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1 INTRODUCTION

State-owned enterprises (SOEs) play a critical role in South Africa's economy and are responsible for many essential public services. The state decides on the establishment of SOEs and has overall responsibility for their governance. They are public entities and, although they are 'owned' by the state, this is on behalf of the public. Thus government should be accountable to the public in respect of their functioning. There are a great variety of entities listed in the Schedules to the Public Finance Management Act (PFMA) falling under the umbrella term of SOE.[2] They range from major public entities such as Eskom, to provincial regulatory authorities such as the Liquor Boards and somewhat obscure provincial enterprises such as the Cowslip Investments in KwaZulu-Natal.

However, SOEs, and the enormous debts they have incurred, have become a serious threat to the economy and many of them are failing in the delivery of the services they are mandated to perform. Gumede paints the following, grim picture:

> "The accumulated annual costs of South Africa's dysfunctional SOEs, in terms of jobs losses, deterring investments and reducing economic growth, are now so huge, that they are now a threat to the country's economic sustainability. Without drastic reforms, SOEs debt is likely to force the country to seek a bailout from the World Bank and the International Monetary Fund.
>
> Failing SOEs have a combined debt of close to R2 trillion. Gross debt estimate for the 2018/2019 fiscal year was recently revised by the National Treasury to 55% of GDP pushed upward mostly by corruption, mismanagement and inefficiencies at SOEs, provinces and municipalities. Eskom, the state utility on its own has a debt the equivalent of 8% of South Africa's GDP on its books.
>
> Bailouts and support to the balance sheets of SOEs may break South Africa's fiscal ceiling it has maintained – with increasing difficulty, over the past seven years.

[2] Public Finance Management Act 1 of 1999, Schedule 2 and 3. Schedule 2 lists 21 'Major Public Entities' and Schedule 3 lists a further 177 national public entities.

> Supporting SOEs comes at the heavy cost of cutting expenditures on public services, welfare and infrastructure."[3]

Over the past years, it has become clear that governance failures often lie at the root of the crises in critical SOEs such as Eskom, Prasa and the SABC. Despite the Constitution setting down values and principles governing public administration such as maintaining a high standard of professional ethics, accountability and being development oriented, amongst others, some SOEs have drifted far from these values and principles, and at enormous cost to the tax payer and the economy.[4] Aside from these high level impacts, the failures of many SOEs has had direct and negative impact on the public. Much of the increases in costs of services, delivered by crisis-ridden SOEs such as Eskom, are attributable to these failures. The poor in particular, bear the brunt of breakdowns in services and increased risk to personal safety as a result of failures of SOEs such as Eskom and Prasa. The impact of the collapse of the City of Cape Town's rail commuter system on the City's working class is well documented by #UniteBehind.[5] Furthermore, the 2018 increase in Value Added Tax, with its disproportionally negative effect on the poor, would not have been necessary, if SOEs were not draining the fiscus in the way that they are.

The governing boards of these SOEs should represent a critical layer of accountability and oversight for the SOE performance and administration. They are the all-important link between the public, the state and the SOE. SOE failures must therefore be attributed, in large part, to failed leadership at the board level. There is a widespread and persistent narrative that far too many SOE board members were 'captured', i.e. beholden to represent narrow private interests, whilst serving on these boards. It is clear that there is an urgent need to increase the democratic functioning of SOE boards and to ensure they are effective, transparent and accountable to the public. There are a range of avenues to address this but this paper hones in on the question of board appointments. It brings the criteria and procedure for the appointment of board members, and the mechanisms for and practices of

[3] Gumede 2018.

[4] S 195(1) Constitution.

[5] See https://unitebehind.org.za/wp-content/uploads/metrorail-pamphlet-black-and-white.pdf (accessed 5 December 2019).

transparency and accountability of boards and board members into focus. Who appoints them and according to what criteria?

This paper first examines the legal framework for the appointment and dismissal of board members to state-owned enterprises. Before doing so, it provides a context to the loss of accountability levers associated with the corporatisation of the state by introducing the concept of the Financial Constitution – the constitutional system of checks and balances established to ensure democratic and accountable management of public finances by government. This discussion highlights critical gaps in this system relating to SOEs and underscores the importance of SOE boards, the Executive, and possibly the legislatures in closing that accountability deficit.

Against this backdrop, the paper then proceeds to set out significant features of the legal framework for the appointment and dismissal of board members to state-owned enterprises. The features discussed in this paper are drawn from more in-depth research, namely -

- research into the frameworks for SOE governance undertaken by Wandrag;
- a case study of Prasa, Eskom and the SABC board appointment process undertaken by Wandrag; and
- an application of constitutional principles for accountable democratic governance with regard to SOEs undertaken by Muntingh as component parts of this project. [6]

The paper assesses these key features and makes suggestions for change. For this, it draws on international norms, in particular those formulated by the Organisation for Economic Co-operation and Development (OECD) in its *Guidelines on the Governance of State Owned Enterprises for Southern Africa*.[7] It also makes extensive reference to the report published by the Presidential Review Committee on State-owned Entities, entitled *Growing the Economy – Bridging the Gap*.[8]

Furthermore, where appropriate, the paper makes comparisons with the management of SOEs in Ethiopia. Ethiopia is chosen as a comparator given the fact that, like South Africa, it

[6] See www.dullahomarinstitute.org.za (accessed 10 February 2020).

[7] OECD 2014.

[8] PRC 2013.

emerged from conflict in the early nineties and subsequently embarked on a trajectory of 'state-led development' under a doctrine of 'democratic centralism'. A quarter of a century later, it is safe to say that the country has benefited a great deal more from the performance of its SOEs than South Africa has. Are there lessons for South Africa in Ethiopia's approach to the management of SOE boards?

It is important to note that the inquiry set out in this paper is necessarily limited in its scope and effect. The focus on board appointments misses a myriad of other factors that have contributed to the demise of so many SOEs and perhaps even continue to do so. This paper in no way argues that redesigning board appointments alone will solve South Africa's problems with SOEs. However, it argues that it is an important part of a broader agenda of substantial transformation of the policy and governance framework surrounding SOEs.

2 CONSTITUTIONAL CONTEXT: SOUTH AFRICA'S FINANCIAL CONSTITUTION

2.1 Financial Constitution

In his paper on the Financial Constitution,[9] Steytler provides an illuminating context for State Capture and analyses how State Capture systematically targeted each building block of the 'Financial Constitution'. Further to that, and of particular relevance to this paper, he illustrates how the corporatisation of the state by placing public functions in SOEs, affects the Financial Constitution. We argue that this is a critical context for the examination of the legal framework for the appointment and dismissal of SOE Board members.

So what is the Financial Constitution? It is a concept that sets out how the Constitution and statutes regulate public money, i.e. money that belongs to and must serve the citizens of that country. It involves the constitutional architecture for the state's raising and spending of public money. Much of its origins can be traced back to British constitutionalism as set out by one of the earliest and most influential British scholars of constitutionalism, Dicey.[10] Even though it has undergone significant changes, British constitutionalism undeniably influences many constitutions in Anglophone Africa.

[9] Steytler 2017.

[10] Dicey 1988.

