

CASES REFERRING TO THE KING REPORT

1. MYBURG V BARINOR HOLDINGS (PTY) LTD AND ANOTHER¹:

“[16] Barinor had two answers to this proposal. The first is that, on a practical level, it needed to retain Boshoff’s expertise while negotiations for the two big property developments were ongoing. The second was a more principled one, based on the King code on corporate governance: that is that the executive positions of CEO and FD should be kept apart.” (STEENKAMP J)

“[18] With regard to the second proposal, the current structure of a financial manager reporting to the CEO is not ideal. The incumbent of the financial manager position has made a number of elementary errors. But that in itself does not make the dismissal substantively unfair merely because Barinor rejected Myburgh’s proposal. Its reliance on the King III principles is persuasive.” (STEENKAMP J)

2. MTHIMUNYE-BAKORO V PETROLEUM OIL AND GAS CORPORATION OF SOUTH AFRICA (SOC) LIMITED AND ANOTHER²:

“The meeting of 18 June 2015 was in violation of these principles. Thus, it stood to be declared unlawful and the decisions and resolutions taken and passed at the meeting had to be declared invalid and of no force and effect. In this connection he cited the judgment in South African Broadcast Incorporation Limited v Mpofu and Another [2009] 4 ALL SA 169 (GSJ) in which a full bench approved certain basic principles of corporate governance relying, *inter alia*, on the King Report on Corporate Governance for South Africa (which is referred to as the King Code).” (DAVIS J)

1 Myburgh v Barinor Holdings (Pty) Ltd and Another (C 820/13) [2015] ZALCCT 1.

2 Mthimunye-Bakoro v Petroleum Oil and Gas Corporation of South Africa (SOC) Limited and Another (12476/2015) [2015] ZAWCHC 113; 2015 (6) SA 338 (WCC).

3. CAXTON AND CPT PUBLISHERS AND PRINTERS LIMITED V MEDIA 24 PROPRIETARY LIMITED AND OTHERS³:

“Mr Retief, as non-executive Chairman shall have the authority and responsibility to oversee the implementation and ensure compliance with sound and generally accepted corporate governance policies by the Group (which, for the avoidance of doubt, will include the establishment of, and consulting with, an audit committee and such other committees the Board may deem necessary or as required in terms of the Act and the King Report);” (BOQWANA AJA, DAVIS JP AND ROGERS AJA)

“The significant change, it argues, was brought about by the conversion of Novus to a public company on the terms set out in the MOI, which effectively rendered the old agreement unlawful. In this connection, it submits that the regime of joint control under the old agreement was incompatible with s66 (1) of the Companies Act 70 of 2008 (‘the new Companies Act’); paragraph 35.1 of the

MOI, the Listing Requirements of the JSE and King III. The change had to be made, it submits, in compliance with the law.” (BOQWANA AJA, DAVIS JP AND ROGERS AJA)

“The Listing Requirements further prescribe compliance with principles 2.1.1 and 2.2.5 of King III which require companies to be headed by a board that directs, governs and is in effective control of the company and the board to play a prominent role in the strategy-development process and not be the mere recipients of strategy proposed by management.” (BOQWANA AJA, DAVIS JP AND ROGERS AJA)

“This takes one conveniently to the preamble to clause 4.3. Everything is made subject to the duties of the members of PMG’s board in terms of the 2008 Companies Act, the MOI, the Listing Requirements and ‘the Law’ (a term very

³ Caxton And CPT Publishers And Printers Limited v Media 24 Proprietary Limited and Others (136/CAC/March 2015) [2015] ZAWCHC 209 (25 November 2015).

widely defined in the agreement and including, so the parties agree, King III).”
(BOQWANA AJA, DAVIS JP AND ROGERS AJA)

