. The fiduciary's intentions are not relevant but for the fact that there was failure to disclose is enough to infer that the director acted dishonestly and in bad faith and therefore breached the important duty to disclose interest in a contract. Any profits made by a director in such contracts are due to the company as directors are not allowed to make secret profits from transactions where they failed to disclose their personal financial interest. The duty by a fiduciary to disclose gives a company an opportunity to make prudent decision regarding any matter to be decided by the board of directors.

3.3 THE SOUTH AFRICAN CONSTITUTION AND THE INTERPRETATION OF STATUTES

Overarching all legislative prescripts is the Constitution and its supremacy which is reflected in s 2 of the Constitution as 'supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled'.[95] Therefore, all national, provincial and other subordinate legislation must be consistent with the Constitution to remain valid, every piece of legislation is tested against the fundamental principles and constitutional imperatives enshrined in the Constitution as the law of the land. Parliament is vested with the power to legislate on matters of national importance[96] whereas the provincial legislature and municipal council have the power to legislate on matters affecting the province and municipalities respectively. One of the key purposes of the Companies Act is to 'promote compliance with the Bill of Rights as provided for in the Constitution, in the application of company law'.[97] Therefore, the interpretation of statutes must be fused with constitutional values as articulated in s 39(2) of the Constitution[98] to

[93] Bhengu N 'Section 75 introduced significant changes to Companies Act' *BizCommunity* 18 July 2014 available at *http://www.bizcommunity.com/PDF/PDF.aspx?1=196&ci=116343* (accessed on 7 July 2017)
[94] *S v Gardener & Another* 2011 (1) SACR 570 (SCA) available at *http://www.saflii.org/za/cases/ZASCA/2011/24.pdf* (accessed on 15 June 2018).
[95] S 2 of the Constitution of the Republic of South Africa.
[96] S 43(a) of the Constitution states that 'In the Republic, the legislative authority – (a) of the national sphere of government is vested in Parliament, as set out in section 44'.
[97] S 7(a) of the Companies Act No 7 of 2008.
[98] S 39(2) states that when interpreting any legislation, and when developing the common law or customary law, every court tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

ensure to it that the Companies Act 'gives express recognition to the constitutional imperatives. The basic principles of constitutional democracy insofar as public administration is concerned is well articulated in s 195 of the Constitution. That provision provides as follows in this regard:

> (1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:
>
> (a) A high standard of professional ethics must be promoted and maintained.
>
> (b) Efficient, economic and effective use of resources must be promoted.[99]

Therefore, s 75 requires public administrators to adhere to high standards of professionalism and use the States resources in an effective manner, it seems though that without upholding the principles enshrined in s 195 board of directors fail to uphold a higher moral ground regarding disclosure. This is evident when IGCE of Eskom failed to disclose his interest that his stepdaughter 'was a director of and had a financial interest in a company that was doing business with Eskom Generation at a time when Mr Koko was head of generation and subsequently IGCE at Eskom'.[100] State resources cannot be used to advance the interest of a director as this is deemed unethical lacks professionalism expected from a director and therefore conflicts with the director's duties to advance the interests of a company, acting in good faith and for a proper purpose. Therefore, it is clear that as a basic principle the SOCs must conform to the overarching principles articulated in s 195 of the Constitution pertaining to professional ethics and efficient use of States resources. Policies of the SOCs must be in clear alignment with the Constitutional principles for public administration to ensure that they achieve the objectives for which they were created and restore public confidence. This is the foundation and the essence of the duty to disclose personal financial interest as in the event directors do not promote high standards of professional ethics with regards to duty to disclose personal financial interest then what manifest is a breach of this duty.

[99] S 195 of the Constitution of the Republic of South Africa, 1996.

[100] Chris Yelland 'Key Eskom witnesses fail to appear at Koko's disciplinary hearing' EE Publishers 19 October 2017 available at https://www.ee.co.za/article/key-eskom-witnesses-fail-appear-kokos-disciplinary-hearing.html (accessed on 25 January 2018).

3.4 THE PUBLIC FINANCE MANAGEMENT ACT 1999 (PFMA) AND ITS REGULATIONS

By virtue of being a SOC, directors of the SCO's are required to comply with the PFMA, over and above the 2008 Act. In this regard chapter 6 of the PFMA has been specifically designed to deal with public entities and as such, SOCs are no stranger to the requirement to comply with the disclosure of personal financial interest. By design SOCs are expected to comply with both public sector legislation, their own legislative frameworks including policies as well as the Companies Act. This requires boards of directors which has multi facets of expertise that will be efficient and effective in pursuing the objectives of the SOC. As stated in the objective of the PFMA that it is enacted:

> to regulate financial management in the national government and provincial government; to ensure that all revenue, expenditure, assets and liabilities of those governments are managed efficiently and effectively, to provide for the responsibilities of persons entrusted with financial management in those governments, and to provide for matters connected therewith.[101]

Schedule 2 and 3 public entities must comply with the requirements of the PFMA and be accountable for matters that affect them. Chapter 6 of the (PFMA) including its regulations[102] further requires the board of directors or member of the accounting authority as stated by s 50(3) of the PFMA to disclose personal financial interest.[103] Section 50 (3) of the PFMA requires that a member of an accounting authority discloses personal financial interest or private business be it direct or indirect relating to a spouse, partner, or close family member. This disclosure is broad and all-encompassing and incorporates the spouse and relatives of a director or a member of an accounting authority. Clearly the intention of this financial disclosure is to create transparency in how government and state-owned enterprises do business, to ensure accountability and further

[101] Preamble of the Public Finance Management Act of 1999.
[102] Regulations concerning Public Entities' GN R774 in GG 14784 of 7 May 1993
[103] S 50 (3) of the Public Finance Management Act of 1999 states that: A member of an accounting authority must – (a) disclose to the accounting authority any direct or indirect personal or private business interest that that member or any spouse, partner, or close family member may have in any matter before the accounting authority; and (b) withdraw from the proceedings of the accounting authority when that matter is considered, unless the accounting authority decides that the member's direct or indirect interest in the matter is trivial or irrelevant.

avoid a conflict of interest between the interest of a member of an accounting authority and the interest of the institution that ought to be served.

Further, s 50(3)*(b)* requires that the member recuses himself/herself from the proceedings of the matter unless the members involvement is considered insignificant. The recusal of the member is to ensure fairness in the proceedings and avoid possible influence and compromise of the process. The failure of the former GCEO of Eskom in recusing himself in the people and governance committee where recommendations were made to review the Eskom pension fund policy, which resulted in him unduly benefiting more than R30 million as a pay out when he took early retirement from Eskom.[104] is a clear conflict of interest resulting in the breach of the duty in terms of s 50(3)*(a)* and *(b)* of the PFMA. In *Democratic Alliance and Others v Minister of Public Enterprises and Others*[105] Motajane J confirmed in his judgment that 'there is a strong inference to be drawn from the above factors that the early retirement agreement was deliberate scheme devised by Eskom with the involvement of Mr. Molefe to afford him pension benefits he was not entitled to'.[106] This was a clear case of a director unduly benefiting financially from the company which is strictly prohibited by the PFMA. In terms of s 86 (2) 'an accounting authority is guilty of an offence and liable on conviction to a fine, or to imprisonment for a period not exceeding five years, if that accounting authority wilfully or in a grossly negligent way fails to comply with a provision of s 50,51 or 55'.[107] The State, as the sole shareholder did not invoke these provisions to give meaning to the glaring governance failures at Eskom. The exception of non-disclosure is when the accounting authority considers the member's direct or indirect interest to be trivial[108] or immaterial. This exception could never have been used in the former GCEO's case as his interest was worth considering as it was material and direct by virtue of him being an executive director

[104]*Democratic Alliance v Minister of Public Enterprise and Others, Economic Freedom Fighters v Eskom Holdings Limited and Others; Solidarity Trade Union v Molefe and Others* (33051/2017; 34568/2017; 34042/2017) [2018] ZAGPPHC 1 (25 January 2018) para 27, 'Brian Molefe scores 'R30 m payout' from Eskom' Times Live 16 April 2017 available at *https://www.timeslive.co.za/sunday-times/news/2017-04-16-brian-molefe-scores-r30m-payout-from-eskom/* (accessed on 5 August 2017).

[105] *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).

[106] *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) 56.

[107] S 86 (2) of the PFMA.

[108] Oxford dictionary defines trivial as not important or serious; not worth considering.

of Eskom. The exception in s 50(3)*(b)* presents challenges in considering what is trivial or not as the PFMA does not define what is a "trivial" matter nor elaborate on the nature or extent of this exception. This will clearly be to the discretion of an accounting authority to determine. These powers have far reaching implications for SOCs and create a gap in the Act as the triviality of the matter is highly subjective, as what is trivial to one's eyes is material to the other. This is an opportunity for the reviewal of the Act by deleting the words trivial or irrelevant and align the provision of s 50(3) to the 2008 Act.

3.5 ANALYSIS OF SECTION 75 OF THE COMPANIES ACT 2008

The Companies Act 2008 which came into effect on 1 May 2011 has partially codified the fiduciary duties of directors and as a result the fiduciary duties have now become 'mandatory, prescriptive and unalterable'[109] such that when a director exercises the power and performs the functions of a director it must uphold and adhere to the duties as prescribed in s 75 and s 76 of the 2008 Act. This Act has dealt with the duty encapsulated in s75 distinctly and separately from other fiduciary duties embedded in s 76 of the 2008 Act in that s 75 lays out with clarity the procedure for the disclosure to be made. The directors are bound by the fiduciary duties and cannot elect to contract outside of these duties as they are meant to 'raise the standard of corporate directorial behaviour.'[110]

3.5.1 Meaning of key terms and scope of the application of the duty

For the purposes of this analysis it is pivotal that specific terms used in s75 be clearly defined to give better context to the analysis to be provided below.

(a) Director

A director being a member of the board of the company is defined in s 75(1)*(a)* to include an alternate director[111] that is a director appointed to substitute a director from time to time, a prescribed officer[112] similarly to directors is also included in the definition of a director and a

[109] Cassim F (ed), Cassim M & Cassim R et al *The Law of Business Structures* (2012) 284.
[110] Cassim F (ed), Cassim M & Cassim R et al *The Law of Business Structures* (2012) 284.
[111] See 2.3.1in Chapter 2 dealing with director of a company.
[112] Companies Regulations, 2011 (GN 351 GG 34239 of 26 April 2011) in reg (2) defines a prescribed officer as 'despite not being a director of a particular company, a person is a 'prescribed officer' of the company for all purposes

person who is a member of a committee of the board of a company[113] such as audit committee members, risk governance committee members, remuneration committee members, nomination committee members as well as social and ethics committee.[114]

Having noted the definition of the director in the aforementioned paragraph and as defined in chapter 2 above,[115] to the contrary the definition of the prescribed officer has been generalised to the extent that the regulations define this person as someone who has executive control as well as management of the business activities of the company in whole or significant portion save to say that this person is not title prescriptive. Regulation 38(2) provides as follows regarding its application:

> This regulation applies to a person contemplated in sub-regulation (1) irrespective of any particular title given by the company to – (a) an office held by the person in the company; or (b) a function performed by the person for the company.[116]

What is clear in the regulation is that the prescribed officer is not title prescriptive as the person must exercise executive control and management of the business activities of the company whether wholly or a great part thereof regardless of the office held or function performed. Therefore, in the same manner that a director is held to account, the prescribed officer will be held to that same standard of accountability. These prescribed officers are described by Cassim et al as Treasurer, Chief Financial Officer, General Counsel, General Secretary, Chief Operations Officer they are under the same fiduciary duties as those imposed on directors.[117] Cassim et al states that 'the consequence of this approach is that persons who may be non-directors have onerous duties thrust on them even though they do not have decision-making powers'.[118] In *Volvo (Southern Africa) v Yssel*[119] it was confirmed that the Respondent was acting in a position of trust and therefore could not have secured the contract if it was not for the position he held at Volvo regardless of the fact

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of the Act if that person – *(a)* exercises general executive control over and management of the whole, or a significant portion, of the business and activities of the company; or *(b)* regularly participates to a material degree in the exercise of general executive control over and management of the whole, or a significant portion, of the business and activities of the company'.

[113] S 75(1)*(a)*(ii).

[114] These different committees are suggested by Part 5.3 Principle 8 on King IV Code on Corporate Governance.

[115] Refer to 2.3.1 above.

