



REPUBLIC OF NAMIBIA

MEDIA STATEMENT

THE ACTIVATION OF THE PUBLIC ENTERPRISES

GOVERNANCE ACT, 2019

Introduction and background:

The first thing we did after the Ministry of Public Enterprises was created on 21 March 2015 by His Excellency the President was to conduct research and benchmarking to understand why the majority of our Public Enterprises were failing and also to understand how some reference countries managed to effectively reform their Public Enterprises to a point where, in some cases, they have become the actual benchmark for their Private Sector counterparts in those countries.

In the case of Namibia, we identified two major core reasons for the failure of some of our Public Enterprises. The first is that we have attempted to govern our Public Enterprises using **flawed governance models**. After Independence our Public Enterprises were governed under a decentralized model where every Public Enterprises reported to a particular Line Ministry without common corporate governance guidelines. This resulted in a lack of corporate governance uniformity as the various Line Ministries adhered to different governance principles as they deemed fit.

In 2006 the State-Owned Enterprise Governance Act was promulgated, and this introduced the dual-governance model that has been in existence ever since. In a dual governance model, the enterprises each report to two authorities; in our case it was to the Line Ministries and the State-Owned Enterprise Governance Council. The 2006 Act allowed for the establishment of this council and defined the various functions and powers enshrined within the council as chaired by the Prime Minister. When the Ministry was created in 2015, we simply amended this legislation by replacing the “council” with the “Minister of Public Enterprises” but the dual governance model remained in place.

The second reason exposed by our research and benchmarking is the fact that during both periods of decentralized and dual governance the State as shareholder of a large portfolio of complicated and important Public Enterprises failed to equip itself with the **relevant skills to perform the functions required from such a shareholder**. The Shareholder must be able to perform analysis of business models and business plans, financial analysis and financial planning analysis, performance management, business development, data management and reporting, human capital management, economic and sector analysis stakeholder management etc. On this matter we have made good progress and will soon have our final, permanent structure in

place that makes provision for a specialist division to enable us to perform these complex functions associated with the shareholder responsibilities of a large portfolio of complex entities.

Identifying and migrating towards an appropriate Governance/Ownership Model:

Research and benchmarking clearly illustrated that a centralized governance model is proving to be the most effective governance model for Public Enterprises and there has been a global shift towards this model over recent years. In a centralized governance model, the shareholder or ownership functions are centralized under one authority ensuring the uniform governance of Public Enterprises.

This authority takes different forms in the different jurisdictions and vary from Ministries or agencies to the more recent shift towards a holding company structure. In Namibia we were faced with a unique challenge complicating an elegant solution to address the flawed governance model. While other countries have only recognized commercial entities as State-Owned- or Public Enterprises, we registered several non-commercial entities such as service providers, education institutions, regulators etc. as Public Enterprises.

Having realized that these non-commercial entities perform equally important functions, we had to conceptualize a governance solution that would cater for their needs as well as for those of the typical commercial entities. This is the background and logic for the creation of the **Hybrid Governance Model for Namibian Public Enterprises** as approved by Cabinet in June 2016. This model defined three categories of Public Enterprises:

1. Commercial Public Enterprises
2. Non-Commercial Public Enterprises
3. Financial Institutions and Extra-Budgetary Funds

The logic behind this model is that although the centralization of ownership is the most appropriate governance model, it would be a mistake to centralize the ownership functions of all the above categories of Public Enterprises. One of the most fundamental anomalies we had to address in the design of the new governance architecture was to address the scenario where potential conflict of interests existed in cases where some authorities (Ministries) had complete control over all policy formulation, regulatory functions and implementation within a certain sector.

This created fertile ground for possible unintended uncompetitive behavior and might have influenced the slow liberalization of certain sectors of our economy. In the Hybrid Governance Model only the ownership of the Commercial Public Enterprises are centralized while

the other two categories remain in a dual governance model where the Ministry of Public Enterprises will set corporate governance guidelines that they must adhere to while the typical functions associated with ownership will remain with the various Line Ministries.

We are confident that this will result in improved corporate governance that will in turn lead to higher efficiencies and performance while the model effectively separates the functions of the State as policy formulator, regulator and implementer/operator.

