



# **Appointing Directors to the Boards of State-Owned Enterprises**

A proposed framework to assess suitability

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## 1 INTRODUCTION

Armstrong has observed that: “The value of SOEs [state-owned enterprises] lies in their potential to provide efficient, reliable and affordable critical products and services in key sectors, such as power generation and water supply, transport, oil and gas and hospitals. They enable expensive and expansive investments that are often beyond the private sector’s capacity. Thus, well-run SOEs can contribute to health, welfare, education and infrastructure improvements, poverty reduction and inclusive economic growth.”<sup>1</sup>

There are some 276 SOEs in South Africa – the majority of these operating at national level and 78 at provincial level.<sup>2</sup> Their mandates and scale of operations vary greatly – from Eskom with a mandate to provide electricity to various regulatory bodies, such as provincial liquor boards. Common to all of them is that an SOE must provide some benefit to the public, be that a service (e.g. transport, electricity or water) or regulate an activity (e.g. gambling) or support economic development or promote arts and culture, to name a few. However, running SOEs well has been shown to be a challenge.

The Presidential Review Committee (PRC) on SOE provided a broad critique of SOEs including the legal framework, recruitment of staff and board members as well as competence:

*The legislative framework for SOEs was found to be inadequate, displaying evidence of conflict and duplication. The governance, ownership policy, and oversight systems were found to be inadequate. The quality of the board and executives’ recruitment was found to be inadequate. There is no clarity on the role of the executive authority; boards; and the Chief Executive in the governance and operational management of SOEs.*<sup>3</sup>

The National Development Plan (NDP) also expressed concern about SOEs not achieving their developmental potential and pointed the finger to a credibility deficit in board appointments and instability in SOE boards.<sup>4</sup>

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<sup>1</sup> Armstrong, P. *Corporate Governance and SOEs*, <https://ethicalboardroom.com/corporate-governance-and-soes/> .

<sup>2</sup> Schedules 2 and 3 Public Finance Management Act.

<sup>3</sup> Presidential Review Committee on State Owned Enterprises (2013) *Growing the Economy – Bridging the Gap*, Vol 1 p. 8.

<sup>4</sup> National Planning Commission (2012) *National Development Plan 2030: Our Future-make it work*, Pretoria, p. 72.

There is little doubt that in many instances the appointment of directors to SOE boards in recent years left much to be desired. The current state of SOEs such as Eskom, Prasa and SAA is indicative of the quality of appointments that were made and evidence before the Zondo Commission provided further revelations about how the system was manipulated to benefit private interests.

The overarching impression of the current state of SOE boards is one of a fractured reality where different rules apply differently and inconsistently – there is not one set of core rules (including legislation) binding all SOEs to a standard that supports the developmental state.<sup>5</sup> For example, there is not a uniform set of criteria applicable in the recruitment of SOE board directors. In this fractured and disparate reality, it was and still is easy to make decisions that are not necessarily in the broad public interest for which individuals and boards can be held accountable. The PRC summed it up as follows:

*Notable observations and findings are that South Africa has no common agenda for and understanding of SOEs. This diversity ranges from varying terminology used to denote SOEs to the perceived absence of a universal and obligatory long-term vision and plan for SOEs that clarifies their role in the country at large. There are no commonly agreed strategic sectors and priorities. In addition to the absence of a consolidated national repository for all SOEs, there is confusion regarding SOEs categorisation. There are also challenges with regard to balancing the trade-offs between commercial and non-commercial objectives of SOEs.<sup>6</sup>*

Two key flaws in the appointment and dismissal of SOE board members have been identified.<sup>7</sup> The first flaw relates to **procedural** issues, but is embedded in bigger questions surrounding the role and position of SOEs.

- In practice, board members are appointed by the relevant shareholder Minister, ostensibly in consultation with cabinet. This has proven to be problematic and does

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<sup>5</sup> Wandrag, R. (2019) *The legal framework for the appointment and dismissal of SOE board members*, Bellville: Dullah Omar Institute. Wandrag, R. (2019) *The legal framework governing the appointment and dismissal of board members and executives of Eskom, Prasa and the SABC*, Bellville: Dullah Omar Institute.

<sup>6</sup> Presidential Review Committee on State Owned Enterprises (2013) Vol 1 p. 8.

<sup>7</sup> Wandrag, R. (2019) *The legal framework for the appointment and dismissal of SOE board members*, Bellville: Dullah Omar Institute. Wandrag, R. (2019) *The legal framework governing the appointment and dismissal of board members and executives of Eskom, Prasa and the SABC*, Bellville: Dullah Omar Institute.

not represent the 'robust and transparent' process, recommended by King IV.<sup>8</sup>

- The appointment procedures are a function of the problematic triplicate stakeholder role of government, being shareholder, industry policy maker and regulator combined into one.
- The link between the public and governance of SOEs is absent, or ill-defined at best. Parliament plays a direct role in appropriating funds to government departments and overseeing their performance and expenditure. However, SOEs often raise their own revenue, thereby avoiding a key component of Parliament's oversight power. However, they return to Parliament to approve emergency bail-outs. This disjuncture finds expression in at least the appointment procedures.
- Partly because of the conflicting legislative framework (see below), procedures for the appointment of SOE board members often lack integrity and are not transparent, do not provide for adequate public engagement and take place without any communication to the South African public about the role of SOEs and the importance of the appointment processes.

The second flaw relates to **substantive** criteria for appointment. Too often, there is a disjuncture between the fiduciary duties of SOE board members and the profile, skills and expertise of incumbents, pointing to inadequate criteria for appointment and dismissal or inadequate application of these.

Three main issues can be lifted to guide recommendations in addressing the current shortcomings.<sup>9</sup> Firstly, there needs to be a diffusion of power and discretion when appointing SOE board members. There is currently too much power and discretion in the hands of the relevant minister and this has resulted in poor appointments as well as instability at board and senior management levels.<sup>10</sup> The government is also simultaneously the majority or sole shareholder, the policymaker and the regulator of SOEs. This is an untenable situation. Secondly, the public is both an indirect shareholder and a direct or indirect stakeholder in SOEs, yet there is an opaque relationship between the executive and the SOE and an almost non-existent relationship between the public and the executive in this regard. There is no

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<sup>8</sup> IODSA (2016) *King IV – Report on corporate governance for South Africa*, p. 116.

<sup>9</sup> Submission by the Dullah Omar Institute to the Zondo Commission, 19 June 2019, Ref. 3/1/SCC/512.

<sup>10</sup> For example, in a recent report the AGSA reported that in a sample of 15 SOEs, 33% of CEO positions and 20% of CFO positions were vacant for six months or longer (AGSA (2018) *Annual Report 2017/18*, p. 118).

coherent framework for the appointment of SOE board directors, and the current system lacks the opportunity or forum to see that appointments to SOE boards are based on merit and the needs of the organisation and the public. Thirdly, the current process of appointment is not transparent and appointments are generally made by the relevant minister in the absence of an obligation or mechanism to consult publicly. The lack of transparency can, at least in part, be attributed to the confusing legal framework and the fact that SOEs fall outside the financial constitution. The financial constitution refers to provisions in law specifying how the state should manage its finances and covers at least the following:

- A democratically elected parliament authorises the raising of revenue;
- A semi-autonomous revenue collection authority deposits all revenue in a single revenue fund (bar a few explicit exceptions);
- A democratically elected parliament authorises withdrawals from the single revenue fund by means of an Appropriations Act, subject to some limitations;
- Independent bodies determine or advise on aspects of expenditure;
- An independent body ensures that expenditure decisions comply with the Appropriations Act;
- An independent body (Public Service Commissions) controls the largest expenditure item – personnel appointments – ensuring value for money and preventing nepotism;
- An independent office of the Auditor-General reviews *ex post facto* the financial statements and transactions of state entities;
- A legislature oversees the legality and appropriateness of the spending of the appropriated funds.<sup>11</sup>

These features express the basic principles of constitutionalism. First, the raising and expenditure of funds are subject to democratic decision-making; secondly, the expenditure of funds is subject to limitations, including the separation of powers; thirdly, the raising and expenditure of funds are subject to the rule of law; and finally, the expenditure of funds should be for a public (developmental) purpose. SOEs are not subject to the same

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<sup>11</sup> Steytler, N. (2017) *The 'financial constitution' and the prevention and combatting of corruption: a comparative study of Nigeria, South Africa and Kenya*, Paper delivered at the 5<sup>th</sup> SASCA Conference, 'Corruption and constitutionalism in Africa: Revisiting control measures and strategies', STIAS, September 2017.

requirements. For example, they raise their own revenue, deposit it into their own bank accounts and make their own decisions on how their money should be spent, and this happens by and large in the absence of any public scrutiny.

