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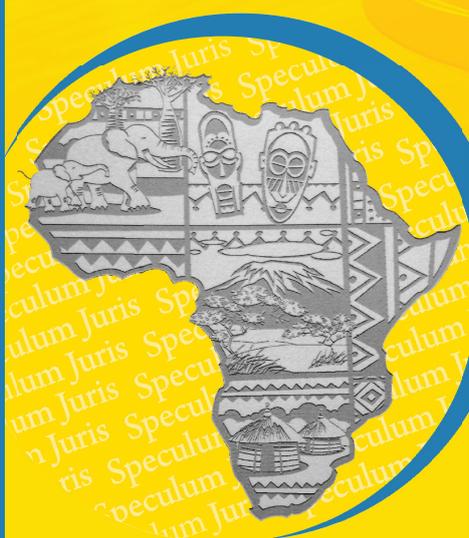
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Corporate Governance in South African Airways: Responsibilities of Directors in State- owned Companies

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Abstract

This article aims to provide an overview of the financial and (mis)management situation in SAA and to show how the failure of the directors to comply with the basic requirements of good corporate governance practices and the King Code led to the total failure of SAA as a public enterprise. Ultimately, the public and especially the shareholders have to trust that the board charged with company oversight will act in the organisation's best interest. The board's actions should justify public and shareholder trust and instil confidence in investors. The board is responsible for ensuring that the business is run in an ethically correct manner. In state-owned companies (SOCs), the state is the primary shareholder, creating concern when the shareholder does not hold the board of directors in a SOC accountable. The board of directors of a SOC should at all times act in the best interest of the company, the best interest of government as a shareholder, but also in the best interest of the public. Specific principles in King IV aid SOC's in ensuring standards of conduct expected from boards of directors applying the

principles of good corporate governance, e.g. leadership, organisational ethics, responsible corporate citizenship, and the composition of the governing body.

Keywords: Corporate governance; state-owned companies; ethical leadership; King Code; fiduciary duties

1 INTRODUCTION

The board of directors is the most important administrative body of a company securing the sustainability of the organisation. A sound management culture is critical in moulding boards of directors' decisions, more specifically, moral decisions.¹ Ultimately, the public and especially the shareholders have to trust that the board charged with company oversight will act in the best interest of the organisation. The board's actions should justify public and shareholder trust and instil confidence in investors. The board is responsible for ensuring that the business is run in an ethically correct manner. In state-owned companies (SOCs), the state is the primary shareholder, creating concern when the shareholder does not hold the board of directors in a SOC accountable. The board of directors of a SOC should at all times act in the best interest of the company, the government as shareholder, but also in the best interest of the public.

Every company should be headed by an effective board that can lead and control the company.² The board consists of a combination of executive directors with intimate knowledge of the company, and of outside non-executive directors, who can bring a broader view to the company's activities under a chairperson who accepts the duties and responsibilities which the post entails.³ The responsibilities of the board consist of setting the strategic aims, providing leadership in effecting them, supervising the company's management, and reporting to shareholders on their stewardship.⁴ The non-executive director's function is to monitor the performance of the board and chief executive officer. An evaluation of the board's effectiveness includes how the board members work together under the chairperson and their ability to provide leadership and objectively evaluate the company's governance processes.⁵

Boards of directors have the following three functions irrespective of whether they operate in the public or private sector.⁶ First, the board of directors is responsible for giving the company an air of legitimacy. This means there should be directors on the board with the necessary skills, knowledge, expertise, and experience in business to ensure confidence in the company and its business activities by shareholders, stakeholders, the business community, and even the government.⁷ Second, it should focus on auditing and legal requirements. The auditing oversight is most often the responsibility of the audit committee, but it is still the responsibility of the whole board to ensure legal compliance.⁸ Third, directors are entrusted with the duty of ensuring that any information given to stakeholders and the public is accurate. Directors carry this responsibility but must rely on information provided by company executives, officers, and

1 Palmiter "Corporate Governance as Moral Psychology" 2017 *Washington & Lee LR* 1149.

2 Wiese *Corporate Governance in South Africa with International Comparisons* (2018) 29.

3 *The Report of the Committee on the Financial Aspects of Corporate Governance* (1992) (The *Cadbury Report*) <https://ecgi.global/sites/default/files/codes/documents/cadbury.pdf> (accessed 29-01-2023) 15.

4 *Cadbury Report* (1992) 20.

5 Cassim *et al. The Law of Business Structures* 3 ed (2018) 279.

6 Wixley and Everingham 3 ed (2010) 49.

7 Wixley and Everingham *Corporate Governance* 47 and 57; Zandtra "Public Policy: Corporate Governance. Enron, Board Governance and Moral Failings" <https://www.acton.org/node/6296> (accessed on 06-06-2024).

8 Wixley and Everingham *Corporate Governance* 98, and Rossouw, Van der Watt and Malan "Corporate Governance in South Africa" 2002 *Journal of Business Ethics* 289; Zandtra "Public Policy" <https://www.acton.org/node/6296>.

other employees, while protected to a certain degree by the business judgment rule.⁹

We believe that an inference should be made as to the apprehensiveness of boards to comply with those procedures intact to ensure ethical and responsible governance within SOCs. In assessing the Companies Act¹⁰ and the King Report IV as a code of good governance, it is necessary to examine the transparency of boards' actions within these organisations and ask how they seem to avoid accountability within the current legal framework designed to govern them. This inquiry is pertinent in light of recent events contradictory to what is expected from SOCs in governance. Examples include the SAA controversies, the SABC qualification scandal, a series of incidents at Eskom, and the gross mismanagement of state assets. These incidents have occurred at the expense of public money.

This article aims to provide an overview of the financial and (mis)management situation in SAA and to show how directors' failure to comply with the basic requirements of good corporate governance practices and the King Code led to the total failure of SAA as a public enterprise.

1 1 Corporate Governance Defined

The essential objectives of corporate governance are to delegate powers to managers and ensure transparency, fairness, accountability, and responsibility to all stakeholders. The Cadbury report¹¹ describes corporate governance as a system whereby companies are directed and controlled.¹² The (OECD) adopted this definition,¹³ and it describes corporate governance as the challenges faced by a director between performance (driving forward) and conformance (prudent control). It provides a useful framework for analysing the key capabilities of directors and the fundamental governance principles of accountability, honesty, and transparency that inform board processes.¹⁴ The 2016 edition of the King Report (King Report on Corporate Governance for South Africa [King IV]) 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”.¹⁵

Cassim views corporate governance as a management framework consisting of structures and processes within which decisions are made and companies are controlled.¹⁶ Schleifer and Vishny¹⁷ focus on the separation of management and finance. Jacobs asserts that corporate governance is determined by the complexity of the organisation and not according to size.¹⁸

Dibra defines corporate governance from a relationship perspective focusing on the relationship

9 *Ibid.*

10 71 of 2008.

11 *Cadbury Report* (1992) 14; Wiese *Corporate Governance* 5; Moloi *Assessment of Corporate Governance Reporting in the Annual Reports of South African Listed Companies* (MCom-dissertation, Unisa, 2008) 1; Berle and Means *The Modern Corporation and Private Property* 2nd ed (1991) 1.

12 Naudé et al. “The Steinhoff Saga: Part Two – The Board that Looked the Other Way” <https://www.news24.com/fin24/the-steinhoff-saga-part-two-the-board-that-looked-the-other-way-20180628> (accessed 29-01-2023).

13 OECD “Principles of Corporate Governance” <https://www.oecd.org/corporate/ca/corporategovernanceprinciples/31557724.pdf> (accessed 29-01-2023).

14 Naudé et al. “The Steinhoff Saga”.

15 Institute of Directors in Southern Africa *King Report on Corporate Governance IV* (2016) (hereafter *King IV*) 20.

16 Cassim et al. *The Law of Business Structures* 271. Al Shunnaq and Al Azzam “Jordanian Corporate Governance and their Impact on Transparency and Objective Disclosure” 2018 *Journal of Law and Policy and Globalization* 47.

17 Shleifer et al. “A Survey of Corporate Governance” 1997 *The Journal of Finance* 737.

18 Jacobs “The Future of Corporate Governance and the Role of Directors” <https://jacobshenri.medium.com/the-future-of-corporate-governance-and-the-role-of-directors-efcf0a5f7c5d> (accessed 02-09-2022) 4.

between management (corporate insiders) and all investors. He further refers to the rule-based processes of laws, policies, and accountability that govern this relationship.¹⁹ Corporate governance is concerned with the separation of corporate ownership and corporate control.²⁰

Similar to Dibra, Al Shunnaq and Al Azzam defines corporate governance as the rules, laws, and standards that define the relationship between the management of the company on the one hand, and the shareholders and stakeholders, on the other.²¹

Palmiter argues that corporate governance is a division of moral psychology, and it is a product of moral values.²² Rathbone and Kyereboah-Coleman hold that corporate governance is the rules and procedures utilised by the board of directors to ensure accountability by all stakeholders.²³

Adeyemi²⁴ and Mapitiya²⁵ concludes that corporate governance is a vital survival mechanism for a company to achieve its long-term goals in a competitive and turbulent economic environment. Cassim emphasized, similar to Adeyemi and Mapitiya, that a company's reputation, share price, and sustainability will likely be affected negatively should it fail to practice sound corporate governance.²⁶

Prasad,²⁷ Gillan and Stark²⁸ assert that corporate governance refers to an effective management system that serves the best interests of the company. According to Goergen, corporate governance is a system for managing a company's stakeholders' interests.²⁹

Corporate governance is not merely the compliance with legislation and various governance codes to ensure a stable economy. Corporate governance is about the structures and processes created whereby a company is managed and controlled in the best interest of the stakeholders and other parties (external stakeholders, governments and local communities) thereby cultivating an integrated culture of responsible behaviour and ensuring maximum efficiency.³⁰ Companies do not operate in a vacuum, because their basic relationships and participants influence society, the environment, and the economy.³¹ Corporate governance systems are essential for the growth of a country's economy and the recovery of public trust after corporate collapses.³²

According to Ogbodo and Umoru, the main objective of corporate governance is monitoring

19 Dibra "Corporate Governance Failure: The Case of Enron and Parmalat" 2016 *European Scientific Journal* 284; Cheffins "The History of Corporate Governance" 2012 *Law Working Paper* 22.

20 Dibra 2016 *European Scientific Journal* 286.

21 Al Shunnaq and Al Azzam 2018 *J of L and Pol and Globl* 47.

22 Palmiter 2017 *Wash & Lee LR* 1120.

23 Rathbone *Understanding Business & Ethics in the South African Context* (2020) 181. Kyereboah-Coleman *Relationship between Corporate Governance and Firm Performance: An African Perspective* (PhD dissertation, University of Stellenbosch, 2007) 18.

24 Adeyemi "Balancing the Objectives of Corporate Governance: Social Welfare v Profitability" 2019 *Journal of Law, Policy and Globalization* 32.

25 Mapitiya "Ownership Types, Corporate Governance and Corporate Performance: The Mediating Effect of Corporate Governance Practices" 2015 *Sri Lankan Journal of Management* 35.