A suitable legal solution had to be identified to allow for the implementation of this governance model and this proved more complicated than initially anticipated due to the potential legal implications related to multiple existing statutes. Therefore, the Ministry decided to consolidate the previous Act and its amendments (2006, 2008, 20015 and to integrate the Hybrid model into one law. The Public Enterprises Governance Act, 2019 is the outcome of this process and following its promulgation in 2019, I agreed to operationalize it by notice in the Government Gazette. Allow me to highlight some of the primary elements of this Act:

The Public Enterprises Governance Act (highlights):

The Act clearly distinguishes between the roles of the various Ministers in their respective responsibilities related to the three main categories of public enterprises and introduces the term “*relevant Minister*” which is defined as follows:

- (a) *in respect of a non-commercial public enterprise -*
 - (i) *that is created by a law, the Minister responsible for the administration of the law governing the establishment and functions of the public enterprise; and*
 - (ii) *that is not created by a law, the Minister responsible for the matters for which the public enterprise was established;*
 - (b) *in respect of a commercial public enterprise, the Minister; and*
- in respect of an extra-budgetary fund, the Minister responsible for Finance;*

Declaration of public enterprises:

The Act empowers the Minister to declare new public enterprise as per Section 2:

1. (1) *The Minister may, in consultation with*

Cabinet, declare -

- (a) any board, corporation, council, fund, trust or other body established as a body corporate by or under an Act of Parliament for performing functions prescribed by that Act or any other law;*
- (b) any unincorporated business in which the State owns half or more of the interest; and*
- (c) any state-*

*owned company, to be a
public enterprise.*

After declaration the Minister must categorize these where the following applies to commercial public enterprises:

- (a) if he or she is of the opinion that the board, corporation, council, fund, trust, body, business or company -*
 - (i) provides a product or renders a service;*
 - (ii) is capable of making a sustained profit; and*
 - (iii) does not perform a regulatory function or administers a fund in the public interest,**specify that it is a commercial public enterprise;*

Extra-budgetary funds are defined as follows:

- (a) if he or she is of the opinion that the board, corporation, council, fund, trust, body, business or company -*
 - (i) was established to administer, allocate or utilise funds intended for a specific purpose; and*
 - (ii) those funds are obtained from moneys appropriated by Parliament or obtained from a levy imposed for the purpose referred to in subparagraph (i),*

specify that it is an extra-budgetary fund.

Application of Act to bodies that are not public enterprises

Section 3. The Minister may, with the concurrence of the Minister responsible for Finance, by notice in the *Gazette*, declare any provision of this Act to apply to any board, committee, fund, trust or any other institution purporting to perform any function under any law, if such institution has acquired or administers money appropriated by Parliament or acquired from a levy imposed by or under a law: Provided that this section does not apply to a local authority or regional council.

The functions and powers of the Minister are defined under Section 4 and include the following:

- to establish generally accepted common principles of corporate governance and good practice governing public enterprises;
- to develop common policy frameworks for the operations of public enterprises, including policy on issues relating to human resources, assets and finance;
- to determine criteria for the performance measurement and evaluation of public enterprises, and develop appropriate means for monitoring their performance;
- To lay down the following Directives:
 - (i) governance agreements to be entered into by a relevant Minister with the board of a public enterprise;
 - (ii) performance agreements to be entered into between a relevant Minister and the individual members of a board of a public enterprise, and between such a board and its chief executive and between its chief executive officer and senior management staff of the public enterprise concerned;
 - (iii) the remuneration levels of board members, chief executive officers and other senior

management staff of public enterprises;

(iv) benefits for employees of public enterprises generally;

(v) the classes of contracts entered into by a public enterprise (including joint ventures, acquisition of other businesses and agreements relating to the corporate structure of a partner of a public enterprise) that may only be concluded after consultation with the relevant Minister, the Minister or the Minister responsible for Finance;

- to advise a relevant Minister on the removal of any member of a board
- to facilitate the provision of programmes for the training and development of members of the boards and management staff of public enterprises on corporate governance and efficient management practices;
- to receive and consider for approval submissions made by public enterprises on the annual distribution of profits and the declaration of dividends in terms of section 21;
- the number of board members to be appointed, the requisite qualifications, experience or skills of persons to be eligible for appointment as members of the board and the term of office of members of a board.

(6) The Minister must exercise the powers relating to public enterprises in the best interest of the State and the public enterprise concerned with due regard to the purpose for which the enterprise has been established.

(7) Despite the provisions of any law, the Minister must represent the Government as the shareholder of a company that is a commercial public enterprise and may exercise all powers of a shareholder on behalf of the State

Board appointments:

Under Chapter 2 the Act clearly explains the different procedures in the appointment of Board members of the various categories of public enterprises.

