THE NEW LEGAL FRAMEWORK FOR THE NAMIBIAN RAILWAYS

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1. INTRODUCTION

The legal framework governing the railways of Namibia has undergone considerable change in recent years. This paper provides a background and also explains some of the important features of the new law which governs the railways today. This new act, the National Transport Services Holding Company Act (Act No. 28 of 1998), was passed into law on 4 September 1998 and became fully effective as from 1 April 1999.

During the colonial days, the railway was run as an integral part of the South African railway system. The railway was therefore at that time governed by the applicable South African legislation. In the early 1980s the railway was operated by the South African Transport Services (SATS), as were the ports and some other components of the Namibian transport system.

However, in 1985 this arrangement came to an end with the SATS turning over all its assets in Namibia to the then administration in Namibia, which had been set up by the South African government. Subsequently in 1988, these assets as well as those of (what was then called) Namib Air were taken over by TransNamib Limited (TNL or the Corporation). TNL was a corporation established in terms of its own unique legislation, the National Transport Corporation Act, 1987. TNL, which was referred to as a multi-modal company, operated the railway, Air Namibia (the successor of Namib Air), the port of Lüderitz (until 1994), a large road haulage company and a number of related businesses.

Soon after Independence in 1990, it became clear that the previous legislation had some structural defects. In brief, the old Act vested too much power in the Board of the Corporation, and provided weak mechanisms for governance and for enforcing accountability. Tensions soon developed between the management, including the Board of TNL, and the owner, the Government of Namibia. These tensions, including the increasing awareness that TNL was not very successful from a financial performance point of view, eventually resulted in the appointment in 1995 of the Independent Task Force to Review TransNamib Limited. The recommendations of that Task Force were subsequently accepted by Cabinet in September 1996, eventually resulting in the National Transport Services Holding Company Act (henceforth the Act or the new Act) replacing the National Transport Corporation Act.

The drafting of the new Act was done by the Department of Transport of the Ministry of Works, Transport and Communication. A number of considerations went into this work reflecting specific policies that Government had accepted in its decision to replace the previous law, but also the experience that had been gained to date in Namibia as concerns the operation of state-owned enterprises. Attempts were also made to take into account recent thinking in the world as concerns the governance of state-owned enterprises, as evidenced by the fact that some features contained in the new Act have been taken from the New Zealand State-Owned Enterprises Act, 1986.

This paper will focus on these features, and will consider the following items:

- internal structure,
- governance,
- railway infrastructure,
- public service obligations, and
- regulation.

2. INTERNAL STRUCTURE

As mentioned, TNL was a multi-modal entity, however not in the modern sense but rather in the sense that it owned and operated a multiple of modes of transport. Whilst it could set up subsidiaries, and also did, TNL operated the railway and the other main transport modes as business divisions, i.e. as part of the main corporation. This was in accordance with the intention of the National Transport Corporation Act.

The new law is more flexible. It envisages, in principle, a holding company structure, according to classical lines, and with each mode of operation vested in a separate company (Section 4(a)). The new TransNamib was also - initially - set up in this way, with a "Holding Company" called TransNamib Holdings Limited and with the railway part of a new company referred to as Namibia Rail and Road Transport Limited (trading as NamRail). The provisions of the Act apply equally to the Holding Company and the subsidiaries which have been established in this way.

However, in terms of the new Act it is also possible to consolidate operations into the Holding Company to allow for operations in the same way as in the olden days (Section 15), and in the first half of 2000 it was decided to consolidate some subsidiaries, including the railway, into the Holding Company. The Act additionally provides for delegation and contracting with other outside service providers in all kind of ways, including concessioning of railway operations (Sections 5(1) and 15(3)). The new Act furthermore includes a sunset provision, allowing the Holding Company to transfer all its business activities, assets, etc., to the various subsidiaries to operate independently but in terms of the new Act, as long as they are majority owned by the Government. The voluntary winding up of the Holding Company, however, requires approval by Cabinet (Section 17).