26 Cassim *The Law of Business Structures* 271.

27 Prasad *Corporate Governance* 3 ed (2014) 3.

28 Gillian and Stark "Corporate Governance Proposals and Shareholder Activism: the Role of Institutional investors" 2000 *Journal of Financial Economics* 275.

29 Goergen *et al.* "Corporate Governance: Non-equity Shareholders" 2010 *Corporate Governance: A Synthesis of Theory, Research and Practice* 469.

30 Wiese *Corporate Governance* 2. Samaha *et al.* "The Extent of Corporate Governance Disclosure and its Determinants in a Developing Market: the Case of Egypt" 2012 *Advances in Accounting* 168.

31 Wiese *Corporate Governance* 2.

32 Malgorzata *et al.* "The Impact of Interplay between Formal and Informal Institutions on Corporate Governance Systems: a Comparative Study of CEECs" 2018 *Comparative Economic Research* 87; Kyereboah-Coleman *Corporate Governance and Firm Performance* 20.

the actions of management and directors and mitigating risks stemming from corporate officers' misdeeds.³³ Thabane and Snyman Van Deventer³⁴ concurred with the detailed definition of Du Plessis³⁵ that corporate governance is a process of balancing the interests of shareholders, internal stakeholders, and other parties who can be affected by the conduct of management to ensure the maximum level of efficiency and profitability is achieved for the company.

According to Wiese, Al Shunnaq and Al Azzam, the definition of corporate governance includes a management framework of regulating and overseeing corporate conduct and balancing the interests of all stakeholders to ensure responsible corporate behaviour to achieve maximum efficiency and profitability for a company.³⁶ According to Peng, the three significant factors of corporate governance are the shareholders, management and directors.³⁷

From the abovementioned definitions, it is clear that corporate governance is the effective, efficient, and independent management and control of a company through structures, rules, laws, practices, and processes to give direction to the company and to monitor and supervise its behaviour while balancing the interests of and relationships between stakeholders, directors, management, investors, and the community through transparency, accountability, fairness, and responsibility in decision-making and oversight.

1 2 A Brief Explanation of Corporate Governance in South Africa

The King Reports and the Companies Act 2008 are the starting point for an investigation into corporate governance in South Africa. King IV serves as a code of good practice for corporate governance and is seen as a critical guideline for entities throughout South Africa.³⁸ The King Report concerns itself with procedures and structures within a company associated with managing, decision-making, and regulating a business.³⁹

The Code applies to all listed companies and is published separately from the final report. The Code consists of three elements: leadership, sustainability, and good corporate citizenship, and is based on the principles of openness, integrity, and accountability.⁴⁰ The Code further refers to financial reporting and aspects concerning the board of directors, executive directors, and non-executive directors⁴¹ of all listed companies.⁴² The main purpose of the Code is to improve the quality⁴³ of corporate governance and promote checks and balances within the corporate structure.⁴⁴ The Code requires a clear division of responsibilities within the corporate structure and a balance of power and authority at the head of a company to ensure that no single individual has unfettered powers of decision.⁴⁵ The function of the non-executive director is to bring an independent judgment to issues of strategy, performance, and resources, including key appointments and standards of conduct. The committee submitted that some corporate failures

33 Ogbodo *et al.* "Imperatives of Corporate Governance on Corporate Citizenship in Nigeria" 2018 *Annual Survey of Intl and Comp L* 136.

34 Thabane and Snyman-van Deventer "Pathological Corporate Governance Deficiencies in South Africa's State-Owned Companies: A Critical Reflection" 2018 *PELJ* 3.

35 Du Plessis, Hargovan and Bagaric *Principles of Contemporary Corporate Governance* 2 ed (2011) 6–7.

36 Wiese *Corporate Governance* 2. Al Shunnaq and Al Azzam 2018 *J of L and Pol and Globl* 47.

37 Peng *Global Strategy* 2 ed (2008) 323.

38 *King Report IV* (2016) 20.

39 Wixley and Everingham *Corporate Governance* 1.

40 *Cadbury Report* (1992) 16.

41 Du Plessis "Corporate Governance and the Cadbury Report" 1994 *SA Merc LJ* 83.

42 *Cadbury Report* (1992) 16.

43 Visser *et al. The A-Z of Corporate Social Responsibility* (2010) 97.

44 Du Plessis 1994 *SA Merc LJ* 83.

45 *Ibid.*

and scandals could have been prevented had a code of best practices existed.⁴⁶ The Code contains multiple built-in checks and balances, enhancing the report's practical usefulness.⁴⁷ Improving the standards of corporate governance by structures and rules alone cannot be achieved.⁴⁸

In exploring corporate governance practices in South African SOCs, the focus will remain on certain specific principles contained in this Code:

- Principle 1. Leadership: “The governing body should lead ethically and effectively.”⁴⁹
- Principle 2. Organisational ethics: “The governing body should govern the ethics of the organisation in a way that supports the establishment of an ethical culture.”⁵⁰
- Principle 3. Responsible corporate citizenship: “The governing body should ensure that the organisation is and is seen to be a responsible corporate citizen.”⁵¹
- Principle 7. Composition of the governing body: “The governing body should comprise the appropriate balance of knowledge, skills, experience, diversity and independence for it to discharge its governance role and responsibilities objectively and effectively.”⁵²

These principles find direct application to the public sector in South Africa. Certain sector supplements have been developed to aid SOCs in applying the principles of good corporate governance.⁵³ These principles will be evaluated alongside section 76 of the Companies Act, which deals with standards of conduct expected from boards of directors.

In South Africa, SOCs play a critical part in the fiscal strength, infrastructure, and growth of the economy.⁵⁴ SOCs must be actively maintained and managed to provide public value and effective governance.⁵⁵ By maintaining good governance in South African SOCs, other companies will be incentivised to follow suit.⁵⁶ Trust is a key concern, and, as seen from Principle 3⁵⁷ of King IV, an organisation should not only be a responsible corporate citizen but should also be “seen” to be one. Boards of directors who violate public trust directly affect whether an organisation is perceived as a responsible corporate citizen.

Properly governed and sustainable SOCs maintain and aid in the fiscal development of a country. With SOCs having to operate and function without the aid of the government primarily, it is troublesome that cash injections amounting to R95.2 billion contributed to the R249.9 billion of government spending in the public sector in the 2017 financial year.⁵⁸ These injections are primarily attributed to mismanagement and poor governance within these public entities, and secondary factors, such as the weak economy, only play a trivial part.⁵⁹ In the 2022/2023 budget, R1.77 billion was budgeted for the SAA, described as the settlement of government debt, but it

46 *Ibid* 82.

47 *Ibid* 89.

48 *Cadbury Report* (1992) 18.

49 *King Report IV* (2016) 40.

50 *Ibid*.

51 *Ibid*.

52 *King Report IV* (2016) 50.

53 Wixley and Everingham *Corporate Governance* 2.

54 Thabane and Snyman-van Deventer 2018 *PELJ* 2 and National Treasury *Budget Review* (2018) 93.

55 PriceWaterhouseCoopers (PWC) *State-Owned Enterprises – Catalysts for Public Value Creation?* (2015) 5.

56 Thabane and Snyman-van Deventer 2018 *PELJ* 2.

57 *King Report IV* (2016) 40.

58 National Treasury 2018, 93.

59 *Ibid* 94.

was reduced to R15 million in the adjustment budget.

After careful analysis of the issues faced in South Africa regarding sound governance and the responsibilities of boards within SOCs, there is a need for improved insight on this highly controversial subject.⁶⁰ Suggestions will follow regarding the abovementioned issues to suggest effective measures of implementation for sound corporate governance within SOCs in South Africa.

This investigation into SOCs is about courageous moral leadership that asks tough questions and insists on transparent answers, and boards are expected to fulfil their roles within organisations and society. Unfortunately, this is not the case. Many governance issues within South Africa arise annually with dire consequences to the country, the economy, and most importantly, the trust of the public and foreign investors.

Corporate governance practices and principles guide directors in making successful company decisions.⁶¹ Current corporate governance best practices assume that independent directors⁶² will not be captured by management and will safeguard the company's assets to maximise shareholders' wealth. The board should consist of independent directors entrusted to make the right decisions and play an important advisory role.⁶³ A director's remuneration should have an equity-based component aligned with the directors' and shareholders' interests.

Ethical leadership is required from the board of directors, and each director should adhere to the duties of a director.⁶⁴ The case of Steinhoff is an example of the failure of ethical leadership. The executive team's failure to commit to ethical business practices, coupled with a board that crossed ethical boundaries and was dominated by strong personalities, led to taking huge financial risks. These risks included rapid acquisitions and a drive for profits that was ultimately unsustainable.

The failure of the board to regulate their behaviours and adhere to the values was clear when shareholders and stakeholders suffered huge financial losses.⁶⁵

The perception is that good corporate governance principles positively affect a company's performance and attract foreign investment. A lack of trust between shareholders and directors is detrimental to both parties. The Codes of corporate governance recommend that companies appoint non-executive directors, audit committees consist of independent members, and the positions of chairperson and chief executive officer be separate.

The minimal compliance, lack of insight into financial statements, and commitment to sound corporate governance practices to satisfy the relevant authorities and shareholders lead to mediocrity and compliance being a mere "tick box" exercise.⁶⁶ The dubious financial practices, deception, and weak accountability should have raised more questions from shareholders and

60 Controversial issues arise in not only the SAA, but in numerous other SOC's, such as Eskom, PRASA and Denel.

61 Woolley and Costas "Directors' Liability and Environmental Law" 2005 *Juta's Buss L* 2.

62 Those who do not have any financial or material interest through an employment, familial or investment relationship.

63 Tung "The Puzzle of Independent Directors New Learning" 2011 *Boston Univ LR* 1175.

64 Jones "The Irrational Actor in the CEO Suite: Implications for Corporate Governance" 2017 *Delaware J of Corp L* 755.

65 Rossouw "Steinhoff's Board Behaved Badly and should be Held to Account" <https://www.wits.ac.za/news/latest-news/in-their-own-words/2018/2018-04/steinhoffs-board-behaved-badly-and-should-be-held-account.html> (accessed 29-01-2023); Naudé "The Steinhoff Saga Part One-The Making of a Corporate Giant" (2018) <https://www.fin24.com/Opinion/the-steinhoff-saga-part-one-the-making-of-a-corporate-giant-20180619> (accessed 23-6-2023).

66 Rossouw "Steinhoff's Board Behaved Badly".

stakeholders.

2 SOUTH AFRICAN AIRWAYS: A CASE STUDY

Given the above context, South African Airways (SAA) will be utilised as a case study, mainly because SAA has been a burden on South African taxpayers for too long especially in the form of bail-outs amounting to billions of rands.⁶⁷ Furthermore, SAA has struggled to keep its fleet in the skies with crippling debt and bad management. As it currently stands, SAA has a history of government bailouts and losses directly linked to taxpayers' monies. The following summaries of the SAA's dire state, dating from the 2016/17 to the 2019/20 financial year, will illustrate this.