This report investigates three questions with regard to the appointment of board directors to SOEs:

- Can the appointment process of SOE directors be measured against constitutional requirements?
- How should the values and principles in section 195 of the Constitution be understood?
- How can the principles be applied to appointments in a methodical manner?

## **2 CAN THE APPOINTMENT PROCESS OF SOE DIRECTORS BE MEASURED AGAINST CONSTITUTIONAL REQUIREMENTS?**

A cross-cutting requirement, although not explicitly listed in the Constitution, is that appointments must be rational. This requirement came to the fore in *DA v President of SA*<sup>12</sup> where the Supreme Court of Appeal (SCA) found that the appointment of Menzi Simelane as NDPP was irrational in that the President failed to take into consideration relevant information emanating from the Ginwala Enquiry, in which negative findings were made about Simelane.<sup>13</sup> The Court found that the President must take *all information into consideration*, that the appointment process has to be rational, and that the President cannot cherry-pick the information on which he or she bases the decision to make an appointment. This must also include the history of candidates. In *DA v President of SA* the SCA went on to state, 'Consistent honesty is either present in one's history or not, as are conscientiousness and experience.'<sup>14</sup> This rationality requirement must therefore permeate decision-making in the public service, especially when making senior appointments.

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<sup>12</sup> *Democratic Alliance v President of the Republic of South Africa and others* (263/11) [2011] ZASCA 241; 2012 (1) SA 417 (SCA); [2012] 1 All SA 243 (SCA); 2012 (3) BCLR 291 (SCA) (1 December 2011).

<sup>13</sup> *Report of the Enquiry into the fitness of Advocate VP Pikoli to hold the office of National Director of Public Prosecutions*, Nov. 2008.

<sup>14</sup> *Democratic Alliance v President of the Republic of South Africa and others*, para. 117.

Section 195(1) of the Constitution sets nine values and principles for the public administration:

- A high standard of professional ethics must be promoted and maintained.
- Efficient, economic and effective use of resources must be promoted.
- Public administration must be development-oriented.
- Services must be provided impartially, fairly, equitably and without bias.
- People's needs must be responded to, and the public must be encouraged to participate in policy-making.
- Public administration must be accountable.
- Transparency must be fostered by providing the public with timely, accessible and accurate information.
- Good human-resource management and career-development practices, to maximise human potential, must be cultivated.
- Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.

Section 195(2) states that these values and principles apply to public enterprises, organs of state and all spheres of government. The Constitution further requires that national legislation must ensure the promotion of the values and principles.<sup>15</sup> It is furthermore stated that 'the appointment in public administration of a number of persons on policy considerations is not precluded, but national legislation must regulate these appointments in the public service.'<sup>16</sup> The Constitution also allows for differentiation between sectors in the public administration and that legislation regulating public administration may differentiate between different sectors, administrations or institutions.<sup>17</sup> The nature and functions of different sectors, administrations or institutions of public administration are also to be taken into account in legislation regulating public administration.<sup>18</sup> It then follows that the nine

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<sup>15</sup> S 195(3).

<sup>16</sup> S 195(4).

<sup>17</sup> S 195(5).

<sup>18</sup> S195(6).

values and principles set an appropriate framework to assess the appointment process of SOE directors. It is also the case that the Public Service Commission uses these nine principles as the basic framework in its regular *State of the Public Service* reports. A general requirement, in addition to the nine principles, is that decisions in the public service must be rational and take all information into account as per the Simelane-decision.

To this should be added that an SOE board needs a strategy that is distinct but supportive of the overall SOE strategy. The board strategy will then by and large determine the board composition needs and thus the requirements for new board members.

### **3 HOW SHOULD THE VALUES AND PRINCIPLES BE UNDERSTOOD?**

In order to gain a better understanding of each of the values and principles a closer description of each follows below.

#### **3.1 A HIGH STANDARD OF PROFESSIONAL ETHICS**

Professionalism is highly reliant on expertise (knowledge) and self-regulation, and less dependent on compliance management. When we consult a doctor or a lawyer, it is reasonable to have high expectations of expertise (the knowledge) and reputation or history of behaviour that is untarnished by unethical behaviour or behaviour lacking integrity. It is in this plain language sense that citizens should expect of civil servants in general, but especially those in senior positions of trust, to adhere to a high standard of professional ethics. Part of the current problem is, as already pointed out, the fractured nature of the SOE sector and that there is no uniform and universally applicable set of rules. 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, the Protocol on Corporate Governance in the Public Sector and the Handbook for the Appointment of Persons to Boards of State and State-Controlled Institutions.<sup>19</sup> However, these soft law instruments have not been effective in advancing compliance with good governance principles in SOE.

It has been noted that ethics are essentially two things, the first being ‘well-founded standards of right and wrong that prescribe what humans ought to do, usually in terms of

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<sup>19</sup> De Visser J. and Waterhouse, S. (2020) *SOE Boards and democracy*, Bellville: Dullah Omar Institute.

rights, obligations, benefits to society, fairness, or specific virtues.<sup>20</sup> This would refer to conduct that must be refrained from (e.g. stealing, murder and fraud) as well as the virtues of honesty, compassion and loyalty. Furthermore, ethical standards also refer to standards relating to rights, such as the right to life, the right to freedom from torture and the right to privacy. Secondly, 'ethics refers to the study and development of one's ethical standards.'<sup>21</sup> It is because 'feelings, laws, and social norms can deviate from what is ethical'<sup>22</sup> that it is required to constantly reflect on one's standards to verify that they are reasonable and well founded. Following from this 'ethics also means, then, the continuous effort of studying our own moral beliefs and our moral conduct, and striving to ensure that we, and the institutions we help to shape, live up to standards that are reasonable and solidly-based.'<sup>23</sup>

In the public service a high standard of professional ethics would then mean that officials, including SOE board directors, need to be firstly aware and comply with a known and accepted standard of ethical behaviour in service of the public and, furthermore, continuously assess their behaviour as well as the standards they are measured against to ensure that they meet a high standard and that the standard itself is relevant, accurate and sets a high bar. With reference to the appointment of board directors, it would mean that the process adheres to clear standards of what proper and ethical conduct is, and also that the people involved in appointment processes continuously reflect on their own decision-making and the results thereof. This would equally apply to structures of the state to ensure that an SOE, for example, behaves in an ethical manner.

### **3.2 EFFICIENT, ECONOMIC AND EFFECTIVE USE OF RESOURCES**

Effectiveness is the degree to which something is successful in producing a desired result. Effectiveness refers only to whether the programme or department has achieved the desired objective, without reference to the costs or inputs. A programme may be effective, but not efficient or cost effective. For example, it may be an effective measure in preventing crime to

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<sup>20</sup> Velasquez, M., Andre, C., Shanks, T and Meyer, M. (2010) *What is Ethics?*

<https://www.scu.edu/ethics/ethics-resources/ethical-decision-making/what-is-ethics/>

<sup>21</sup> Velasquez, M., Andre, C., Shanks, T and Meyer, M. (2010).

<sup>22</sup> Velasquez, M., Andre, C., Shanks, T and Meyer, M. (2010).

<sup>23</sup> Velasquez, M., Andre, C., Shanks, T and Meyer, M. (2010).

provide all South Africans with a personal body-guard, but this will not necessarily be an efficient or cost-effective measure, as it would entail an unreasonable cost.