“The absence of derogation from the board’s powers and duties is consistent with the Listing Requirements and King III. The former require that a listed company must have a policy evidencing a clear balance of power and authority at the level of the board to ensure that no one director has unfettered powers of decision-making. The latter requires inter alia that a company must be headed by a board that directs, governs and is in effective control of the company and that the board must play a prominent role in the strategy-development process and not be a mere recipient of strategy proposed by management.” (BOQWANA AJA, DAVIS JP AND ROGERS AJA)

“Against that background, it is not unreasonable to suppose that the parties intended, consistently with the MOI, the Listing Requirements and King III, to place final management authority on all matters in the board’s hands while retaining as much verbiage from the old agreement as would get past the JSE, thus providing a basis for arguing that there has not been a transition from dual (or joint) control to sole control. But for the reasons I have endeavoured to explain, the argument cannot succeed.” (BOQWANA AJA, DAVIS JP AND ROGERS AJA)

4. MINISTER OF WATER AFFAIRS AND FORESTRY V STILFONTEIN GOLD MINING COMPANY LIMITED AND OTHERS⁴:

“Practising sound corporate governance is essential for the well-being of a company and is in the best interests of the growth of this country’s economy especially in attracting new investments. To this end the corporate community within South Africa has widely and almost uniformly accepted the findings and recommendations of the King Committee on Corporate Governance – see King Report on Corporate Governance for South Africa – March 2002.

⁴ Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company Limited and Others (7655/05 , 7655/05) [2006] ZAGPHC 47 (15 May 2006).

Regarding the Board of directors the King Report states the following:

'The Board is the focal point of the corporate governance system. It is ultimately accountable and responsible for the performance and affairs of the company. Delegating authority to board committees or management does not in any way mitigate or dissipate the discharge by the board and its directors of their duties and responsibility.'

The conduct of the second to fifth respondents fly in the face of everything recommended in the code of corporate practices and conduct recommended by the King Committee. In my view the second to fifth respondents acted irresponsibly in merely abandoning the first respondent, a listed company of which they were the directors.”

“The King Committee, correctly in my view, stressed that one of the characteristics of good corporate governance is social responsibility. The Committee stated as follows:

'A well-managed company will be aware of, and respond to, social issues, placing a high priority on ethical standards. A good corporate citizen is increasingly seen as one that is non-discriminatory, non-exploitative, and responsible with regard to environmental and human rights issues. A company is likely to experience indirect economic benefits such as improved productivity and corporate reputation by taking those factors into consideration.'

See King Report March 2002 page 12 paragraph 18.7.”

5. KALAHARI RESOURCES (PTY) LTD V ARCELORMITTAL SA AND OTHERS⁵:

“Kalahari submits that AlvilT's obligation to provide funding to Kgalagadi in terms of clause 24.1.3 of the shareholders' agreement, is not subject to the performance by Kalahari of any obligations in terms of that agreement including

⁵ Kalahari Resources (Pty) Ltd v ArcelorMittal SA and Others (12/16192) [2012] ZAGPJHC 130; [2012] 3 All SA 555 (GSJ) (26 June 2012).

the obligation to register the mining right, which was in its name, into the name of Kgalagadi and to comply with corporate governance recommendations set out in the King II Report, as provided for in the shareholders' agreement.” (COPPIN J)

“In terms of clause 12.9 of the shareholders' agreement it is, inter alia, agreed that the Board of Kgalagadi shall "insofar as reasonably and practically possible" adopt and apply the recommendations of the King Commission on Corporate Governance (save those provisions that relate to the appointment of non-executive directors); a code of conduct dealing with all empowerment issues; as well as a progressive policy.” (COPPIN J)

“The obligation of Kgalagadi's board to adopt and apply, insofar as reasonably and practically possible, inter alia, the recommendations of the King Commission on Corporate Governance are, in my view, not reciprocal.” (COPPIN J)

6. **LEVENSTEIN V S⁶:**

“It is common cause that the foot of this this letter was subsequently endorsed by the chairman with the comment:

‘The non-executive directors of REGAL have unreservedly and unconditionally authorised and approved the contents of this letter relating to cash and the shares requested by the Chief executive officer – Mr Jeffrey Levenstein.’