- Board members of Non-commercial Public

Enterprises and extra-budgetary funds will be appointed by the Line Ministers

- Board members of Commercial Public Enterprises are appointed by the Minister (of Public Enterprises) “in consultation” with Cabinet.
- A person will only be allowed to serve on two boards of Public Enterprises
- All board appointments must be Gazetted.
- The new process has already been introduced where board vacancies are advertised in local media and prospective board members are interviewed by a panel where industry experts are also invited to participate in.

Performance Management:

The Act makes specific provision for performance management and will provide the basis for one of our most crucial strategies to reform Namibian public enterprises which is to create a performance-based culture. Together with this, Section 13 describes the new Integrated Strategic Business Plans (ISBP) that will be required for each public enterprise. A performance-based culture will be created as follows:

- (a) We will only approve feasible Integrated Strategic Business Plans (ISBPs) with clear, measurable key performance indicators (KPIs).
- (b) The Minister will enter into performance agreements with each individual board member and the KPIs will be directly aligned to those of the ISBP.
- (c) The board will enter into a performance agreement with the Chief Executive Officer with the same KPIs contained in the ISBP.
- (d) The Board also has to ensure that the CEO enters into performance agreements with senior management staff aligned to the same ISBP KPIs.
- (e) We will introduce an incentivized remuneration approach where remuneration will consist of a basic salary with the possibility of an incentivized performance bonus when KPIs are

- achieved.
- (f) The Act allows for the removal of board members in cases of non-performance.
 - (g) Failure of the CEO and senior management to comply with the provisions of performance agreements will constitute grounds for his or her dismissal unless such failure was caused by unforeseen circumstances beyond their control.

Integrity and Ethics:

Complimentary to existing laws and institutions, we have captured particular elements to identify and discourage fraud and corruption. A powerful provision that relates to accountability, integrity, fraud and corruption is found under Section 12 and read as follows:

“....the following conditions apply to every member of the board of a public enterprise as if those conditions were contained in the relevant performance agreement entered into by that member in terms of subsection (1) -

- (a) the member must at all times act honestly in the performance of the functions of his or her office;*
- (b) the member must at all times exercise a reasonable degree of care and diligence in the performance of his or her functions;*
- (c) the member, including after he or she has ceased to be a member of the board of a public enterprise, must not make improper use of information acquired by virtue of his or her position as such a member to gain, directly or indirectly, an advantage for himself or herself or for any other person or to cause detriment to the public enterprise; and*
- (d) the member must not make use of his or her position as a member to gain, directly or indirectly, an advantage for himself or herself or for any other person or cause detriment to the public enterprise.*

- (3) If a person contravenes a condition referred to in subsection (2) or any other condition of the performance agreement entered into by him or her in terms of subsection (1), the relevant*

Minister, in the name of the relevant public enterprise, may recover from the person as a debt due to the public enterprise by action in a competent court -

- (a) if that person, or any other person, made a profit as a result of the contravention, an amount equal to the profit; or*
- (b) if the public enterprise has suffered any damage or loss as a result of the contravention, an amount equal to that damage or loss.*

(2) Subsections (2) and (3) are applicable in addition to, and not in derogation of, any other law relating to the criminal or civil liability of the member of a board and do not prevent the institution of any criminal or civil proceedings in respect of such liability.

Special Investigations:

The Minister has the power to direct special investigations in relation to any matter concerning the business, trade, dealings, affairs, assets or liabilities of a public enterprise.

Section 29 (4):

(4) If the Minister thinks after studying a report submitted in terms of this section, that –

(a) there is reason to suspect that any corrupt activity has occurred, he or she must refer the report to the Anti-Corruption Commission established by section 2 of the Anti-Corruption Act, 2003 (Act No. 8 of 2003); or

(b) there is reason to suspect that any other criminal activity has occurred, he or she must refer the report to the Inspector-General of the Namibian Police Force.

Section 27 gives a thorough description of the powers of a special investigator appointed by the Minister and any person who-

- (a) fails to comply with a lawful direction of a special investigator;*
- (b) without lawful reason, refuses or fails to produce documents or answer questions sought or asked by a special investigator;*

- (c) *hinders or obstructs a special investigator;*
- (d) *wilfully destroys or alter any document or any other thing relevant to an investigation,*

commits an offence and is liable on conviction to a fine not exceeding N\$100 000 or to imprisonment for a period not exceeding 2 years or to both such fine and such imprisonment

Subsidiaries:

We have strengthened the provisions for the Minister to have oversight of subsidiaries created by Public Enterprises. The Minister may by regulation impose obligations of any public enterprise in relation to any matter with a view to achieve the efficient governance of the subsidiary and the monitoring of its performance and the performance of the Board and senior management of the subsidiary. We plan to pay special attention to subsidiaries and will request full disclosure of relevant subsidiary information from all public enterprises.