The World Bank explains that an assessment of efficiency relates the results or outputs of a programme to its costs; efficiency is the extent to which a programme has “converted its resources or inputs (such as funds, expertise, time, etc.) *economically* into results in order to achieve the maximum possible outputs, outcomes, and impacts with the minimum possible inputs”.<sup>24</sup> Ideally, a monetary value is placed on the benefits arising from the activities of the programme, and this is compared with the actual costs of the programme. But in most cases, a monetary quantification of a programme’s outputs and outcomes is problematic and would be based on potentially controversial assumptions. In these cases, the assessment of efficiency focuses on ratios such as the number of lives saved, the number of children vaccinated, or the number of additional households served with electricity per thousand or million Rand invested.

An assessment of cost-effectiveness takes the benefits arising as a given and asks whether these could have been produced at a lower cost compared with alternatives. Cost-effectiveness is the extent to which a programme has “achieved results at a lower cost compared with alternatives ... Shortcomings in cost-effectiveness occur when the programme is not the least-cost alternative or approach to achieving the same or similar outputs and outcomes.”<sup>25</sup>

In respect of the appointment process, efficiency and effectiveness can then be measured in how resources are used to appoint directors in a manner that contributes to the skills and abilities of the board as a whole, as well as supporting stability in the board and its effectiveness as a governing structure.

### **3.3 DEVELOPMENT-ORIENTED**

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<sup>24</sup> *World Bank Sourcebook for Evaluating Global and Regional Partnership and Programs: Indicative Principles and Standards 2009* available at [http://siteresources.worldbank.org/EXTGLOREGPARPROG/Resources/grpp\\_sourcebook\\_chap11.pdf](http://siteresources.worldbank.org/EXTGLOREGPARPROG/Resources/grpp_sourcebook_chap11.pdf).

<sup>25</sup> *World Bank Sourcebook for Evaluating Global and Regional Partnership and Programs: Indicative Principles and Standards 2009*.

The Preamble to the Constitution places a development obligation on all by firstly recognising the injustices of the past and that this needs to be addressed by healing the divisions of the past and establishing a society based on democratic values, social justice and fundamental human rights. Central to this is the duty to improve the quality of life of all citizens and free the potential of each person. Although all rights are in one way or the other inter-connected, the Bill of Rights enumerates a number of rights related to individual and collective development: freedom of trade, occupation and profession; environment; property; housing; health care, food water and social security; children and education. The fact that socio-economic rights are justiciable gives further weight to the development obligation in the Constitution.<sup>26</sup>

At the international level the 17 Sustainable Development Goals (SDGs) and the preceding Millennium Development Goals (MDGs) provide further guidance on a development-oriented approach.<sup>27</sup> The 17 SDGs are:

- No Poverty;
- Zero Hunger;
- Good Health and Well-being;
- Quality Education;
- Gender Equality;
- Clean Water and Sanitation;
- Affordable and Clean Energy;
- Decent Work and Economic Growth;
- Industry, Innovation and Infrastructure;
- Reduced Inequality;
- Sustainable Cities and Communities;
- Responsible Consumption and Production;
- Climate Action;
- Life Below Water;
- Life on Land;

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<sup>26</sup> *Certification of the Constitution of the Republic of South Africa*, 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996) paras 77-78.

<sup>27</sup> United Nations, SDGs, <https://www.un.org/development/desa/disabilities/envision2030.html>.

- Peace and Justice Strong Institutions;
- Partnerships to achieve the Goal.

The National Development Plan (NDP) lists 12 goals in its vision for 2030:

- Growing the economy and creating employment
- Building economic infrastructure
- Environmental sustainability and resilience
- An inclusive rural economy
- South Africa in the region and the world
- Transforming Human Settlements
- Health care for all
- Social protection
- Building Safer Communities
- Building a capable and developmental state
- Fighting corruption
- Nation building and social cohesion.<sup>28</sup>

In relation to the goal “Building a capable and developmental state” the NDP lists the following objectives:

- A state that is capable of playing a developmental and transformative role.
- A public service immersed in the development agenda but insulated from undue political interference.
- Staff at all levels have the authority, experience, competence and support they need to do their jobs.
- Relations between national, provincial and local government are improved through a more proactive approach to managing the intergovernmental system.
- Clear governance structures and stable leadership enable state-owned enterprises (SOEs) to achieve their developmental potential.<sup>29</sup>

Following from the above, at least three questions can be asked:

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<sup>28</sup> National Planning Commission (2012) *National Development Plan 2030: Our Future-make it work*, Pretoria.

<sup>29</sup> National Planning Commission (2012) p. 71.

- What must SOE's do to support the objectives of the NDP?
- Is the Board of Directors skilled to oversee that the SOE performs in support of the NDP objectives?
- What skills and qualities supportive of the NDP objectives should the Minister (or other structure) look for when appointing board directors?

### **3.4 PROVIDE SERVICE IMPARTIALLY, FAIRLY, EQUITABLY AND WITHOUT BIAS.**

Objectivity requires that a decision-maker is able to express itself or deal with perceived facts or conditions, without distortion by personal feelings, prejudices, or interpretations, and not use its powers to favour individuals or groups. In the appointment of SOE board directors it is not only the history of the applicant that is important (i.e. does it reflect a track record of being objective, fair and impartial), but also the structure and processes assessing the applicants (e.g. the committee that interviewed applicants in 2018 for the position of NDPP), the minister or the President that makes the appointment, as well as the SOE Board itself in the appointments that it makes (e.g. CEO).

In the appointment of SOE board directors the question then becomes whether there is a history of fair and equal treatment, or is the applicant's history tainted with allegations or facts of unfair discrimination? Whether or not there is a history of fair and equal treatment is something that can thus be objectively tested. It also needs to be asked if the appointment itself was fair and rational and based on objective criteria emphasising merit.

### **3.5 PEOPLE'S NEEDS MUST BE RESPONDED TO, AND THE PUBLIC MUST BE ENCOURAGED TO PARTICIPATE IN POLICY-MAKING.**

Participatory democracy should be seen as something more than casting one's vote in an election and the right to be a political candidate. This much is clear from article 25 of the International Covenant on Civil and Political Rights (ICCPR), which South Africa ratified in 1998, giving every citizen, in addition to the rights to vote and to be elected, the right "to take part in the conduct of public affairs, directly or through freely chosen representatives". Public participation in democratic processes thus goes beyond participation in elections and extends into other affairs of the democratic state. This is confirmed by the Human Rights Committee:

The conduct of public affairs, referred to in paragraph (a), is a broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels. The allocation of powers and the means by which individual citizens exercise the right to participate in the conduct of public affairs protected by article 25 should be established by the constitution and other laws.<sup>30</sup>

How the public participates in public affairs and the particular modalities to achieve this should thus be described in domestic law.

The issue of public participation in SOE performance, policy-making and appointment decisions have not been dealt with by our courts, but two recent decisions from the Constitutional Court and SCA respectively dealt with public participation in the legislative processes of Parliament and the provincial legislatures.<sup>31</sup> Some guidance in respect of SOE and public participation can be gleaned from the two decisions. It is in particular in *Doctors for Life International v The Speaker of the National Assembly and Others* (hereafter *Doctors for Life*)<sup>32</sup> that the Constitutional Court dealt in detail with a number of critical issues relating

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<sup>30</sup> UN Human Rights Committee *General Comment 25*, CCPR/C/21/Rev.1/Add.7(1996) para 5.

<sup>31</sup> *Doctors for Life and Matatiele Municipality and Others v President of the Republic of South Africa and Others* 2006 (5) BCLR 622 (CC). *King and Others v Attorneys Fidelity Fund Board of Control and Another* 2006(4) BCLR 462 (SCA).