2.1 The SAA in the 2016/17 Financial Year

In the 2017 budget review, SAA was considered technically insolvent and was clearly experiencing major governance challenges at that time.⁶⁸ According to a Treasury review on 22 February 2017, the government was to review and restructure the state's aviation assets.⁶⁹ This review was completed and has resulted flights on the profitable Johannesburg–Cape Town route were reduced⁷⁰ and certain flight routes were completely canceled⁷¹ to try to assist the financially distressed carrier. Furthermore at least ten planes within the SAA fleet were to be disposed of (it is noted that no such sale has taken place)⁷² and the international flight offering saw further reductions.⁷³

Despite the steps above, issues continued to emerge that raised concerns about the efficiency of governance within the airline. At that time, these concerns included the following:

- SAA required R21.6 billion within the three-year period to safeguard its sustainability;⁷⁴
- SAA has recorded a loss of R21.4 billion from 2011 to 2017;⁷⁵
- Additionally, further losses of R5.6 billion for 2014/15 were recorded and R1.5 billion for 2015/16, respectively;⁷⁶
- SA Express was grounded by the South African Civil Aviation Authority (SACAA), as aircraft within the fleet were deemed not airworthy.⁷⁷
- A further R3 billion bailout, owed to a lender, Citibank, was required in this financial

67 See for example National Treasury *Budget* (2017) 98; Mkhwanazi "SOEs may Require Cash Injection – Gordhan" *The Star* 25 May 2018, 11; *Sunday Tribune* "Another SAA Bailout" 1 October 2017, 1; Mashigo "Stop Bailing Out SAA, says PSA's Ivan Fredericks" *The New Age* 13 March 2018, 4; Ensor *Daily Dispatch* 2018, 9. Also see "DA Demands Disclosure of SAA Bailout" *Daily Dispatch* 14 May 2018, 4 and *TimesLIVE* "Demand for Full Info about SAA Funding" *The Herald* 14 May 2018, 4.

68 National Treasury *Budget Review* (2017) 101; Reuters "SAA Austerity Plans will Cost Jobs" *Afro Voice* 12 June 2018, 11.

69 *Ibid.*

70 De Lange "SAA to Dump Routes" <https://www.news24.com/News24/saa-to-dump-routes-20170826> (accessed 29-01-2023).

71 Port Elizabeth, East London and all central South African destinations.

72 De Lange "SAA to Dump Routes".

73 *Ibid.*

74 Mkhwanazi "SOEs May Require Cash Injection – Gordhan" *The Star* 25 May 2018, 11.

75 Mkhwanazi *The Star* 4.

76 National Treasury (2018) 99.

77 Beangstrom "New Schedule to Fill Flight Gap" *Diamond Field Advertiser* 31 May 2018, 19 and Giliham "'State Capture' Grounds SA Express" *The Herald* 25 May 2018, 1.

year.⁷⁸

The 2017 budget review further stated: “At a consolidated level, the financial position of public entities improved in 2015/16.”⁷⁹

It is assumed that the SAA did not fall within this ambit of improvement. As of 2016/17, it was acknowledged that despite the proper legal framework governing SOCs, several find themselves in extreme financial difficulty due to weak corporate governance, failure to fulfil fiduciary duties, and poor procurement practices.⁸⁰

These concerns drastically materialised in the following financial year, resulting in government bailouts of R13.7 billion.⁸¹ In the following paragraphs the 2017/18 financial year is discussed.

2 2 The SAA in the 2017/18 Financial Year

The following year, according to the 2018 budget review, SAA was still labelled as one of the most burdensome SOCs to South Africa’s national finances.⁸² In the review, it was highlighted that without “rigorous reforms” in entities such as the SAA, future survival is highly doubted.⁸³ It is critical to note that according to the 2017 state of affairs discussed above, the airline, at that time, was supposed to find itself in a turn-around plan which had already shown losses to continue until 2020.⁸⁴ The fact that “rigorous reform” was suggested again in the 2018 review speaks of obvious lip service being paid but no effective action to have followed. However, some restructurings within the airline, similar to those in 2017, were implemented to assist the troubled airline. These restructurings included retrenchments throughout the SAA Group were to occur;⁸⁵ pricing with suppliers is to be negotiated;⁸⁶ and further reductions in international flight offering.⁸⁷

As mentioned,⁸⁸ we identified certain concerns regarding the situation at SAA in 1997. In 2018, these concerns were heightened. Firstly, the public sector’s finances have been exhausted, with the debts of SOCs having increased drastically from the previous financial year (the government’s net debt was approximately R2.5 trillion at that time).⁸⁹ Secondly, lending requirements to the SOCs were projected to be R77.4 billion higher than in the 2017 financial year.⁹⁰ Thirdly the guarantee (or bailout) exposure of SAA has decreased, but the bailout facilities of the airline have not been proportionally decreased and stood at R19.1 billion for the 2018 financial year⁹¹ and the risks relating to SOCs have increased in significance.⁹² Bailouts to the carrier amounted

78 *Sunday Tribune* “Another SAA Bailout” 1 October 2017, 1.

79 National Treasury *Budget* (2017) 98.

80 *Ibid.*

81 National Treasury (2018) 3.

82 National Treasury (2018) 95.

83 *Ibid.*

84 African News Agency “SAA Deal Needs Scrutiny” *The Citizen* 24 December 2018, 4.

85 Reuters “SAA Austerity Plans will Cost Jobs” *Afro Voice* 12 June 2018, 11.

86 *Ibid.*

87 *Ibid.*; and Monyae “National Vision Needed to Help SAA Soar again” *Pretoria News* 14 November 2018, 12.

88 See 2 1 and 2 2 above.

89 National Treasury (2018) 3.

90 National Treasury (2018) 11.

91 National Treasury (2018) 90.

92 *Ibid.*

to R10 billion for the 2017/18 financial year.⁹³

According to news reports, SAA recorded a net loss of R5.7 billion for the 2017/18 financial year.⁹⁴ However, SAA's official financial statements were, again, not produced.⁹⁵

Furthermore, the 2018 budget review stated:

The combined profitability of state-owned companies, measured by return on equity, fell from 0.8 per cent in 2015/16 to 0.3 per cent in 2016/17. Several are in financial distress.⁹⁶

Again in 2018, it was acknowledged that poorly governed companies burdened the country's fiscal development through reckless expenditure, mismanagement, and functional inefficiency.⁹⁷ Also, according to the budget review, "extensive remedial action"⁹⁸ is underway, but what this might entail remains unclear and seems similar to the "rigorous reform" that was required in 2016/17.

This is almost exactly a reiteration of the 2017 budget review and serves as evidence of the repetitive nature of government in dealing with corporate governance issues within SOCs.

2.3 The SAA in the 2018/19 Financial Year

At the time, the airline found itself in another future turn-around strategy. We could not determine whether it was the same turn-around strategy tabled in the 2016/17 financial year or whether it was yet another one the airline found itself in. The 2018/2019 annual financial statement was not audited and is still only in draft form. The following steps were taken by the airline to stabilise itself financially:

- The consideration of involving a possible equity partner was mentioned by the president, however unlikely;⁹⁹
- Negotiations regarding an open line of credit were underway, involving the National Treasury as well as various banking institutions;¹⁰⁰
- According to the carriers' then-CEO, a restructuring of the balance sheet, acceleration of revenue performance, and a refreshed fleet were to be affected.¹⁰¹ This was mentioned in the motivation tabled to the Treasury to receive a R5 billion bailout which was eventually paid;¹⁰²
- SAA's route network was being evaluated and adjusted, with a specific focus on the optimisation of domestic routes and the development of international and regional

93 Mashigo "Stop Bailing out SAA, says PSA's Ivan Fredericks" *The New Age* 13 March 2018, 4 and Ensor 2018 *Daily Dispatch* 9.

94 FIN24 "SAA Does Damage Control" *Daily Sun* 12 November 2018, 2.

95 Maqhina "Government Irregular Spending at R72bn Likely to Rise, Says DA" *Daily News* 8 October 2018, 7 and Ensor "SM Seeks R5bn to Navigate Turbulence" *Daily Dispatch* 26 April 2018, 2. Also see National Treasury (2018) 99.

96 National Treasury (2018) 93.

97 National Treasury (2018) 94.

98 National Treasury (2018) 99.

99 FIN24 "SAA Adamant it will not be Shut Down or Sold" *Witness* 12 November 2018, 2 and Monyae *Pretoria News* 2018, 12.

100 Ensor *Daily Dispatch* 26 April 2018, 9.

101 *Ibid.*

102 *Ibid.* Also see FIN24 "SAA Offered Billions, but there are Conditions" *Witness* 24 December 2018, 2; FIN24 "Bailouts will Lower SA's Credit Rating" *Witness* 27 April 2018; and Thabane and Snyman-van Deventer 2018 *PELJ* 5.

markets;¹⁰³

- The carriers' unprofitable Cape Town/London route was cancelled and practically handed over to British Airways, who made the route profitable.¹⁰⁴
- Reports have surfaced that the airline was willing to sell equity shares to lessen its need for constant bailouts.¹⁰⁵

National Treasury tabled the 2019 budget review on 20 February 2019.¹⁰⁶ It would seem, contrary to the previous budget review discussed above, that SAA took a backseat, as another SOC, ESKOM, was the main focus of this budget review. Little mention was made of the distress in which the carrier found itself. This proves the statement made above, in that mere lip service is being paid to the SAA's troubles and the far-reaching impact the failing SOC has on the country.

According to the 2019 budget review, concerns within the airline escalated as follows:

- The government's net debt was, similar to 2016/17, expected to be R2.52 trillion, to which SOCs contribute greatly.¹⁰⁷
- Governments' overall lending requirements have escalated by R15.3 billion since the tabling of the 2018 budget review,¹⁰⁸
- The risk that SOCs posed in the 2018 budget review was not mediated, and SOCs have still been deemed a major fiscal risk.¹⁰⁹
- SAA's guarantee (or bailout) exposure has increased significantly from R11.1 billion to R17.3 billion.¹¹⁰
- No financial statements were tabled by the SAA, and it seems that the 2019 budget review did not address the issue or recognise the concern as it did in the 2018 budget review.¹¹¹

Furthermore, the 2019 budget review stated:

The Public Finance Management Act requires state-owned companies listed in schedule 2 of the Act to generate sufficient financial resources from their operations to meet obligations to employees, the public and debt holders. Several entities cannot meet these obligations. (At that time), return on equity has deteriorated to -0.3 per cent (in 2017/18).¹¹²

Yet again, the 2019 budget review stressed that SOCs that are not governed effectively drain the growth of the country's economy. Furthermore, the 2019 budget review also expressed the repetitive manner in which the government proceeded to address the poor governance in SOCs.