The Financial Constitution is informed by a number of drivers that seek to constrain discretion with public money. First, there is a healthy and inbuilt 'distrust' of the executive, from which flow the checks and balances that seek to balance the discretion of the executive with the need for oversight by, and in some cases, direction from a democratically elected legislature. Secondly, it is informed by a concern with democratic oversight over raising and spending taxpayers' money. Thirdly, a preference for limiting government by insisting on separation of powers, on checks and balances, an enforceable Bill of Rights and on the rule of law. Post-colonial constitutions in Anglophone Africa added a fourth driver, namely the insistence that taxation and public expenditure must serve transformation and developmental goals.[11]

A foundational premise to the notion of financial constitutions, is that all decisions relating to public money (raising revenue through taxes, levies or duties; or spending through national budgets) must be democratic. Thus decisions must be transparent to the public, and in many democracies, also allow for public input. It is legislatures that are mandated to fulfil the critical roles of serving as public forums as well as representing the public. Hence the oversight and accountability-seeking roles ascribed to legislatures in a Financial Constitution are underpinned by their democratic purpose.

In essence, the Financial Constitution is a constitutional architecture that involves the following eleven distinct aspects to constrain the executive's discretion over public money:

1. Democratic Parliaments, as the forum established to represent the public, and not the Executive, authorises the raising of revenue.
2. Borrowing by the state (or subnational components of the state) is generally not permitted without the legislature's authorisation.
3. The Constitution envisages a (semi-)independent agency to collect revenue.
4. Revenue collected by this agency is deposited in a single revenue fund.
5. Parliament authorises withdrawals from that revenue fund through appropriations legislation (i.e. a budget).
6. Independent bodies determine or advise on aspects of expenditure.
7. A Controller of the Budget ensures that expenditure complies with the budget.

[11] Steytler 2017, 18 ff.

8. There is constitutional recognition of a National Treasury, as a line ministry with elevated status.
9. Parliament exercises oversight over the spending of the appropriated funds by the Executive.
10. There is an Auditor-General who reviews financial statements and transactions *ex post facto*.
11. There is constitutional recognition of an independent central bank that is tasked with maintaining currency value.

2.2 South Africa's Financial Constitution

South Africa's Constitution bears almost all of the above hallmarks.

First, Parliament is established at the centre of South Africa's vision of government 'by the people under the Constitution'.[12] It has the responsibility to represent the public, to provide a national forum for public consideration of issues within its functions of law making and scrutiny of the executive. Parliament is also required to conduct its business in an open manner and to facilitate public involvement in law making and its other functions.[13] Thus in South Africa, Parliament passes legislation authorising taxation, a principle applicable also to provincial and municipal levels. So, in principle, only the legislatures may make decisions about taxation.[14] This is in line with the abovementioned feature of the Financial Constitution.

Secondly, government may not borrow freely. Loans, guarantees and other future financial commitments incurred by public institutions are subject to strict requirements set out in Chapter Eight of the PFMA.

Thirdly, and also in line with the Financial Constitution, the semi-independent South African Revenue Services collects revenue which is deposited into the National Revenue Fund.[15]

[12] The Constitution of the Republic of South Africa. Act 108 of 1996, Section 42(3).

[13] The Constitution of the Republic of South Africa. Act 108 of 1996, Section 59(1).

[14] In practice, South Africa's legislatures have a strong documented track record of 'rubber stamping' proposals from the Executive (the Treasury).

[15] S 213(1) Constitution.

Fourthly, Parliament passes an annual budget, and fifthly, this budget authorises public expenditure by the national executive according to a set plan, including transfers to provinces and municipalities.[16] The 2009 Money Bills Amendment Act, is notable, in that it gives Parliament powers to influence and amend budgets presented by the executive and mandates public participation in these processes – powers that have to date, been underutilised.[17]

Sixth, the Constitution establishes bodies to advise and check on executive organs of state with the Public Protector and the Financial and Fiscal Commission as key examples.[18]

The seventh hallmark, namely the Controller of the Budget, is absent from South Africa's constitutional architecture on public finance. This function has been absorbed by the National Treasury.

The eighth hallmark is present again because the Constitution itself recognises the National Treasury as the custodian of public finance standards.[19]

The ninth hallmark is also present as Parliament is tasked with exercising oversight over the national executive's expenditure.[20] The oversight is matched by real power. If Parliament loses confidence in the national executive, it may pass a motion of no confidence and remove the President from office. In addition, the 2009 Money Bills Amendment Act gives parliament powers to make budgetary recommendations to the executive based on its oversight on financial performance.[21]

[16] Ss 77(1-2), 120(1-2) and 213(2) Constitution.

[17] The Money Bills Amendment Procedure and Related Matters Act, Act 9 of 2009.

[18] Ss 182, 220, 214(2) Constitution.

[19] S 216 Constitution.

[20] S 42(3) Constitution.

[21] S 5(2) Act 9 of 2009. Critics consider these provisions to be too onerous in the first place, and, linked to low capacities within legislatures, to have had little impact on budgets tabled by the executive. Pauw J (2011) *Will the Money Bills Amendment Act enhance the Power of the Purse in South Africa*? and Muller S (2019) *Fiscal oversight by Parliament and Provincial Legislatures.*

The tenth hallmark is present because the independent Auditor-General is mandated in the Constitution to audit and report on public expenditure.[22]

Finally, the eleventh hallmark is present as the Constitution charges the independent Reserve Bank with protecting the value of the Rand.[23]

All in all, it is clear that, by insisting on the abovementioned architecture of public finance, the South African Constitution closely follows the Financial Constitution model. It constrains the discretion of the executive in dealing with public finances and provides mechanisms for democratic oversight over these.

2.3 Whether the Financial Constitution applies to SOEs

There are two reasons why the above exposition of the Financial Constitution is relevant to SOEs in South Africa. First, it exposes the methodical nature of the attack by the State Capture project. Steytler argues that the State Capture project methodically targeted key components of the Financial Constitution.[24] The alleged efforts of the Gupta family to establish influence over the South African Revenue Services, the Public Protector, the National Treasury and even the Reserve Bank are well documented. In addition, the pivotal role of Parliament as the appropriations and oversight body relating to public finances is more limited with regard to SOEs than it is for national departments, and it was severely compromised by a ruling party determined to protect the President.

However, the main reason why it is relevant is this: it prompts a realisation that for SOEs, the rules are different. This is because the corporatisation of the state deliberately creates critical exceptions to this constitutional architecture. We argue that in at least five respects, the Financial Constitution does not apply to SOEs, much of the carefully constructed checks and balances, that seek to constrain executive discretion with regard to public finance, don't apply to SOEs. We suggest that this is critical as a background to the recent capture of these SOEs for nefarious interests and to the formulation of proposals to address this. It is therefore important to examine the five ways in which SOEs depart from the Financial Constitution.

[22] S 188 Constitution.

[23] S 223 Constitution.

[24] Steytler 2017, 23ff.