<sup>32</sup> In the *Doctors for Life International* (DFL) decision, DFL had applied directly to the Constitutional Court, challenging the constitutional validity of four Bills. DFL argued that Parliament failed to fulfil its constitutional obligation to facilitate public involvement when it passed four Bills, all of which related to health issues. These Bills were: the Sterilisation Amendment Bill; the Traditional Health Practitioners Bill; the Choice on Termination of Pregnancy Amendment Bill; and the Dental Technicians Amendment Bill. However, DFL's complaint was confined to the process followed by the National Council of Provinces (NCOP). The Court had to consider four questions: first, whether the Constitutional Court is the only court which can hear a matter of this nature; second, whether it is competent for the Court to grant declaratory relief in respect of the proceedings of Parliament; third, the nature and scope of the constitutional obligation of a legislative organ of state to facilitate public involvement in the law-making process; and fourth, whether on the facts of the case the NCOP complied with that obligation when passing the health legislation under challenge, and, if it did not, the consequences of its failure. Turning to the question whether the NCOP has complied with its duty to facilitate public involvement in relation to the Traditional Health Practitioners Act, and the Choice on Termination of Pregnancy Amendment Act, Ngcobo J, found that: a) these two Bills had generated great public interest at the NCOP as evidenced by requests for public hearings; b) in the light of these requests, the NCOP decided that public hearings would be held in the provinces and advised the interested groups of this fact; c) the nature of these Bills was such that public hearings should be held; d) a majority of the provinces did not hold hearings on these Bills because of insufficient time and this fact was drawn to the attention of the NCOP; and e) the NCOP did not hold public hearings. In the light of this, Ngcobo J held that the failure by the NCOP to hold public hearings in relation to the Traditional Health Practitioners Act and the Choice on Termination of Pregnancy Amendment Act was unreasonable. He therefore concluded that the NCOP did not comply with its obligation to facilitate public involvement in relation to these two Acts as contemplated by section 72(1)(a) of the Constitution.

to public participation in the legislative processes and it is necessary to dwell on this somewhat. From the outset it should be emphasised that the respective tasks of the legislature and SOE's are different and even if there is good jurisprudence on what public participation means in the context of making laws, it should not automatically follow that it applies in the same manner to SOEs. However, it should also be recognised that SOEs make decisions, often with potentially significant implications, about tax payers' money and that the public therefore has a right to participate in some way. The challenge therefore lies in how we can discern from the constitutional jurisprudence on public participation applicable to the legislature, norms and principles to result in more transparent and accountable practices in SOEs and the appointment of their directors?

Given that Parliament has considerable discretion in complying with section 72(1)(a) of the Constitution, the Constitutional Court was quick to point out that whether or not Parliament has complied with the requirement of public participation will vary from case to case, but that Parliament must "act reasonably in carrying out its duty to facilitate public involvement in its processes".<sup>33</sup> In *Doctors for Life*, Ngcobo J cites Sachs J approvingly from an earlier decision by the same court:

*"The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case."*<sup>34</sup>

To determine what is reasonable depends on the facts and circumstances of a particular case.<sup>35</sup> The appointment of SOE board members is quite a specific set of circumstances and it may be argued that the particular context reduces the need for public participation. It is an executive power, explicitly given to the Minister with indirect impact on the public. It is not the same as a bill or an act regulating conduct, limiting freedoms etc. On the other hand, it can also be argued that inappropriate appointments to SOE boards and poor, if not reckless

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<sup>33</sup>*Doctors for Life* para 125.

<sup>34</sup>*Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amicus Curiae)* 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) at paras 111-3.

<sup>35</sup>*Doctors for Life* para 127.

and corrupt decision-making by SOE boards have a very direct impact on the public, and one does not have to look much further than Eskom and Prasa for examples in this regard. Furthermore, because SOEs fall outside the financial constitution, there is all the more reason for greater transparency. Therefore, the intensity of the impact of a flawed appointment is that the constitutional rights of people dependent on the SOE for delivery, are violated. They are violated with impunity because there is no oversight if the Board is condoning or facilitating failure.

Reasonableness remains, however, an objective standard based on a number of factors and these are set out in the *Doctors for Life* decision. Firstly, the court attached particular importance to the nature and importance of the legislation as well as the intensity of its impact on the public. Secondly, consideration must be given to the practicalities of the law-making process, such as time and costs involved, but that saving time and money is not an excuse for limiting or diluting public participation. In short, consideration must be given to the legislation's content, importance and urgency.<sup>36</sup> Ultimately, the court had to assess if Parliament fulfilled its duty to facilitate public involvement by; firstly providing meaningful opportunities for public participation in law-making and, secondly, whether measures were taken to ensure that people had the ability to take advantage of the opportunities provided.<sup>37</sup> The Constitutional Court therefore saw the right to political participation giving rise to the positive right to participate in political decision-making, but simultaneously imposing a duty on the State to facilitate public participation by ensuring this right be realised.<sup>38</sup>

The Court proceeded to give further guidance on how Parliament should fulfil this duty and emphasised that merely "allowing" public participation, under the particular circumstances, is not enough, but that measures must be taken to facilitate public participation. Parliament must provide notice of and information about the legislation under consideration and the available opportunities for public participation. To this end it may be necessary to provide education to build capacity for public participation. The Court was, however, not prescriptive in respect of the specific actions to be taken and said that public participation exists on a

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<sup>36</sup>*Doctors for Life* para 128.

<sup>37</sup>*Doctors for Life* para 129.

<sup>38</sup>*Doctors for Life* para 129.

continuum that ranges from providing information and building awareness to partnering in decision-making.<sup>39</sup>

In *King and Others v Attorneys Fidelity Fund Board of Control and Another* (hereafter *King case*)<sup>40</sup> the SCA was even more descriptive of public involvement:

‘Public involvement’ is necessarily an inexact concept, with many possible facets, and the duty to ‘facilitate’ it can be fulfilled not in one, but in many different ways. Public involvement might include public participation through the submission of commentary and representations: but that is neither definitive nor exhaustive of its content. The public may become ‘involved’ in the business of the National Assembly as much by understanding and being informed of what it is doing as by participating directly in those processes. It is plain that by imposing on Parliament the obligation to facilitate public involvement in its processes the Constitution sets a base standard, but then leaves Parliament significant leeway in fulfilling it.<sup>41</sup>

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<sup>39</sup>*Doctors for Life* para 129.

<sup>40</sup> In the *King and Others v Attorneys Fidelity Fund Board of Control and Another* decision the appellants, disappointed investors, had unsuccessfully sought in a division of the High Court to challenge a statute of Parliament that precluded them from obtaining compensation for their losses from the Attorneys’ Fidelity Fund. They challenged the validity of the statute which amended the Attorneys Act 53 of 1979. They contended that that section 59 of the Constitution had not been satisfied. That provision requires inter alia that “the National Assembly must facilitate public involvement in the legislative and other processes of the Assembly and its committees”. Appellants contended that there had been insufficient public consultation about the statute in question. Since Parliament had not involved the public sufficiently in the process of adopting the amending Act, it was contended, the statute was invalid. They appealed to the Supreme Court of Appeal. In 1998 Parliament amended the Attorneys Act 53 of 1979 to preclude recovery from the Attorneys Fidelity Fund of moneys deposited with an attorney not in the usual course of practice, but to invest on behalf of a client. In striking the case from the roll with costs, the Supreme Court of Appeal pointed out that in terms of section 167(4)(e) of the Constitution, only the Constitutional Court had jurisdiction to decide that Parliament had failed to fulfil a constitutional obligation. While it was so that, subject to the Constitutional Court’s confirmation the Supreme Court of Appeal and the High Courts had jurisdiction to declare that a statute was constitutionally invalid, it had to be borne in mind that invalidity could result from different reasons. If it were contended that Act was invalid because Parliament had failed to comply with a procedural prerequisite in enacting it (for instance, if a Bill had not obtained a majority of votes), or because a statute as enacted violated a provision of the Bill of Rights, the Supreme Court of Appeal and the High Courts would have jurisdiction to grant an order declaring it invalid. But a statute might also be invalid because Parliament had so completely violated an obligation placed upon it by the Constitution that it ceased to be or to function as the body envisaged in the Constitution. In such an extreme case Parliament would lack the power to pass legislation under the Constitution. However, Appellants had not made out such a case. They admitted that there had been public involvement. They did not claim that Parliament had ceased to function entirely as the body entrusted with legislative capacity under the Constitution. Their claim therefore fell short of making out a case for legislative invalidity. Even if they had made out a sufficient case, only the Constitutional Court would have power to grant them the relief they sought.