103 FIN24 *Daily Sun* 2018, 2; and FIN24 *Witness* 2018, 2.

104 Monyae *Pretoria News* 2018, 12.

105 FIN24.

106 National Treasury *Budget Review* (2019) i.

107 National Treasury (2019) 9.

108 *Ibid.*

109 *Ibid.*

110 National Treasury (2019) 86.

111 Maqhina *Daily News* 2018, 7.

112 National Treasury (2019) 90.

The SAA's debt, as reported by its then-CEO, Vuyani Jarana, stood as follows on 31 March 2018:

- R26 billion in debt in contrast to the airlines' R13 billion assets;¹¹³
- The R26 billion debt increased to R2 billion by July 2018 with no recorded increase to the airlines' asset value;¹¹⁴
- In June 2018, it was reported that the airline has approximately R1 billion in ticket-fee debt due to them from various debtors,¹¹⁵ which the airline was unable to collect effectively;¹¹⁶
- On 24 December 2018, the airline predicted further losses of R5.2 billion over three (3) months for the rest of the financial year;¹¹⁷
- R14.2 billion of SAA's debt was due in March 2019.¹¹⁸

The national carrier has received many guarantees from National Treasury.¹¹⁹ To continue, in the 2018/19 financial year of SAA, the following bailouts and estimated future bailouts were recorded. At that time, R10 billion in bailouts had been injected into the carrier in the past year (2018/19).¹²⁰ In April 2018, the SAA required an additional R5 billion bailout which was put forth to the airline by National Treasury.¹²¹ In November 2018, another R21 billion in bailouts was estimated over the following three (3) years.¹²² In December 2018, the interim CFO of the airline stated that another R17 billion was required by March 2019 to cover maturing debt and fund working capital.¹²³

As can be seen in the 2018/19 financial year, concerns, losses, and bailouts had gained even more traction than in 2016/17 and 2017/18, respectively. The following financial year will show issues of board instability and further bailouts.

2 4 The SAA in the 2019/20 Financial Year

The following section will deal with the state of affairs of the SAA in its 2019/20 financial year (1 March 2019 to 30 June 2020). This section will serve to highlight the persistent challenges and troubles of SAA, It is noted that this section of the work is limited in that the budget review for 2019/20 was only be tabled in 2020. Reference is made to the State of the Nation address, panel investigations and articles published in 2019. There have been no audited financial

113 Peron "The Insanity of SAA's Debt Crisis" *The Witness* 22 November 2018, 15.

114 *Ibid.*

115 Angola, Senegal, Zimbabwe and Nigeria.

116 Mkhwanazi "Debtors Keep SAA's Wings Clipped" *Sunday Independent* 3 June 2018, 4.

117 FIN24 *Witness* 2018, 2.

118 *Ibid.*

119 *Ibid.*

120 Ensor *Daily Dispatch* 2018, 9. Also see "DA Demands Disclosure of SAA Bailout" *Daily Dispatch* 14 May 2018, 4; and *TimesLIVE* "Demand for Full Info about SAA Funding" *The Herald* 14 May 2018, 4.

121 *TimesLIVE* 2018, 4. Also see FIN24 *Witness* 2018,10 and Reuters "SAA Secures R3.5bn to Stay Afloat" *The Herald* 19 February 2019, 7.

122 Skiti "High-level Turbulence Rocks SAA" *Mail and Guardian* 30 November 2018, 5 and Peron *The Witness* 2018, 15. Also see Mashigo *The New Age* 2018, 4.

123 FIN24 *Witness* 2018, 2.

statements for SAA for 2019/2020 and after that.

Some concerns within the SAA are again highlighted in the 2019/20 financial statement:

- SAA was ordered to pay R1.1 billion to Comair in an anti-competition case;¹²⁴
- SAA has not tabled its annual report and financial statements; two years after its financial year-end;¹²⁵
- SAA secured another R3.5 billion loan on 15 February 2019 to fund working capital (until June 2019);¹²⁶
- CEO Vuyani Jarana resigned at the beginning of June 2019. The appointment of another CEO resulted in the SAA appointing its eighth CEO in five years.¹²⁷

To build on these concerns, the Judicial Commission of Inquiry launched an investigation into state capture whereby corruption and fraud in the public sector were investigated. This inquiry has, among others, unveiled evidence of mismanagement and irregular board interference within the SAA such as procurement inconsistencies after an award to BnP Capital to serve on an advisory basis *regarding* the restructuring of maturing debt.¹²⁸ Mismanagement by for example Dudu Myeni and Phumeza Nhantsi were uncovered by the Judicial Commission of Inquiry. Myeni, a former SAA executive, instructed other executives to interact with her personal advisor regarding board decisions. Her personal advisor was not employed nor remunerated by SAA.¹²⁹ BnP Capital attempted to obtain a cancellation fee from SAA in the amount of R49.9 million, and the contract in which the board handled the cancellation clause was found to be irregular and not in accordance with good governance practices.¹³⁰ Suspended SAA CFO, Nhantsi, stated that when looking at the procurement of BnP Capital, in retrospect, she had her reservations as to the procurement practices involved.¹³¹ Nhantsi also exclaimed that former executive, Myeni, expected the board to “do illegal things”.¹³² She subsequently stated that she did not report such board activity as she was “overtaken by events”.¹³³

In the June 2019 State of the Nation address, President Ramaphosa exclaimed that, amongst others, all programmes and policies will aim to create a “capable, ethical and developmental state.”¹³⁴ A need was also highlighted to define better and understand the respective mandates of SOCs in South Africa to boost competitiveness and regulation.¹³⁵ From the above inquiry, it

124 Reuters “SAA Set to Reorganise” *The Witness* 19 February 2019, 5.

125 Ginindza and Khumalo “SAA to be Split into Three Divisions” *Pretoria News* 2019, 9.

126 Reuters *The Herald* 2019, 7, Marais “SAA Asks State to Decide on Financial Aid” *Business Day* 19 February 2019, 1, Marais “SAA Lands R3.5bn to Stay Afloat until June” *Daily Dispatch* 20 February 2019, 10 and Manyane “Union Wary of SAA’s Proposed Restructuring Plan” *Sunday Independent* 24 February 2019, 4.

127 Jonker “Ethiopian Airlines an Example from Africa of what SAA should Strive for” *Business Day* 15 March 2019, 11. Also see Thabane and Snyman-van Deventer 2018 *PELJ* 5.

128 Judicial Commission of Inquiry *Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State* (Live broadcast 14-06-2019.)

129 Judicial Commission of Inquiry *Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State* (Live broadcast 18-06-2019) 33–39.

130 *Ibid* 8, 39–42 and 157–158.

131 Judicial Commission of Inquiry (18-06-2019) 60.

132 Judicial Commission of Inquiry *Inquiry into Allegations of State Capture, Corruption and Fraud in the including Organs of State* (Live broadcast 19-06-2019) 15–16.

133 Judicial Commission of Inquiry (19-06-2019) 20–21.

134 Ramaphosa *State of the Nation Address* (2019) 5.

135 *Ibid* 25.

is clear that SAA has a history of incompetent and unethical board members.

The following steps were being taken by the airline to stabilise itself financially in its 2019/20 financial year:

- The selling of its subsidiary company, Airchefs, was considered;¹³⁶
- The possible transfer of aircraft in the airline's fleet to its subsidiary, Mango had the room to grow its service capacity as a low-cost carrier;¹³⁷
- SAA's then CEO again stated that more unprofitable routes would be cancelled;¹³⁸
- Agreements to roll over maturing debt in the amount of R9.2 billion were concluded to focus on turning around the airline;¹³⁹
- The transformation of its low-cost subsidiary, Mango, into a hybrid of a low-cost carrier and a carrier that can provide more exclusive and upmarket services.¹⁴⁰
- The possible reinstatement of former Mango CEO Nico Bezuidenhout to bring back executives with "airline-specific" experience.¹⁴¹
- In the 2018/19 financial year, the finding of a possible equity partner was mentioned. In 2019/20, this suggestion was again made by the Minister of Public Enterprises; however still unlikely;¹⁴²
- According to Jarana, the SAA is to reorganise itself into three separate business units, international, regional, and domestic. Each division will aim to have its own management to decentralise decision-making, improving accountability.¹⁴³ This statement was subsequently misunderstood as a major business restructure, and Tlali Tlali, an SAA spokesperson, later clarified that Jarana was referring to the operating model within the SAA.¹⁴⁴

While governments' aid through the years could be seen as an act of patriotism by assisting the country's flagship (yet fatally injured) airline, all of these efforts may be in vain should core issues of poor corporate governance persist.

Over the timespan as outlined above, SAA's national regulator and the board of SAA have attempted to improve the airline's state of affairs. Certain suggestions were made on how the national carrier could lift itself from its wounded state with the hope that issues of poor governance and an ineffective board could be resolved.

136 Bloomberg "SAA to Sell Catering Business" *The Star* 2 May 2019, 19, Hutchings "SAA Debt Rollover Deal Agreed to in Principle" *The Herald* 1 May 2019, 9; Reuters *The Witness* 2019, 5 and Maqhina "Outcry over Unbundling of SAA" *Daily News* 19 February 2019, 4.

137 Bloomberg News "Possible Debt Roll over Deal for SAA" *The Witness* 1 May 2019, 5 and Bloomberg *The Star* 2019, 19.

138 Hutchings *The Herald* 2019, 9; and Reuters *The Witness* 2019, 5.

139 Bloomberg News *The Witness* 2019, 5, Hutchings *The Herald* 2019, 9; and Reuters *The Witness* 2019, 5.

140 Hutchings *The Herald* 2019, 9.

141 Khumalo "Bezuidenhout Front Runner to Head Mango" *The Star* 3 May 2019, 15.

142 Paton "Gordhan Sets out SOE Strategy" *Business Day* 14 March 2019, 2.

143 Ginindza and Khumalo *Pretoria News* 2019, 9, Reuters *The Witness* 2019, 5, Mjo "SAA also to be Split into Three Units" *Sowetan* 20 February 2019, 4 and Reuters *The Herald* 2019, 7.

144 "SAA is 'Not Following in Eskom's Unbundling Footsteps'" *The Citizen* 19 February 2019, 7. and Maqhina *Daily News* 2019, 4.

2 4 Report on SAA to the Department of Public Enterprises Portfolio Committee on 1 September 2021

Due to the significant financial losses and negative cash flow problems suffered by SAA, the entity was placed in business rescue on 5 December 2019. It was under the control of the business rescue practitioner up to 30 April 2021.