[116] Regulation 38 (2) of the Companies Regulations, 2011 (GN 351 GG 34239 of 26 April 2011).

[117] Cassim F (ed), Cassim M & Cassim R et al *Contemporary Company Law 2 ed* (2012) 386-387.

[118] Cassim F (ed), Cassim M & Cassim R et al *Contemporary Company Law 2 ed* (2012) 464.

[119] *Volvo (Southern Africa) v Yssel* 2009 (6) SA 531 (SCA).

that such a contract was unrelated to his duties hence all profits made had to be recovered by the company. Company policies must clarify the categories of persons deemed to be prescribed officers to eliminate any confusion that might arise as a consequence of prescribed officers being unaware of the extent of their responsibilities to the company. This may result in prescribed officers falling short of the standard of compliance with the duties as prescribed in s 75 and s 76 of the 2008 Act. This may consequently affect the disclosure by a party who has no knowledge that they carry such a duty. There is an opportunity for the Companies Regulations to be revised to bring clarity in this section.

(b) Related person

Section 75(1)*(a)* of the 2008 Act describes a related person 'when used in reference to a director, has the meaning set out in section 1, but also includes a second company of which the director or a related person is also a director, or a close corporation of which the director or a related person is also a member. It has already been established who a director is for the purpose of determining who has a duty to disclose personal financial interest. Thus, s 75(1)*(a)* of the 2008 Act goes beyond the director and its immediate company but also includes a related person or company. In terms of s 2(1)*(a)* of the 2008 Act[120], describes a related person as individuals married or living together or those separated by no more than two degrees of natural or adopted consanguinity or affinity as described in the table below The extent of the relationship of a director to a company in terms of s 2(1)*(b)* of the 2008 Act is where the director directly or indirectly controls the juristic person[121].Below is a table depicting consanguinity or affinity relationship (first and second degrees):

Consanguinity (natural or adopted) e.g. relationship to director		Affinity (natural or adopted) e.g. relationship to spouse or partner	
First degree	Second degree	First degree	Second degree

[120] S 2(1) states that 'For all purposes of this Act- *(a)* an individual is related to another an individual if they—
(i) are married, or live together in a relationship similar to a marriage; or (ii) are separated by no more than two degrees of natural or adopted consanguinity or affinity; *(b)* an individual is related to a juristic person if the individual directly or indirectly controls the juristic person, as determined in accordance with
subsection (2)'.
[121] Examples is where a director is a member of company where he has majority

Mother and Father	Grandmother and grandfather,	Mother and Father in law	Grandmother and Grandfather,
Brother and Sister	Aunts and Uncles	Brother and Sister in law	Aunts and Uncles
Children	Nephews and Nieces		Nephews and Nieces
	Half-siblings		Half-siblings

Unfortunately, the 2008 Act does not define the first and second degree of natural or adopted consanguinity or affinity and the definitions are derived from *King IV* Practice Note.[122] In terms of the above table, a director has a duty to disclose his/her personal financial interest or interest of a related person at a meeting of a board.[123] This is done to avoid a conflict between the interest of the director or related person with those of the company whom the director has a duty towards. Any interest not disclosed in accordance with the related person will result in breach of s 75(5) of the 2008 Act and the director may be held liable in terms of s 77(2)*(a)* thereof.[124] Even though the scope of the relationship between the director and related persons seems broad and covers to a large extent various degrees of relationship, there are other types of relationships that may result in the conflict between the interests of the director and the interests of the company and not recognising other relationships such as stepchildren creates a gap in the application of s 75 of the 2008 Act. This gap presents a challenge where a director may neglect to disclose an interest of this related person to the company by virtue of this relationship not being covered by the Act. IGCE of Eskom[125] failed to declare his stepdaughter's interest to the board as she was appointed as a non-executive director of Impulse International (Pty) Ltd. This is the company that was awarded contracts by Eskom during the time the IGCE of Eskom acted as an executive director.[126]

[122] *King IV* practice note, 2018.
[123] S 75(5)*(a)* of the Companies Act, 2008.
[124] Liability of a director will include loss, damages or any costs sustained by the company as a consequence of the breach of s 75.
[125] Mr Koko Matshela was Acting GCEO of Eskom from 1 December 2016.
[126] 'Koko did not follow correct procedure to declare interest – witness' fin24 23 November 2017 available at *http://www.fin24.com/Economy/Eskom/live-koko-hearing-resumes-after-one-month-break-20171123* (accessed on 30 September 2018).

Mr Koko in his disciplinary hearing[127] with Eskom testified that he had declared his interest contrary to Eskom management that 'Matshela did not follow the correct processes in declaring conflict of interest'.[128] To curb any confusion regarding the disclosure of an interest concerning a related person there is room for the Minister through regulations to clarify who is covered in terms of first and second degree of related person and possibly include other relationships that might affect this duty.

The person who is a director of one company and has controlling rights in another company as contemplated in s 2(1)*(b)* of the 2008 Act must disclose his interest as required by s 75(5) of the 2008 Act to the board of directors of the company. Example is if A is a director in company B and has controlling rights in company C, Company C secures a contract where A is the only controlling director and Company C is in direct competition with Company B, A has a duty in terms of s 75(5) of the 2008 Act to disclose in company B that he has interest in Company C as Company C is regarded as a related company to A and therefore included in s 2(1)*(b)* of the 2008 Act. Failure of such disclosure is tantamount to breach of the duty to disclose personal financial interest and failure to make such disclosure will result in A breaching the duty and stands to lose profits made.[129] In *Robinson v Randfontein Estates Gold* Mining the court described the appellant's conduct as a device to evade the fiduciary duties he owed to the holding company as a director of that company, creation of a company for the sole intention of defrauding the company from its profits can result in criminal liability.

[127] 'Koko's response to charge sheet' available at *http://www.ee.co.za* (accessed on 30 September 2018).
[128] 'Eskom's Matshela Koko: I've declared all my conflicts of interest' available at *http://refinery5.com/eskoms-matshela-koko-ive-declared-all-my-conflicts-of-interest/* (accessed on 30 September 2018)
[129] *OnSite Waste Management CC v WasteServ Waste Management CC and Another* 2012 ZAGPPHC 428 'the second defendant had opened up a company that became in direct competition to the plaintiff without the knowledge of the plaintiff. The first defendant secured a contract for waste removal and the plaintiff became a subcontractor thereto, this was done without the knowledge of the directors of the plaintiff. The second defendant as the 100% shareholder of the first defendant failed to disclose his interest to the plaintiff of which he was a Manager responsible for Sales and Marketing and a 30% shareholder in the plaintiff and further failed to disclose secret profits made by the first defendant to the plaintiff' available at *http://saflii.or/za/cases/ZAGPPHC/2017/428.html* (accessed on 1 June 2019).
[129] 'State Owned Enterprises: The new Companies Act, PFMA and King III in perspective' available at *https://www.pwc.co.za/en/assets/pdf/companies-act-steering-point-4.pdf* (accessed on 28 March 2018).

(c) Personal Financial Interest

The preceding paragraphs of this 3.5.1 have dealt with who has a duty to the disclosure contemplated by s 75(5) of the 2008 Act A personal financial interest is defined in s1 of the 2008 Act as:

> when used with respect to any person – (a) means a direct material interest of that person, of a financial, monetary or economic nature, or to which a monetary value may be attributed; but (b) does not include any interest held by a person in a unit trust or collective investment scheme in terms of the Collective Investment Schemes Act, 2002 (Act No. 45 of 2002), unless that person has direct control over the investment decisions of that fund or investment.[130]

Based on the above definition the following elements must be present for a disclosure to happen, firstly an interest has to be direct,[131] and secondly it must be material[132] as it has potential of affecting one's judgement. To confirm the materiality of the matter Davis J in *Mthimunye-Bakoro v Petroleum and Oil Corporation of South Africa (Soc) Ltd and Another* described the move of the director wanting to be involved in the deliberations concerning her own suspension as a clear conflict of interest which warranted that director to recuse herself from such deliberations by virtue of being a director of the company. He went further to state that:

> Given the breadth of the definition of personal financial interest … she could not, by virtue of the provisions of the Act, or alternatively the common law, be permitted to participate in meetings regarding her suspension. There could be no rational basis for suggesting that a person who faced suspension had no conflict of interest and could deal with the matter impartially, without taking her own interest into account and only taking account of the company's interest.'[133]

The interest of the employee in the *Mthimunye-Bakoro* case was not only direct but it was significant in that she would have been very biased and subjective in dealing with the matter and

[130] Chapter 1: Interpretation, Purpose and Application in terms of the Companies Act No. 71 of 2008.

[131] In *OnSite Waste* Management, this case exemplified the presence of the elements of s75(5) in that the interest of the second defendant was direct as he stood to benefit directly as the 100% shareholder and the only member of the first defendant.

[132] Material is defined in s1 of the 2008 Act 'when used as an adjective, means significant in the circumstances of a particular matter, to a degree that is—*(a)* of consequence in determining the matter; or *(b)* might reasonably affect a person's judgement or decision-making in the matter'.

[133] *Mthimunye-Bakoro v Petroleum and Oil Corporation of South Africa (Soc) Ltd and Another* 2015 (6) SA 338 (WCC) available at http://www.saflii.org/za/cases/ZAWCHC/2015/113.html (accessed on 12 July 2017)

as such this would have naturally affected her judgment. Thirdly, the interest must be of a financial, monetary or economic nature[134] or where a monetary value can be derived. In *OnSite Waste Management CC v WasteServ Management CC & Another*[135] The failure to disclose personal economic benefit by the second defendant resulted in breach of his fiduciary duties towards the plaintiff to an extent that the court ordered that the second defendant must account for profits and economic benefits received. Bagwa J further stated that 'the second defendant had an absolute duty not only to disclose his status visa-vis the first defendant but also to make a clean breast of his pricing activities and profits to the plaintiff'.[136] This non-disclosure was a direct violation of the director's fiduciary duty in terms of s 75(5) of the 2008 Act as well as the Close Corporations Act. The defendant was clearly dishonest.

3.5.2 The context in which disclosure happens – s 75(5) of the 2008 Act

Disclosure is a result of the director's interest in a matter to be considered at a meeting by the board[137] and s 75(5) requires that the director makes known his interest to the board. Even though s 75(4) encourages directors to make disclosures 'at any time' to the board or shareholders of the company prior to the meeting of the board. The declaration made in advance by the director allows the board adequate time to consider the declaration. Even though the Act does not prescribe the timelines within which the disclosure must happen save to say that it can either happen 'at any time' or at the meeting of the board of directors, some company policies dealing with disclosure or conflict of interest policies prescribe timeframe within which a director should make his interest known.[138] Since the disclosure depends on the honesty of the director, a company that does not have strong internal controls to monitor compliance in terms of s 75(5) will be at the mercy of the director who fails to disclose his/her interest and divert company resources to himself/herself or a

[134] Bagwa J stated in para 67 in *OnSite Waste Management CC v WasteServ Waste Management CC and Another* that the second defendant had an absolute duty not only to disclose his status visa-vis the first defendant but also to make a clean breast of his pricing activities and profits to the plaintiff

[135] *OnSite Waste Management CC v WasteServ Waste Management CC and Another* 2012 ZAGPPHC 428 available at http://saflii.or/za/cases/ZAGPPHC/2017/428.html (accessed on 1 June 2019).

[136] *OnSite Waste Management CC v WasteServ Waste Management CC and Another* 2012 ZAGPPHC 67.

[137] This suggests that the discussion of the matter by the board is imminent and therefore a director must voice his dislcosure of interest or the interest of the related person in a meeting.

[138] Eskom's Conflict of Interest Policy requires directors/employees to declare their interest within a period of 5 days.

related person. Therefore, such a director will not only breach this duty but also the duty to act in good faith, for a proper purpose and in the best interest of the company.

Apart from the timing, the disclosure must pertain to a matter to be considered at a meeting of the board[139], the transaction has not yet been considered nor approved by the board but will be a subject of deliberation at a board meeting hence the director is required to disclose the interest before such deliberations take place in order to prevent a conflict that may arise. In *Robinson v Randfontein Estates Gold Mining* the court held in this case that 'where one man stands to another in a position of confidence involving a duty to protect the interest of that other, he is not allowed to place himself in a position where his interests conflict with his duty'.[140]

There are other transactions or agreements[141] concluded by the company where a director acquires personal financial interest, regardless, such agreements or matters must be disclosed as s 75(4) states that disclosure can happen at any time. Mupangavanhu states in his thesis that 'in order to determine what is material a court will need to make an objective assessment, and the outcome will depend on the facts and circumstances of a particular case'.[142] The case of the IGCE of Eskom of a conflict of interest arising as a consequence of his stepdaughter being a non-executive director of Impulse International which did business with Eskom resulted in the IGCE of Eskom having a direct material interest which warranted a disclosure, whether at the meeting or any time thereafter. The director's interest is material[143] when it is significant and affects the director's judgment as a director who is conflicted will ordinarily not act objectively in advancing the interest of the company.