<sup>41</sup> *King and Others v Attorneys Fidelity Fund Board of Control and Another* 2006(4) BCLR 462 (SCA) para 22.

That SOE's must respond to the needs of people is a *sine qua non* to the legitimacy of SOE's as the government, representing the people is the only or majority shareholder. As Wandrag has observed:

In SOEs, government as only shareholder, also represents the interest of the public as stakeholders, but with the government as shareholder being solely responsible for board appointments, the public as stakeholders lack the power to exercise any influence over SOE governance. The typical corporate structure of shareholders having the unfettered power to appoint board members is therefore also not suited to the governance of SOEs.<sup>42</sup>

It is not inconceivable nor impractical for the relevant minister (or other tier of government depending on the type of SOE) to engage the public in one way or the other when considering the appointment of board directors. The recent process to find a new NDPP is an example in this regard. Not only did the President entrust the identification of suitable candidates to an advisory panel, but the interview process was open to the public, albeit after a court application from *Right2Know*. To this must be added that the requirements and selection criteria for SOE board directors need to be in the public domain to ensure that the conclusions of the interview panel are rational and based on fact.

### **3.6 PUBLIC ADMINISTRATION MUST BE ACCOUNTABLE**

The Constitution requires that the executive must account to Parliament<sup>43</sup> for its actions, policies, expenditure etc. Corder, Jagwanth, and Soltau explain it as follows: "Accountability can be said to require a person to explain and justify - against criteria of some kind - their decisions or actions. It also requires that the person goes on to make amends for any fault or error and takes steps to prevent its recurrence in the future."<sup>44</sup> Oversight has a broader meaning than accountability and includes a wide range of activities and initiatives aimed at

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<sup>42</sup> Wandrag, R. (2018) *The legal framework governing the appointment and dismissal of board members and executives of the SABC, Eskom and Prasa* p. 6.

<sup>43</sup> Section 55(2) and Section 92(3)(b).

<sup>44</sup> Corder, H. Jagwanth, S. and Soltau, F. (1999) *Report on Parliamentary Oversight and Accountability* Faculty of Law, University of Cape Town <https://pmg.org.za/files/oversightaccount991018.rtf> (Accessed 14 January 2020).

monitoring the executive.<sup>45</sup> While accountability and oversight may differ in respect of scope and focus, it is also clear that the two are closely linked and mutually reinforcing.

Accountability is understood to mean the relationship “between the bearer of a right or a legitimate claim and the agents or agencies responsible for fulfilling or respecting that right”.<sup>46</sup> This means that a government must be able to and indeed explain how it executed its mandate.<sup>47</sup> The point has also been made that the normal features of a democracy (e.g. multi-party elections and universal suffrage) are necessary but not sufficient to ensure healthy accountability between citizens and the government.<sup>48</sup> Democratic elections therefore do not make for clean government and new democracies remain haunted by human rights violations, nepotism and corruption, which do not disappear with the advent of democratic elections.<sup>49</sup>

The construct of accountability can be split into two dimensions: horizontal accountability and vertical accountability. According to Schacter, the state must be willing “to restrain itself by creating and sustaining independent public institutions to oversee its actions, demand explanations, and when circumstances warrant, impose penalties on the government for improper and illegal activity”.<sup>50</sup> The accountability that the state imposes on itself and on governments is commonly referred to as horizontal accountability. Vertical accountability refers to the control external institutions exercise over a government, such as the electorate, the media and civil society.<sup>51</sup>

The fact that a relationship exists between the state and another internal or external body does not automatically result in an effective accountability relationship, and three principles need to be adhered to, namely transparency, answerability, and controllability. The answerability requirement states that decision-makers must be able to justify their decisions and actions publicly in order to substantiate that they are reasonable, rational and within

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<sup>45</sup>Corder, H. Jagwanth, S. and Soltau, F. (1999).

<sup>46</sup> U4 Anti-Corruption Resource Centre *Corruption Glossary* <https://www.u4.no/terms> (accessed 14 Jan 2020).

<sup>47</sup> Muntingh, L. (2007) *Prisons in the South African constitutional democracy*, Johannesburg: Centre for the Study of Violence and Reconciliation, p. 16.

<sup>48</sup> Schacter, M. (2001) When Accountability Fails – a framework for diagnosis and action, *Isuma* Vol. 2 No. 2, p. 1.

<sup>49</sup> Muntingh, L. (2007), p. 16.

<sup>50</sup> Schacter, M. (2001), p. 2.

<sup>51</sup> Schacter, M. (2001), p. 2.

their mandate.<sup>52</sup> Answerability (and transparency) will, however, be meaningless if there are no mechanisms in place to sanction actions and decisions in contravention of the given mandate; accountability institutions must therefore be able to exercise control over the institutions that they are overseeing.<sup>53</sup> Failure to hold government and individuals accountable create the conditions for impunity to exist.<sup>54</sup>

It then follows that applicants need to have a history of being accountable, reflecting compliance with the principles of transparency (see below) answerability and controllability. Furthermore, since it is the Minister that makes the appointment, it is ultimately the Minister that must be accountable for the appointment as well as the appointment process.

By way of summary, the three requirements in respect of accountability are:

- Parliament and the Minister must ensure that a good process is legislated (it is failing in that at the moment).
- The Minister must ensure that a rational process is followed and be able to explain such a process.
- The Minister must ensure that a good candidate is appointed and the decision be explained to Parliament if requested.

### **3.7 TRANSPARENCY MUST BE FOSTERED BY PROVIDING THE PUBLIC WITH TIMELY, ACCESSIBLE AND ACCURATE INFORMATION.**

Turning to transparency, the Constitution emphasises “the values that underlie an open and democratic society”.<sup>55</sup> In very blunt terms it means that public officials, including a Minister, have a duty to act visibly, predictably and understandably.<sup>56</sup> More specifically, the actions of officials must be predictable in that they should be guided by policy, legislation, regulations, standing orders and good practice. When called to account, officials must be able to motivate their decisions and actions in a manner that is rational and justifiable. In sum, it needs to be

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<sup>52</sup> U4 Anti-Corruption Resource Centre *Corruption Glossary* <https://www.u4.no/terms> (accessed 14 Jan 2020).

<sup>53</sup> U4 Anti-Corruption Resource Centre *Corruption Glossary* <https://www.u4.no/terms> (accessed 14 Jan 2020).

<sup>54</sup> Muntingh, L. (2007), p. 16.

<sup>55</sup> S 39(1)(a) Constitution.

<sup>56</sup> Transparency International ‘What is transparency?’ <https://www.transparency.org/glossary/term/transparency> (accessed 14 Jan 2020).

known what officials are doing, and when asked, they must be able to provide an understandable and predictable answer.<sup>57</sup> However, without knowing what officials are doing and how decisions are made, accountability is impossible: there can be no accountability without information.<sup>58</sup>

Effective transparency also requires that information of a particular depth and quality must be available to oversight structures and the public. Issuing evasive statements such as “a thorough investigation was conducted” or “appropriate action was taken” without actually presenting the detailed facts does little to inform the public or oversight structure if an investigation was actually conducted or any action indeed taken.<sup>59</sup> Frustrated and incomplete investigations or explanations increase the tension and suspicion between the officials inside the system and those on the outside of the system by widening the knowledge divide.<sup>60</sup> Where it concerns board appointments, if the process is truly transparent, it will not come as a surprise to observers who are indeed appointed.