SAA was grounded on 27 March 2020, due to the COVID-19 pandemic and only started operations again on 23 September 2021. It was stated before the committee that “[t]he funding for subsidiaries of R2.7 billion was approved as part of the R10.5 billion appropriation. The funding is being disbursed to fund restructuring to align to reduced business activities, settle unpaid salaries and creditors.”¹⁴⁵

It is proposed that the business rescue process enabled SAA to restructure its organisation and its balance sheet.¹⁴⁶ The strategic focus since the business rescue exit is: i) fleet planning; ii) route network; iii) employee engagement; iv) ensuring route rights, airport slots, and strategic partnerships are maintained; v) renewal of the operator certificate; vi) engagement with stakeholders; and vii) rebuilding customer trust through brand repositioning.¹⁴⁷ SAA reduced its workforce from over 4500 to 1000 employees, and the fleet was reduced to what is required from a start-up under COVID-19 conditions. Compromises were reached with creditors and lessors to reduce the debt on the balance sheet.¹⁴⁸

The national government paid the legacy lender debt of R4.1 billion in July 2021, and R3.1 billion plus interest is still outstanding to lenders and was due for payment in August 2022.¹⁴⁹

2 5 Department of Public Enterprises: An Update on its State-owned Enterprises on 12 August 2022

Takatso Aviation was created specifically for the acquisition of SAA and was bidding to acquire SAA operations, SAA Technical, and Air Chef.¹⁵⁰ It was reported in the media that the investment firm, Toto Investment Holdings filed documents on 23 June 2022 in the Cape Town High Court against the government’s sale of SAA to Takatso Consortium for R51 (US\$3) This transaction was called “unlawful and constitutionally invalid”.¹⁵¹ Toto Investment Holdings claimed that the process to acquire a 51 per cent stake in the airline by Takatso Consortium lacked transparency and that Toto Investment Holdings was unfairly excluded from the deal. Meanwhile, National Treasury had also withdrawn its support of the sale of the airline and stated that “the sale still represents a ‘contingent liability’ to the fiscus” because Takatso will have the right to assess whether any ongoing liabilities in SAA must still be settled by the government.¹⁵² This means the government will still be liable for outstanding business rescue obligations stemming from its bankruptcy proceedings.¹⁵³ In view of this, National Treasury

145 Powerpoint presentation to the Department of Public Enterprises Portfolio Committee on 1 September 2021. [On file with authors].

146 *Ibid.*

147 *Ibid.*

148 *Ibid.*

149 *Ibid.*

150 Subramoney “Competition Tribunal hearing into the SAA-Takatso merger underway” *The Citizen* 20 June 2023, <https://www.citizen.co.za/business/tribunal-hearing-saa-takatso-merger-underway/> (accessed 30-01-2023).

151 Research Unit of the Department of Public Enterprises *An Update on its State-owned Enterprises on 12 August 2022*: 4. [On file with authors].

152 *Ibid.*

153 *Ibid.*

stated that “the airline still represents an ongoing risk to the state as the terms are skewed heavily towards the buyer.”¹⁵⁴ The transaction includes the following: i) the government will retain special voting rights; ii) the government’s voting rights ensures that SAA cannot be sold without the government’s consent; iii) the government would also have full voting rights over “matters of national interest”; iv) the government would retain a stake of at least 33.3 per cent; v) the government will receive R3 billion in preference shares that can be redeemed through future cash flow; vi) Takatso will provide R3 billion in working capital; and vii) Takatso will hold SAA’s assets valued at about R3 billion.¹⁵⁵ Takatso Consortium bought the airline for a notional sum of approximately US\$3 in return for spending commitments and responsibility for operations.¹⁵⁶

2 6 Competition Commission: 2023

In May 2023, the Competition Tribunal recommended the Competition Tribunal’s approval of a 51 per cent disposal of SAA shares to Takatso, provided that certain conditions are met.¹⁵⁷ The first condition deals with removing the minority partners, Global Aviation and Syranix, from the consortium to ensure there will not be decreasing competition in the domestic airline market.¹⁵⁸ The second condition deals in the main with the limitation of merger-related retrenchments and determines a minimum number of employees at SAA.¹⁵⁹ The Commission then recommended that the tribunal approve the merger subject to the recommended conditions.¹⁶⁰

2 7 The SAA Saga Continues in 2024

After almost three years of negotiations, the plan to privatise the SAA has finally been abandoned by the national government. This failure of the negotiations means that the government is yet again in full control of SAA. It also means that the board of directors must take control and manage the company to become profitable and sustainable.¹⁶¹ The Department of Public Enterprises announced that in view of the failure of the negotiations, it had taken the decision to revert SAA to 100 per cent state ownership and informed the board of the company to create a corporate plan for the future of the airline, including a bigger fleet and more routes.¹⁶²

The failure of the negotiations is mainly because of disagreements over the price the consortium had to pay for its majority stake in SAA. After restructuring to a much smaller airline with fewer routes, fewer airplanes, and an agreement with Lufthansa in terms of which South African passengers can book with SAA to European destinations, but fly on Lufthansa aircraft from Johannesburg.¹⁶³ The perceived restoration of SAA’s financial situation was the reason for the failure of negotiations between the South African government and the Takatso Consortium.

154 Research Unit of the Department of Public Enterprises (2022) 5.

155 *Ibid.*

156 *Ibid.*

157 Subramoney *The Citizen* 2023; Khumalo “Competition Commission Provisionally Approves Takatso, SAA Deal” *The Citizen* 12 May 2023, <https://www.citizen.co.za/news/competition-commission-approves-takatso-saa-deal-may-2023/> (accessed 30-01-2023).

158 *Ibid.*

159 *Ibid.*

160 Khumalo “Competition Commission” (accessed 30-01-2023).

161 Dron “Southern Discomfort” <https://www.timesaerospace.aero/features/air-transport/southern-discomfort> (accessed 06-06-2024); Bovenizer “South Africa Abandons Sale of SAA after Negotiations Fall Through” <https://www.airport-technology.com/news/south-africa-abandons-sale-of-saa/?cf-view> (accessed 06-06-2024); Birns “Pretoria Axes South African Airways Privatisation Deal” <https://www.ch-aviation.com/news/138148-pretoria-axes-south-african-airways-privatisation-deal> (access 06-06-2024).

162 Bovenizer “South Africa Abandons Sale of SAA” (accessed 06-06-2024).

163 Dron “Southern Discomfort”; Bovenizer “South Africa Abandons Sale of SAA”.

The South African government stated that the initial valuation of SAA during the pandemic was R2.4 billion (around \$120 million). However, market conditions have changed over the past three years, and a new valuation of R6.5 billion should be considered for the sale of the SAA, taking into account public interest and fair market price.¹⁶⁴ Both parties withdrew from the agreement because of the inability to reach agreement on the airline's value.¹⁶⁵

But SAA's financial problems are still not so easily solved. The USA imposed a civil claim against SAA on behalf of passengers not refunded by SAA on tickets purchased to and from the USA for flights that were canceled during the COVID-19-grounding of airline operations.¹⁶⁶ SAA settled with the USA Department of Transportation's Office of Aviation Consumer Protection to pay a fine of \$300,000 (R5.4 million) for COVID-19-pandemic flight cancellations or deviations to avoid protracted litigation. It brings the total COVID-19-related refunds paid out by SAA to over R2.2 billion between April 2021 and March 2023.¹⁶⁷

3 THE ROLE OF DIRECTORS IN STATE-OWNED COMPANIES

According to the Companies Act a company is defined as a juristic person.¹⁶⁸ These juristic persons are managed by boards of directors who act in the organisation's best interests.¹⁶⁹ Also defined in section 1 of the Companies Act, "director means a member of the board of a company, or an alternate director of a company and includes any person occupying the position of a director or alternate director, by whatever name designated".

Section 76 of the Companies Act sets out directors' fiduciary duties towards a company to a certain degree by setting standards of conduct by which directors should abide. These standards, together with common law fiduciary duties, as partly codified in section 76, will be evaluated against directors' conduct in SOCs.

The split between the board of a company and ownership underlies the importance of corporate governance.¹⁷⁰ The board of directors can be seen as representatives in practice and legal representatives of a SOC. Certain components of corporate governance fall within the main responsibilities of the board of directors, assisted by management, including supervision, direction, and executive action.¹⁷¹ The board has discretion and authority to manage the interests of a SOC, especially economic interests. Through this discretion, the board must properly consider and attend to legal and moral aspects of the business that might arise. The board of directors and management further play an enormous role in implementing an ethical culture within a company as they are seen by stakeholders, especially the employees, as the leaders or the face of business dealings.¹⁷² From this, we argue that these individuals should act as role

164 *Ibid.*

165 *Ibid.*

166 "SAA Settles US Fine – Pays over R2 billion in Refunds" <https://businesstech.co.za/news/business/775252/saa-settles-us-fine-pays-over-r2-billion-in-refunds/> (accessed 06-06-2024); Paton "SAA to Pay R5m Penalty to US Govt" <https://www.news24.com/fin24/companies/saa-to-pay-r5m-penalty-to-us-govt-20240604> (access 06-06-2024); Leathern "SAA Reaches a Settlement with US over Massive Fine" <https://www.thesouthafrican.com/lifestyle/saa-reaches-a-settlement-with-us-massive-fine/> (access 06-06-2024).

167 *Ibid.*

168 Section 1.

169 *Harlowe's Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co NL* 1968 HCA 37; *Howard Smith Ltd v Ampol Petroleum Ltd* 1974 1 All ER 1126 1131; *Whitehouse v Carlton Hotels (Pty) Ltd* 1987 162 CLR 285; *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd* 2006 5 SA 333 (W).

170 Wixley and Everingham *Corporate Governance* 8.

171 Wixley and Everingham *Corporate Governance* 8; and Rossouw, Van der Watt and Malan 2002 *J of Buss Ethics* 289.

172 Van Wyk *The Relevance of Business Ethics in Defining the Role of Internal Company Stakeholders* (LLM-dissertation, University of the Free State 2014) 76.

models to other stakeholders to establish a sound and healthy ethical culture.

Therefore, the board of directors managing a SOC are those who are subject to blame when the performance of a SOC is not up to standard.¹⁷³ SOC's must be actively maintained and managed in the future to provide real public value and effective governance.¹⁷⁴ Trust is a key concern and, as seen from Principle 3¹⁷⁵ of King IV, an organisation should not only be a responsible corporate citizen but should also be “seen” to be one. Boards of directors who violate the public trust directly affect whether an enterprise is perceived as a responsible corporate citizen. Moreover, as defined above, the board of directors is responsible for accounting to other stakeholders of a company.¹⁷⁶

3 1 The Common Law Concept of Fiduciary Duty and Section 76 of the Companies Act

The need to have stern rules regulating fiduciary relationships has been acknowledged through time, and the scope of section 76 endeavours to provide such regulatory guidelines in modern company law. Statutory provisions, such as section 76, increase legal certainty within South African company law.¹⁷⁷

In addition to directors’ duties, as set out in the Companies Act, certain common law fiduciary duties also find application. These fiduciary duties originate in English principles of equity¹⁷⁸ and must be executed according to the standards of conduct found in section 76 of the Companies Act. Through this, directors face the enormous task of upholding such standards.

Section 76(3) of the Companies Act expects the directors to act in good faith and with proper purpose in the best interest of the company with the necessary care, skill, and diligence and therefore it can be reasoned that ethical conduct from directors when performing their duties will include:

- Not to cause harm, misuse, or take advantage of the company including prevention of corruption and insider trading;
- Effectively communicate, and disclose all necessary information including accurate, true, and timely financial reports and statements and annual reports;
- Act in the best interests of the company without any conflicts of own interest with that of the company;
- Act in good faith at all times when performing their duties as directors by dealing with sincerity, honesty, and integrity;
- Have the necessary degree of care, skill and diligence when executing their responsibilities and ensuring that they continuously enhance their skills and update their knowledge.

From the already mentioned issues that continuously arise within the SAA, an assumption can be made that none of these codified standards of conduct is being taken seriously by the board of SAA and its shareholder, the South African government.