Restructuring of Public Enterprises:

The reform of Public Enterprises will consist of two parallel elements:

1. Improving the performance and feasibility of existing Public Enterprises.
2. Restructuring Public Enterprises. This may include any of the options as mentioned in the Act as well as several others such as the merging of public enterprises and the re-absorption of public enterprises into Line Ministries.

Chapter 5 contains all the provisions related to the restructuring of Public Enterprises. The restructuring of Public Enterprises may include the following:

- (a) *in the case of a public enterprise not being a company, that the public enterprise -*
 - (i) *be converted into a company registered under the Companies Act; or*
 - (ii) *forms or acquires a company to which specified assets, liabilities and undertakings of the public enterprise must be transferred;*

- (b) *that a public enterprise which is not a company be converted into a state-owned company*
 - (a) *that the share capital of a state-owned company be reorganized and made available, either in full or in part, for disposal to members of the public;*
- (b) *that the undertaking and assets and liabilities, or certain specified assets and liabilities of the public enterprise be transferred to another public enterprise;*
- (c) *that the undertaking and assets of a public enterprise, or part of its undertaking and certain of its assets, be offered for disposal to members of the public;*
- (d) *that a public enterprise be liquidated;*

It is important to stress that the Minister can only identify a public enterprise to be considered for restructuring “in consultation with Cabinet”. I want this to be noted to allay any fears that the Minister will have the power to unilaterally embark on a restructuring without it requiring Cabinet approval. When any restructuring is contemplated, we are bound by the Act to take into account the purpose for which the public enterprise was created, a risk assessment and impact report, the performance of the public enterprise, the reasons for restructuring and any representations made by any relevant stakeholder.

As to the potential question of when the public enterprises will be transferred, allow me to explain by referring to the Act.

Provisions of this Act prevail:

Section 41:

The provisions of this Act prevail if a conflict relating to any matter provided for in this Act arises between this Act and the provisions of the establishing law or document of a public enterprise.

Repeal of laws and savings:

Section 42:

- (4) *All public enterprises listed in Schedule 1 of the*

Public Enterprises Governance Act, 2006 (Act No. 2 of 2006), are deemed to have been declared to be public enterprises under section 2.

- (5) *A public enterprise referred to in subsection (4) is deemed to have been declared to be an extra-budgetary fund if -*
- (a) *it was established for the sole or major purpose of administering, allocating or utilising funds intended for a specific purpose; and*
 - (b) *those funds are obtained from moneys appropriated by Parliament or obtained from a levy imposed for the purpose referred to in subparagraph (a).*
- (6) *A public enterprise referred to in subsection (4) and that does not comply with subsection (5) is deemed to have been declared to be a non-commercial public enterprise if -*
- (a) *it has been established for the sole purpose of performing a regulatory function; or*
 - (b) *the public enterprise performs a public function and is substantially funded from money appropriated by Parliament or from levies imposed by law.*
- (7) *A public enterprise referred to in subsection (4) and which does not comply with subsection (5) or (6), is deemed to have been declared to be a commercial public enterprise under section 2.*

Considering the contents of the above, it should be clear that the legal implementation of the Hybrid Governance Model is effectively in place and active. Formal handover meetings will be arranged with each affected Ministry and these will be concluded as soon as practical.

The Ministry of Public Enterprises remain committed to elevated transparency and seamless cooperation with the various Line Ministries during the transition and post-transition period. The fact that this model and legislation has now clearly redefined the role of the State as policy formulator, owner, regulator and implementer will facilitate more uncomplicated inter-ministerial interaction and

cooperation which is of vital importance.

The successful implementation of the new Hybrid Governance Model and the reform of our Public Enterprises will only be possible if we approach this collectively.

The successful reform of our Namibian public enterprises is a non-negotiable element that has become critical to ensure that the current economic downturn is countered as soon as possible. I believe that economic recovery will be all but impossible without calculated but expedited public enterprise reforms to increase profitability, contain and minimize subsidies and to entirely cease bailouts as soon as practical.

-END