First, many SOEs raise revenue directly from citizens without using a tax collection agency as an interface. Eskom, Prasa, the SABC and many other SOEs are empowered to charge and collect user fees, albeit often within the constraints determined by the regulatory body determining the rates, such as the National Energy Regulator of South Africa. While the SOEs often don't depend exclusively on these fees, there is no doubt that this revenue plays a key part in their functioning. This is a departure from the third feature of the Financial Constitution.

Secondly, in a further departure from that same aspect of the Financial Constitution, the revenue collected by SOEs is not deposited into the National Revenue Fund but in the SOEs own bank account(s).

Thirdly, departing from the second feature of the Financial Constitution, in many instances, SOEs may borrow without the direct involvement of Parliament.

Fourthly, an SOE's expenditure plan is not approved by Parliament but by its Board. It is thus the company and not Parliament that authorises withdrawals from those bank accounts. In other words, the fourth feature of the Financial Constitution (Parliamentary approval of the budget), mentioned above, does not apply.

Fifthly, Parliament does not directly oversee the legality and appropriateness of spending by an SOE: the SOE board and the relevant Minister do that. Ministers are required to report to Parliament on the performance of the SOEs that fall within their mandate, this reporting is generally provided to Parliament along with the reporting on all of the relevant department's mandates – thus receiving inadequate attention; it is also generally of the 'broad brush strokes' variety lacking in any real detail. While Parliament may summon the representatives of SOEs to appear before it and demand reports, there is no final 'remedy' for Parliament to dismiss SOE leadership. This is an important departure from the ninth hallmark of the Financial Constitution.

These critical exceptions to the Financial Constitution are not unintentional. The rationale for this design is to enable the SOE to operate according to business principles on the belief that this results in greater efficiency, be sufficiently insulated from political interference, and have clarity of purpose. However, it is clear that in South Africa, the framework failed on both counts. If the most troubled SOEs, such as SAA, Eskom, Prasa and the SABC were to be judged

according to business principles, they would most likely be candidates for business rescue.[25] Furthermore, the framework clearly did not succeed in keeping political interference at bay, judging from the testimony heard by the Zondo Commission with extensive details of large-scale political interference in the operations of SOEs. Therefore, despite the rationality of its intentions, the deliberate interruption of the accountability framework of the Financial Constitution has not worked. These exceptions result in a critical design flaw in the architecture relating to SOEs, the mechanisms for transparency and public involvement that are provided by the legislatures are weakened and in practice largely non-existent.

The above exposition of South Africa's Financial Constitution, how it was systematically attacked by agents of State Capture, and how SOEs avoid its rigour, make it all the more important to carefully consider how to apply some of the missing protective democratic elements of the Financial Constitution to the governance of SOEs, and specific to the narrower scope of this paper, to consider this in relation to how SOE board members are appointed and dismissed. Remembering that the Financial Constitution is driven by the need to constrain discretion in handling public money and that at least five key aspects of it do not apply to SOEs, the question arises: who then fills that accountability deficit? How is the public interest in the functioning of SOEs safeguarded? It is because SOEs are not subject to the same intensity of transparency or democratic oversight as a government department is, and because SOEs are supposed to operate on 'business principles' that great reliance is placed on the boards to ensure good corporate governance.

This is where the paper arrives at the critical role of the boards of SOEs and the question as to how members of these boards are appointed and dismissed. If these SOE Boards must fill the accountability deficit, caused by SOEs escaping much of the Financial Constitution, there is a clear public interest in who sits on these boards and how they are appointed. The next part of the paper turns to what the law provides on this, i.e. the legal framework for the appointment and dismissal of SOE board members.

[25] See also Wandrag 2018, 37.

3 LEGAL FRAMEWORK FOR THE APPOINTMENT AND DISMISSAL OF BOARD MEMBERS

3.1 Introduction

The legal framework will be discussed by focusing on four key areas. The first question is: how does the law deal with the question as to who appoints SOE board members? Given that the state is sole or majority shareholder, how does that power translate to the appointment of SOE boards and how is the public interest secured? Secondly, how are the all-important executives of SOEs appointed and how does this compare with good corporate governance practices? Thirdly, what is the trend in the law with respect to formulating criteria for appointment and/or rules with respect to eligibility? Fourthly, what does the law provide with respect to the power to dismiss executives?

As will be set out below, these issues are regulated in a complex web of overlapping and, at times contradictory laws. In her two papers, comprehensively outlining the legal framework for the appointment and dismissal of board members, Wandrag sets out these complexities.[26]

With respect to most SOEs, there are three different legal frameworks that must be considered. The first is the Public Finance Management Act.[27] The PFMA is always applicable to an SOE, given that it lists them as public entities. The second is the Companies Act.[28] This Act is not always applicable. It applies only to those SOEs that are registered as companies which is not all of them. Prasa, for example, is not registered as a company. When an SOE is registered as a company in terms of the Companies Act that Act will apply. The third framework to consider is the specific law establishing the SOE, referred to here as the 'founding legislation'.

In addition to these laws, there are various 'soft law' instruments, i.e. protocols and guidelines that are (usually) not binding but are (supposed to be) influential. Examples are the King III and King IV principles,[29] the Protocol on Corporate Governance in the Public Sector[30] and the

[26] Wandrag 2018; Wandrag 2019.

[27] Act 1 of 1999 (PFMA).

[28] Act 71 of 1998.

[29] King 2009; King 2016.

[30] Department of Public Enterprises, 2003.

Handbook for the Appointment of Persons to Boards of State and State-Controlled Institutions. What follows is an overview of the key trends in how these legal and 'soft law' instruments treat the four questions above.

3.2 Who appoints SOE board members?

In dealing with the question as to who has the authority to appoint board members, the law presents a convoluted picture. The key tenets are as follows:

- The PFMA, which (as indicated above) is always applicable to an SOE, does not provide any detail on the appointment of board members. It includes the power to appoint board members within its definition of "ownership control".[31] In SOEs, "ownership control" is exercised by the national government, through the relevant Minister (and by the provincial MEC in provinces). The PFMA therefore implicitly locates the power to appoint board members in the relevant Minister. However, it does not provide any procedures or standards for the appointment or dismissal of SOE Board members.
- The Companies Act, applying to all SOEs that are registered as companies, provides that their directors are elected at the company's Annual General Meeting (AGM). With the state usually being the sole shareholder in state-owned companies, the effect is that the person who exercises the powers of the shareholder, i.e. the relevant Minister, will appoint the directors. There is no role defined for the public as 'stakeholders' in the Companies Act as this would not apply in the private sector context. The company's Memorandum of Incorporation (MoI) or Articles of Association (the document that sets out the rights, duties and responsibilities of shareholders, directors and others within a company) may provide for another procedure, however.
- The founding law, i.e. the law that establishes and further regulates the SOE, sometimes does, and sometimes does not regulate board appointments. For example, the Broadcasting Act deals with the appointment of non-executive SABC board members.[32] However, the legislation establishing Eskom and Prasa is silent on the appointment of board members.

[31] S 1 "ownership control" PFMA.

[32] Act 4 of 1999.

In summary, the law is unclear and contradictory. What is clear, however, is that the law most often leans towards vesting the power to appoint board members in the relevant Minister. Furthermore, it often does so without insisting on any substantive or procedural requirements to guide the Minister's decision making (see further below at para 3.5).