Public engagement and participation is dependent on transparency and access to information. In addition to the nature of information provided, there must be systems and mechanisms for providing regular information targeted at different ‘publics’ to enable the reasonable and meaningful engagement of different sectors of the public with the questions of SOE governance. The specialised nature of the work of SOEs means that there will be information needed that is targeted at specialists in that field, and also that as far as possible the issues and concepts for discussion and decision-making are explained to the lay public in a manner that enables them to grapple with the questions at hand. This may include information such as, candidates for SOE board positions, information on the processes to be followed, minutes of SOE board meetings, strategic documents and reports on progress from SOEs amongst others. A further element is that of by what means the public are able to access

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<sup>57</sup> Muntingh, L. (2007), p. 25.

<sup>58</sup> De Maria, W. (2001) Commercial-in-Confidence: An obituary to transparency? *Australian Journal of Public Administration*, Vol. 60 No. 4, p. 92; Hammarberg, T. (2001) Searching the truth – the need to monitor human rights with relevant and reliable means. *Statistical Journal of the United Nations*, ECE 18, pp. 131-140.

<sup>59</sup> Gennaco, M. (2006) Towards Increased Transparency in the Jails and Prisons: Some Optimistic Signs. *Journal of Law and Policy*, Vol. 22, p. 197.

<sup>60</sup> Bibas, S. (2005) Transparency and Participation in Criminal Procedure. *New York University Law Review*, Vol. 86 No. 3, p. 912.

the information (how and where), and at what stage of the decision-making processes information is made available (when).

As public companies, the public must have reasonable access to information of this nature, this serves firstly to facilitate public involvement in SOEs and secondly to increase the accountability of SOEs to the public. In addition to a direct duty to be considered and spelt out for SOE boards in this regard, there are duties on the responsible ministries and on Parliament that must be further developed and enforced/implemented to increase the transparency of decision-making at SOEs.

### **3.8 GOOD HUMAN-RESOURCE MANAGEMENT AND CAREER-DEVELOPMENT PRACTICES, TO MAXIMISE HUMAN POTENTIAL, MUST BE CULTIVATED.**

The *White Paper on Human Resource Management in the Public Service* regulates human resource management and development, but it is unclear if it also applies to SOE's.<sup>61</sup> Nonetheless, it is regarded as an appropriate point of departure. The purpose of the White Paper is described as “to provide a policy framework that will facilitate the development of human resource management practices which support an effective and efficient Public Service, geared for economic and social transformation. Human resource management is therefore, regarded as one of the strategic instruments of the transformation agenda for the Public Service.”<sup>62</sup>

The White Paper formulates a set of principles for human resource management in the public service:

- Decentralisation: Human resource management should be managed in a decentralised manner. This can mean: (a) Devolution: The shift of final responsibility and accountability from the centre to the periphery, namely from the centre to the executing authority. (b) Delegation: Assigning of functions, powers and authority to a lower level.

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<sup>61</sup> Department of Public Service and Administration (1997) *White Paper on Human Resource Management in the Public Service*, <http://www.dpsa.gov.za/dpsa2g/documents/acts&regulations/frameworks/white-papers/pservicedec.pdf>.

<sup>62</sup> Department of Public Service and Administration (1997) p. 7.

- Efficiency: Human resource management must aim to minimise waste and maximise value.
- Effectiveness: Human resource management must be outcomes-based.
- Flexibility: Human resource management will be flexible and creative, taking into account both the operational needs of the organisation and the needs of the employees.
- Diversity: Whilst observing the primary objective of human resource management, employees will be managed in an environment that accommodates and values their culture.
- Service standards: Human resource management units will set standards for the level of service they will provide to their customers.<sup>63</sup>

As with regards to recruitment, the White Paper identifies ‘selection on merit’ as a key tenet of the human resources framework, noting that “Selection on merit is fundamental to ensuring that the Public Service recruits and promotes people of the highest calibre. The aim is to ensure that the person selected is, of the available applicants, the person best suited for the position, on the basis of his or her skills, experience, abilities, personal attributes, future potential as well as the need to achieve a representative and a diverse workforce in the Public Service.”<sup>64</sup> It proceeds to set down a set of principles for the recruitment process.

***Job-related selection criteria:*** The criteria on which selection is made should relate only to the inherent requirements of the duties to be undertaken, but also take account of the wide variety of ways in which suitability can be assessed, for example, competency acquired through previous experience or training. Educational qualifications should not, alone, predetermine suitability. The criteria should not be used to undermine the goal of achieving representation and advancement of previously disadvantaged groups.

***Fairness:*** The process of selection should not discriminate against external and/or internal applicants, nor against any applicant on the grounds of race, colour; gender, disability, age, religion, belief, culture, marital status, sexual orientation, pregnancy, domestic circumstances or any arbitrary criteria.

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<sup>63</sup> Department of Public Service and Administration (1997) p. 11.

<sup>64</sup> Department of Public Service and Administration (1997) p. 21.

**Equity:** All candidates should be measured against the same objective criteria with due regard to the need for diversity and the representativeness of the Public Service. Such criteria should be drawn up in writing in advance of the selection process. A minimum of three people should undertake the selection, including a Chairperson who is responsible for ensuring fairness and objectivity. All applicants for a particular post should be assessed by the same selection panel and on the same criteria.

**Transparency:** Written records, which should be easily accessible, must be kept of the criteria used in selecting interviewers, the selection criteria applied, and of the assessment markings of individual candidates, as well as the basis for the decision, in order to be able to demonstrate that the process was fair and open.

The above applies to SOE board in two ways. Firstly, SOE Boards must oversee human resources in the organisation and must therefore apply the above directly or see that it is applied. It therefore follows that there must be the necessary skills and competence appointed to the board to ensure this. Secondly, the structure(s) that identifies and appoints an SOE Board member must equally apply the above principles.

### **3.9 PUBLIC ADMINISTRATION MUST BE BROADLY REPRESENTATIVE OF THE SOUTH AFRICAN PEOPLE.**

Addressing the imbalances of the past is a constitutional imperative and much progress has been made in this regard since 1994. The Minister of Public Service and Administration recently, in response to a parliamentary question noted “The public service largely mirrors the demographics of the country and consists of an African population of 81.4% [927,446], coloured population of 8.6% [98,333], white population of 7.5% [85,422] and the Asian population of 2.5% [28,514].”<sup>65</sup> However, she noted that the equity target for disabilities (2%) have not been met. The 2018 Employment Equity report produced by the Department of Labour reflects that equity is still some way off in certain sectors, and it is particularly the position of women requiring attention:

- White people occupy 67.7% of top management jobs in South Africa

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<sup>65</sup> State leads the way in meeting employment equity targets’, *Business Day*, 6 June 2018, <https://www.businesslive.co.za/bd/national/2018-06-06-state-leads-the-way-in-meeting-employment-equity-targets/>

- Black people occupy 83.5% of positions at unskilled level
- Women occupy 43.5% of semi-skilled jobs
- Africans are the most represented in technically skilled labour
- In senior management, males occupy 66.2% of the positions.<sup>66</sup>

The race and gender profiles of the boards of three SOE's (Eskom, Prasa and SABC) are presented in Table 1 together with the South African population profile. The most observable trend is that nearly two thirds of board members are males (65%) compared to being 49% of the total population. Africans are slightly under represented to the benefit of Indian and White board members. Coloured people are significantly under represented, making up less than 3% of the three boards but constituting almost 9% of the population.

*Table 1 Race and gender profile of boards at three SOEs as at February 2019*

PRASA		African	Coloured	Indian	White	Total
	Male	4		1		5
	Female	3			1	4
	<b>Total</b>	<b>7</b>	<b>0</b>	<b>1</b>	<b>1</b>	<b>9</b>
ESKOM		African	Coloured	Indian	White	Total
	Male	5	1		1	7
	Female	6				6
	<b>Total</b>	<b>11</b>	<b>1</b>	<b>0</b>	<b>1</b>	<b>13</b>
SABC		African	Coloured	Indian	White	Total
	Male	7		1	2	10
	Female	1			1	2
	<b>Total</b>	<b>8</b>	<b>0</b>	<b>1</b>	<b>3</b>	<b>12</b>
TOTAL		African	Coloured	Indian	White	Total
	Male	16	1	2	3	22
	Female	10	0	0	2	12
	<b>Total</b>	<b>26</b>	<b>1</b>	<b>2</b>	<b>5</b>	<b>34</b>
TOTAL %		African	Coloured	Indian	White	Total

<sup>66</sup> '5 key findings of the Employment Equity Commission Report 2018' *Alberton Record*, 28 June 2018, <https://albertonrecord.co.za/181300/5-key-findings-employment-equity-commission-report-2018/>.