Why a holding company structure? Partly because this was seen by the Independent Task Force as an appropriate way of managing a complex organisation. But another reason was to allow for full or partial privatisation of parts - or subsidiaries - of the successor to TransNamib Limited. The Independent Task Force had thus indicated in its report that a future partial privatisation of Air Namibia should be considered, and it also recommended the full privatisation of a large part of the road haulage operations owned by TNL.

Why the sunset clause? The explanation for this provision can be found in the observation made by the Independent Task Force that the multi-modal structure of TNL, which although it could also be found elsewhere in Southern Africa, e.g. in South Africa, is a unique industrial structure in the transport sector in a world-wide perspective. Typically, transport operations are performed by stand-alone operators, and the development in the transport sector is also characterised by a movement towards specialisation in this area, including vertical unbundling. Multi-modal operations, in the sense 'seamless operations' from the point of view of the shipper or traveller, are increasingly also made possible through intermediaries or agreements between operators. The sunset clause will hence facilitate the transformation of TransNamib into ordinary transport operating companies, and the establishment of the Namibian transport sector along more modern lines.

It should be mentioned that a first step in this direction has already been taken, as Air Namibia has been established as a fully separate company; it is thus not under TransNamib Holdings any longer. It is

understood that this development can be seen as a first step towards a future partial privatisation of Air Namibia.

3. GOVERNANCE

Under the governance heading the following is considered:

i) the relationship to company legislation,
ii) the object of the company,
iii) the Chief Executive Officer (CEO),
iv) separation between shareholding and other functions of the government,
v) the shareholding minister,
vi) the performance agreement, and
vii) transparency.

First, the previous TransNamib operated in terms of its own legislation. A characteristic of that arrangement was that the liabilities of the directors were limited. Section 18 of the National Transport Corporation Act stated:

> *"A director or an employee of the Corporation shall not be personally liable for any loss or damage which may occur in or in connection with the performance of his duties, unless the loss or damage is due to his wilful misconduct, dishonesty, gross negligence or failure to comply with any provisions of this Act"*

This formulation (in combination with the object that applied to TransNamib Limited, see below) made it virtually impossible to hold a director accountable. The new law now provides for all companies, i.e. the Holding Company and all its subsidiaries, to be Companies Act companies, and the fiduciary duties hence now fully apply, as well as other regulatory provisions of the Companies Act (Section 2). It is a stated policy of the Government of Namibia to always establish essentially commercial operations within the framework of the Companies Act.

Second, along with this reform there has now been a significant change in the formulation of the object of the new company. The new Holding Company and its subsidiaries should be run on commercial principles alone, i.e. they should be profitable and as a minimum cover their own costs (Section 4). In the old regime, the object of the Corporation not only included the requirement to run the railway, the airline, etc. "on general business principles", but also (Section 2 of the National Transport Corporation Act):

> *"The object of the Corporation shall be…to manage, control, maintain, exploit and promote in the national interest transport services…"*

Thus in terms of the old Act, the directors had powers of a political nature, which of course made it virtually impossible to establish any performance standards with respect to the Corporation, as well as to measure performance. In terms of the new legislation, the object of the board is purely to perform in commercial terms, whilst responsibility for all public interest matters has been vested in the Minister responsible for Transport; see further below.

Three, the new legislation provides for the Chief Executive Officer (CEO) not to be a director. In the old regime the CEO, who was referred to as the Managing Director, was also a member of the board, as is also normally the case in the private sector. The CEO in terms of the new Act is appointed by the Board, but in order to ensure that the CEO does not command too much power as is often the case in an environment of weak governance, the new legislation, in line with other similar recent legislation in Namibia, allows the CEO to only attend Board meetings provided he is invited to do so (Section 5(4)). The clear separation between the executive function, on the one hand, and the policy making and supervisory function, on the other hand, has been seen as a necessary instrument in Namibia to ensure that each component of a state-owned enterprise plays its role, and that the CEO does not also try to run the board. This separation feature is also incorporated into other laws governing state-owned enterprises in Namibia.

Four, in terms of the new legislation - and continuing the philosophy of establishing clear roles within and with respect to state-owned enterprises - there is a clear separation of functions within the Government. Three functions can be identified for a state-owned enterprise, viz. (i) the ownership function, (ii) the performance of regulatory functions, and (iii) and the management of public service obligations. Ideally these should be handled by three distinctly different components of the government. In the case of the new Act, there is only a separation between the ownership function and the other two functions, which are both performed by the Minister responsible for Transport (Section 1). As explained later, the reason for this is that the regulatory provisions with respect to the Holding Company and its subsidiaries are limited.