3.3 Who appoints executives?

In addition to the question as to who appoints board members, there is the question as to who appoints executive board members, such as the entity's Chief Executive Officer (CEO) and the Chief Financial Officer (CFO). This is a critical power and the law must be clear on *who* has the power to appoint executives and *how* this power is circumscribed.

The PRC's conclusion that "the appointment of CEOs of almost all SOEs has to be approved by the executive authority" suggests a near-uniform position on who has the power to appoint executives, namely the relevant Minister.[33] While this may certainly represent political practice, there is considerable uncertainty in the law. The legal wrangling over the appointment of the CEO of the SABC, the debacle with the appointment and subsequent removal of the CEO of Eskom and the myriads of CEOs and interim CEOs that have been appointed to Prasa, bear testimony to this.[34] In all these cases, the damage inflicted upon users, commuters, the public at large and the fiscus, has been immense. It is suggested here that the law presents a mixed picture as to who appoints executives:

- The PFMA, being the Act that is always applicable, does not contain any details. However, the PFMA includes the power to appoint the executive head under the definition of "ownership control", which is exercised by the National Executive, through the relevant Minister. So in terms of the PFMA, it is the Minister's responsibility.[35]
- The Companies Act (applicable to most, but not all SOEs) puts forward a different approach. It considers the power to appoint the executives as part of the running of the business. So in terms of the Companies Act, it is the Board (and not the Minister) who

[33] PRC 2013, 110.

[34] See also Wandrag 2019.

[35] PRC 2013, 110.

appoints the CEO. It is not entirely clear whether this may be changed by the company's MoI but it can be argued that the MOI may not contradict the Act.

- The founding law sometimes does, but very often does not, regulate who appoints executives. For example, in regulating the SABC, the Broadcasting Act regulates the appointment of non-executive board members but not the appointment of executive board members. However, with respect to the SABC, the Court has determined that executives are appointed by the SABC Board and not by the Minister.[36] The Eskom Conversion Act again, does not regulate the appointment of executives, arguably leaving it entirely to the Minister. Finally, the legislation governing Prasa gives the Board the authority to make a recommendation to the Minister of Transport who then makes the final decision.
- The applicable 'soft law' is also contradictory. The Protocol on Corporate Governance in the Public Sector suggests that the decision be taken by the Board "in concurrence with the Minister". In other words, the Minister may veto the Board's decision. King IV suggests that the Board be involved "to the greatest extent possible". Whilst leaving it open, it seems to favour the least possible involvement by the Minister.

In summary, when it comes to the appointment of board executives, the law is also unclear and contradictory. For example, the PFMA contradicts the Companies Act in this respect.

3.4 Who dismisses executives?

In what is now becoming a familiar refrain, the question as to who dismisses a state-owned entity's executives (such as the CEO and the CFO) is also not clearly regulated and often implied if not assumed.

- As far as the PFMA is concerned, the power to remove an executive would again fall under the definition of "ownership control". This means that the relevant Minister exercises that power.
- The Companies Act provides that it is the majority shareholder that may dismiss any director, including the CEO. In practice, this also means that government, through the Minister, dismisses executives. The Act does insist on prior notice and an opportunity for

[36] See Wandrag 2019, 28.

an embattled executive to state his or her case. In a private company, the board as well as the shareholders act as layers of accountability and quality assurance for good governance. These roles are not separated in the case of SOE, creating a critical flaw undermining good governance.

- The founding law sometimes does, but very often does not, regulate who dismisses executives. For example, the Armaments Corporation of South Africa Limited Act 51 of 2003, founding law for Armscor, provides that the Minister dismisses board members. Despite the specific rules in the founding legislation, the courts have insisted on procedural fairness, often borrowing from the above provisions in the Companies Act. The Broadcasting Act is an exception in that it provides that the National Assembly dismisses directors.
- King IV suggests that not the shareholder, but the Board should have the power to remove executives. It thus goes against the grain of the PFMA and the Companies Act, both of which point towards the relevant Minister exercising that power.

The overall picture here is that the various legal frameworks point towards the relevant Minister dismissing executives. In doing so, it creates a framework in terms of which SOE executives are beholden to the Minister as opposed to being accountable to the Board. This is at odds with corporate governance principles as espoused by King IV.[37]

3.5 Criteria and eligibility

With respect to the criteria for appointment to an SOE Board and the rules for eligibility, the law is again fragmented with some elements being regulated but others not. There seems to be no consistent approach to this issue across the SOEs. The same applies to the factors that disqualify an individual from appointment.

The PFMA contains no provisions dealing with criteria or eligibility for SOE Board membership. The Companies Act also does not provide any criteria for appointment to an SOE Board. This is unsurprising, given the Act's generic focus on for-profit companies. However, the Act does stipulate who is disqualified from being a board member. In the main, these disqualifications concern unrehabilitated insolvents, persons removed from an office of trust for dishonest

[37] See Wandrag 2018, 30.

misconduct, persons convicted of financial crimes relating to company management and persons declared delinquent by a court.[38] This represents an important, but also narrow (namely focused on past financial conduct) window of exclusion of problematic SOE board members. The focus on exclusionary variables have the effect of setting a very low bar for what can rightly be regarded as very influential positions that, as is currently the case, have vast implications for the financial health of the state and the country. The setting of a low bar for inclusion has already shown to be problematic in the appointment of the NDPP.

The founding legislation again presents a fragmented approach. The PRC commented, in general, that "[s]ome legislation contained limited specifications on the required qualifications of board members".[39] A few examples underscore the fragmented and limited approach. The legislation governing Prasa provides that certain sectors must be represented and includes only one substantive criterion for appointment of further members, namely "expertise and experience in the management of a private sector enterprise".[40] When it comes to Eskom, the founding legislation is also silent on the criteria. Eskom's MOI is strategically circumspect on it. It provides that age, independence, skills as well as racial and gender diversity "must be considered".[41] These are generically formulated criteria and do not speak to the specific requirements that apply to the business of Eskom. Furthermore, they are not requirements that must be met but aspects that must be considered. With this, the MOI (see above in para 3.2) suggests that "independence" and "skills" are not requirements for appointment to the Board of Eskom. They are merely aspects to be considered and can thus be overridden by other considerations. In effect, this opens the door for cherry picking.

With respect to the SABC, the law is much clearer. The legislation insists that Board members are suitable for appointment, based on a range of criteria, linked to the mandate of the SABC. It also demands a commitment to the rights and values, associated with that mandate and provides that the Board must represent a cross-section of South Africa.[42]

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[38] For greater detail, see Wandrag 2019, 10.

[39] PRC 103, 107.

[40] Wandrag 2019, 14.

[41] Wandrag 2019, 19.

[42] Wandrag 2019, 23-24.

Analysists persuasively argue that the appointment of political cronies over people with appropriate technical expertise is a strong contributing factor behind the weak performance of many SOEs that has put South Africa at the edge of the 'Fiscal Cliff'.[43] The paltry provisions in the legal frameworks enable this. To effect any 'turnaround' in failing SOEs it is essential that technical expertise be at the forefront of appointments decisions; legal frameworks must provide a stronger obligation to ensure this.