3.5.3 What needs to be disclosed – s 75(5)(a)-(c) of the 2008 Act

Pertaining to what needs to be disclosed, section 75(5)*(a)* importantly describes the requirements in the following words:

[139] This refers to a transaction to be tabled for consideration by the board which has not yet taken place.
[140] *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 177 http://uir.unisa.ac.za/bitstream/handle/10500/18274/18274/1SAfrMercantileLJ1221.pdf (accessed on 20 August 2017).
[141] S 75(6) refers to existing transactions or agreements already concluded by the board.
[142] Mupangavanhu B (2016) 169.
[143] Refer to s1 of the 2008 Act.

> If a director of a company, other than a company contemplated in subsection (2) (b) or (3), has personal financial interest in respect of a matter to be considered at a meeting of the board, or knows that a related person has a personal financial interest in the matter, the director –
>
> *(a)* must disclose the interest and its general nature before the matter is considered at the meeting;
> *(b)* must disclose to the meeting any material information relating to the matter, and known to the director;
> *(c)* may disclose any observations or pertinent insights relating to the matter if requested to do so by the other directors.[144]

A similar provision appears in s 50(3)*(a)* of the PFMA where a member of an accounting authority must disclose to the accounting authority any direct or indirect personal or private business interest that the member or any spouse, partner, or close family member may have in any matter before the accounting authority. A director who has knowledge of a proposed transaction to be considered by the board has an obligation to disclose the transaction's general nature, the details of the interest being disclosed and any observations regarding the transaction. This suggests that information that could be relevant in this regard relates to how the director is connected to the transaction, personal details of such transaction and any other relevant information for the board to consider. Boards can be blindsided if a director fails to disclose his/her connection to the transaction being considered and such conduct causes breakdown of trust between the director and its board regardless of whether the transaction exists or not at the time. In *Phillips v Fieldstone Africa (Pty) Ltd* Heher JA stated that 'the rule is a strict one which allows little room for exceptions. It extends not only to actual conflicts of interest but also to those which are a real sensible possibility'.[145]

Directors who have been implicated in conflicts of interest are in most cases no longer at the employ of their organisations[146] due to the breakdown of trust between the director and its company. In *Dorbyl Ltd v Vorster*[147] the court confirmed that the defendant failed to disclose the offer and its terms to the plaintiff and therefore he was in breach of his fiduciary duties. Directors

[144] S 75(5)*(a)* of the Companies Act of 2008.
[145] *Phillips v Fieldstone Africa (Pty) Ltd* 2004 (3) SA 465 (SCA) at para 31.
[146] Brian Molefe who was a GCEO of Eskom, Koko Matshela who was a Acting GCEO, Gert Yssel who was the Manager Information Technology at Volvo (Southern Africa), the list does not end here.
[147] *Dorbyl Ltd v Vorster* 2011 (5) SA 575 para 28.

are provided with an opportunity even after the transaction has been concluded to disclose their interest or that of a related person, therefore a director who becomes aware of the interest must disclose even after the transaction has been concluded.[148] In *OnSite Waste Management CC v WasteServ Management CC & Another*[149] the second defendant as the 100% shareholder of the first defendant failed to disclose his interest to the plaintiff of which he was a Manager responsible for Sales and Marketing and a 30% shareholder in the plaintiff. The court held that 'the second defendant had an absolute duty not only to disclose his status visa-vis the first defendant but also to make a clean breast of his pricing activities and profits to the plaintiff'.[150] Therefore, there is little or no room to excuse a director who breaches this duty since there are many opportunities available to a fiduciary who stands in a relationship of trust between himself/herself and the company to disclose and therefore liability for breach of duty is inescapable.

3.5.4 What ought to happen after disclosure – s 75(5)(d)-(g) of the 2008 Act

A director is required to recuse himself at the board meeting immediately after making the disclosure. This director is not allowed to participate in any deliberations concerning a matter where he/she has an interest unless requested by the board to provide relevant information that will assist the board in making a decision. Similarly, s 50(3)*(b)* of the PFMA indicates that the member of the accounting authority must withdraw from the proceedings unless the board decides that the members direct or indirect interest is trivial or immaterial. The difference herein is that the only instance when a director in terms of the 2008 Act can be present at the meeting is if he is requested to provide pertinent information whereas s 50(3)*(b)*of the PFMA suggests that a member of an accounting authority can be participate in the meeting provided the board considers his/her interest to be trivial. What can be deemed trivial by the PFMA can be a contravention in the 2008 Act, therefore there is room to align the provisions of s 50(3)*(b)* of the PFMA to those of s 75(5) (a) to (g) of the 2008 Act. A board of directors in a SOC need to apply more caution to the provisions of the PFMA to ensure that there is no contravention of the provisions of the 2008 Act. In *Geoffrey*

[148] See s 75(6) of the Companies Act 2008.
[149] *OnSite Waste Management CC v WasteServ Waste Management CC and Another* 2012 ZAGPPHC 428 available at http://saflii.or/za/cases/ZAGPPHC/2017/428.html (accessed on 1 June 2019).
[150] *OnSite Waste Management CC v WasteServ Waste Management CC and Another* 2012 ZAGPPHC 67.

v Hesber Impala (Pty) Ltd[151] the respondents who had an interest in the resolution tabled at a meeting of directors did not leave the meeting and further voted in the tabled resolution regardless of the conflict of interest that existed. The conflict of interest was acknowledged by all the directors, but the real question was whether the votes of the directors were valid. The court held that:

> the second to fourth respondents have not breached their legal duties as directors of the first respondent. There are cogent and reasonable explanations for their refusal to start charging the Sibuya and Salisbury rental[152]

Therefore, this meant that the votes remained valid. This clearly reflects that not every case of failure of a director who is conflicted to recuse himself/herself will result in a breach of director's duties as each case is dealt with on its own merits. Whether this provision is fair is another question as on the face of it, it appears to be unfair considering that this is exactly what the legislation had intended to circumvent by introducing such an elaborative section on the duty to disclose personal financial interest. Regardless of the director's absence from the meeting, the director is regarded as being present to quorate the meeting[153] and absent for the purpose of determining whether a resolution has sufficient support[154] to safeguard the interest of the company. Companies including SOCs must appoint fit and proper directors who will execute their duties without fear or favouritism and upholding this important duty to disclose personal financial interest with honesty.

3.5.5 Implications of non-compliance – s 75(7)(a) - (b) and ss (8) of the 2008 Act

In terms of s 75(7):

> A decision by the board, or a transaction or agreement approved by the board, or by a company as contemplated in subsection (3), is valid despite any personal financial interest of a director or person related to the director, if it — (a) was approved in the manner contemplated in this section; or (b) has been ratified by an ordinary resolution of the shareholders.[155]

[151] *Geoffrey v Hesber Impala (Pty) Ltd and Others* 2016 ZAGP 23 (JHC).
[152] Indicated by AJ Adams in para 39 of *Geoffrey v Hesber Impala (Pty) Ltd*.
[153] See s 75(5)*(f)*(i) of the Companies Act of 2008.
[154] See s 75(5)*(g)*(ii) of the Companies Act of 2008.
[155] In terms of s 75(7) of the Companies Act of 2008.

Simply put, a director's failure to disclose personal financial interest does not necessarily invalidate a transaction approved by the board where the board has ratified such transaction by ordinary resolution of shareholders.[156] This means that the transaction or agreement is voidable at the instance of the company. An approved transaction remains valid notwithstanding personal financial interest where the board has approved the transaction following disclosure[157] or even where transactions is approved without disclosure it can be ratified by ordinary resolution of shareholders or declared valid by a court.[158] This was not the case in *Omar v Inhouse Venue Technical Management (Pty) Ltd*[159] where Gamble J made the following observation:

> No attempt was made to ratify any of the impugned transactions or agreements at board level because neither of the directors was remotely aware of their common law obligations nor of the restrictions imposed by section 75, nor of their obligations under section 76. Neither was there any application by any of the respondents for a declaration of validity by the court under section 75(8).[160]

The court concluded by handing down an order that directors acted in contravention of s75 of the 2008 Act in that they failed to disclose their personal financial interests in transactions undertaken one of the directors.[161] This was contrary to *Geoffrey v Hesber Impala (Pty) Ltd*[162] discussed above[163] where the court was approached regarding the validity of the votes in the resolution of the board of directors' meeting and made an exception by declaring valid the resolution due to all the directors being conflicted. The consequence of the breach of the duty in s 75 is that the company can claim any damages, loss or costs sustained by the company as a result of the breach.[164] The benefits that have accrued to the director will have to be considered in order that any profits made are disclosed and paid back to the company.

[156] Refer to 3.5.3 above.
[157] See s 75(7)*(a)* of the Companies Act of 2008.
[158] See s 75(7)*(b)*(i)-(ii) of the Companies Act of 2008.
[159] *Omar v Inhouse Venue Technical Management (Pty) Ltd* 2015 (3) SA 146 (WCC).
[160] Para 65 of *Omar v Inhouse Venue Technical Management (Pty) Ltd* 2015 (3) SA 146 (WCC).
[161] Refer to Gamble J in the order granted in the above case.
[162] *Geoffrey v Hesber Impala (Pty) Ltd and Others* 2016 ZAGP 23 (JHC).
[163] Refer to 3.5.4 above.
[164] S 77(2) of the Companies Act of 2008.

3.5.6 Exceptions to the duty to disclose personal financial interest – s75(2)*(a)-(b)* of the 2008 Act

Section 75(2)*(a)* and *(b)* of the 2008 Act determine instances where directors are excused from the application of the duty to disclose personal financial interest and such exceptions in the main are where a decision affects all directors[165] or a class of persons[166], removal of the director from office[167] or if one person holds all shares of the company[168] and is the sole director.[169] The decision of the court in the *Geoffrey v Hesber Impala (Pty) Ltd* case where all the directors were conflicted could well be interpreted to fall within the ambit of s 75(2)*(a)*(i)*(aa)* of the 2008 Act as all the directors in this case were affected by the tabled resolution. Even though only one out of four directors voted in favour of the resolution, this meant that the one director was bound by the decision of the majority regardless of the declared conflict of interest that existed. However, instances where a company has a sole director and that director does not hold all of the issued shares of the company then the disclosure requirement applies and the director will be required to disclose its personal financial interest or that of its related person to the shareholders of the company

3.6 VOLUNTARY CODES OF CORPORATE GOVERNANCE PRACTICE

Corporate governance is defined by the Cadbury Committee in the United Kingdom as 'the way in which companies are directed and controlled.'[170] In South Africa the *King reports*[171] immensely

[165] Refer to s 75(2)*(a)*(i)*(aa)* This section does not apply— (a) to a director of a company— (i) in respect of a decision that may generally affect—(aa) all of the directors of the company in their capacity as directors.
[166] S 75(2)*(a)*(i)*(bb)* which states that a class of persons, despite the fact that the director is one member of that class of persons, unless the only members of the class are the director or persons related or inter-related to the director; or
[167] S 75(2)*(a)*(ii) (ii) in respect of a proposal to remove that director from office as contemplated in section 71.
[168] S 75(2)*(b)*(i) to a company or its director, if one person—(i) holds all of the beneficial interests of all of the issued securities of the company.
[169] S 75(2)*(b)*(ii) of the Companies Act of 2008 refers to the only director of the company.
[170] Mongalo T 'The emergence of corporate governance as a fundamental research topic in South Africa' SALJ (2013)
[171] Mervyn King is a Senior Counsel and former Judge of the Supreme Court of South Africa, he is Chair Emeritus of the King Committee on Corporate Governance in South Africa, which produced *King I report* in 1994, *King II report* in 2002 and *King III report* in 2009 and *King IV report* in 2016 available at https://www.mervynking.co.za/ (accessed on 1 August 2017)

contributed in shaping the corporate governance landscape from *King I, II, III reports* and now the *King IV report.*[172] South Africa has also been a member of the OECD which is meant to reform SOE's priorities and improve the 'governance and performance of SOEs, and promote competitive, transparent and more efficiently-run enterprises.'[173] Voluntary codes are by their nature unenforceable as a company chooses whether it desires to subscribe to a code or not however its importance is that they shape the culture of an organisation. Most SOCs have subscribed and embraced the *King reports* in their policies in order to give them effect and therefore become binding and enforceable. However, the Johannesburg Stock Exchange (JSE) listed companies are required to enforce the *King Code of Governance for South Africa* as its application is mandatory for these companies.