This endorsement was not dated. However, in a letter dated 26 January 2000 addressed to the chairman of the board by Mr PF Nhleko, at the time a non-executive director of Regal, mention is made of a meeting of the non-executive directors held on Tuesday 25 January 2000. Mr Nhleko went on to confirm that in principle he had no qualms with the appellant’s remuneration structure being reviewed and Regal’s restraint agreement with the appellant being re-assessed, although he suggested that a remuneration committee should be established in accordance with the ‘King Code’ for corporate governance.’ In the light of this,

6 Levenstein v S (890/12) [2013] ZASCA 147; [2013] 4 All SA 528 (SCA) (1 October 2013).

the endorsement was presumably made by the chairman pursuant to the meeting mentioned by Mr Nhleko.” (Cachalia, Bosielo, Leach and Willis JJA and Meyer AJA)

7. SOUTH AFRICAN BROADCASTING CORPORATION LTD AND ANOTHER V MPOFU⁷:

“During the early part of 2008 an induction meeting of the Board was held. An expert in corporate governance and author of the King Code, Mr Mervyn King SC gave a presentation to the Board on its oversight role and there was particular emphasis on the delineation of the role between management and the Board.” (Victor J)

“The King Report on Corporate Governance for South Africa 2002 deals with public sector enterprises.” (Victor J)

“King recommends that public enterprise should try and apply the appropriate principles set out in the Code. The Code sets out principles and does not determine detailed conduct.” (Victor J)

“The Board and its directors are ultimately accountable and responsible for the performance and affairs of the company. King noted that given the synergy which takes place between individuals of different skills, experience and background, the unitary board structure with executive and non-executive directors interacting remains appropriate for a South African company. In terms of the King Code, Board meetings should include mechanisms that are efficient and timely. Board members should be briefed prior to meetings and Board members should take the responsibility of being objectively satisfied that they have been furnished with all the relevant information and facts before making a decision.” (Victor J)

“The respondent’s limited participation at the meeting is common cause. He was called in and only allowed to deal with the matter of Dr Zikalala. Such

⁷ South African Broadcasting Corporation Ltd and Another v Mpofu (A5021/08) [2009] ZAGPJHC 25; [2009] 4 All SA 169 (GSJ) (11 June 2009).

participation was neither meaningful nor in accordance with the best practice as described in the King Report particularly when regard is had to the fact that the SABC is a public enterprise.” (Victor J)

“The Board of Directors in state-owned enterprises are not only enjoined to consider their responsibilities in terms of the King Report 2002.” (Victor J)

“Ubuntu-botho is deeply rooted in our society. These values should assist in informing corporate decisions made by directors in state owned enterprises. Proper and constructive dialogue would enable better outcomes in the decision making process. Heated and impetuous decision making is the stuff of irrational outcomes. This must be avoided. This form of governance is underpinned by the philosophy of ubuntu-botho. The time is right to incorporate the views of umuntu ngumuntu ngabantu in the King code of good governance.” (Victor J)

8. COUNCIL FOR MEDICAL SCHEMES V SELFMED⁸:

“On 13 May 2005, Theys addressed another letter to Werth. The letter stated that

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‘[T]his Office. . . can find no provision in the rules of the scheme for an executive chairperson. This kind of position also flies in the face of the King Report on governance, which advocates a division of the powers between the chairperson and the principal officer (CEO). As neither the rules nor corporate governance model make provision for the position of an executive chairperson, there is no basis for the scheme to have such a position. The creation of this position is accordingly ultra vires the rules of the scheme.’” (Navsa, Van Heerden, Ponnar, Malan JJA and Petse AJA)

“Bester’s advice to the board should be viewed against the background of the fact that, in terms of Selfmed’s Rules, the principal officer is disqualified from being a member of the board of trustees. It is also clear from the Rules that the

8 Council for Medical Schemes and Another v Selfmed Medical Scheme and Another (561/2010) [2011] ZASCA 207 (25 November 2011).