3.6 Other matters

The legal framework for board appointments is important not only for the issues addressed in the paragraphs above. There are a range of other matters in the legal framework that impact the health of the board governance. In this respect, the PRC sets out how the various laws and guiding instruments contain different and often contradictory rules on critical issues such as –

- the nature of the vetting process (e.g. whether a security, police clearance or credit check is needed);
- whether or not government officials may be members of SOE boards;
- the terms of office of boards and board members;
- the size of boards;
- representation, including skills, race, gender, industry background and ideological and political affiliation; and
- multiple board memberships.[44]

In addition, the PRC points out different approaches with respect to issues such as the delineation of roles between the Minister and the department, consultation with the board before and during recruitment, and whether or not the recruitment is preceded by an evaluation of needed competencies.[45]

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[43] 'How to protect against state capture in the future? A Civil Society Consultation on SOE Board and Executive appointments'. Held on 18 November 2019. Dullah Omar Institute. One example provided was the lack of aviation expertise among SAA board members.

[44] PRC 2013, 104.

[45] PRC 2013, 104.

Furthermore, we will argue that, in the context of SOEs escaping much of the Financial Constitution, it is problematic that the legal framework does not provide for any transparency or public input.[46]

3.7 How are conflicts resolved?

It can be argued that having multiple laws applicable to the appointment of SOE Board members is not an insurmountable problem. While having conflicting laws is not ideal, the law can be quite capable of offering clear rules for resolving conflicts between laws. These conflicts do not have to result in legal uncertainty as long as the 'supremacy' clauses, i.e. rules that determine which law prevails in case of conflict, are clear and consistently applied. In the case of the appointment and dismissal of board members to SOEs, however, the rules are neither clear nor consistently applied.

The PFMA and the Companies Act seem to be clear about which among the two of them prevails: if there is conflict between the PFMA and the Companies Act, the PFMA prevails. If there is conflict between the Companies Act and the founding legislation, the Companies Act prevails. However, Wandrag points out that the courts have at times found otherwise and held that the founding law prevails over the Companies Act.[47] The courts seem to favour an approach whereby the specifics of the founding legislation prevail over the generally applicable provisions of the Companies Act. In sum, the rules and practice for resolving conflicts between the three applicable frameworks do little to settle the uncertainty with respect to the appointment.

4 OBSERVATIONS

Drawing on the above overview of the legal framework for the appointment and dismissal of board members, we make a number of observations.

4.1 The legal framework is fragmented

The OECD Guidelines recommend that governments "simplify, streamline and harmonise" the legal form of state-owned entities because "[d]ifferent legal forms can be a source of

[46] See para 4.5 below.

[47] Wandrag 2019, 26.

confusion and lead to a loss of transparency".[48] We have argued that the legal framework for the appointment of board members of SOEs is fraught with overlap and contradiction. The PRC concludes that the legal framework for board appointments is "disparate and inconsistent" and proposes overarching legislation.[49] However, despite the OECD guideline and despite the PRC recommendation, and given the exposure of corruption and capture over many years preceding the writing of this article, the South African government has still not heeded the OECD's warning and taken steps to address these contradictions

The fragmented nature of the legal framework for board appointments is not just a legal problem. As the PRC notes, this "opens the space for political and self-interested meddling in the appointment and recruitment of boards and executives".[50] At the very least, the legal uncertainty that resulted from this has worked against good governance at SOEs. The protracted court battles with respect to appointments and dismissals at the SABC and other SOEs bear testimony to this.

The experience in Ethiopia, a country that has benefited from the contribution made by its SOEs, offers some useful guidance here. One of the most important differences between the two countries' approaches to SOEs is that, unlike South Africa, Ethiopia has a single dedicated legal regime for SOEs. It exists in the form of a Public Enterprise Proclamation.[51] However, like in South Africa, there is still some fragmentation because not all SOEs in Ethiopia fall under this Proclamation. There is a considerable number of SOEs that are governed by the Commercial Code, i.e. regular company regulations.

We need two further issues to be placed on the agenda, being (1) the development of cross cutting minimum standards and (2) a review of Schedules 2 and 3 of the PFMA.

4.2 The silent complicity of the PFMA

The second observation is that the PFMA appears to be a significant part of the problem. This Act is generally regarded as a rigorous framework for the responsible handling of public

[48] OECD 2014, 6-7.

[49] PRC 2013, 100.

[50] PRC 2013, 102.

[51] Public Enterprise Proclamation No. 25/1992 (Public Enterprise Proclamation).

finances. However, its treatment of the appointment and dismissals of board members to SOEs is deeply problematic. The PFMA is silent on who appoints board members and what the procedure is. However, its definition of "ownership control" includes it as part of the Minister's power. Implicitly, the appointment of board members thus becomes a power exercised by the Minister without any procedural rigour or transparency and subject to no specific criteria. Given that the PFMA trumps the Companies Act, this is particularly problematic.[52] We suggest that this legal vacuum has set the scene for many sinister appointments. The relevant incumbents then proceeded to use their positions for private gain with disastrous consequences for the public service that was supposed to be rendered by the SOE. Furthermore, public trust in these institutions has been seriously damaged and the road to regain that trust will be long for SOEs such as Eskom, Prasa and the SABC.

In this scenario, a particular risk arises, namely that some board members enjoy a special relationship with the Minister. It can hardly ever be said that an entire board is beholden to the Minister because the power relations are too diffused. However, there is the practice of Ministers ensuring the appointment of one or two 'friendly' board members. The OECD Guidelines warn against this when they state that the government "has the power to communicate the government's expectations to individual SOEs, but it should do so (…) as part of an engagement with the entire board rather than bilaterally vis-à-vis individual directors or company managers".[53]

4.3 Company rules for boards are not suitable for state-owned companies

The Companies Act seems ill-designed for the specific nature of a state-owned company. Targeted at companies, it assumes that shareholders will vote at an AGM to elect a board. Given that the state, represented by the Minister, is majority or sole shareholder in all SOEs, it also therefore starts off by effectively locating the power to appoint board members with the relevant Minister as this is the only person who has a vote. The public are absent.

It follows from the Companies Act that the Board, not the Minister, appoints executives. The company's MoI may then provide for more specific rules and procedures. However, the

[52] If the specific founding legislation contains provisions on the appointment of board members, these would apply. However, oftentimes, the founding legislation does not.

[53] OECD 2014, 15.

Minister can exercise significant control over the content of these MoIs. The litigation surrounding the MOI of the SABC revealed that one Minister sought to use the MOI to cement her power to appoint the CEO, contrary to the founding legislation. MoIs are also difficult to access. This is underscored by the SABC judgment where even the Court seemed to have been confused about the status of the most recent MoI.[54] Lastly, MoIs may seek to contradict legislation (such as is the case with SABC) yet do not have the same authority as legislation.