Five, the role of the owner is to be played by a Shareholding Minister, as also provided for under other similar and recent legislation in Namibia. His Excellency, the President, designates the Shareholding Minister; thus any minister - with the exception of the Minister responsible for Transport - can in principle be appointed. In fact, the shareholding function can even be performed by more than one minister (Sections 3(2), 3(3) and 3(4)). Currently the Minister of Finance is the Shareholding Minister for TransNamib Holdings.

This provision has meant a clear improvement in comparison with the previous Act, which identified the Cabinet as responsible for performing the ownership function. Although it was generally recognised that the Minister responsible for Transport should play the ownership role on behalf of Cabinet during the previous regime, there was no legal foundation, and this vagueness was exploited by the then board of directors to undermine the Government's control function. Indeed, this lack of clarity led to a situation where several ministers became involved with TNL, and a dangerous precedent was established.

Six, the new Act provides for a Performance Agreement between the Board and the Shareholding Minister. This is the most important instrument for effecting accountability and is, in addition, to the Annual General Meeting, the main instrument for interaction between the Board and the Shareholding Minister. The approach used to the operations, format and contents of the Performance Agreement is similar to the arrangement provided for under the New Zealand State Enterprises Act of 1986, the accepted model legislation in the world today in this area. The Performance Agreement refers not only to the Holding Company but also to its subsidiaries (Section 6).

The Performance Agreement covers, *inter alia,* (i) the expectation of the Government in respect of scope of business, efficiency and financial performance, (ii) the principles to be followed for the purposes of business planning, (iii) dividend policy, (iv) measures to protect financial soundness, and (v) the measures by which it is possible to asses financial performance, operational and service level performance, and the

management of human resources. The onus is on the Holding Company to draft and formulate the Performance Agreement, and the role of the Shareholding Minister is to accept the proposed Agreement, if he finds it satisfactory. The idea behind this approach is to facilitate the enforcement of accountability, in that the Performance Agreement is supposed to primarily reflect the ambitions and expectation of the board of directors.

Seven, transparency: Transparency is provided for in that the Act contains a clause allowing the Shareholding Minister to demand information - but only in terms of a written notice - from the Board and making it an obligation on the Board to provide that information (Section 9). The role of this provision is to reduce the importance of two classical problems, i.e. the presence of - what in technical language is referred to as - asymmetric information (that is the information advantage enjoyed by the management and Board vis-à-vis the owner), and the tendency of ministers to use phones rather than written forms of communication. Transparency is further provided for by not only requiring the Annual Report to be tabled in the National Assembly, but also a separate annual report setting out achievements in terms of the Performance Agreement. That report is therefore a public document as well as the performance agreement itself (Section 7).

In summary the new Act provides for a very stringent regime of interaction between the owner and the Board of Directors. The sources of information to be obtained by the Shareholding minister include, but is limited, to the Annual Report on the Financial Statements, the Annual Report on the Performance Agreement, and information obtained from written directives. This information allows the Minister to act at the Annual General Meetings (e.g. by appointing new directors) but, also if deemed warranted, to amend the Performance Agreement, after consultation with the Board.

4. SEPARATION OF INFRASTRUCTURE

In terms of the previous act, the railway was operated in a combined - vertically integrated - format. The present legislation provides for a transfer of the ownership of the railway infrastructure to the State. However, the arrangements in Namibia are not the same as in many other countries, where separation has also been accomplished in recent years. In Namibia there is no separate infrastructure provider; the new owner, the State uses the Holding Company as its agent to manage the railway, and the Holding Company has to pay for its use, essentially being the running cost of maintaining the system according to set standards (Section 13).