	Male	47.1	2.9	5.9	8.8	<b>64.7</b>
	Female	29.4	0.0	0.0	5.9	<b>35.3</b>
	Total	<b>76.5</b>	<b>2.9</b>	<b>5.9</b>	<b>14.7</b>	<b>100</b>
SA Population % <sup>67</sup>		African	Coloured	Indian	White	Total
	Male	39.5	4.3	1.3	3.8	<b>48.8</b>
	Female	41.4	4.5	1.2	4.0	<b>51.2</b>
	Total	<b>80.9</b>	<b>8.8</b>	<b>2.5</b>	<b>7.8</b>	<b>100.0</b>

The above data show that great strides have been made in attaining equity in respect of race and gender, but also that there remains room for improvement. The lesson to be taken from the above is that in appointment processes those assessing the applicant(s) need to be mindful of the current situation and assess the applicant in the context of the SOE. It also follows that the structure(s) assessing candidates also need to be sufficiently diverse and avoid bias, such as the “old boys’ club” phenomenon.

#### **4 HOW CAN THE PRINCIPLES BE APPLIED IN APPOINTMENTS IN A METHODOICAL MANNER?**

In the preceding the emphasis was placed on the functional requirements of the appointment process and structural requirements were not placed under the spotlight, save that it was noted that there needs to be a diffusion of power and discretion when appointing SOE board members.<sup>68</sup> Moreover, the government is also simultaneously the majority or sole shareholder, the policymaker and the regulator of SOEs and this is an untenable situation. In what follows reference is made to a “Nominations Committee” and “Appointments Committee” as structures created to diffuse decision-making. This should be considered as a proposal for further deliberations and research. Creating such structures may be regarded as justifiable for major SOEs but not for smaller ones or other government business entities listed in Schedule 3 of the Public Finance Management Act.

<sup>67</sup> StatSA (2018) P0302 - Mid-year population estimates, [http://www.statssa.gov.za/?page\\_id=1854&PPN=P0302](http://www.statssa.gov.za/?page_id=1854&PPN=P0302)

<sup>68</sup> For example, in a recent report the AGSA reported that in a sample of 15 SOEs, 33% of CEO positions and 20% of CFO positions were vacant for six months or longer (AGSA (2018) *Annual Report 2017/18*, p. 118).

In order to apply the principles in the appointment process it is necessary to unpack them in a methodical manner, indicating for each the following:

- What is the policy goal flowing from the constitutional principle?
- What is the outcome being sought?
- What is the operational definition?
- Why is it important to measure this?
- What is the indicator and measure to collect the correct and relevant information?

Policy goal	<b>(1) A high standard of professional ethics must be promoted and maintained.</b>
Outcome	Directors of SOEs seek responsibility and welcome accountability, demonstrate customer care principles, interact with colleagues in a professional manner (e.g. treats colleagues as customers and generates enthusiasm) is self-critical, and listens.
Definition	In the identification and appointment of SOE directors, care is taken to identify candidates meeting requirements of professional knowledge and personal integrity. (see <i>Democratic Alliance v President of the Republic of South Africa and others</i> (263/11) [2011] ZASCA 241; 2012 (1) para. 116). <sup>69</sup>
Motivation	Professionalism is highly reliant on expertise (knowledge) and self-regulation, and less dependent on compliance management. It is reasonable to have high expectations of expertise and a history of behaviour that is untarnished by unethical behaviour or behaviour lacking integrity.
Indicator(s)	<ul style="list-style-type: none"> <li>● The appointment criteria are clear in specifying honesty, integrity and expertise as key considerations for a position as director of an SOE.</li> </ul>

<sup>69</sup> [116] I disagree with the view that in applying s 9(1)(b) of the Act the President is entitled to bring his subjective view to bear. First, the section does not use the expression ‘in the President’s view’ or some other similar expression. Second, it is couched in imperative terms. The appointee ‘must’ be a fit and proper person. Third, I fail to see how qualities like ‘integrity’ are not to be objectively assessed. An objective assessment of one’s personal and professional life ought to reveal whether one has integrity. In *The Shorter Oxford English Dictionary on Historical Principles* (1988), inter alia, the following are the meanings attributed to the word ‘integrity’: ‘Unimpaired or uncorrupted state; original perfect condition; soundness; innocence, sinlessness; soundness of moral principle; the character of uncorrupted virtue; uprightness; honesty, sincerity.’ Collins’ Thesaurus (2003) provides the following as words related to the word ‘integrity’: ‘honesty, principle, honour, virtue, goodness, morality, purity, righteousness, probity, rectitude, truthfulness, trustworthiness, incorruptibility, uprightness, scrupulousness, reputability.’ Under ‘opposites’ the following is noted: ‘corruption, dishonesty, immorality, disrepute, deceit, duplicity.’

	<ul style="list-style-type: none"> <li>● The appointment process is reviewed on a regular basis to assess if it has promoted a high standard of professional ethics.</li> <li>● Thorough background checks are performed to establish if candidates comply with a high standard of professional ethics.</li> <li>● The appointment process considers all information when selecting candidates for shortlisting and invites submissions.</li> <li>● Candidates not meeting the requirements of a high standard of professional ethics are not appointed.</li> <li>● Candidates should have a demonstrable level of knowledge of the sector of the SOE, or other specialist knowledge directly relevant to and needed by the SOE.</li> <li>● Candidates should have a demonstrable level of knowledge and experience of corporate governance.</li> <li>● Has the candidate ever been reported to a Chapter Nine institution, a professional body or employer for criminal, unethical and/or unprofessional behaviour? If so, what was the finding?</li> <li>● Did the candidate proactively disclose any matters that might raise questions about his or her professionalism and ethics?</li> </ul>
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Policy goal	<b>(2) Efficient, economic and effective use of resources must be promoted.</b>
Outcome	The budget is utilised in line with the strategic plan.
Definition	The budget, as approved by the Board, is used to fund pre-determined activities.
Motivation	In order to have maximum value for money it is important that the budget is utilised in the correct and approved manner.
Indicator(s)	<ul style="list-style-type: none"> <li>● Has the candidate ever been directly associated with a finding of unauthorised, wasteful and/or fruitless expenditure in a public or private entity?</li> </ul>

	<ul style="list-style-type: none"> <li>● Has the candidate ever been directly associated with an adverse audit finding in a public or private entity?<sup>70</sup></li> <li>● Does the candidate have demonstrable experience in the efficient and effective use of a similarly sized budget?</li> <li>● Has the candidate ever been declared a delinquent director?</li> </ul>
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Policy goal	<b>(3) Public administration must be development-oriented.</b>
Outcome	SOE's understand and fulfil their role in a developmental state in an accountable and transparent manner.
Definition	Vision 2030 requires a capable and developmental state: capable in that it has the capacity to formulate and implement policies that serve the national interest; developmental in that of poverty and inequality, and building the state's capacity to fulfil this role.
Motivation	It is a requirement of the Constitution to address the imbalances of the past and improve the quality of life of all.
Indicator(s)	<ul style="list-style-type: none"> <li>● Candidates have a clear understanding of the position and functions of the SOE in a capable and developmental state.</li> <li>● Candidates have demonstrable experience in entities supportive of building a capable and developmental state.</li> <li>● The selection criteria emphasise the role of the SOE in building a capable and developmental state.</li> </ul>

<sup>70</sup> The Auditor-General can express one of the following audit opinions: (a) Clean audit outcome: The financial statements are free from material misstatements (in other words, a financially unqualified audit opinion) and there are no material findings on reporting on performance objectives or non-compliance with legislation. (b) Financially unqualified audit opinion: The financial statements contain no material misstatements. Unless the Auditor General expresses a clean audit outcome, findings have been raised on either reporting on predetermined objectives or non-compliance with legislation, or both these aspects. (c) Qualified audit opinion: The financial statements contain material misstatements in specific amounts, or there is insufficient evidence for the Auditor-General to conclude that specific amounts included in the financial statements are not materially misstated. (d) Adverse audit opinion: The financial statements contain material misstatements that are not confined to specific amounts, or the misstatements represent a substantial portion of the financial statements. (e) Disclaimer of audit opinion: The auditee provided insufficient evidence in the form of documentation on which to base an audit opinion. The lack of sufficient evidence is not confined to specific amounts, or represents a substantial portion of the information contained in the financial statements.