4.4 Government wants to control the appointment of executives

Fourthly, there is considerable pressure from within government for Ministers to play a direct role in the appointment and dismissal of executives. It appears that a scheme by which the Board would recruit and decide, subject to consultation with the Minister, would not satisfy the government's desire to be involved. The PRC noted that its research revealed "strong views in Government that the shareholder Minister should appoint the CEO".[55] It suggested a middle road by recommending that the Board would recruit candidates and then make recommendations to the Minister who would decide in concurrence with Cabinet.[56]

However, the OECD is unequivocal in its Guidelines about who appoints the CEO: "The board of directors should have the power to appoint and remove senior management. This may involve a process of dialogue with government, but the ultimate responsibility must reside with the board".[57] It considers the appointment and removal of the CEO as a key role for an SOE board because, so the Guidelines argue, "[i]f CEOs feel that they "owe their jobs" to the executive powers in government or the ownership function then it is virtually impossible for SOE boards to exercise their monitoring function and assume full responsibility for corporate performance".[58]

4.5 The protocols and codes have not worked

[54] Wandrag 2019, 26.

[55] PRC 2013, 110.

[56] PRC 2013, 110.

[57] OECD 2014, 28.

[58] OECD 2014, 30.

The emergence of a raft of 'soft law' instruments, such as the 2003 Protocol on Corporate Governance in the Public Sector, King III and King IV and the 2008 Handbook for the Appointment of Persons to Boards of State and State-Controlled Institutions, has not assisted much to clarify the question as who appoints board members and how this is to be done. It has also not improved transparency and public involvement surrounding these appointments in any way. The Protocol is dated and internally inconsistent. For example, it advocates for SOE boards to have "full and effective control" while also holding on to the Minister's power to appoint both the board and the CEO. Furthermore, King III and King IV do not address the issue with sufficient precision and are in any event not compulsory except for listed companies.[59] The Handbook for the Appointment of Persons to Boards of State and State-Controlled Institutions is widely ignored, according to the PRC.[60] For example, after setting out the Handbook's principles of merit, transparency, representation, consistency and probity, the PRC demurs that "most of the SOEs that the PRC interviewed have never heard of these principles".[61]

In its recommendations for a framework for board appointments, the PRC argues for a new "Handbook on Board Appointments".[62] However, would a handbook go far enough, given the fact that similar 'soft law' instruments seem to have had little effect in the past? All in all, it is submitted that the past failures of the soft law instrument point towards the need for a legislative framework instead of intensifying efforts to redraft or apply soft law.[63]

4.6. The law does not require transparency or public input

The public is the primary stakeholder in SOEs, and the Minister acts as the 'custodian' of public interests. It is also safe to say, by and large, that SOEs are funded by public money. Furthermore, many SOEs provide essential services, required by the Constitution and law, on behalf of government, and in service to the public. Given that SOEs escape the 'usual' scrutiny of the Financial Constitution, it is therefore startling that the law does not require any

[59] PRC 2013, 102.

[60] PRC 2013, 101.

[61] PRC 2013, 107.

[62] PRC 2013, 111.

[63] Wandrag 2018, 37.

transparency and/or public engagement in the appointment of SOE board members. The PFMA, Companies Act, and the founding legislation for most SOEs,[64] as discussed above, do not contain any legal requirement to follow a transparent procedure and/or seek public input on the appointments of SOE board members or CEOs.

Even the transparency that is required in the various protocols and handbooks (and subsequently widely ignored, so the PRC found) does not extend far beyond advertising the vacancy and gazetting the appointment. The PRC, for example, comes to the disquieting conclusion that "[i]n most cases candidates are recommended to Cabinet for approval without being interviewed". In most cases, appointments are made, "based on the Curriculum Vitae and any other knowledge of the candidate the department or Minister happens to have".[65]

Therefore, these critical appointments are made behind closed doors, away from public scrutiny. While we have learnt that legal requirements for transparency and public participation, through the legislatures, in critical processes such as the appointment of the public protector, members of the Judicial Services Commission, or the SABC board amongst others, does not on its own protect against the exercise of negative political or private interests in those appointments; it is safe to say that the constitutional requirements for this provide some measure in this regard as well as increasing the potential for exposing foul play.

Parliament and the legislatures are the central (but not the only) site established by the Constitution for governance that is 'based on the will of the people'. The Constitutional Court has described the critical role of Parliament thus:

> *"Similarly, the National Assembly, and by extension Parliament … is the voice of all South Africans, especially the poor, the voiceless and the least-remembered. "It is the watchdog of State resources, the enforcer of fiscal discipline and cost-effectiveness for the common good of all our people. … In sum, Parliament is the mouthpiece, the eyes*

[64] The founding legislation of Prasa and Eskom for example, are silent on these issues, however the Broadcasting Act does include a role for Parliament, and the requirement that the public participation nominations processes, that they be transparent and open, and that the shortlist of candidates be published, (Broadcasting Act no. 4 of 1999 Section 13).

[65] PRC 2013, 107.

and the service-delivery-ensuring machinery of the people. No doubt, it is an irreplaceable feature of good governance in South Africa."[66]

In other matters too, the Court has made strong statements regarding Parliament's critical role to exercise oversight over public resources, stressing the point that public resources belong to 'the people' and that Parliament must exercise its oversight over this 'at the beck and call of the people'.[67]

SOEs are mandated to manage critical public resources, and when they fail have profound impact on public finances, yet only enjoy minimal Parliamentary oversight. The logic behind giving legislatures a lesser role in the governance of SOEs is partly due to the intention to stabilise and protect these important sites of service delivery from party politicking, shifting political whims, and undue political influence. The structure as it is, ensures that SOEs should be guided by government strategy through the influence of the Minister, but that this can be executed, independently, by people with the necessary expertise and know-how in business and related to the specific service delivered by that SOE. Evidence emerging from the Zondo Commission of Inquiry into State Capture indicates that this measure has not been sufficient to provide that protection. The consequence of the lesser role to Parliament regarding SOE governance, is that the constitutional mandates that some SOEs are responsible for delivering under the guidance of the Minister do not have the same mechanisms for openness and public transparency or the potential for public involvement, as is the case with those services that are delivered directly by government departments.[68] This applies both to oversight in general and to appointments.

If the logic is maintained that Parliament should not be given a greater role in the appointment of SOE board members in order to preserve the (thus far failed attempt at) protection from political influence, then the question remains: how to increase transparency to and participation of the public in these processes? We cannot remove from the equation

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[66] *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others [2016] ZACC* 11 Para 22.

[67] *United Democratic Movement v Speaker of the National Assembly and Others* [2017] ZACC 21 Paras 7 and 29.

[68] It is worth reminding ourselves that the Constitution requires that the legislatures involve the public not only in their law making functions, but also in their 'other processes' i.e. their oversight and accountability functions. Constitution of the Republic of South Africa. Act 108 of 1996, S59(1)(a).

that these boards have significant power to make decisions that critically affect the lives of the public and have cost the public so much through bailouts and failed services thus far.

The National Energy Regulator Act (No 40 of 2004), while not including provisions for transparency and public involvement in the appointments of boards specifically, does provide an interesting case study through which to examine how a legal framework has attempted to ensure that there is public accountability from an SOE – in this case the National Energy Regulator South Africa – in general. The requirements were recently tested by the Earthlife Africa and Southern African Faith Communities Environment Institute case against the Minister of Energy and others in the Western Cape High Court.