173 PWC (2015) 8. Also see Rossouw, Van der Watt and Malan 2002 *J of Buss Ethics* 289.

174 PWC (2015) 5.

175 *King Report IV* (2016) 40.

176 PWC (2015) 8. Also see Rossouw, Van der Watt and Malan 2002 *J of Buss Ethics* 289.

177 Havenga “Directors’ Fiduciary Duties under Our Future Company-Law Regime” 1997 *SA Merc LJ* 319. Companies Act ss 75–77 is evidence of the inclusion by the legislator of certain standards and duties to which the directors are bound to perform their tasks. See also GK 468 GG 2004:17 (26493).

178 Havenga 1997 *SA Merc LJ* 310. Also see *Bellairs v Hodnett* 1978 1 SA 1109 (A).

4 RED FLAGS WITHIN STATE-OWNED COMPANIES

The following section identifies red flags that raise concern in South African SOCs. These red flags were identified using the mentioned King IV principles of good governance. Section 76 of the Companies Act will be linked to these identified issues.

King IV places more emphasis on ethics than the Companies Act. Thus it is important to discuss these red flags with reference to the King IV report on good governance, the Companies Act, and common law fiduciary duties of boards of directors. Four specific principles, as found in the King IV, will be addressed together with how they relate to the identified red flags. These are:

- Competence (the lack thereof within the SAA) in the composition of the governing body;
- SAAs' Leadership, together with the boards' apprehensiveness to comply;
- The organisational ethics of the company and the lack of accountability within the SOC.
- Responsible corporate citizenship and the shortcomings thereof found in the SAA.

4.1 Competence (King IV Principle 7)

According to an executive opinion of the World Economic Forum, an inadequately educated workforce is one of the reasons business is slow for South Africa when it comes to investments.¹⁷⁹ This impediment aggravates already inefficient government bureaucracy, policy instability, and corruption.¹⁸⁰

It could be assumed that a competent board of directors should be appointed to govern a company.¹⁸¹ A further assumption is made that where organisations such as SOCs are involved, it is an inherent requirement that competency should be the order of the day as these organisations are directly linked to the monies of its shareholders (in a broad sense), the taxpayers.

An issue directly related to incompetence within our SOCs is the failure to plan. In 2001, Eskom was nominated Power Company of the Year at the Financial Times Global Energy Awards in New York.¹⁸² After that, in October 2007, countrywide blackouts rolled throughout, and an electricity emergency was declared in January 2008.¹⁸³ This downward spiral was directly linked to poor planning. SAA's decline can also be attributed to poor planning.

King IV Principle 7 and the Companies Act set out guidelines relating to the competence of boards of directors. Thus, analysing the issue at hand, it is clear that SAA is in a recovery phase without the prospects of making a profit when considering the already mentioned bailouts. A competent board needs thorough planning to make the airline profitable in the long term. Still, the constant bailouts are detrimental to the sustainability of SAA, as without bailouts, SAA will not be able to operate.

In an interview, SAA's then-CEO stated slow decision-making prevented the airline from effectively implementing its turn-around strategy.¹⁸⁴ Also, according to Jarana, the airline was

179 Isa "Turning Back from the Abyss" *Finweek* 22 June 2017, 27.

180 *Ibid.*

181 This is also codified in s 76 of the Companies Act 71 of 2008.

182 Pillay "Eskom Scoops Top Global Award" *Sunday Independent* 16 December 2001 2.

183 "Eskom had Power to Avert Energy Crisis" *The Star* 2 November 2015, 1; and Beangstrom "Total Blackout Still a Possibility" *Diamond Field Advertiser* 2015, 1.

184 Leitch "Ceo Interview: How Sick is SAA – and what will it Cost to Fix it?" *FIN24* 19 April 2019, 1.

recruiting key individuals from around the world to assist the battered airline.¹⁸⁵ It was assumed that local individuals with the necessary skills and expertise are careful to affiliate with the airline, and the board was looking to recruit competent individuals internationally. What is concerning is that even after years of dysfunction, the airline was still attempting to source individuals with the necessary knowledge and skills to run the airline. Years of incompetence and insufficient skills, and insufficient board qualifications have negatively impacted the running of the airline over the years.¹⁸⁶

4 2 Board Effectiveness and the Apprehensiveness to Comply with General Principles of Good Governance (King IV Principle 1)

Mark Barnes, South African Post Office CEO, found a misuse of funds on a grand scale when he stepped into office in 2016, and exclaimed that this was due to “wasted, irregular, fruitless, fraudulent expenditure and total mismanagement...” in the SOC for over a decade.¹⁸⁷ Today, when examining the airline, SAA is also a victim of such extravagant expenditure.

Over time, boards have had a clear apprehensiveness to comply with those principles and procedures intact to govern them, leading the airline into a downward spiral. As correctly stated by Barnes,¹⁸⁸ SOCs are businesses, and these businesses need to be run profitably. With a board that disregards compliance with basic principles of good governance, this becomes an impossible task. Over the years, numerous governance concerns were raised when the need to strengthen effective corporate governance gained traction in companies in South Africa.¹⁸⁹

King IV Principle 1 deals with board leadership and reads: “The governing body should lead ethically and effectively.”¹⁹⁰ This principle imposes a duty on directors to act ethically, lead effectively, and ensure their obligations are realised properly. This also links to section 76 of the Companies Act dealing with director conduct, particularly the obligation of material disclosures by the directors.

However, when referring to the SAA, the Standing Committee on Public Accounts (SCOPA) pointed out dire circumstances regarding letters of appointment, unsigned contracts, evergreen contracts, and contracts with suppliers, which were automatically renewed when the terms expired.¹⁹¹ They took a dim view of how SAA manages its business.

Thus, the questions beg: Why is the board apprehensive about complying with basic principles of good governance? And, is SAAs’ board still apprehensive about complying with the basic principles of good governance? By prompting these questions, the need for a governing body that leads ethically and effectively is emphasised.

4 3 Lack of Accountability (King IV Principle 2)

It is clear that a lack of transparency and accountability is fatal to an organisation’s long-term growth and value. Two key concepts relating to effective corporate governance concerning management supervision and, most importantly, an effective board, are identified,¹⁹² namely

185 *Ibid.*

186 Thabane and Snyman-van Deventer 2018 *PELJ* 16.

187 De Waal and Pienaar “The Man on a Mission to Save the Post Office” *Finweek* 19 May 2016, 39.

188 *Ibid* 40.

189 Wixley and Everingham *Corporate Governance* 5.

190 *King Report IV* (2016) 40.

191 SABC News “Scopa Live Broadcast” (23-08-2017).

192 Wixley and Everingham *Corporate Governance* 2.

accountability and transparency.

Recently, radical transparency, which relates to accountability, has surfaced, and organisations can no longer hide poor governance and ineffectiveness. Mere compliance with auditing and financial reporting is becoming less sufficient to discharge a company's duty of accountability.¹⁹³ Accountability also includes accounting to a company's vast range of stakeholders and shareholders.¹⁹⁴

Taking into account the link between transparency and accountability, it is of utmost importance that taxpayers should be informed what government officials are doing with taxpayers' money.¹⁹⁵ Without public trust, an organisation is deemed to fail. In cases such as SAA, it is clear that even after failure, there is complete disregard for public monies. In 2017 a concerning statement was made by Musa Zwane, SAA's Acting CEO at that time, on national television to SCOPA. He stated that: "I think if you look at consistency within which disciplinary code is applied across the company (SAA), it is not consistently applied..."¹⁹⁶

It is clear that this inconsistency is the only consistency within SAA.

The only way National Treasury and the board of SAA can even start to seal the leak is by holding those responsible accountable for their actions. Without this accountability, there is no transparency and, in turn, no public or investor trust. The foundation of successful governance is public trust.¹⁹⁷

This lack of accountability was pointed out when, in a visit to South Africa, former mayor of Washington DC, Tony Williams, quietly suggested that: "There could be improved accountability, from the national government down (in South Africa)."¹⁹⁸

Therefore, focusing on King IV Principle 2: "The governing body should govern the ethics of the organisation in a way that supports the establishment of an ethical culture."¹⁹⁹ A link is made to section 76(3)(a) of the Companies Act. This entails a duty to act ethically as a director and, in other words, through the performance of board functions, in good faith and for a proper

193 *King Report IV* (2016) 5.

194 Wixley and Everingham *Corporate Governance* 2.

195 Fabricius "A Mayor, not a Magician" *Finweek* 30 March 2017, 39.

196 SABC News 2017.

197 Fabricius *Finweek* 2017, 40.

198 *Ibid.*

199 *King Report IV* (2016) 40.

purpose.²⁰⁰

4 4 Lack of Corporate Citizenship (King IV Principle 3)

Principle 3 of the King IV Report deals with responsible corporate citizenship. The principle states that: “The governing body should ensure that the organisation is and is seen to be a responsible corporate citizen.”²⁰¹

“Corporate citizenship” entails rights, obligations and responsibilities conferred to an organisation that such entity has toward society and the environment.²⁰² Regarding SOCs, this “corporate citizenship” is scrutinised as taxpayers’ monies are used to run such organisations. It raises concerns when a company, such as SAA, is run in such a manner which is detrimental to state finances, society and investor confidence.

The biggest hurdle faced in South Africa is the lack of investment, and the figures from the Reserve Bank displayed this crisis when it contrasted contracted sharply in 2016.²⁰³ Poor corporate citizenship links to the lack of investment as outsiders fail to trust and respect organisations that disregard these rights and obligations conferred upon them.

SAA is being managed in a fashion which is harmful to state finances. This in itself speaks of poor corporate citizenship.

5 SOUTH AFRICAN AIRWAYS: THE CASE STUDY CONTINUED

SAA, a large SOC in South Africa, employs over ten thousand people and is reported to be the leading airline on the African continent.²⁰⁴ Over the years, this leading airline has faced ongoing criticism, as evident from the media reports referenced in this article. SAA is a vital SOC, the leading carrier serving 25 destination countries across six continents and major destinations within South Africa from its hub, Johannesburg.²⁰⁵ According to FlySAA, it has identified its

200 *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd* 2014 5 SA 179 (WCC) 74: “The principles to be applied in cases where the articles of association of a company confer a discretion on directors with regard to the acceptance of transfers of shares are, for present purposes, free from doubt. They must exercise their discretion bona fide in what they consider — not what a court may consider — to be in the interests of the company, and not for any collateral purpose. They must have regard to those considerations, and those considerations only, which the articles upon their true construction permit them to take into consideration. In construing the relevant provisions in the articles, it is to be borne in mind that one of the normal rights of a shareholder is the right to deal freely with his property and to transfer it to whomsoever he pleases. When it is said, as it has been said more than once, that regard must be had to this last consideration, it means, I apprehend, nothing more than this: that the shareholder has such a *prima facie* right, and that right is not to be cut down by uncertain language or doubtful implications. The right, if it is to be cut down, must be cut down with satisfactory clarity. It certainly does not mean that articles, if appropriately framed, cannot be allowed to cut down the right of transfer to any extent which the articles on the true construction permit ... There is nothing, in my opinion, in principle or in authority to make it impossible to draft such a wide and comprehensive power to directors to refuse to transfer as to enable them to take into account any matter which they conceive to be in the interests of the company ... (T)he question, therefore, is simply whether, on the true construction of the particular article, the directors are limited by anything except their bona fide view as to the interests of the company. In the present case the article is drafted in the widest possible terms, and I decline to read into that clear language any limitation other than a limitation which is implicit by law, that a fiduciary power of this kind must be exercised bona fide in the interests of the company. Subject to that qualification, an article in this form appears to me to give the directors what it says, namely, an absolute and uncontrolled discretion.”