3.6.1 *King IV report* ('*King IV*')

There has been a shift by SOCs in embracing the voluntary application of the *King reports* and applying the principles of corporate governance brought by the new guidelines for corporate law reform introduced in 2004 to 'review and modernise company law … bring our law in line with international trends …'[174] Muswaka L stated that the 'Act and *King III report* should work in tandem to promote the development of the South African economy by *inter alia* encouraging high standards of corporate governance'.[175] One of the main corporate governance imperatives is to ensure that there is 'ethical compliance with laws and regulations, transparency, disclosure, accountability and responsibility to stakeholders'.[176] The alignment of the *King IV report* to the 2008 Act helps company directors to comply with the mandatory statutes and better serve the company by complying with their fiduciary duties.

[172] *King IV report* which came into effect 1 April 2017.
[173] Preamble of the OECD Guidelines on the Governance of State-Owned Enterprises for Southern Africa, November 2014.
[174] South African Company Law for the 21st Century 'Guidelines for Corporate Law Reform' GN 1183 in GG 26493 of 23 June 2004 available at *http://www.gov.za/sites/www.gov.za/files/26493_gen1183a.pdf* (accessed on 04 August 2018).
[175] Muswaka L 'Directors' Duties and the Business Judgment Rule in South African Company Law: An Analysis' (2013) Vol 3 (7) *International Journal of Humanities and Social Science* 95 available at *http://www.ijhssnet.com/journalVo_3_No_7_April_2013/10.pdf* (accessed on 20 August 2017).
[176] Cassim F (ed), Cassim M & Cassim R et al *Contemporary Company Law* 2 ed (2012) 19.

The voluntary application of the *King reports*[177] which applied on a 'apply or explain' principle and the non-codification of the duties of directors were among the rationale for strengthening the legislative and regulatory framework in South Africa. More emphasis was to be placed on corporate governance particularly in SOCs as it is evident that 'good corporate governance is essential if an organisation is to achieve prosperity for itself and the broader society'.[178] *King IV report* goes further and defines corporate governance as 'the exercise of ethical and effective leadership by the governing body towards the achievement of the following governance outcomes: ethical culture, good performance, effective control and legitimacy'.[179] The SOCs would be tested in their application of good corporate governance within the context of its definition and implementation of its principles. Ethical leadership[180] suggest that ethics should be a core value of a company where directors should yield with ease to principles of transparency, accountability, responsibility, competence and integrity.

The *King IV report* entrenches in principle 1.1 'ethical and effective leadership'[181] in order to achieve the outcomes desired in SOCs and includes the director's fiduciary duties. There is a further emphasis in principle 2.2[182] for disclosure to be done as it will assist the SOC to operate in an efficient manner and uphold good corporate governance. SOC are at the centre of driving economic growth and commercial activities both nationally and internationally therefore its role cannot be over emphasised in society hence the need to ensure that the available frameworks and legislative prescripts are fully implemented. It is with regret that 'irregular practices including conflicts of interest and outright corruption have also been alleged thus, there is a need for strong efforts to improve the efficiency, competitiveness and commercial viability of existing SOEs'.[183] The conflict of interest has been cited by Mafunisa MJ as 'a primary reason for concern … is that

[177] See 3.6 above.
[178] King IV Report on Corporate Governance for South Africa 2016.
[179] *King IV Report* on Corporate Governance for South Africa 2016.
[180] *King IV report* indicates that 'Ethical leadership is exemplified by integrity, competence, responsibility, accountability, fairness and transparency. It involves anticipation and prevention, or otherwise amelioration, of the negative consequences of the organisations activities and outputs on the economy, society and environment, and the capitals that it uses and affects'.
[181] *King IV Report* on Corporate Governance for South Africa 2016, Part 6 Supplement for State Owned-Entities, Principle 1.1: 'The governing body should set the tone and lead ethically and effectively'.
[182] *King IV Report*, Principle 2.2: 'The governing body should ensure that reports and other disclosures enable stakeholders to make an informed assessment of the performance of the SOE and its ability to create value in a sustainable manner'.
[183] OECD 'Guidelines on the Governance of State-Owned Enterprises for Southern Africa' 2014 4.

they reduce public trust and confidence in the integrity and impartiality of public functionaries'.[184] Clearly where there is a conflict of interest due to non-disclosure of a personal financial interest it affects good corporate governance and questions the credibility of board of directors in enforcing compliance.

Moreover, the *King IV report* goes further and includes the different sector supplements of which the state-owned entities are encapsulated in part 6.6 of the *King IV report*. It defines ethics as 'ethical values applied to decision making conduct and the relationship between its organisations, its stakeholders and broader society'.[185] Ethical principles amongst others are honesty, integrity, law abiding and fairness. These ethical principles that board of directors must apply have to be tested in one form or another. Within the context of disclosure of personal financial interest directors must act ethically by disclosing their interests or the interest of their family members to the Board. This is clearly a demonstration of being honest and abiding by the legislative framework that SOCs are required to by the Companies Act and PFMA to disclose personal financial interest. This provides the company represented by the board of directors with an opportunity to take appropriate steps in the decision making process by ensuring that a member who is conflicted is not part of the decision making process and the result will inevitably bring credibility to the corporate governance processes of SOCs.

3.6.2 OECD Guidelines on governance of SOE's in Southern Africa

The OECD Southern Africa Network on the governance of SOE[186] main objective is to improve corporate governance of SOCs. The guidelines on SOE's was formally launched in 2014 in an OECD network meeting that took place in Zambia which is meant to reform SOE's priorities and improve the 'governance and performance of SOEs, and promote competitive, transparent and more efficiently-run enterprises.'[187] Adopting a regional approach to corporate governance can

[184] Mafunisa MJ 'Conflict of Interest: Ethical dilemma in politics and administration' (2003) *South African Journal of Labour Relations 4.*
[185]*King IV Report* on Corporate Governance for South Africa, 2016.
[186] OECD-Southern Africa Network Guidelines on the Governance of State-Owned Enterprises for Southern Africa, November 2014.
[187] Preamble of the OECD Guidelines on the Governance of State-Owned Enterprises for Southern Africa, November 2014.

also help achieve regional integration goals. The OECD like the *King IV reports* are voluntary codes of practice, they are supposed to shape a culture of ethical leadership.

The focus by the SADC network on the SOCs is due to the fact that they are central to government economic development and delivering basic services to its people. Therefore, it is pivotal how the SOCs carry on their mandate to fulfill the desired outcomes for the people and economy at large. At the center of the delivery of economic and basic services is the adaptation of good corporate governance practices to realize domestic and regional intended objectives. The proper governance of SOCs must be addressed in order to fulfill its mandate of supporting government imperatives without them being known and labelled as a conduit to loot government's financial resources. Some of the concerns in the running of SOCs within the region has been the technical skills, management, irregular practices such as conflict of interest and corruption. The existence of these challenges are at the heart of the current state of affairs of SOCs and in the South African context the State being the major shareholder of SOCs poses further risks of State interference as it was evident in the *Public Protector state of the capture report*.

It can therefore be deduced that a link exists between company efficiency and disclosure of personal financial interest due to non-adherence to good corporate governance within SOCs. The plethora of media has showed that 'the failure of various SOEs during the past 10 years has had a negative impact on public finances and economic growth. Developmental opportunities have been missed as a result of misdirection of resources away from creating value for the South African public to fattening the pockets of a few cronies linked to the governing party.'[188] In countries where SOCs are not performing well, including South Africa, the problem is less to do with the fact that they are in public hands as opposed to private ownership. It is about how they are governed. If the oversight role performed by the Ministers is inadequate, SOCs will under-perform.

3.7 CONCLUSION

The common law duty of honesty, loyalty and good faith has received much status in the 2008 Act by partial codification of the duties of directors and the duty to disclose personal financial interest

[188] 'Governance of State Owned Enterprises: Reforming the unreformable?' Daily Maverick 27 February 2018 available at *http://www.dailymaverick.co.za/opinionista/2018-02-27-governance-unreformable* (accessed on 18 October 2018).

is one such duty and central to this study. It has been established in this chapter 3 through case law the trends that are prevalent in directors allowing their personal interests to conflict with the interest of the company to the extent that manifest a breach of s 75 of the 2008 Act. Even though recorded cases of failure to disclose personal financial interests are predominantly emanating from the private sector there is a trend in the SOCs of publicised poor governance as well as possible conflict of interests by directors. If these cases are prosecuted, it will set an example of no tolerance of failure to disclose interest by the SOCs.

This chapter has revealed that in most cases it is difficult to divorce the failure to disclose personal financial interest and the financial or economic benefit derived from such transactions by directors which creates a conflict of interest and impedes on the objective judgment of a director. Even though s 75 of the 2008 Act is well written than its predecessor, the 1973 Act, this chapter has identified areas of improvement such as the definition of prescribed officers which require more clarity on who is covered by this definition due to its vagueness, other types of relationships not covered in the definition of related person, there is a need for a sole director to account to the company by disclosing his or her interests, and lastly synergies to be created between s 50(3) of the PFMA and s 75(5) of the 2008 Act to bring the PFMA more in line with the 2008 Act. Better enforcement of this duty is required to improve good governance in SOCs in order to have compliant SOCs. A breach of this duty has far more reaching implications for directors. The 2008 Act, PFMA as well as the *King IV* report 'they share many principles of good governance, and alignment of these is not only possible, but desirable in the spirit of the overarching governance principles of accountability, fairness, transparency and responsibility'.[189] This is key to promote good governance in companies.

[189] 'State Owned Enterprises: The new Companies Act, PFMA and King III in perspective' available at *https://www.pwc.co.za/en/assets/pdf/companies-act-steering-point-4.pdf* (accessed on 28 March 2018).

CHAPTER 4: LIABILITY OF DIRECTORS AND ENFORCEMENT OF THE DUTY

4.1 INTRODUCTION

The preceding chapter has analysed relevant statutory provisions in the 2008 Act and the PFMA. This was done with the view in establishing whether the standards contained in s 75 of the 2008 Act are clear, and if not, what the gaps are particularly insofar as it compares to s 50(3) of the PFMA considering that the SOCs as schedule 3 public entities unlike other private companies, must comply with both the PFMA as well as the 2008 Act. Liability of directors is found both in common law and in statute and this chapter will explore liability in terms of s 77(2) of the 2008 Act as well as s 83(1) of the PFMA which holds a director liable for financial misconduct for failing to comply with s 50 of the PFMA. This is not the only liability attributed to a director who breaches s 75 of the 2008 Act as well as s 50(3) of the PFMA but the law allows for a director to be criminally charged in terms of s 86(2) of the PFMA as well as the Criminal Procedure Act.[190]

Fiduciary duties must be adhered to by company directors, who are fiduciaries, since the company cannot act on its own. For this reason, company law creates the principal – agent relationship between the company and its director.[191] Therefore, directors are expected to exercise their powers and perform their functions in a manner that responds to the legal duties of directors, in particular and for this study the duty to disclose personal financial interest. The media reports, *PP report*[192], *AG report*[193]and the Portfolio Committee report ('committee report')[194] are but amongst the few State institutions that have reported on the state of governance in SOCs.