NERA requires that the National Energy Regulator of South Africa (NERSA) must ensure that its decisions are in writing; that they are consistent with the Constitution; in the public interest; that the decisions must follow a procedurally fair process in which 'affected persons have the opportunity to submit their views and present relevant facts and evidence to the Energy Regulator';[69] that they must be based on reasons which are summarised and recorded and the factual and legal basis on which the decisions are taken must be clearly explained.[70] The Act also requires that the decisions and reasons for them must be made available to the public, unless it is protected in terms of the Promotion of Access to Information Act (No. 2 of 2000).[71] The court found that NERSA had failed in its obligation to consult the public on a critical decision.

This case thus shows that the duty to provide information to the public and to facilitate public participation can fall to the SOE, and be enforced. There is no doubt that the current lack of transparency, public involvement, and rigour plays a major part in enabling appointments for motives other than the public cause to be pursued by the SOE.

[69] The Court is clear in this matter that the words 'affected persons' mean the public in this instance. *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others (65662/16) [2017] ZAGPPHC 58; [2017] 2 All SA 519* (GP) (8 March 2017) Para 43.

[70] National Energy Regulation Act No.40 of 2004. (NERA). Section 10(1).

[71] NERA. Section 10(2).

5 WHAT MUST BE DONE?

5.1 Introduction

It is clear that legal reform is needed with respect to the regime for the appointment of Board members to SOEs. This legal reform must safeguard the critical role that the State, through the executive, plays in overseeing the SOE. However, it must triangulate this with the need for good corporate governance, transparency and democracy. The OECD Guidelines provide critical guidance in stating that the State should exercise its ownership rights by -

1. being involved in board nomination processes, while ensuring that board objectivity and independence are maintained;
2. communicate the states' objectives to the entire board via appropriate channels; and
3. establish adequate procedures for monitoring and assessing SOE performance.[72]

A number of suggestions are made below.

5.2 Rules-based appointments: an overarching SOE law

The OECD recommends that the process of appointing SOE board members be "rules-based and overseen by a governmental ownership function" (i.e. the executive as shareholder). It is clear that government must oversee the process of appointment. As far back as 2013, the PRC recommended the adoption of an overarching framework law for SOEs. We suggest that this law addresses and clarifies the authority and process of appointing board members to SOEs. It must provide clear guidance for the overlapping legislative frameworks. In particular, it must clearly address the issue of supremacy, i.e. which law prevails in the case of conflict. This is critical to solve the current fragmentation of legal frameworks applicable to the appointment and dismissal of SOE board members.

Furthermore, we argue that this overarching SOE legislation must incorporate a number of key principles and standards with respect to SOE board appointments. These will be further outlined below.

[72] OECD 2014, 11.

5.3 Parliamentary oversight

The OECD Guidelines emphasises the importance of Parliamentary oversight: "Reporting to Parliament is important for the overall process of transparency and accountability, including in relation to public budget processes".[73] Further, South Africa's legislatures have a critical democratic duty to ensure public involvement in all of their functions. Given the critical role SOEs play and given the impact of poor SOE governance on the country's economy, the question arises whether Parliament's involvement, which carries the additional benefits of transparency and public involvement, in the appointment of board members of SOEs is adequate.

Parliament's current involvement is mainly defined by its indirect oversight function. This oversight function extends through their oversight of the executives to SOEs. Parliament is expected to hold Ministers and their departments accountable for the role they play with respect to SOEs. This includes the appointments Ministers make to the Boards of SOEs. The question is: should there be a more direct role for Parliament in the appointment process itself? The backdrop to this question is the argument that the expansive role accorded to SOEs, and their exemption from the Financial Constitution, has created a democratic deficit. Very significant decisions are made by organs of state without public involvement and without public scrutiny. Involving Parliament in the nominations process would enhance transparency, could potentially increase opportunities for public engagement, and deepen Parliament's oversight role. There is one prominent SOE, in respect of which Parliament already has a distinct role in the appointment of board members – the SABC. The non-executive members of the SABC board are appointed by the President on advice of the National Assembly. Furthermore, the National Assembly is empowered to dismiss directors.

However, there are also a number of arguments to maintain a limited involvement of Parliament. First, it would clearly not be practically possible for Parliament to play a direct role in the appointment and dismissal of board members to each SOE. The sheer number and varying impact of these SOEs, would militate against this, however this could be addressed in part by limiting Parliament's role to a handful of larger SOEs. Secondly, and quite critically, while parliamentary involvement would enhance transparency, the very nature of Parliament

[73] OECD 2014, 25.

as a political body, will no doubt insert further political considerations and potential influence into a process that must revolve around merit. Thus increasing Parliament's role in pursuit of improved transparency and participation, could have unintended and serious negative consequences on other critical aspects. In a global context, South Africa fares well as a multi-party democracy, however given the dominance of a single political party in Parliament, the positive effects of multi-party politics at this level are limited to increased critical and robust debate – it does not continue adequately through to decision making. Thus an increased role for the legislature in both appointments and dismissals, as is the case with the SABC board, would be good in principle, but due to the dominance of one party, it would not necessarily prevent undue political influence.

It must also be noted that, as a Chapter Nine institution, the SABC occupies a somewhat special position in the family of SOEs. It has its origins in section 192 of the Constitution which requires "an independent authority to regulate broadcasting in the public interest". This is an additional motivation for parliamentary involvement.

5.4 Transparency and public participation in appointment processes

The duty to ensure transparency and public participation in the board appointments processes of those SOEs that are considered to have significant impact on the public must be assigned in the legal framework. Regardless of what route is taken – placing the duty on Parliament, the Minister, or any structures that may be established for the purpose of managing SOE board appointments – the articulation of standards for transparency and public involvement in SOE board appointments must be enumerated.

The OECD Guidelines insist that the process for appointing board members must be "a transparent nomination process, which is clearly structured and based on verifiable skills and experiences of the candidates".[74] Elsewhere, the Guidelines further specify that "[n]ominations should be based on a transparent, contestable and merit-based appointment process where candidates can put their names forward and have their qualifications

[74] OECD 2014, 13.

evaluated".[75] Meaningful public participation is integrally linked to effective measures for transparency.

Transparency demands that the public has reasonable access to information on all of the phases of the recruitment of board members and executives. To meet the requirements for transparency, the framework must include standards for public notification regarding vacancies, calls for nominations, and long and shortlisted candidates. Reasonable timeframes for this notification must be articulated in the framework, as well as an expression of by what means this information will be made available, in order to ensure that it reaches those sectors of the public most affected by the decisions. The public must be provided with information on the full list of potential nominees (the long list) and on who from the long list was selected for the short list. Information on who *did not* make it onto the shortlist or was not selected for appointment, is as important to ensure transparency and accountability to the public as information on who was selected for the short list or successful in their application. In addition, the public must have access to the CVs of all applicants so that decision makers can be held accountable for their considerations in making the appointments.

Transparency extends to providing information on why certain decisions are taken, thus the framework should include the kind of requirements found in NERA that require decisions to be based on reasons; and that these should be explained, recorded, and made public. It should be required that this record include an explanation of how inputs received through public participation were considered and on what factual basis the ultimate decisions were taken. Furthermore, if advisory panels or a nomination committee are used to prepare nominations or appointments, they must conduct most of their work in public, and there must at least be a publicly available record of its work.