201 *King Report IV* (2016) 40.

202 *King Report IV* (2016) 28.

203 *Isa Finweek* 2017, 12.

204 South African Airways Group (SAA) *Integrated Report for the Year Ended 31 March 2016*, 12.

205 *Ibid.*

mission as follows:

“Delivering commercially sustainable world-class air passenger and aviation services in South Africa, the African continent and to our tourism and trading partners.”²⁰⁶

There is clear that SAA’s standard of performance is not where it should be. All SOCs, including SAA, face massive scrutiny and pressure because they are regarded as strategically important flagships to the country.²⁰⁷ There is a set legislative and regulatory framework for SOCs including SAA. The Public Financial Management Act and the Companies Act are the two specific acts that pertinently relate to SAA’s governance.

According to Treasury, SAA’s Board has been cleaned up, and SAA’s shareholders, the State, approve these appointments and changes.²⁰⁸ According to the Institute of Directors (IOD) in the King IV Report Principle 7 reads: “The governing body should comprise the appropriate balance of knowledge, skills, experience, diversity and independence for it to discharge its governance role and responsibilities objectively and effectively.”²⁰⁹ It is clear that the new board has been diversified and some old branches cut out for the tree to grow but the question remains if this would be the turning point for the failed carrier or whether it could be seen as too little too late. Accountability is a grey area when only time will tell whether former Chairperson, Dudu Myeni, will be held accountable for her gross mismanagement within the airline in the past.²¹⁰ Giants, such as Bell Pottinger and KPMG, have been held accountable for their association with corruption. Still, the former Chair was only asked to leave without further consequences.²¹¹

An overriding concern is whether the newly elected/appointed board will utilise their knowledge, experience, independence and skills to elevate the carrier from its state of “no-confidence” as envisaged and highlighted in Principle 7 of the King IV code.²¹²

The performance of the board can be enhanced by identifying the motivating force behind the director’s efficiency, the size, and the preeminent mix between executive, independent, non-executive, and non-independent non-executive directors so that the subsequent board will feature a variety of viewpoints of considerable formal independence. This strong independence has been denoted by Sharpe²¹³ as “cosmetic independence.” Sharpe²¹⁴ proposes that an additional essential methodology to independence is required wherein the “cosmetic independence” approach be replaced by a “substantive methodology” for selecting directors. The substantive methodology consists of the components of time, information and knowledge required for a board to make well-informed resolutions, which forms the basis of the board’s oversight and monitoring roles. We agree with Sharpe²¹⁵ that the cosmetic independence of corporate boards has an adverse bearing on the decision-making processes and how the board participates in successfully monitoring management since unaffiliated directors will lack the qualities of time, information and understanding to successfully monitor top management and avoid financial

206 SAA (2016) 7.

207 Chilenga *State Owned Enterprises: a Policy Analysis of South African Airways (SAA)* (MsocSc dissertation, University of KwaZulu-Natal, 2016) 40.

208 National Treasury (2017) 1 and Chilenga *State Owned Enterprises* 54.

209 *King Report IV* (2016) 40.

210 The organisation undoing tax abuse (OUTA) and the SAA Pilots’ Association has jointly brought a case against the former chairperson in order to declare her a delinquent director.

211 At the time of writing, trial proceedings against Myeni had not yet commenced.

212 IOD *Practice Notes – Independence of Governing Body Members* (2017) 5.

213 Sharpe “The Cosmetic Independence of Corporate Boards” 2011 *Seattle Univ LR* 1435.

214 Sharpe 2011 *Seattle Univ LR* 1436.

215 *Ibid.*

disaster.

A director's independence is frequently inhibited by the social dynamic and fundamental preconceived notion of board meetings and boardroom norms which confines the director's precarious assessment of the CEO's suggestions.²¹⁶ In addition, a director's independent judgement may be constrained if he feels obligated to support the CEO who nominated his appointment or fears that he will not be reappointed if he voices an opinion contrary to the majority of other board members²¹⁷ or critically assesses the CEO's proposals. Millstein argues that previous corporate governance collapses in the private sector resulted from passive directors who looked the other way while management made poor decisions,²¹⁸ and unfortunately, the same applies to SOCs. Millstein concludes that the key to preventing future corporate governance failures is a fundamental change in corporate leadership. Directors must become vigorous competitors and activists in challenging management decisions and corporate practices.²¹⁹ Again the same should apply in SOCs.

5 1 Suggestions by the National Regulator and SAA

In this section, proposals by SAA's board of directors and the SOC's national regulator will be set out. The national regulator has been changed and juggled over time. For this section, the ensuing discussion will centre around the suggestions these role-players made to improve financial predicaments and issues of poor governance within the SAA. It is important to evaluate these proposals because even though such efforts were made, certain red flags still arose regarding issues of poor governance measured against the already identified principles set out in the King IV report.

The Standing Committee on Public Accounts (SCOPA) held an inquiry, in the form of a live broadcast, regarding the dealings of SAA on 23 August 2017.²²⁰ In this inquiry, SAA made certain suggestions regarding issues raised by the committee, which will be discussed hereunder. Furthermore, National Treasury, in their 2017, 2018 and 2019 budget review, mentioned several suggestions, including the increase of policy certainty and stabilisation measures to be implemented within SOCs, more specifically, in SAA.²²¹ These proposals aimed to restore fiscal confidence and create sustainability.²²²

A summary of these proposals will follow.

5 1 1 Codes, Practices and Policies

First, organisations are directly affected by their board of directors' ethical and business decisions. In this regard, ethics codes have become a widely used tool to deal with morally questionable situations that arise daily within a company. These codes implore company directors to do the ethically correct thing.²²³ However, ethics codes are only as good as their enforcement. Unfortunately, in many instances, there is no enforceability or accountability when boards fail

216 Sharpe 2011 *Seattle Univ LR* 1449.

217 Also known as groupthink which limits the board's independence for monitoring.

218 Millstein *The Activist Director: Lessons from the Boardroom and the Future Corporation* (2017) 3.

219 Millstein *The Activist Director* 87.

220 SABC News 2017.

221 National Treasury (2017) 98 and 121. Also see National Treasury (2018) 1 and (2019).

222 National Treasury (2018) 1.

223 Silverstein "Enron, Ethics and Today's Corporate Values" <http://www.forbes.com/sites/kensilverstein/2013/05/14/enron-ethics-and-todays-corporate-values/> (accessed 30-01-2023).

to adhere.

SAA's board suggested an increase in policy certainty.²²⁴ Although these terms may seem inviting, further investigation needs to follow as to the substance of the statement. Questions to be asked are:

- What does this “policy increase” entail;
- Is there a timeline attached thereto; and
- What are the consequences for the board/employees should such increased policies not be adhered to?

In the 2018 budget review, the following feedback was provided relating to the proposed improved codes, practices and policies mentioned in the 2017 financial budget review,²²⁵ namely R10 billion was provided to the SAA for the SOC to settle the short-term financial obligations of the national carrier; a new CEO of SAA has been appointed;²²⁶ a restructuring officer in SAA has been appointed; private sector participation was (supposedly) being encouraged; and (yet another) turn-around plan has been implemented.²²⁷

The feedback seems promising on paper, but we question the effectiveness thereof. Such ethical codes and increased policy certainty should give employees and even individuals on the board and managerial team confidence to speak up when faced with difficult situations or concerns because they will be able to know that it will not go unheard and they will be acted upon. This can only be the case if such codes and policies are not just a pieces of paper but a document which is respected and lived by in the organisation and its business dealings. Management assisted by the board should be able to handle problems holistically and create an air of legitimacy in the organisation.

To reinforce our concern about ineffective codes, practices and policies, the 2019 budget review mentioned that implemented policies are seen as ineffective.²²⁸ Again, an attempt is made to end such “policy inertia” that hinders investments and tarnishes confidence in SOCs.²²⁹ This attempt by the government includes private-sector partnerships, but no specific plan was mentioned regarding privatising the national carrier.²³⁰

Policy uncertainty in 2017 resulted in major downgrades of the South African economy for the first time in 17 years at that time.²³¹

5 1 2 More Transparent Disclosure of Information

Former US Supreme Court Justice, Louis Brandeis, described the importance of transparency as “sunlight is the best disinfectant”,²³² as quoted by Wong.²³³ The foremost objective of transparency

224 SABC News 2017.

225 National Treasury (2018) 7.

226 The newly appointed CEO at that time had subsequently resigned in June 2019.

227 National Treasury (2018) 7.

228 National Treasury (2019) 1.

229 *Ibid.*

230 *Ibid.*

231 Isa *Finweek* 2017, 12. Also see National Treasury (2018) 3 and 82.

232 Delpont “Offer to the Public: Even More Disharmony” 2005 *SA Merc LJ* 388; Al Shunnaq and Al Azzam 2018 *Journal of L and Poly and Globl* 45.

233 Wong “Uses and Limits of Conventional Corporate Governance Instruments: Analysis and Guidance for Reform (integrated version)” 2009 *Northwestern Univ LR* 2.

is ensuring adequate and unvarying information²³⁴ is timeously divulged to stakeholders and shareholders to make informed investment conclusions. Transparency guarantees equal access to information between management and shareholders, reassures preferred behaviour, and manages potential conflicts of interest among parties.²³⁵

Not surprisingly, the absence of reliable corporate disclosures to outsiders and the lack of external controls, such as shareholder activism, were also highly detrimental to many fallen giants.²³⁶ It is necessary to emphasise the SAA should provide more transparent information to the public and the company's shareholders, as this will boost investor confidence in the airline. To ensure long-term corporate success, the traditional, narrow focus on profit must be extended to include active engagement with the society in which a corporation operates.²³⁷ The SAA and its regulator also believed that more frequent disclosures and effective communications are needed. In many inquiries, the board has promised disclosers but failed to deliver the same.

SAA's Tlali Tlali has replied to an inquiry by ANN7 on leaked reports that: "The board will inform the nation of the outcomes and any action necessary once the outstanding work has been concluded and the final reports tabled."²³⁸

This standard of vague responses seems to be the the norm when asked tough questions. SAA's regulator and SAA's board have built a reputation of being unable to answer questions addressed to them directly.

When the focus is placed on "[e]nhanced accountability and transparency requirements", as found in Chapter 3 of the Companies Act, SAA failed when they admitted on national television that their accounting officer did not fulfil his roles and responsibilities.²³⁹ The proposals in the various budget reviews for more transparency in SOCs are correct, but with the lack of disclosures, the regulation thereof is ineffective.