The further question that this chapter seeks to respond to is whether the standards created by statute are enforced and who enforces these standards. Are the oversight bodies tasked with enforcement

[190] Criminal Procedure Act 51 of 1977.
[191] See generally *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* (1915 AC 705).
[192] State of Capture: '*Report on an investigation into alleged improper and unethical conduct by the President and other state functionaries relating to alleged improper relationships and involvement of the Gupta family in the removal and appointment of Ministers and Directors of State-Owned Enterprises resulting in improper and possibly corrupt award of state contracts and benefits to the Gupta family's businesses'* Report No: 6 of 2016/17.
[193] *Auditor General's report on State Owned Entities* for the 2016/17 financial year.
[194] 'Report of the Portfolio Committee on Public Enterprises on the inquiry into governance, procurement and the financial sustainability of Eskom, dated 28 November 2018' available at *https://www.parliament.gov.za/storage/app/media/Links/2018/November%202018/28-11-2018/Final%20Report%20-%20Eskom%20Inquiry%2028%20NOV.pdf* (accessed on 16 October 2019).

of directors' duties sufficiently equipped to enforce the standards. SOCs are unique in their nature as they are governed by government legislation as well as the 2008 Act. SOCs are known to have one shareholder which is the State. Ordinarily, the *Annual Report* and the audited Annual Financial Statement ('AFS') of the company will reflect on the state of health of a company. *King IV report* indicates that reliance on the audited AFS is not enough 'to discharge the duty of accountability.'[195] *King IV report* goes further and defines accountability as the 'obligation to answer for the execution of responsibilities'.[196] Section 165 of the 2008 Act makes provision for certain categories of persons[197] to institute legal proceedings to compel a company to take legal action against any third party to protect the interests of the company, this action is called a derivative action. The importance thereof is to keep the company through its board of directors accountable. This chapter will therefore respond to the above questions within the context of the subject matter of director's disclosure of personal financial interest and its implications on good corporate governance and company efficiency.

4.2 LIABILITY OF THE DIRECTORS FOR BREACH OF SECTION 75 OF THE 2008 ACT

Chapters 3 and 4 have analysed whether the standards contained in s 75 of the 2008 Act are clear, if not, what are the gaps identified particularly insofar as it compares to s 50(3) of the PFMA considering that the SOCs as schedule 3 public entities unlike other private companies must comply with both the PFMA as well as the 2008 Act. The duty to disclose personal financial interest is separate from other fiduciary duties and one can only deduce that the intention of the legislature in so doing was to give this paramount duty its unique identity and the importance of its application. This duty ought to receive attention in SOCs due to the public funds used to pursue the objectives of the State which must ultimately benefit the public hence public funds cannot and should not be misappropriated in any way or form. Therefore, the level of scrutiny of compliance to s 75 of the 2008 Act must be strengthened to prevent costly consequences for the company. The

[195] *King IV Report on Corporate Governance for South Africa*,2016 page 5.
[196]*King IV Report on Corporate Governance for South Africa*, 2016 page 9.
[197] According to s 165(2) *(a) – (d)* of the Companies Act of 2008, persons that can institute legal proceedings are (a) shareholders, (b) director or prescribed officer, (c) registered trade union, (d) any person granted leave of the court to institute the action.

consequences for breaching s 75 of the 2008 Act is liability of directors in terms of s 77(2) of the 2008 Act. This part of chapter 4 will examine the consequence of breach of this duty in terms of civil and criminal liability of directors for failure to disclose personal financial interests.

4.2.1 Liability in terms of the Companies Act 2008

Section 77 (2) of Companies Act of 2008 provides for the liability of directors in the event where there is a manifest breach of a fiduciary duty such as conflict of interest, including breach of the duty to disclose personal financial interest. As to be demonstrated below, s 77 confirms the retention of relevant common law principles applicable to breach of fiduciary duties. Section 77 (2) states that:

> A director of a company may be held liable-
>
> *(a)* in accordance with the principles of the common law relating to breach of a fiduciary duty, for any loss, damages or costs sustained by the company as a consequence of any breach by the director of a duty contemplated in section 75, 76 (2) or 76 (3) *(a)* or *(b)*;[198]

Therefore, a company has a right to hold directors liable in terms of s 77 (2) of the 2008 Act for any loss, damages, costs incurred by the company due to a breach of duty to disclose personal financial interest. By failing to disclose personal financial interest a director could also be in breach of fiduciary duties as contemplated in s 76(2) of the 2008 Act to act in good faith, for a proper purpose and in the best interest of the company. In *Volvo (Southern Africa) v Yssel*[199] as a consequence of the breach to disclose personal financial interest the respondent was ordered to pay back all the commission he had earned in the unlawful transaction he concluded with a recruitment agent. Lord Russell stated in *Regal (Hastings) Ltd v Gulliver*[200] that 'the liability arises from the mere fact of a profit having, in the stated circumstances, been made. The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account'.[201] The liability of the director is not dependent on whether the director had knowledge or not of the

[198] S 77(2) of the Companies Act of 2008.
[199] *Volvo (Southern Africa) v Yssel* 2009 (6) SA 531 (SCA).
[200] *Regal (Hastings) Ltd v Gulliver* (1942) 1 ALL ER.
[201] *Regal (Hastings) Ltd v Gulliver* (1942) 1 ALL ER 378.

transgression but rather the fact that the director has transgressed the duty to disclose personal financial interest and therefore must account. In *S v Gardener*[202] the directors of LeisureNet conceded that they owed a duty to disclose situations of actual or potential conflict of interest. They were both members of the executive and ethics committees of LeisureNet, therefore they were well acquainted with what was required by the statutory requirements. Bagwa J found in *OnSite Waste Management CC v WasteServ Waste Management CC and Another* that, the defendant was guilty of breach of the duty to disclose personal financial interest and the court ordered that 'the second defendant is found liable towards the plaintiff to account for the proven profits and economic benefits received by the second defendant directly or indirectly'.[203] The defendant had to account for both proven profits and economic benefits due to his failure to comply with the duty, his interest was direct and financial and prejudicial to the plaintiff.

The PFMA has a corresponding section to s 77(2) of the 2008 and that provision is s 83(1) of the PFMA which holds a director liable for financial misconduct for failing to comply with s 50 of the PFMA. Furthermore, s 83(2) of the PFMA prescribes that every member is held individually and severally liable for any financial misconduct of the accounting authority. Therefore, directors who transgress s 50 of the PFMA cannot escape liability. Surprisingly, we have not seen much case law directly relating to s 75 in SOCs and yet there is reported poor governance as indicated in chapter 2 and 3 above. One of the cases that stands out is the IGCE of Eskom who transgressed s 50 of the PFMA and Eskom embarked on a disciplinary hearing as he failed to disclose conflict of interest that related to his stepdaughter who was a director and shareholder of Impulse International a company that did business with Eskom. This was a clear violation of s 75(5) of the 2008 Act and s 50(3) of the PFMA, however, the disciplinary case collapsed[204] on the basis that the power utility could not prove their case and the evidence leader withdrew from the process. This demonstrate that there was a gap in obtaining credible witnesses and proper evidence gathering in order to prove the assertions and allegations made. What has been the trend in government is resignations[205] rather than directors being accountable for breach of the legal duty as well as slow

[202] *S v Gardener & Another* 2011 (1) SACR 570 (SCA) available at *http://www.saflii.org/za/cases/ZASCA/2011/24.pdf* (accessed on 15 June 2018).
[203] *OnSite Waste Management CC v WasteServ Waste Management CC and Another* 2012 ZAGPPHC 71.
[204] Jordaan N 'Koko's disciplinary hearing conducted fairly: Eskom 29 November 2017 available at *https://www.timeslive.co.za/news/south-africa/2017-11-29-kokos-disciplinary-hearing-conducted-fairly-eskom/* (accessed on 15 June 2018).
[205] Examples of such resignations: Matshela Koko, Brian Molefe resigned at Eskom.

progress in commencing with proceedings. This is important as there are timeframes within which the State must commence with proceedings.[206] The 2008 Act indicates that these cases must be brought within a period of three years during the time when the act was deemed to have been committed.[207] There is clearly a challenge insofar as the State's failure to bring these cases before the courts. In many instances shareholders such as the State lack the political will to ensure that legal proceedings are instituted against those involved in conflicts of interests cases. It is common in South Africa to see legal actions to enforce standards of conduct for those responsible for governing SOCs and SOEs being taken by trade unions, political parties as well other organisations such as OUTA in the interest of protecting the company. *Solidarity Trade Union v Molefe and Another* is a good example of a case where civil society successfully instituted legal action to have the board of directors of Eskom to not reinstate Mr Molefe as GCEO.[208] This is a decision that the board and the shareholder failed to take voluntarily in protecting the interests of the company and therefore, s 165 gives trade unions standing to institute legal action that should have otherwise been instituted by the shareholder. Are State law enforcers not well equipped to deal with cases involving a breach of the director's legal duty towards a company, or is it a matter of not having resources to collate adequate evidence to present a convincing case? In the alternative, is there a possibility of a power struggle that exists between the shareholder and the board of directors such that boards are not able to execute their work in the best interest of the company but rather become agents of the shareholder exclusively. This study has limited the writer in fully ventilating on some of these questions and therefore, future studies will respond comprehensively to these thought provoking questions.

It is possible that a director who breaches a duty in s 75 of the 2008 Act will be potentially guilty of breaching the duty to act in good faith and for a proper purpose[209] and the duty to act in the best interest of the company[210] as directors who ordinarily breach this duty are acting to serve their own interests rather than protecting the interests of the company, therefore it will present difficulty for the director to argue otherwise.

[206] See s77(7) of the Companies Act,2008.
[207] See s 77(7) of the Companies Act of 2008.
[208] *Solidarity Trade Union v Molefe and Another* 2017 (34042/2017) ZAGPPHC.
[209] See s 76(3)*(a)* of the Companies Act of 2008.
[210] See s 76(3)*(b)* of the Companies Act of 2008.

4.2.2 Criminal liability for non-disclosure

The liability of directors can extend as far as criminal liability is concerned as long as a case beyond a reasonable doubt can be proven and that there was intention to defraud the company Trollip J indicated in *S v Heller and Another*[211] elements to be present for criminal non-disclosure[212] and without these elements it will be difficult to prove a case of criminal non-disclosure. In *Gardener v The State* the question was whether the appellants withheld disclosure of their interest in Dalmore with intent to deceive the board, the State was required to prove this case beyond a reasonable doubt.[213] Without proving intent the case of criminal non-disclosure must fail regardless of the presence of all other elements since the bar for proving a criminal case is beyond a reasonable doubt. Heher JA sentenced the appellants to seven years imprisonment.[214] Section 86(2)[215] of the PFMA prescribes a fine or imprisonment of a maximum period of five years for failure to disclose personal financial interest. Board of directors must take note of the judgements which have far reaching implications on boards who intentionally take decisions to defraud the State and or companies.

4.3 OTHER POTENTIAL ENFORCERS OF THE DUTY

The standards created by statute must have enforcers, and the question is who the enforcers of the standards are. This part of chapter 4 will focus at the various enforcers of the duty from the role of the Minister to chapter 9 institutions created by the Constitution such as the public protector. Are these enforcement bodies enforcing compliance insofar as the director's duty to disclose personal financial interest amongst other duties of directors.

[211] *S v Heller and Another* (2) 1964 (1) SA 524(W).
[212] *S v Heller and Another* para 536-538 as follows: (a) a duty to disclose the particular fact; (b) a wilful breach of this duty under such circumstances as to equate the non-disclosure with a representation of the non-existence of that fact; (c) an intention to defraud which involves (i) knowledge of the particular fact; (ii) awareness and appreciation of the existence of the duty to disclose; (iii) deliberate refraining from disclosure in order to deceive and induce the representee to act to its prejudice or potential prejudice; (d) actual or potential prejudice of the representee to act to its prejudice or potential prejudice.
[213] *Gardener v The State* 2011(1) 570 (SCA) 33.
[214] *Gardener v The State* 2011(1) 570 (SCA) 78.
[215] S 86(2) states that an accounting authority is guilty of an offence and liable on conviction to a fine, or to imprisonment for a period not exceeding five years, if that accounting authority wilfully or in a grossly negligent way fails to comply with a provision of section 50,51 or 55.

4.3.1 The State's role in holding directors to account

The State[216] plays a pivotal role in how companies are controlled and managed as the sole or majority shareholder[217] and therefore the State has a responsibility of holding the board to account in the exercise of their powers and the performance of their functions. How the board accounts to the shareholder is through the Ministers who are in turn accountable to Parliament for the exercise of their powers and the performance of their functions'.[218] Therefore, Ministers have an oversight responsibility over SOCs. The relationship between the shareholder and the board of directors is such that the board of directors acts on behalf of the shareholder by managing the day to day business of the company with the assistance of the management team in order to realise the shareholders' objectives. Therefore, the board must account to the shareholder on the financial and non-financial performance of the company. It is not for the board to act for their own interests or allowing their interests to conflict with the interests of the company but rather to pursue that which is in the best interest of the company. Section 75 of the 2008 Act as well as s 50(3) of the PFMA are meant to improve the regime of disclosure and curb conflict of interest between the interests of the director and those of the company.