We further suggest that, in addition to the abovementioned measures to increase transparency and accountability, nominations and appointments processes must include reasonable opportunities for the public to provide inputs in the nominations and appointments processes. These opportunities must extend to the candidates for appointment to SOE boards and executives by the relevant Minister. However, if the appointments process includes the establishment of a nominations committee, they should also extend to making

[75] OECD 2014, 28.

input into the composition of such a nominations committee. The basic requirements to enable meaningful participation should be set out, including guidelines to ensure reasonable[76] timeframes and mechanisms for participation.

5.5 Appointment on merit and principle

In his address to the African Network of Corporate Governance of State-Owned Enterprises, Gumede bemoans the fact that "appointments are made based on patronage, not merit or competency and the efficiency, productivity and quality of delivery of public services – and accountability are below par". He insists that "[a]ppointments should be made on merit".[77] The OECD Guidelines echo his call by stating that "[t]he boards of SOEs should be composed so that they can exercise objective and independent judgement. This implies that they should be unconnected with the highest levels of government and appointed on the basis of professional merits".

The comparison with Ethiopia suggests that, at least in law, there exists a more principled approach there. Ethiopia's law is far more explicit than South Africa's when it comes to requiring appointments based on merit. Ethiopia's Public Enterprises Proclamation insists on "professionalism, experience and competence" as general criteria for appointment to any board.[78]

We suggest that a framework for the appointment of SOE Board members must insist on qualifications, skills and experience relevant to that particular SOE's mandate. In addition, it must insist on personal qualities commensurate with leadership of a public entity. However, this is not sufficient. A proven commitment to the rights, values and principles underpinning the public service must be part of the requirements. The legislation governing the SABC is a good example in this regard. It is suggested that the basic values and principles governing public administration (set out in s 195(1) of the Constitution) should be the starting point for

[76] This would imply that they are reasonable in timeframe and scale – both in terms of the needs of the SOE and in terms of the possibility for public input.

[77] Gumede 2018.

[78] Art 12(4) Public Enterprise Proclamation.

the formulation of a set of criteria for the appointment of board members to SOEs. This is worked out more detail by Muntingh in his paper as part of this project.[79]

5.6 Broadening the criteria for disqualification

It was pointed out earlier that the law is inconsistent across the SOEs when it comes to disqualifications. The Companies Act provides a robust set of disqualifications but they are linked mostly to prior financial misconduct. This therefore does not address the issue of conflicts of interest arising from civil servants, members of Parliament or even members of the judiciary serving as members of SOE Boards. The OECD Guidelines warn against members of government being represented on boards.[80] We argue that civil servants, members of national, provincial or municipal legislatures and members of the judiciary ought not to be considered for board membership as this compromises the independence of the relevant board. Furthermore, the number of boards that one individual may serve on must be limited. Lastly, there should be uniform rules pertaining to term limits.[81]

5.7 Dispersing the power to appoint

Apart from the above procedural and substantive requirements for appointments, the institutional structure for SOE Board appointments must be revisited, we argue. The current dispensation is that, for most major SOEs, the relevant Minister has "sole dominion" over the final appointment of board members.[82] It may be argued that there are checks on his or her power in the form administrative nomination procedures within the Department, security vetting and the requirement of cabinet approval. However, we argue that these do not constitute real checks on the Minister's power. Ministers may deviate, with little or no substantiation, from their officials' recommendations. The vetting of candidates happens haphazardly, according to the PRC report, and is any event limited in scope. The requirement of cabinet approval is perhaps the only real check as it brings in the involvement of the

[79] See further Muntingh L (2019) *Appointing Directors to the Boards of State-owned Enterprises: A Proposed Framework to Assess Suitability,* Dullah Omar Institute.

[80] OECD 2014, 31.

[81] See DOI 2019, para 74.

[82] A phrase coined by Xolisa Philip during her address to the Civil Society Consultation on SOE Board appointments (Cape Town, 18 November 2019).

President and other Ministers. However, it is not based in law and thus does not alter the legal position that it is the Minister who has the final say.

We argue that it is important that the power to appoint board members is dispersed so that it no longer resides exclusively in one person. For example, the use of legislated nomination committees or selection panels must be considered. The composition of the nomination committee must be determined by law, which must ensure the involvement of various actors. Depending on the SOE in question, these actors could be Parliament, the executive, Chapter Nine institutions but also representation of the public and key stakeholders in the SOE's operations such as professional associations. This nomination committee can then be empowered to consider applications in a transparent way that includes an opportunity for public input. It can decide a shortlist (with motivations for each suggested name) from which appointments are made.

Clearly, this cannot be legislated in one single standard for all SOEs. However, it is suggested that overarching SOE legislation must determine minimum standards in respect of the above matters, with which each SOE board appointment process must comply.

5.8 Executives must be appointed by the board

When it comes to who has the power to appoint the SOE executives, South African law oscillates and goes from the shareholder to the board, and back again. This has caused confusion, which was used enthusiastically to loot SOEs.

The comparison with Ethiopia, where SOEs have contributed positively to Ethiopia's growth, produces a noteworthy distinction. In a clear departure from the ambivalence in South African law, Ethiopian law is adamant that the board, and not the government, appoints and dismisses the 'General Manager' (equivalent of the CEO in South African terms). In other words, in Ethiopia the law protects the line of accountability between the CEO and the board of a public enterprise.

As noted earlier,[83] the PRC is sympathetic towards the executive appointing the CEO. However, it does acknowledge that vesting the power in the Board may make for a better accountability structure because "if the board appoints the CEO it is likely that it will be far

[83] See para 4.4 above.

more invested in ensuring the CEO acquits him/herself successfully than if an appointee has been imposed on them".[84]

The OECD Guidelines offer a number of examples of involving the state in the appointment of CEOs. They suggest that the state could be empowered to veto the board's decision to appoint a CEO. Alternatively, they suggest that the state could be in charge of vetting the shortlisted candidates for the position of CEO. Thirdly, they suggest that the state could propose a shortlist from which the board selects a CEO.[85]

We suggest that the legal framework must follow the Ethiopian example and make the Board the final authority on the appointment of the CEO. We also suggest that there should be greater transparency in the appointments of CEOs. The public has a right to know how the CEO was appointed and on the basis of what criteria. Standards for transparency regarding CEO appointments must be articulated.

6 CONCLUSION

The legal framework for the appointment and dismissal of SOE board members is inconsistent and often gives the executive untrammelled power. Given the democratic and accountability gap, occasioned by the SOEs' exemption from the Financial Constitution, this has provided a fertile ground for SOE boards to be captured by interests, hostile to the public interest. An overarching law, regulating SOEs would be the appropriate instrument to clarify issues surrounding who has the authority to appoint and dismiss board members and SOE executives, what the criteria and disqualifications for appointment are, how transparency can be improved, how meaningful public engagement can be facilitated and what role should be accorded to Parliament.

[84] PRC 2013, 110.

[85] OECD 2014, 30.

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