5 1 3 Cost Containment Measures

The mere promise of increased transparency is not sufficient to improve governance within the SAA. Another measure to improve the state of affairs in the SAA has been made and takes the form of the board taking certain steps to contain the airline's expenses.

In 2017, it was suggested by Treasury and the SAA's board that certain cost-containment measures were previously implemented and are to be supported by the additional steps referred to above.²⁴⁰ It is clear that the measures implemented in the past, and most likely in the future, are ineffective and a futile attempt to convince the taxpayer that there is a viable future for the airline. There is little reason to believe that the new measures which were to be introduced at that time would be any different.

It should be noted that the fact that the airline is in yet another turn-around strategy on paper, does not necessarily prove that it would be successful this time around. It is accepted that mere talk and no planning is the predominant trend leading to another ten years of losses for the national carrier. Simply stating that the airline will implement measures to cut expenses is

234 Corporate performance, sustainability, operational results, financial health, strategy, prospects, and risks.

235 Wong 2009 *Northwestern Univ LR* 3.

236 Du Plessis, Hargovan and Bagaric *Contemporary Corporate Governance* 426. Also see Keasy, Thompson and Wright *Corporate Governance* 98.

237 Wixley and Everingham *Corporate Governance* 2.

238 SABC News 2017.

239 *Ibid.*

240 National Treasury (2017) 98 and SABC News 2017.

vague, and no sufficient evidence is found that it has indeed been employed.

In 2018, the National Treasury created another safety net for SOCs by allocating an emergency fund amounting to R8 billion for 2018/19, R8 billion for 2019/20 and R10 billion for 2020/21.²⁴¹ This begs the question, why would SOCs attempt to properly implement cost containment measures if the government always casts a safety net?

5 1 4 Improved Internal Reporting through Whistleblowing within the SAA

Established whistleblowing measures within a company can have the effect of effective reporting from within, which will, in turn, lead to internal investigations of any governance violations.²⁴² For whistleblowing to occur, a staff member reports bad behaviour or misconduct to outsiders to sanction the transgressors.²⁴³ It has been shown that subordinates who monitor their seniors' actions within an organisation constrain leadership to act in self-interest.²⁴⁴ Furthermore, regarding the Companies Act, employees fall within the parameters of legislative protection.²⁴⁵

SAA also established a “whistleblowing policy” according to their annual report, which was brought forward to enable individuals to curb corruption and prevent fraud. Any effort towards this goal will be seriously considered, including reporting by staff or third parties of wrongdoing using appropriate channels and methods. SAA has established this whistle-blower mechanism at the disposal of those who would like to report corruption and unethical behaviour within the business.²⁴⁶

For a long time, SOCs have continuously found themselves in the media for corruption, maladministration and poor ethical behaviour of individual board members.²⁴⁷ According to the Treasury, the government is implementing an ongoing effort to fight corruption and root effective governance within SOCs and the public sector.²⁴⁸ With SAA's previous board having been replaced and a whistleblowing policy implemented, Treasury believes this will effectively curb corruption within the SOC.²⁴⁹

Additional procedures implemented, according to the 2019 budget review, is the investigation of those individuals accused of corruption or wrongdoing. Mention is again made that a special board or directorate is in the process of being established to probe into and act against corruption within SOCs.²⁵⁰

Furthermore, we found that poor procurement practices, discussed in the following section dealing with red flags within SOCs, directly result from corruption in SOC. These practices have affected the credibility of SOCs, and the culture of anti-competitiveness has further opened the door for corruption within SOCs, according to the 2018 budget review.²⁵¹

241 National Treasury (2018) 4.

242 Eijsbouts “Corporate Codes as Private Co-Regulatory Instruments in Corporate Governance and Responsibility and Their Enforcement” 2017 *Indiana Journal of Global Legal Studies* 203.

243 Chitimira “An Analysis of the General Enforcement Approaches to Combat Market Abuse (Part 2)” 2013 *Obiter* 72.

244 Bird and Park “Organic Corporate Governance” 2018 *Boston College LR* 27 and 55.

245 Companies Act s 159. Also see Katz “Governance under the Companies Act 71 of 2008: Flexibility is the Keyword” 2010 *Acta Juridica* 262.

246 Mkhwanazi “SAA Irritation over PP’s Stance on Whistle Blowers” *Saturday Star* 9 September 2017, 1 and Russel “SAA’s Black Box of Shame” *The Star* 30 June 2017, 1.

247 Manoko “Deal with Rot in SOEs – COSATU” *Afro Voice* 27 June 2018, 5; Commission of Inquiry 14-06-2019 and Khumalo *The Star* 2019, 1.

248 National Treasury (2018) 5; Manoko *Afro Voice* 2018, 5.

249 National Treasury (2018) 5.

250 National Treasury (2019) 1.

251 National Treasury (2018) 6.

5 1 5 The Establishment of Proper Capital Structure within the SAA

According to SAA, the board is refining the financial running of the entire group as a priority.²⁵² In 2017, the airline stated that new and more profitable routes would be established.²⁵³ However, neither the SAA nor its regulator has provided a conclusive or sustainable action plan. Poor planning is prevalent, and the statement that there is a plan to “... stabilise the airline” also does not indicate what it entails.²⁵⁴

In the following year, according to the 2018 budget review, these initiatives by SAA and Treasury were obviously in vain as the review emphasised that capital markets have reduced loans due to the lack of “meaningful” reorganisations in SOCs.²⁵⁵

Again in the 2019 budget review, reorganisation within SOCs was still a theme. The SAA, however, barely featured in the 2018/19 review. In this review, more emphasis was placed on moving towards capital injections from the private sector when it was stated that there is a priority to “[r]enew economic growth by strengthening private-sector investment, improving the planning and implementation of infrastructure projects, and rebuilding state institutions.”²⁵⁶

From this, a viable action plan relating to the SAA is still vague, and we are of the opinion that this is another “pie in the sky” situation where false promises are made. Furthermore, some parties and bodies, such as the African National Congress (ANC) and *Congress of South African Trade Unions (COSATU)* are strongly against privatising these entities and are willing to fight “tooth and nail” to prevent this from realising.²⁵⁷ Others, such as the Democratic Alliance (DA), argue for the full privatisation of the carrier.²⁵⁸ Dodo Mogajane, Treasury’s Director General, also exclaimed that by sharing risk with the private sector, SOCs, such as the SAA, can become financially viable.²⁵⁹

Contrary to those efforts already made, restructuring on a grand scale is required to attract investments from the private sector in South Africa or internationally. All the suggestions made by the SAA’s board of directors and its regulator are needed. However, the implementation of these proposals, in some instances, is unreliable.

5 2 Remarks in Relation to Suggestions by SAA and National Treasury

Companies have for some time been concerned with the effectiveness of the board of directors as well as the improvement of other governance mechanisms in the wake of unexpected collapses and losses for shareholders, such as SAA discussed above. There is a characteristic of unethical behaviour in boards of directors causing this collapse which also features in similar corporate collapses through time.²⁶⁰ The board is central to implementing and formulating corporate governance and is responsible for disclosing information regarding the company’s financials to all stakeholders.²⁶¹

This brings us back to the issue of accountability within state-owned organisations and further begs the question as to whether the State is not again entering into a vicious cycle destined

252 SABC News 2017.

253 National Treasury (2017) 101. Also see FIN24 *Daily Sun* 2018, 2.

254 National Treasury (2017) 101. Also see FIN24 *Witness* 2018, 2; FIN24 *Daily Sun* 2018, 2.

255 National Treasury (2018) 4.

256 National Treasury (2018) 2.

257 Manoko *Afro Voice* 2018, 5.

258 African News Agency *The Citizen* 2018, 4.

259 Ensor *Daily Dispatch* 2018, 2.

260 Corporate collapses such as Enron and World Bank.

261 Keasy, Thompson and Wright *Corporate Governance* 97.

deemed to repeat itself. Despite the valiant efforts discussed, there was, and is predicted to be, little success, especially where vague action plans and a constant repeat of historic turnovers are brought to the table by the SAA Board and Treasury.

Ethics committees have been established in section 42 of the Companies Act within state-owned organisations to monitor governance and policies within these entities. The purpose is clear, but the effectiveness of these committees remains questionable.

6 CONCLUSION

Companies are increasingly seen as vital to societal welfare, and thus, they are expected act with moral integrity and accountability. When we look at the principles of good corporate governance, there is a clear indication of how the ethical expectations that societies have of modern companies have shifted and changed in recent times. It clearly indicates that the SAA as a SOC failed in its mandate as a public entity and does not comply with even the basic principles of good corporate governance.

Ethical behaviour and compliance with codes within a company should be rewarded to establish a healthy corporate culture, and unethical behaviour should be dealt with effectively and seriously. It is unacceptable to ignore problematic issues within a business, and the basis for creating an ethical and just corporate culture is to focus on sustainable and just business values. Therefore, organisations will be sustained by the reputation they build over time and measured in how they handle and communicate with shareholders, employees and the public.

Promoting awareness and understanding of issues among key stakeholders will ensure that the business is innovative and that more responsible leaders come to the fore. Boards, shareholders and employees should not be seen as separate entities but as fellow watchdogs for a sustainable and ethical environment.

The board of directors is expected to act in the public interest, and ethical behaviour is just as important as technical competence. A failure to act ethically leads to a lack of public confidence and greater restrictions through legislation, together with economic pressure.²⁶²

The purpose of ethical codes such as King IV and legislation governing the standards of conduct of directors is to ensure they adhere to corporate governance principles and are essential to ensure a financially viable and successful SOC. However, the Companies Act and King IV are ineffective if mere lip service is paid to these systems and guidelines. The ultimate consequences for South Africa are hard to grasp or even comprehend should accountability be a mere academic term that no board takes seriously.

As the South African government took 100 per cent control of SAA after the failure of the take-over transaction, the board of directors of SAA should take the necessary steps to strengthen good corporate governance within the company to work towards profitability and sustainability. The directors must develop a strategic plan with clear objectives to move SAA towards profitability and sustainability. However, the most important first step is to ensure that the directors have the necessary skills, knowledge, experience, and independence to fulfill their duties. The appointment of all directors including the CEO, COO, and CFO should not be political but business-orientated. The board of directors should be so diverse as to include specialists in business management, aviation, finance, law, risk management, strategies and planning. The specific responsibilities of directors and management must be clearly defined to ensure accountability. In addition to that, directors must take full responsibility for transparency by timely publishing annual reports and financial statements in accordance with international financial standards. Strict financial controls and policies must be developed and implemented.

²⁶² Sagar, Mead and Bampton *Fundamentals of Ethics, Corporate Governance and Business Law* (2008) 118.

External audits in addition to the audit by the Auditor-General will contribute to the restoration of SAA's reputation. In addition, a culture of ethical conduct and compliance should be developed within SAA and ethical behaviour and integrity must be a key component of all decision-making and conduct within the company. All of this will only be possible if the government has the political will to appoint a board of directors that will be able to conduct the business of SAA ethically with sound business decision-making without interference by government.