4.3.1.1 The role of the Minister in holding boards of directors to account

The Minister as a representative of the shareholder is entrusted by the President in terms of s 92(1) of the Constitution with the executive powers. The Ministers are accountable to Parliament for the exercise of their powers and performance of their functions.[219] It is therefore for this reason that Ministers must in turn ensure that board of directors account remain accountable as the Ministers has a responsibility to report to Parliament concerning matters under their control.[220] Whether Ministers have been successful in their executive responsibilities of holding boards of directors to account, in particular, concerning the duty to disclose personal financial interest to avoid a conflict between competing interests of a director and the company is concerning. This mini thesis has

[216] The Government of the Republic of South Africa.
[217] See schedule 2 Major Public Entities and schedule 3 Other Public Entities in the Public Finance Management Act 1 of 1999.
[218] S 92(2) of the Constitution of the Republic of South Africa states that Members of the Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions.
[219] S 92(2) of the Constitution.
[220] S 92(3)*(b)* of the Constitution.

extensively discussed the case of the Eskom former GCEO who did not recuse himself in the people and governance committee where recommendations were made to review the Eskom pension fund policy which resulted in him unduly benefiting more than R30 million as a pay out when he took early retirement from Eskom.[221] It is rather concerning that the Minister failed to take appropriate steps in ensuring that the board of directors account for their decisions. In *DA v Minister of Public Enterprises* Matojane J states that 'the applications have a common feature, namely to review and set aside the decision of the Minister of Public Enterprises to appoint and/or reinstate, the third respondent, Mr. Molefe to the position of Group Chief Executive at Eskom after he had departed from Eskom on a purported early retirement agreement'.[222] Ministers must protect the interests of the State by enforcing compliance in SOCs paying specific attention to the pertinent duty to disclose personal financial interest. As Mabuse J stated in *Molefe and Others v Minister of Transport and Others* that there must be 'proper exercise of statutory powers by the Minister, who exercises public power… .'[223] The exercise of power by the Minister must be to enforce accountability and ensure that directors adhere to the shareholders compact,[224] Khampepe J in *Minister of Defence and Military Veterans v Motau and Others*[225] described the matter before him as 'a case of accountability' as the Minister of Defence was swift in holding the board to account for breaching their legal duties contrary to the Eskom case. There is a need to strengthen political oversight to ensure that the executive authority holds board of directors to account in the enforcement of the duties of directors as this will permeate through the organisation and contribute to running SOCs that are effective and efficient.

[221] See 3.4 above.
[222] *Democratic Alliance v Minister of Public Enterprises and Others under case number: 33051/2017, Economic Freedom Fighters v Eskom Holdings Limited* under case number: 34458/2017 and *Solidarity Trade Union v Brian Molefe* under case number: 34042/2017 available at http://www.saflii.org/za/cases/ZAGPPHC/2018/1.html (accessed on 01 November 2019) at para 1.
[223] *Molefe and Others v Minister of Transport and Others* (17748/17) 2017 ZAGPPHC 14
[224] A shareholder compact is a 'document signed annually by Eskom, in consultation with the Minister of Public Enterprises, agrees on its performance objectives, measures and indicators in line with the Public Finance Management Act (PFMA)' available at *http://integratedreport.eskom.co.za/iir2014/int-shareholder.php* (accessed on 1 November 2019).
[225] *Minister of Defence and Military Veterans v Motau and Others* 2014 ZACC 18.

4.3.1.2 The role of the Portfolio Committee

Pre 1994 the South African government did not have an oversight model and the National Assembly had to realise the mechanisms for accountability and maintaining of oversight by the executive organs of state as only the 'joint rules and orders and joint committees were in existence in terms of the Constitution'.[226] The Constitution makes it clear that 'members of the Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions'.[227] However the mechanisms to ensure accountability and maintain oversight[228] was adopted by the National Assembly on 19 March 2009 with an oversight model called the 'Parliamentary Oversight Model'.[229] It was necessary that 'the immediate implications of the work of Committees in employing oversight were examined, and it was explained that the Committees were one of the mechanisms by which Parliament called ministers and department officials to account as to how they exercised their powers and executed their duties'.[230] This oversight model resulted in Portfolio Committees represented by each Department. Therefore, the Minister accounts to Parliament through the Portfolio Committee as the Minister has a responsibility of exercises oversight function over SOCs. The meeting report of the Parliament project office stated that the rational for the creation of the oversight model by Parliament was to:

> protect and detect abuse; prevent illegal and unconstitutional conduct on the part of Government; to protect the rights and liberties of citizens; to hold Government answerable for how the money of tax payers was spent; to make Government operations more transparent and to increase public trust in the Government.[231]

Therefore, the committee is one such enforcement body who holds not only the Minister to account but also the board of directors. The oversight inquiry into governance, procurement and the

[226] S 45 of the Constitution of the Republic of South Africa.
[227] See s 92(2) of the Constitution.
[228] See s 55(2) of the Constitution.
[229] 'Role of Parliamentary Portfolio Committees and Members of Parliament on Oversight: Workshop' 2010 available at *https://pmg.org.za/committee-meeting/11720/* (accessed on 16 October 2019).
[230] 'Role of Parliamentary Portfolio Committees and Members of Parliament on Oversight: Workshop' 2010 available at *https://pmg.org.za/committee-meeting/11720/* (accessed on 16 October 2019).
[231] 'Role of Parliamentary Portfolio Committees and Members of Parliament on Oversight: Workshop' 2010 available at *https://pmg.org.za/committee-meeting/11720/* (accessed on 16 October 2019).

financial sustainability of Eskom was launched on 21 June 2017[232] and the *Committee report*[233] focused on issues of poor governance, procurement irregularities, allegations of improprieties regarding IGCE of Eskom and early retirement and reappointment of former GCE of Eskom amongst other issues to be investigated. In the investigation the committee will further 'assess compliance with legislation affecting the SOC.'[234] The committee must be appraised for the investigation and report[235] produced creating visibility to actions that must be taken by the SOCs, SIU and National Prosecuting Authority ('NPA'). Recently, there has been some successful stories at Eskom regarding enforcement of the duty to disclose personal financial interest as 'SIU told Scopa it had referred the cases of seven Eskom officials to the NPA, with another eight cases being prepared for referral'.[236] This being the case, there is still a long way to go in enforcement of the duty and successful prosecutions as the wheel of justice is turning very slow. This presents an opportunity for the State to consider an independent regulatory agency that will enforce compliance by way of improving enforcement of standards relating to director's conduct. This regulatory or specialised agency must be vested with full powers to act against directors or prescribed officers who breach the statutory duties. Small victories are worth being celebrated as it signals a strong message of no tolerance to breach of the duty to disclose personal financial interest which result in conflicting and competing interests between the interests of the director and company. Contrary to South Africa, other jurisdictions such as United Kingdom[237] and Australia[238] have statutory enforcement agencies operating in terms of statutes that enforce the

[232] 'Report of the Portfolio Committee on Public Enterprises on the inquiry into governance, procurement and the financial sustainability of Eskom, dated 28 November 2018' available at *https://www.parliament.gov.za/storage/app/media/Links/2018/November%202018/28-11-2018/Final%20Report%20-%20Eskom%20Inquiry%2028%20NOV.pdf* (accessed on 16 October 2019).

[233] 'Report of the Portfolio Committee on Public Enterprises on the inquiry into governance, procurement and the financial sustainability of Eskom, dated 28 November 2018' available at *https://www.parliament.gov.za/storage/app/media/Links/2018/November%202018/28-11-2018/Final%20Report%20-%20Eskom%20Inquiry%2028%20NOV.pdf* (accessed on 16 October 2019).

[234] Public Finance Management Act, 2002, (b) Eskom Conversion Act, 2012, Companies Act, 2008, Pension Funds Act, and any appropriate legislation applicable to the inquiry.

[235] 'Report of the Portfolio Committee on Public Enterprises on the inquiry into governance, procurement and the financial sustainability of Eskom, dated 28 November 2018' available at *https://www.parliament.gov.za/storage/app/media/Links/2018/November%202018/28-11-2018/Final%20Report%20-%20Eskom%20Inquiry%2028%20NOV.pdf* (accessed on 16 October 2019).

[236] Merten M 'Thousands of Eskom officials failed to declare financial interests, SIU verifies' Daily Maverick 14 October 2020 available at https://www.dailymaverick.co.za/article/2020-10-14-thousands-of-eskom-officials-failed-to-declare-financial-interests-siu-verifies/ (accessed on 21 October 2020).

[237] The Company Directors Disqualification Act, 1986 makes provision for the Secretary of State to bring an application to disqualify a director on an expedient basis, if this is in the public interest.

[238] Australian Corporations Act, 2001 gives the Australian Securities and Investments Commission powers.

directors duties and are not dependent on the State to issue a certificate to prosecute just like in countries like South Africa. Comparative analysis of different enforcement agencies fall outside of scope of this study and therefore will be explored in future studies.

4.3.1.3 The role of the Standing Committee on Public Accounts (SCOPA)

Standing Committee on Public Accounts ('SCOPA') is one of the Parliamentary committees that interrogates the financial statements of public bodies including public entities, interacts with the report of the AG in order to ensure to it that the public funds are spent in accordance with government's objectives. The AG and SCOPA work hand in hand as the role of the AG is to 'audit and report on the accounts, financial statements and financial management'[239] of various institutions funded using public funds. AG tables departments audit reports as well as any other institution that is accountable to the State in Parliament, and further brief SCOPA on the AG's report regarding the financial performance of a public body. It is these SOCs accounts and audited financial statements that allows SCOPA to have a view of the financial status of an SOC. SCOPA as an oversight body does not have the power to directly take action against directors who breach this duty as their role is to recommend action to be taken. This has also created frustration within the role of SCOPA confirmed by the SCOPA chairperson that 'he wants the body to have more power to bring wayward government entities and officials into line. SCOPA has no prosecutorial powers, and can only recommend police investigate cases of alleged illegality',[240] this is an indicator that there is a need for a regulatory body that will have all the powers to enforce the duty in terms of s 75 of the 2008 Act. Another indicator that there is a need for an independent regulatory body to enforce the duty of directors is the time it takes for law enforcers to prosecute, by the time a referral is made for prosecution damage to the State's financial resources is irreversible and possibly a claim has already prescribed. The effect this has is non-efficient enterprises who struggle to deliver on their mandate and depend on State bailouts for their survival. This is an indication of not only financial but governance challenges as confirmed by the PIC in the 2018 *business report* that it will provide Eskom with a R5 billion loan due to 'enormous

[239] See s 188 (1) of the Constitution.
[240] 'New SCOPA chair wants parly watchdog to have more 'bite' 3 July 2019 available at *https://mg.co.za/article/2019-07-03-new-scopa-chair-eyes-priorities* (accessed on 12 October 2019).

liquidity constraints which were threatening the company's going concern status'[241] Therefore, the need to have an independent regulatory body focusing specifically on the issues of disclosure by directors and avoiding a conflict of interest will help curb this surge of failure to disclose personal financial interest that has engulfed South Africa's SOCs.

4.3.1.4 The role of the Public Protector (PP)

In terms of the Constitution, the Public Protector ('PP') is a chapter 9 institution established to 'strengthen constitutional democracy' in South Africa. The PP's powers are regulated by the National Assembly in terms of s 182(1)[242]. The importance of the role of the PP in investigating any conduct in any state institution is key in how SOCs have exercised their powers and performed their functions to the detriment of some of South Africa's SOCs such as SAA, SABC, Eskom and Denel to mention a few. The SOCs are states vehicle to provide services to the public and the PP is vested with the power to investigate any improper conduct that relates to SOCs, in so investigating such conduct, report its findings to the National Assembly and finally take appropriate remedial action, the duty to disclose personal financial interest or director's conflict of interests is such duty that falls within the ambit of the powers of the PP. Due to the breadth and length of the role of the PP and the capacity constraints to investigate any conduct, it makes it almost impossible for the PP to enforce the duties of directors efficiently and effectively hence, the proposal of an independent regulatory body. The role entrusted to the PP in terms of the Constitution and the Public Protector Act[243] is important in ensuring that board of directors remain accountable for their actions and any conduct which is prejudicial and does not serve its intended purpose require to be pursued by the PP. The *Public Protector's report*[244] demonstrated the existence of maladministration and improper conduct by board of directors which is the resultant of breach of directors' duties. The *PP's report* was the reason the Judicial Commission of Enquiry

[241] 'PIC will bail out Eskom with a R5 billion loan' 5 February 2018 available at *https://www.iol.co.za/business-report/energy/pic-will-bail-out-eskom-with-a-r5-billion-loan-13113950* (accessed on 05 February 2019).
[242] S 182 states '(1) The Public Protector has the power, as regulated by national legislation—
(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice; b) to report on that conduct; and
(c) to take appropriate remedial action'.
[243] Public Protector Act 23 of 1994.
[244] State of Capture: '*Report on an investigation into alleged improper and unethical conduct by the President and other state functionaries relating to alleged improper relationships and involvement of the Gupta family in the removal and appointment of Ministers and Directors of State-Owned Enterprises resulting in improper and possibly corrupt award of state contracts and benefits to the Gupta family's businesses'* Report No: 6 of 2016/17.

into allegations of State Capture was sanctioned by the President. At the time of writing this mini thesis the Zondo Commission has yet to finalise its work.

