

Can directors of state-owned companies be held to account by the SA public?

4 July 2018 4 min read

South African President Ramaphosa admitted in his state of the nation address that state-owned enterprises "are experiencing severe financial operation and governance challenges". He continued to promise in his state of the nation address that the government would "intervene decisively to stabilise and revitalise state-owned enterprises".

With the South African Government being the sole shareholder of state owned companies (SOCs), the duty of directors to act in the best interest of the company has traditionally been to maximise profits for the company's shareholders, i.e. the Government. Over time, however, public opinion has dictated that a variety of other stakeholders' interests should also be recognised.

So, can the directors of these companies be held personally liable by the South African public as ultimate stakeholders? And, what exactly are the duties of directors of SOCs?

The second question must be considered, before the first can be answered.

In this regard, principle 16 in King IV provides that '*In the execution of its governance role and responsibilities, the governing body should adopt a stakeholder-inclusive approach that balances the needs, interests and expectations of material stakeholders in the best interests of the organisation over time*'.

The stakeholder inclusive approach advocated by King IV is that:

'Directors owe their fiduciary duties to the company and to the company alone as the company is a separate legal entity from the moment it is registered until it is deregistered ... The company is represented by several interests and these include the interests of shareholders, employees, consumers, the community and the environment. Thus, requiring of directors to act in good faith in the interest of 'the company' cannot nowadays mean anything other than a blend of all these interests, but first and foremost they must act in the best interest of the company as a separate legal entity ... An interest that may be primary at one particular point of time in the company's existence, may well become secondary at a later stage.'

This approach in King IV seems to echo emerging case law on corporate governance.

For example, in *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd* [2006 5 SA 333 \(W\)](#), the court referred to a previous King Report by testing directors' conduct against the requirements in that Report, and found that by not complying with the principles embedded in the King reports, directors may be in breach of their duty of care and skill.

Also, in the case of *Mthimunye-Bakoro v Petroleum Oil and Gas Corporation of South Africa (SOC) Limited* [\[2015\] JOL 33744](#) corporate governance was defined as '*... the animating idea of which is to ensure net gains in wealth for shareholders, protect the legitimate concerns of other stakeholders and improve efficiency, organisational performance and resource allocation.*'

We must, of course, also consider the South African Companies Act 71 of 2008. Section 5(1) of this Act states that the Act must be interpreted in such a way that gives best effect to the purposes listed in section 7. Section 7(d) specifically provides that directors have to manage a company in such a manner that promotes both economic and social benefits, and 7(k) provides for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders.

Therefore, it is incumbent on directors to not only act in the best interests of the company's shareholder (Government), but also in the best interest of all its stakeholders. And, in failing to act in the best interest of both shareholders and other stakeholders alike, personal liability for losses and/or damages incurred by stakeholders may follow. For example, if wages are lost because business had to shut down due to electricity cuts, it would be necessary to ascertain what caused those electricity cuts and if the lost wages are a direct result of decisions taken by the power utility at board level (this is the tricky and expensive part for a claimant). And, of course, if there are enough employees who have lost wages, then a class action may also follow.

However, the burning question is whether or not any one or group of stakeholders have suffered enough harm as a *direct* result of the directors' failure to act with due care and skill, that would justify the time and expense of travelling down this very rocky road.

Given the state of South Africa's SOC's, it seems more likely than ever before.

If you would like to learn more about [Insolvency](#), [Business Rescue & Restructuring](#), please visit our practice area page.