duties of the principal officer are to act as an executive officer of the scheme on the direction and authority of the board of trustees. In the *Explanatory Memorandum to the Model Rules for Medical Schemes registered under the Medical Schemes Act, 1988 (Act No. 131 of 1998)*, it is stated that, although not legally disqualified, it is advisable that the principal officer does not become a trustee in view of the fact that the board appoints him or her and there could be a conflict of interest. If provision is made for such appointment, then the principal officer should be an *ex officio* member of the board. Moreover, in the second King Report on Governance in South Africa in 2002 ('King II'), Chapter 2, in dealing with the 'Role and Function of the Chairperson', recommended that there should be a clearly accepted division of responsibilities at the head of the company to ensure a balance of power and authority, so that no one individual has unfettered powers of decision-making. The chairperson of the board should preferably be an independent non-executive director. Given the strategic operational role of the chief executive officer, this function should be separate from that of the chairperson." (Navsa, Van Heerden, Ponnann, Malan JJA and Petse AJA)

9. UNITED PEOPLES UNION OF SOUTH AFRICA V REGISTRAR OF LABOUR RELATIONS⁹:

"The **King Report III on Corporate Governance, Chapter 6** addresses the issue of compliance with laws, rules, codes and standards. **Item 3 of chapter 6** states:

'Corporate governance is the expression of ethical values and standards. As such compliance should also be understood to be an ethical imperative for the governance of companies...'

There is no difference in terms of record keeping and reporting between a company for gain and an organisation not for gain. **Item 4** states:

⁹ United Peoples Union of South Africa v Registrar of Labour Relations (J2252/09) [2011] ZALCJHB 275 (15 February 2011).

'Compliance with applicable laws should be understood not only in terms of the obligations that they create, but also for the rights and protection that they afford'" (MBILENI AJ)

10. LAZARUS MBETHE V UNITED MAGNESE OF KHALAHARI (PTY) LTD¹⁰:

"Although the Memorandum of Association provides that the business of the respondent be conducted through various committees, which powers of delegation are endorsed by section 72(1) of the Act, in terms of clause 12 of the shareholders agreement, such committees were required to be presided over by persons who were directors of the respondent and could not make binding decisions unless ratified by the Board. This is a requirement, endorsed by section 72(2) of the Act and King III, which is in conflict with the Memorandum of Association, which is the subject matter of the first two demands dealt with below." (WENZEL AJ)

"The essence of the first statutory demand is that there are provisions in the shareholder's agreement relating to Board Committees which are in conflict with the provisions of the Companies Act and King III Report on Corporate Governance for South Africa 2009 in so far as they relate to activities, authority and quorate decision making processes." (WENZEL AJ)

"In paragraphs 20 and 22 of the demand it is stated that:

'20. It is apparent that the shareholders agreement of UMK is in conflict with the provisions of the Act and King III in relation to the activities, authority and quorate decision-making processes of the Board Committees. It is consequently bad in law thus rendering void or voidable matters purportedly decided by them to the extent of such inconsistency.'" (WENZEL AJ)

10 Mbethe v United Manganese of Kalahari (Pty) Ltd (42213/2014) [2016] ZAGPJHC 8 (11 February 2016).

“In support of this demand the applicant seeks also to rely upon clause 12.4 of the shareholders agreement and King III :

125.1. Clause 12. 4 of the shareholders agreement requires members of committees to comply fully with the requirements of the Companies Act and King III; and

125.2. Paragraph 131 of King III provides that :

‘Committees, other than risk committees should only comprise members of the board and should have a majority of non-executive directors. The majority of the non-executive directors serving on these committees should be independent. Committees should be chaired by independent non-executive directors, other than the executive committee which is ordinarily chaired by the CEO.’” (WENZEL AJ)