4.4 CONCLUSION

The consequences of the breach of s 75 of the 2008 Act is liability in terms of s 77(2) of the 2008 Act, thereof, liability of directors is not only confined to s 77(2) of the 2008 Act and s 83(1)*(a)* of the PFMA but also extends to criminal liability in terms of s 86(2) of the PFMA read with the Criminal Procedure Act.[245] It has been established that directors who contravene this duty can also be held criminally liable where there was an intention to defraud the company. By failing to disclose personal financial interest a director could also be in breach of fiduciary duties as contemplated in s 76(2) of the 2008 Act to act in good faith, for a proper purpose and in the best interest of the company. The question of whether the duty is effectively enforced particularly in SOCs has been answered in this chapter by reflecting on various cases both in this chapter as well as chapter 3 above. Therefore, s 77(2) of the 2008 Act and s 83(3)*(a)* and s 86(2) of the PFMA are clear insofar as liability of directors for failure to disclose personal financial interest. What has been a challenge are the wheels of justice turning slow in prosecuting these cases of failure to disclose personal financial interest arising from conflict of interest. This chapter further identified that even though there are various shareholder representatives in a form of different oversight bodies there is lack of tangible actions being undertaken from the reports compiled by these oversight bodies to ensure accountability and better governance with the exception of some breakthroughs by the portfolio committee on public enterprises. Therefore, due to the fragmented and numerous oversight bodies whose powers are only constrained by making recommendations to law enforcement agencies, it has been argued that there is a need for an independent regulatory agency, such as the one that exists in Australia, that will be responsible for enforcing the directors statutory duties to the extent of private prosecution being allowed rather than being dependent on the State's role to prosecute.

[245] Criminal Procedure Act 51 of 1977.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1 INTRODUCTION

The duty to disclose personal financial interest is a common law duty and one of the paramount duties of directors. This study has responded to s 75 of the 2008 Act insofar as how companies, in particular SOCs, have dealt with this fiduciary duty. This study was inspired by the plethora of media reports, court judgements and parliamentary reports regarding some of South Africa's SOCs such as Eskom, SABC and PRASA as a SOE, with the reports alleging poor corporate governance, breach of fiduciary duties and continuous government bailouts as a consequence of the governance and sustainability challenges perpetually experienced by the SOCs. These problems were an indication that enforcement of relevant legal standards is perhaps lax and therefore presented an opportunity for this study to investigate how the research problem could be resolved. This thesis set out to answer the main or key research question(s) and some sub-inquiries which were identified in Chapter 1.

The main or central research question which this chapter interrogated is: whether the standards contained in the statutory duty to disclose personal financial interest, contained in s 75 of the 2008 Act are clear, and whether they are effectively enforced in South Africa especially against SOCs. A related inquiry relates to what the implications of non-disclosure of personal financial interests are on good corporate governance and company efficiency.

Related questions pursued by this Study are as follows:

- What must be disclosed, by who, to whom, and when?
- What is the legislative framework relevant to disclosure of personal financial interest?
- Who enforces the duty and holds directors to account?
- What is the liability for breach of disclosure of personal financial interest?
- How have the courts dealt with the non-disclosure of personal financial interest?
- How effective are oversight bodies in taking appropriate steps against transgressors?

- How can governance be improved in SOCs?

5.1 SUMMARIES OF CHAPTERS

The below chapters provides relevant response to the central question including related questions and are discussed below:

Chapter 1:

Chapter 1 introduced the research problems and outlined the main research question and sub-inquiries among the many other introductory aspects to the Study.

Chapter 2:

Chapter 2 laid the foundation for understanding the nature of a director – company relationship. It was established that a director is a fiduciary who owes a paramount duty of loyalty to the company. By implication, a director cannot place himself or herself in a position where his personal interests interfere or conflict with his duty to the company. Thus, Chapter two inter alia, provided a foundation to understanding a director's duty to disclose personal financial interest as provided for in s 75 of the 2008 Act.

Chapter 3:

Chapter 3 explored the legal framework relating to the standards contained in the duty to disclose personal financial interest. For example, it was established through an analysis of s 75 – the scope of application of the duty, meaning of key terms 'personal financial interest', materiality of the interests; what needs to be disclosed, when this must be disclosed and to whom the disclosure must be made; what should happen after disclosure and implications for non-disclosure This chapter has shown that in most cases it is difficult to separate the failure to disclose personal financial interest and the financial or economic benefit derived from transactions by directors which creates a conflict of interest and impedes on the objective judgment of a director. Also, the disparities between s 75(5) of the 2008 Act and s 50(3) of the PFMA were identified and proposed solution provided. Furthermore, this chapter has identified areas of improvement such as the definition of prescribed officers which require more clarity on who is covered by the definition, other types of

relationships not covered in the definition of related person, alignment of s 50(3) of the PFMA to s 75(5) of the 2008 Act.

Chapter 4:

Chapter 4 laid down the consequences of the breach of s 75 of the 2008 Act and liability in terms of s 77(2) of the 2008 Act, and it has been shown in this study that liability of directors is not only confined to s 77(2) of the 2008 Act and s 83(1)*(a)* of the PFMA but also extends to criminal liability in terms of s 86(2) of the PFMA read with the Criminal Procedure Act[246] with consequence of conviction and sentence. The question whether the duty is effectively enforced particularly with respect to SOCs has been responded to in chapter 4 by reflecting on case law as well as the duty of oversight bodies. The limitations of the powers of the oversight bodies to only recommend and refer matters creates a challenge in ensuring that contraventions the statutory duty to disclose personal financial interest are dealt with expeditiously as the oversight bodies examined do not necessarily have prosecutorial powers. Therefore, this chapter reflects on possible solutions to address the challenge, one such proposed solution being the establishment of an independent regulatory body that will be responsible for enforcing the directors' statutory duties and to permit private prosecution to minimise dependence on the State's role to prosecute.

Chapter 5:

This chapter summarises the findings of the Study and attempts to also summarise the answers to the research questions and related enquiries. It concludes by making clear recommendations.

5.2 CONCLUSION

An examination of s 75 of the 2008 Act, the PFMA, the available primary and secondary legal authorities was done with the aim to establish whether legal standards pertaining to directors' duty to disclose personal financial interests are clear and whether they are effectively enforced. It was discovered, through an examination of examples from Eskom and other SOCs, that the board of directors have often failed to meet the standards encapsulated in s 75 of the 2008 Act and breach of this duty has had devastating results for the SOCs. Civil and criminal liability for the directors'

[246] Criminal Procedure Act 51 of 1977.

breach of the duty should under normal circumstances deter offenders of this duty however it has not been the case. The gaps identified in the 2008 Act and the PFMA must be attended to in order to strengthen compliance with relevant legal standards. As revealed in chapters 3 and 4, it appears that the close personal relationships not covered by the first and second degree of relationships such as close family friends and stepchildren need to be considered for inclusion in the Act. It was also proposed that the definition of a prescribed officer must be expanded. There is a need to create a synergy between the 2008 Act and PFMA insofar as disclosure is concerned. Lastly, this study proposes establishment of an enforcement agency, and further propose that this agency should enforce compliance independently and be vested with full prosecutorial powers. SOCs cannot achieve efficiency if there are weak internal controls, culture of non-compliance and disregard of good corporate governance. The task at hand for board of directors requires sober and absolute independent boards, free from any and all interferences for the work of the board to successfully achieve set objectives.

5.3 RECOMMENDATIONS

Considering the gaps identified in s 75 of the 2008 Act as well as s 50(3) of the PFMA which SOCs are required to comply with, the following recommendations are made:

i. Definition of a prescribed officer:

A prescribed officer is not title prescriptive as the person must exercise executive control and management of the business activities of the company whether wholly or a great part thereof regardless of the office held or function performed. Therefore, the same measure that a director is held to account, the prescribed officer will be held to that same measure. It is recommended that, in accordance with Regulation 38 (2) of the Companies Regulations, 2011, company policies in accordance with the company organograms, must define who is deemed to be a prescribed officer to ensure that the affected group of persons are well conversant with the legal duties expected of a prescribed officer.[247]

[247] Refer to 3.5.1 for a discussion.

ii. Definition of related person:

Section 2(1) defines a related person to mean - (a) an individual who is related to another individual if they—(i) are married, or live together in a relationship similar to a marriage; or (ii) persons who are separated by no more than two degrees of natural or adopted consanguinity or affinity; (b) an individual related to a juristic person if the individual directly or indirectly controls the juristic person, as determined in accordance with subsection (2).

It is recommended that the legislature considers including other types of relationships to the definition of related person that may result in a conflict between the interests of the director and the interests of the company. Not recognising these other relationships such as stepchildren creates a gap in the application of s 75 and can potentially expose a company to harm .[248] Another evidence that the meaning of a related person needs to be expanded is the COVID-19 PPE scandal[249] showing company resources being diverted to close friends by directors of company and failing to disclose this conflict.[250]

iii. Enforcement of the duty

- Due to the fragmented and numerous oversight bodies[251], and risk of overlap between these bodies and the NPA for example, it is proposed that a specialised agency mandated to enforce compliance to deal with breach of duties or standards of conduct, be created as a way of improving enforcement of standards relating to director's conduct. This will include private prosecution powers being allowed rather than the current overdependence on the NPA which might not have all the relevant resources to prosecute such cases.

[248] See discussion in 2.3.2 above regarding former Eskom Interim GCEO's stepdaughter who was a director and shareholder of a company that received contracts from Eskom.
[249] Refer to 1.2 above.
[250] Refer to table in 3.5.1 (b) for the first and second degree of relationship by consanguinity or affinity.
[251] Refer to 4.3 above.

- Similarly to the powers of the Auditor General that have been expanded to hold SOCs to account by making the board members personally liable for the misappropriation of public funds, so Parliament should consider strengthening the powers of oversight bodies in order for their recommendations to carry more weight by giving portfolio committees more powers.[252]

iv. Synergy between s 75(5) of the 2008 Act and s 50(3) of the PFMA

Section 75(5) of the 2008 Act sets with clarity minimum standards of conduct expected from a director after disclosure of personal financial interest, however s 50(3) of the PFMA[253] even though refers to a director withdrawing from the proceedings, creates a confusion and exception by relaxing the recusal requirement at the discretion of the accounting authority on the basis of the matter being trivial or immaterial. What can be deemed trivial by the PFMA can be a contravention in the 2008 Act. Therefore, it is proposed that s 50(3) of the PFMA be amended to reflect the acceptable standards in s 75(5) of the 2008 Act so this does not distract from the minimum standards in s75(5) of the 2008 Act. This can be done by adopting the same wording provided by s 75(5) of the 2008 Act into s 50(3) the PFMA.

v. Oversight committees and law enforcement agencies to take note of the three year prescription period within which an action must be instituted against a director in terms of s 77 (7) of the 2008 Act.

[252] Refer to 4.3.1.3 above.
[253] Refer to 3.4 and 3.5.4 above for full discussion.

BIBLIOGRAPHY

BOOKS

Cassim FHI, Cassim MF & Cassim R 'et al' *Contemporary Company Law* (2012) Cape Town: Juta & Company.

Cassim FHI, Cassim MF & Cassim R 'et al' *The Law of Business Structures* (2012) Cape Town: Juta & Company.

Pretorius JT, Delport PA & Havenga M 'et al' *Hahlo's South African Company Law through the cases* (1999) Cape Town: Juta & Company.

Wiese T *Corporate Governance in South Africa with International Comparison* (2014) Cape Town: Juta & Company.