What is being accomplished in this way? Essentially four things:

- firstly an arrangement providing for a level playing field with the road sector is put in place. On 1 April 2000, Namibia introduced road user charges, which means that both road users and the railway now have to pay cost recovery charges, although these do not have to cover historical costs or expenditures motivated on social grounds.
- secondly, through the separate agency agreement between the Holding Company and the State, provided for under the Act, the owner can regulate the exploitation of the railway in primarily two ways, firstly to ensure adequate safety and secondly to ensure that the value of the railway network is appropriately safeguarded in a long term perspective (Sections 13(2) and 13(4))
- it opens up the possibility for new entities to become involved in new railway infrastructure developments (Section 13(5))
- it makes it absolutely clear that the financing of any new railway development first and foremost is a government responsibility and cannot be pushed over onto NamRail (Section 13(10)).

The Railway Management Agreement - i.e. the agency agreement - is expected to be signed in June 2000 by TransNamib Holdings and the Minister of Works, Transport and Communication, who is the minister responsible for the railway infrastructure. The Agreement sets out the procedures to be applied by TransNamib Holdings to ensure minimum maintenance standards of the railway as well as railway safety, and details regarding the payment of expenditures for maintenance, reinvestments and rehabilitation works. The Agreement also provides for the format of reporting by the Holding Company and arrangements for inspection by the Ministry of Works, Transport and Communication.

5. PUBLIC SERVICE OBLIGATIONS

The Act provides for the Minister responsible for Transport to require the Holding Company to carry out specified transport services which may be loss-making. However, the Holding Company must be compensated for any losses made by means of Parliamentary appropriations. It should be added that these obligations can, in principle, only be imposed by the Minister responsible for Transport in consultation with the Shareholding Minister (Sections 8 and 10).

The reason for this provision in the Act is to ensure that the Holding Company and its subsidiaries shall consider one and only one object, i.e. operations along business principles. Non-profitable services shall thus only be provided in the event that cost-recovery can be accomplished through subsidies from the Government.

So far the Holding Company has not approached the Government with a request for subsidies, although this can be expected to happen in a not too distant future. The traffic on the Namibian railway system is with few exceptions thin, and the railway makes large losses at present, notwithstanding the fact that it does not have to cover the historical costs of the railway infrastructure. The Holding Company will therefore have to request subsidies if it is to be able to sustain current operations. When Government is finally approached on this matter, it can be expected that a major debate will develop as concerns the scope and size of the Namibian railway operations.

6. REGULATION

The final aspect of the new law relating to the railway, as well as other parts of the operations of TransNamib Holdings to be considered here, concerns regulation. As mentioned above, railway safety is regulated through the agency agreement between TransNamib Holdings and the Minister responsible for Transport. To protect the public interest in this area, the Act also provides for a complaints procedure. Thus if in someone's opinion, TransNamib Holdings does not perform according to agreed safety standards, it is possible to lodge a written complaint with the Minister responsible for Transport. The Act sets out the procedures which must then be set in motion to ensure that the complaint is dealt with adequately and in a transparent way (Section 11).

As concerns economic regulation, there is none, and no other legislation in this sphere either in Namibia. This is the reason why it was not deemed necessary to identify a separate minister to be responsible for regulatory matters. The explanation for the absence of economic regulatory instruments is basically that almost all of TransNamib Holdings' operations take place in markets subject to competition.

7. CONCLUDING WORDS

The new legal framework embodies a number of principles which - based on experience since Namibia attained independence 10 years ago - have been established as desirable in order to improve the operations of state-owned companies, including the structure of the governance regime. These developments are, however, seen as only necessary in order to improve performance; they are not sufficient. Performance of the ownership function will also have to be improved, a challenge which is more and more becoming apparent to the Government of Namibia. For that reason it is not expected that the new Act alone will lead to improvement in performance; other actions will have to follow, and the Government is now taking the first steps to address this challenge, including formulating a policy on the Government's own organisation with respect to state-owned enterprises and the role of private capital.

Similarly, the new role to be played by the State vis-à-vis railway infrastructure will pose new challenges. Here the Namibian reform must be seen as vary cautious in that it, unlike in other countries, makes use of the established railway operator to perform the operational functions with respect to the infrastructure. However, only the future will tell if this 'in-between' solution will strike the right balance between the need for a commercial approach to the running of railway infrastructure, on the one hand, and for taking into account the political demands on this infrastructure, on the other.

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