“As I have said, in so far as Raimate purported to take a decision to terminate the Zatospace contract, his actions would be unlawful and contrary not only to the appendix to the Shareholders Agreement, the Act and King III. However, the Act is subject to the Memorandum of Association which permits such conduct and trumps the Act and the Shareholders Agreement.” (WENZEL AJ)

“The office of CEO, as is that of deputy CEO, is a substantial position with wide ranging powers which cannot simply be assumed. In terms of clause 11.2 of the Shareholders Agreement, the CEO is responsible for the day to day management of the respondent and when read with paragraph 60 of King III, this includes ensuring that the respondent comply with all relevant laws and good governance principles.” (WENZEL AJ)

“It is for this reason that the applicant has sought to pin its case for the continuation of this contract on the averred obligation of the respondent to promote the interests of the community in line with broad economic empowerment principles required in terms of the Shareholders Agreement, the Act and King III.” (WENZEL AJ)

“This is in accordance with the principles of good governance including fairness, accountability, responsibility and transparency recommended in paragraph 5 of King III and clause 12.4 of the 58 Shareholders Agreement which places a fiduciary duty on the directors of the respondent to promote the interests of the community.” (WENZEL AJ)

“This is all the more so where this is not based on a legally cognizable cause of action apart from an amorphous obligation in line with the Constitution, section 7 of the Companies Act and King III to promote the interests of the community failing which the respondent’s mining right may be in jeopardy.” (WENZEL AJ)

“It is of some significance that in formulating the first demand it is averred that any decisions taken by such committees in conflict with the Act and King III would be void or voidable, which would include the decision taken by the procurement committee to cancel the Zastropace contract.” (WENZEL AJ)

11. DAVID JOHN RANGLES V CHEMICAL SPECIALITIES LTD¹¹:

“On 4 August 2009 the applicant issued a 10 page document entitled to whom it may concern” and he sent it to the board of the company. The document deals with various issues of his concern and reads:

‘1. This is a report (and a Protected Disclosure) to the Audit committee and the Board on activities in the affairs of Chemical Specialities (CS) that in my opinion contravene the law, or the Code of Ethics (copy attached), or King II or the standards of good corporate governance that CS supports to adhere to its annual reports.’” (CELE J)

11 Randles v Chemical Specialist Ltd (D 42/2010) [2010] ZALC 22; (2010) 31 ILJ 2150 (LC) ; [2010] 7 BLLR 730 (LC) (5 February 2010).

12. DEMOCRATIC ALLIANCE V SOUTH AFRICAN BROADCASTING CORPORATION SOC LTD AND OTHERS¹²:

“Finally, I do not accept that the SABC will suffer irreparable harm if disciplinary proceedings are brought against Mr Motsoeneng. The harm that the SABC has suffered is apparent from the report of the Public Protector, which states:

‘All of the above findings are symptomatic of pathological corporate governance deficiencies at the SABC, including failure by the SABC Board to provide strategic oversight to the National broadcaster as provided for in the SABC Board Charter and King III Report... Mr Motsoeneng has been allowed by successive Boards to operate above the law, undermining the GCEO among others, and causing the staff, particularly in the Human Resources and Financial Departments to engage in unlawful conduct.’” (SCHIPPERS J)

13. BYTES TECHNOLOGY GROUP AND OTHERS V MICHAEL¹³:

“The SCCU investigating officer, the Advocate from the NPA, and/or officials from the Competition Commission may also wish to speak to you regarding a commercial crime which has been allegedly been committed against your organisation. Therefore, to assist you to determine this to further audit your KING II, Companies Act and Corporate Governance compliance on the above listed contacts, the evidence documents used in the opening of this fraud case are available for your records.” (FABRICIUS J)

12 Democratic Alliance v South African Broadcasting Corporation Soc Ltd and Others (12497/2014) [2015] ZAWCHC 182; [2016] 1 All SA 504 (WCC); 2016 (3) SA 468 (WCC) (27 November 2015).

13 Bytes Technology Group and Others v Michael (4586/10 , 23511/11) [2014] ZAGPPHC 926 (25 November 2014).