JOURNAL ARTICLES

Mafunisa MJ 'Conflict of Interest: Ethical Dilemma in Politics and Administration' (2003) *South African Journal of Labour Relations 4*.

Mongalo T 'The emergence of corporate governance as a fundamental research topic in South Africa' (2003) 120 *SALJ* 173.

Muswaka L 'Directors Duties and the Business Judgment Rule in South African Company Law: An Analysis' (2013) Vol 3 (7) *International Journal of Humanities and Social Science* 95.

Ribstein LE 'Limited Liability and Theories of the Corporation' (1991) Vol 50 *Maryland Law Review* 80.

CASES

Aberdeen Railway Co v Blaikie Bros (1854) 1 Macq.

Bristol and West Building Society v Mothew 1996 EWCA Civ .

Corporate Affairs Commission v Drysdale (1978) 141 CLR.

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).

Dorbyl Ltd v Vorster 2011 (5) SA 575.

Fisheries Development Corporation v AWJ Investments 1980 (4) SA 156 (WLD).

Ganes and Another v Telecom Namibia Ltd 2004 (2) All SA 609 (SCA).

Geoffrey v Hesber Impala (Pty) Ltd and Others 2016 ZAGP 23 (JHC).

Gihwala and Others v Grancy Property Ltd And Others 2017 (2) SA 337 (SCA).

Herholdt v Nedbank Ltd (701/2012) [2013] ZASCA 97.

Howard v Herrigel 1991 (2) SA 660 (A).

Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd 1915 AC 705.

Molefe and Others v Minister of Transport and Others 2017 ZAGPPHC.

Minister of Defence and Military Veterans v Motau and Others 2014 ZACC.

Mthimunye-Bakoro v Petroleum and Oil Corporation of South Africa (Soc) Ltd and Another 2015 (6) SA 338 (WCC).

Novick v Comair Holdings Ltd 1979 (2) SA 116 (W).

Omar v Inhouse Venue Technical Management (Pty) Ltd 2015 (3) SA 146 (WCC).

OnSite Waste Management CC v WasteServ Waste Management CC and Another 2012 ZAGPPHC.

Organisation Undoing Tax Abuse NPC and Another v Myeni and Another 2019 ZAGPPHC.

Passenger Rail Agency of South Africa v Swifambo Rail Agency (Pty) Ltd (2015/42219) [2017] ZAGPJHC.

Phillips v Fieldstone Africa (Pty) Ltd 2004 (3) SA 465 (SCA).

Regal (Hastings) Ltd v Gulliver 1942 1 ALL ER.

Robinson v Randfontein Estates Gold Mining Co Ltd 1921 AD 177.

RP v DP and Others 2014 (6) SA 243 ECP.

S v Gardener & Another 2011 (1) SACR 570 (SCA).

S v Heller and Another (2) 1964 (1) SA 524(W).

Solidarity Trade Union v Brian Molefe and Another 2017 (34042/2017) ZAGPPHC.

Volvo (Southern Africa) v Yssel 2009 (6) SA 531 (SCA).

LEGISLATION

Armaments Corporation of South Africa Limited Act.

Australian Corporations Act No 50 of 2001.

Companies Act 61 of 1973.

Companies Act 71 of 2008.

Company Directors Disqualification Act 1986.

Constitution of the Republic of South Africa, 1996.

Criminal Procedure Act 51 of 1977.

Eskom Conversion Act, 13 of 2001.

Legal Succession to the South African Transport Services Act of 1989, as amended.

Public Finance Management Act 1 of 1999, as amended.

WHITE PAPER

South African Company Law for the 21st Century 'Guidelines for Corporate Law Reform' GN 1183 in GG 26493 of 23 June 2004.

DELEGATED LEGISLATION

Regulations Concerning Public Entities GN R774 in GG 14784 of 7 May 1993.

Companies Regulations GN 351 GG 34239 of 26 April 2011.

REPORTS AND POLICIES OF GOVERNMENTAL BODIES

Eskom Integrated Report 31 March 2017.

The 2016/17 Consolidated Report on National and Provincial Audit Outcomes.

OECD 'Guidelines on the Governance of State-Owned Enterprises for Southern Africa' 2014.

G20 OECD 'Corporate Governance Principles' 2015.

Department of Public Enterprises 'Protocol on Corporate Governance in the Public Sector' 2002.

PRASA 2015/16 Annual Report 2016.

Report of the Portfolio Committee on Public Enterprises on the inquiry into governance, procurement and the financial sustainability of Eskom, dated 28 November 2018.

The Judicial Commission of Enquiry into allegations of State Capture, dated 21 August 2018.

The *Public Protector's report* titled Derailed: A report on an investigation into allegations of maladministration, financial mismanagement, tender irregularities and appointment irregularities against the Passenger Rail Agency of South Africa (PRASA) Report no. 3 of 2015/16.

The *Public Protector report*: A report on an investigation into allegations of maladministration, systemic corporate governance deficiencies, abuse of power and the irregular appointment of Mr Hlaudi Motsoeneng by the South African Broadcasting Corporation (SABC), Report no 23 of 2013/2014.

State of Capture: 'Report on an investigation into alleged improper and unethical conduct by the President and other state functionaries relating to alleged improper relationships and involvement of the Gupta family in the removal and appointment of Ministers and Directors of State-Owned Enterprises resulting in improper and possibly corrupt award of state contracts and benefits to the Gupta family's businesses' Report No: 6 of 2016/17.

THESIS

Chakanika A *Corporate Governance in South Africa: Progress and Challenges* (published LLM thesis, University of Cape Town, 2013).

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

INTERNET REFERENCES

2017 Auditor General Report Financial health of State Owned Entities failed amid ballooning irregular expenditure available at *https://www.dailymaverick.co.za/article/2017-11-01-2017-auditor-general-report-financial-health-of-state-owned-entities* (accessed on 18 October 2018).

Applause as Public Enterprises Committee's ends first attempt at state capture inquiry' *Notes from the House* 6 December 2018 available at *http://notesfromthehouse.co.za/news/item/294-applause-as-public-enterprises-committee-s-ends-first-attempt-at-state-capture-inquiry* (accessed on 16 October 2019).

Brian Molefe loses another appeal against paying back pension 24 April 2019 available at *https://www.businesslive.co.za/bd/national/2019-04-24-brian-molefe-loses-another-appeal-against-paying-back-pension/* (accessed on 25 October 2019).

Department of Public Enterprise: Current classification page 8 available at *http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/2006/060607coetzee2.pdf* (accessed on 15 October 2017).

'Deputy FinMin denies scoring Prasa tenders, DA to lay charges' fin24 6 June 2017 available at *http://www.fin24.com/Economy/deputy-finmin-denies-scoring-prasa-tenders-da-to-lay-charges-20170606* (accessed on 5 August 2017).

'Disclosure of Directors Personal Financial Interest: A certain necessity' *VDMA* available at http://www.vdma.co.za/disclosure-directors-personal -financial-interest-necessity/ (accessed on 3 July 2017).

Ethics in the Modern Business World: 'A case study on LeisureNet' available at *https://samples.edusson.com/ethics-in-the-modern-business-world-a-case-study-on-leisure-net* (accessed on 10 August 2017).

'Eskom's Matshela Koko: I've declared all my conflicts of interest' available at *http://refinery5.com/eskoms-matshela-koko-ive-declared-all-my-conflicts-of-interest/* (accessed on 30 September 2018).

'Former Prasa CEO Montana comes out swinging' 17 July 2015, available at *https://mg.co.za/article/2015-07-17-former-prasa-ceo-montana-comes-out-swinging* (accessed on 12 October 2019).

'Governance of State Owned Enterprises: Reforming the unreformable?' Daily Maverick 27 February 2018 available at *http://www.dailymaverick.co.za/opinionista/2018-02-27-governance-unreformable* (accessed on 18 October 2018).

'Governance oversight role over State Owned Entities (SOE)' available at *http://www.treasury.gov.za/publications/other/soe/governance%20oversight%20Role.pdf* (accessed on 12 October 2019).

'Koko's future at Eskom on edge as new details emerge' fin24 5 July 2017 available at *http://www.fin24.com/Economy/Eskom/kokos-future-at-eskom-on-edge-as-new-details-emerge-2017070* (accessed on 15 August 2017).

'Koko did not follow correct procedure to declare interest – witness' fin24 23 November 2017 available *at http://www.fin24.com/Economy/Eskom/live-koko-hearing-resumes-after-one-month-break-20171123* (accessed on 30 September 2018).

'Koko's response to charge sheet' available at *http://www.ee.co.za* (accessed on 30 September 2018).

Merten M 'Thousands of Eskom officials failed to declare financial interests, SIU verifies' Daily Maverick 14 October 2020 available at *https://www.dailymaverick.co.za/article/2020-10-14-thousands-of-eskom-officials-failed-to-declare-financial-interests-siu-verifies/* (accessed on 21 October 2020).

'Mervyn E King SC' available at *https://www.mervynking.co.za/* (accessed on 01 August 2017).

Minister Maswanganyi J Department of Transport 'Minister: 4 PRASA staff linked to companies they awarded contracts to' available at *http://ewn.co.za/* (accessed on 5 August 2017).

Mokone T 'SIU guns for Correctional Services over Covid PPE tenders', Times Live 20 October 2020 available at *https://www.timeslive.co.za/politics/2020-10-20-siu-guns-for-correctional-services-over-covid-ppe-tenders /* (accessed on 21 October 2020).

'New SCOPA chair wants parly watchdog to have more 'bite'' 3 July 2019 available at *https://mg.co.za/article/2019-07-03-new-scopa-chair-eyes-priorities* (accessed on 12 October 2019).

'PIC will bail out Eskom with a R5 billion loan 5 February 2018' available at *https://www.iol.co.za/business-report/energy/pic-will-bail-out-eskom-with-a-r5-billion-loan-13113950* (accessed on 05 February 2019).

'#PRASALEAKS Rig, Conceal, Destroy and Falsify: How State Capture Happened at PRASA' available at *https://unitebehind.org.za/wp-content/uploads/prasa-leaks-how-state-capture-happened-at-prasa..pdf* (accessed on 5 March 2019).

'Report of the Portfolio Committee on Public Enterprises on the inquiry into governance, procurement and the financial sustainability of Eskom, dated 28 November 2018' available at *https://www.parliament.gov.za/storage/app/media/Links/2018/November%202018/28-11-*

2018/Final%20Report%20-%20Eskom%20Inquiry%2028%20NOV.pdf (accessed on 15 October 2019).

'Role of Parliamentary Portfolio Committees and Members of Parliament on Oversight: Workshop' 2010 available at *https://pmg.org.za/committee-meeting/11720/* (accessed on 16 October 2019).

Rothko PR 'Your board members can be held accountable for company losses' UCT Graduate School of Business available at *https://careeradvice.careers24.com/career-advice/management-advice/your-board-members-can-be-held-accountable-for-company-losses-20170714* (accessed on 25 October 2019).

Skae J 'How governance failures messed up Prasa' Fin24 15 March 2017 available at *http://www.fin24.com/Companies/Industrial/how-governance-failures-messed-up-prasa-20170315* (accessed on 5 August 2017).

'SOE boards: It matters who gets appointed and how they get appointed' available at *https://www.iodsa.co.za/news/459327/SOE-boards-It-matters-who-gets-appointed-and-how-they-get-appointed.htm* (accessed on 13 August 2019).

'State Owned Enterprises: The new companies act, PFMA and King III in perspective' available at *https://www.pwc.co.za/en/assets/pdf/companies-act-steering-point-4.pdf* (accessed on 28 March 2018).

'The Protocol on Corporate Governance in the Public Sector, Department of Public Enterprises 2002' available at *https://www.gov.za/sites/default/files/gcis_document/201409/corpgov0.pdf* (accessed on 12 October 2019).

'The State of the Nation Address by the President of the Republic of South Africa, Mr Cyril Ramaphosa' 16 February 2018 available at *http://www.ngopulse.org/sites/default/files/attachments/STATE%20OF%20THE%20NATION%2*

0ADDRESS%20BY%20THE%20PRESIDENT%20OF%20THE%20REPUBLIC%20OF%20SOUTH%20AFRICA.pdf (accessed on 16 October 2019) .

'Treasury sets out stringent conditions for Eskom's R59bn bailout' EWN 9 October 2019 available at *https://ewn.co.za/2019/10/09/treasury-sets-out-stringent-conditions-for-eskom-s-r59bn-bailout* (accessed on 15 October 2019).