Policy goal	<b>(4) Services must be provided impartially, fairly, equitably and without bias.</b>
Outcome	The SOE Board oversees an organisation that behaves in a manner that is fair, equitable and without bias.
Definition	Objectivity requires that the SOE Board is able to express itself or deal with perceived facts or conditions, without distortion by personal feelings, prejudices, or interpretations, and not use its powers to favour individuals or groups.
Motivation	The Constitution is clear in its equality requirements and the prohibition of unfair discrimination.
Indicator(s)	<ul style="list-style-type: none"> <li>● Is there any historical evidence that the candidate has acted in a manner that would not be fair, equitable and without bias? <i>Note: Evidence constitutes preferably a clear finding, but it is at least more than a mere allegation.</i></li> <li>● Is there any historical evidence that the candidate has made a demonstrable contribution to address imbalances of the past? <i>Note: This refers to, but is not limited to race and gender.</i></li> <li>● The selection process must be fair, impartial and without bias, based on objective criteria.</li> </ul>

Policy goal	<b>(5) People's needs must be responded to, and the public must be encouraged to participate in policy-making.</b>
Outcome	The appointment process for SOE directors is transparent and the views of the public are taken into account in a meaningful way.
Definition	The process of appointment is clear and documented. There are opportunities for stakeholder input and this is a matter of public record.
Motivation	Transparency is a constitutional requirement and a transparent appointment process will build trust in SOE's and thus their legitimacy. At minimum this means that those affected by decisions of the identifying body, office bearers in SOEs and departments as well as other stakeholders with an interest or

	mandate in respect of SOEs, must have access to not only the basic facts and figures, but also insight into the mechanisms and processes of decision-making. A consequence of this is that officials and office bearers in SOEs have a duty to act visibly, predictably and understandably.
Indicator(s)	<ul style="list-style-type: none"> <li>● The appointment process is a known and documented process with clear timelines.</li> <li>● The public is given sufficient opportunity to make inputs.</li> <li>● The candidate can demonstrate how he/she would reasonably incorporate transparency and public engagement into the board's operations.</li> </ul>

Policy goal	<b>(6) Public administration must be accountable.</b>
Outcome	The Nominations Committee and the Appointments Committee are able to explain their decisions in a manner that is rational when called to do so, and are similarly able to take responsibility and make amends for mistakes. This means that they are able to understand the mistake that was made and implement corrective measures.
Definition	Corder et al explain it as follows: "Accountability can be said to require a person to explain and justify - against criteria of some kind - their decisions or actions. It also requires that the person goes on to make amends for any fault or error and takes steps to prevent its recurrence in the future." Oversight has a broader meaning than accountability and includes a wide range of activities and initiatives aimed at monitoring the executive. While accountability and oversight may differ in respect of scope and focus, it is also clear that the two are closely linked and mutually reinforcing.
Motivation	There can be no accountability without transparency. Since the government is a shareholder (if not majority shareholder) in an SOE, for which tax payer money is used, it follows that the government and SOE must account to the public for their decisions.

Indicator(s)	<ul style="list-style-type: none"> <li>● The Nominations Committee and the Appointments Committees are willing and able to explain their decisions against a set of predetermined objective standards.</li> <li>● The number of appointments that have been taken on review (e.g. judicial or administrative) and set aside.</li> </ul>
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Policy goal	<b>(7) Transparency must be fostered by providing the public with timely, accessible and accurate information.</b>
Outcome	The appointment process for SOE directors is transparent and the views of the public are taken into account in a meaningful way.
Definition	The process of appointment is clear and documented. There are opportunities for stakeholder input and this is a matter of public record.
Motivation	Transparency is a constitutional requirement and a transparent appointment process will build trust in SOEs and thus their legitimacy. At minimum this means that those affected by decisions of the identifying body, office bearers in SOEs and departments as well as other stakeholders with an interest or mandate in respect of SOEs, must have access to not only the basic facts and figures, but also insight into the mechanisms and processes of decision-making. A consequence of this is that officials and office bearers in SOEs have a duty to act visibly, predictably and understandably.
Indicator(s)	<ul style="list-style-type: none"> <li>● The public is kept informed of vacancies, appointments and dismissals, as well as the reasons thereto concerning SOEs.</li> <li>● The public is kept informed of the processes concerning the filling of vacancies.</li> <li>● There are clear requirements for the vetting process and this is public.</li> <li>● The public is kept informed of the processes concerning the dismissal of SOE board members.</li> <li>● The public has access to the CVs of long listed and short-listed candidates.</li> <li>● There is sufficient time to review candidate CVs.</li> </ul>

	<ul style="list-style-type: none"> <li>● Recommendations for appointment are clearly motivated and based on rational grounds.</li> <li>● Following an appointment, there must be a published record on how the public was consulted and involved in the appointment.</li> </ul>
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Policy goal	<b>(8) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.</b>
Outcome	The SOE shows results through competent performance and excellence through the effective and efficient management of staff in its recruitment and skills development practices.
Definition	Human resource management, HRM, is the department of a business organization that looks after the hiring, management and firing of staff. HRM focuses on the function of people within the business, ensuring best work practices are in place at all times.)
Motivation	This is a constitutional requirement with reference to the transformative goal of the Constitution. Investing in human potential stands central to the NDP.
Indicator(s)	<ul style="list-style-type: none"> <li>● Has the candidate ever been accused of unfair labour practice?</li> <li>● Does the candidate have a track record in developing people's potential?</li> </ul>

Policy goal	<b>(9) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.</b>
Outcome	The board of the SOE and its staff are representative of the people as required by the Constitution.
Definition	The profile of board members and staff reflect the race, gender and other constitutionally defined (see unfair discrimination) variables of the public.

Motivation	This is a constitutional requirement and obligation of all public sector institutions and large private institutions.
Indicator(s)	<ul style="list-style-type: none"> <li>● Calls for applications and appointments to SOE Boards reflect the representivity requirement.</li> <li>● The composition of the Nominations Committee and the Appointments Committee reflects the representivity requirement.</li> <li>● There is a clear plan in place to ensure representivity.</li> <li>● Candidates must have a track record of promoting transformation and/or show an understanding of the issues of representivity and transformation.</li> </ul>

## 5 CONCLUSION.

The preceding proposed a tool to assess if the appointment processes of SOE board directors meet the requirements of section 195(1) of the Constitution. In order to take this forward, a few points need to be noted. Firstly, there is great diversity in the size and mandates of what is called SOE and this diversity has implication in how we approach challenges in governance. It is simply not advisable to compare a major public entity such as Eskom with a provincial public entity such as a liquor board. When looking at SOE reform it is then necessary to understand the entity and its mandate and the possible impact if things go awry. Secondly, SOE reform will require significant structural reforms and the most significant of this is the breaking of the relevant minister's stronghold on discretion in appointments. Thirdly, the framework proposed in the preceding needs to be tested and amended as needed. Admittedly, it was drafted with major public entities in mind and that some of what is being proposed will be difficult if not impractical to implement for smaller entities such as provincial regulatory authorities.