A CONTEMPORARY LEGAL PERSPECTIVE OF THE AUTONOMY OF BOARDS OF DIRECTORS OF PUBLIC ENTERPRISES IN NAMIBIA AND SOUTH AFRICA.

A THESIS SUBMITTED IN FULFILLMENT
OF THE REQUIREMENTS FOR THE DEGREE OF

MASTER OF LAWS

OF

THE UNIVERSITY OF NAMIBIA

BY

BORNVENTURE MAX MBIDZO

9324348

APRIL 2020

MAIN SUPERVISOR: DR. TAPIWA WARIKANDWA

TABLE OF CONTENTS

ABSTRACT

Following a plethora of scandals in public enterprises sectors, corporate governance has become a subject of argumentative debates in the public domain. This study investigated the autonomy of boards of directors of public enterprises' from the shareholder's undue political and managerial interference. The necessity to intensify the boards of directors' legal protection in public enterprises has been compelled by numerous media reports against political undue interference by line ministers. The study revealed that Namibia and South Africa does not have a legal protection framework for boards of directors of public enterprises. The study recommends that section 4 of the Public Enterprises Act 1 of 2019 be amended to ensure that public enterprises retain their autonomy. It is further recommended that a parliamentary committee be established to oversee the appointment of board of directors of public enterprises and to ensure that this parliamentary committee is empowered to summon boards of directors to account for their decisions in public enterprises. To insulate boards of directors of public enterprises from political interference, it was found that boards should be properly empowered, government intervention should be minimised, board appointment processes should be transparent and merit-based.

KEY TERMS

board autonomy, board remuneration, board selection and appointment, corporate governance, directors' duties, line ministry, public enterprise boards, regulatory framework, shareholder interference, parliamentary committee.

ACKNOWLEDGEMENTS

I praise God the Almighty for always being there for me.

I would like to express my sincere gratitude to my supervisor Dr Warikandwa for the continuous guidance during my study, for his patience, motivation, enthusiasm, and immense expertise in this area of study and beyond, I will forever appreciate.

I am indebted and owe my gratitude and appreciation to; my wife Sylleste for her unconditional support and love, my children for enduring my absence over the duration of this study, my siblings for their inspiration and my mother Mary Masule whom we nicknamed 'iron lady' for instilling a sense of determination in our family.

DECLARATIONS

I, **Bornventure Max Mbidzo** declare that the study "

A CONTEMPORARY LEGAL PERSPECTIVE OF THE AUTONOMY OF BOARDS OF DIRECTORS OF PUBLIC ENTERPRISES IN NAMIBIA AND SOUTH AFRICA.

is a true reflection of my own work, and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

I, **Bornventure Max Mbidzo**, grant the University of Namibia the right to reproduce this thesis in whole or in part, in any manner or format, which the University of Namibia may deem fit, for any person or institution requiring it for study; providing that the University of Namibia shall waive this right if the whole thesis has been or is being published in a manner satisfactory to the University.

.....

October 2019

Bornventure Max Mbidzo

ABBREVIATIONS

CEO: Chief Executive Officer

HPP: Harambee Prosperity Plan (HPP)

IoDSA: Institute of Directors of South Africa

MD: Managing Director

MTF: Medium Term Financing

NAC: Namibia Airports Company

Namport: Namibia Ports Authority

Nampower: Namibia Power Corporation

NED: None Executive Director

NSFAF: Namibia Students Financial Assistance Fund

NWR: Namibia Wildlife Resorts

OECD: Organisation for Economic Co-operation and Development

PE: Public Enterprises

PEGA: Public Enterprises Governance Act

PPP: Public Private Partnership

RCC: Roads Contractor Company

SAA: South African Airways

SABC: South African Broadcasting Corporation

SOE: State-Owned Enterprises

UK: United Kingdom

CHAPTER 1

1.1 INTRODUCTION

The contributions of public enterprises to national economy are huge in both developed and developing countries. Public enterprises often face important corporate governance guidelines. As a response many countries and international organisations have taken measures by strengthening corporate governance. Several governments have taken public enterprises reforms using a variety of corporate governance related policy instruments. Despite the growing interest in public enterprise corporate governance, only limited empirical studies have looked into the autonomy of the boards of directors.

It is a hard task to try and suggest the actual origins of corporate governance, but what is clear is that it has been in existence for a very long time. According to Price[1] the topic of corporate governance is a vast subject that enjoys a long and rich history. The issue of governance began with the beginning of corporations, dating back to the East India Company, the Hudson's Bay Company, the Levant Company and other major chartered companies during the 16th and 17th centuries.[2] However, the balance of power and decision-making between board directors, executives and shareholders has been evolving for centuries.[3] Principle 6[4] provides that the governing body should serve as the focal point and custodian of corporate governance in the organization. It goes without say therefore that it is the board of directors which is tasked with the

---

[1] Price, J. 2018. *"What Is the History of Corporate Governance and How Has It Changed?" Available at* www.insight.dilegent.com; [Accessed: 12 June 2019].
[2] Ibid.
[3] Ibid.
[4] King Report IV, p53.

approval of policies. Therefore, corporate governance should be observed against the context of a country's broader legal context. The Cadbury Report[5] defines corporate governance as a multi-faceted subject. It has an important theme of simultaneously improving corporate performance and accountability of individuals involved in the management of an organisation with the aim of attracting financial and human resources on the best possible terms as well as to prevent corporate failure through pursuing objectives that are in the interests of the company and all stakeholders.[6] King Report IV defines corporate governance as the exercise of ethical and effective leadership by the governing body towards the achievement of the following governance outcomes: ethical culture, good performance, effective control and legitimacy.[7]

Operations of public enterprises cannot be dislocated from law, which presupposes that legislation and regulations are the cornerstone of good corporate governance. Public enterprises are governed by multiple legislation and regulations. Although legislation provides guidelines on board's management's reporting. The sheer volume of different legislation makes governance a daunting task. Among the voluminous legislation and regulations it appears that there is no legislation or regulations purporting to promote the autonomy of boards of directors. Public enterprises boards of directors are expected to report and account to oversight structures such as the respective line function departments.

The main purpose of this study is to investigate the autonomy of boards of directors of public enterprises in Namibia. Further, the study will provide recommendations for the protection of the autonomy of public enterprises. The powers of the company are divided between the board of

---

[5] Cadbury Report. 1992. A *Report of the Committee on the Financial Aspects of Corporate Governance.* Available at www.ecgi.org; [Accessed: 16 June 2019].

[6] Organisation for Economic Co-operation and Development (OECD).2004. *Principles of Corporate Governance.* Available at www.oecd.org; [Accessed 16 June 2019].

[7] King IV.2016. Report on Corporate Governance for South Africa, p15.

directors and the shareholders in a general meeting or a shareholders' meeting, and each organ has its own separate sphere of authority.[8] The relationship between the board of directors of public enterprises and the shareholder is regulated by each enabling Act of the Public Enterprise. The government's mandate is to ensure that Public Enterprises uphold principles of good corporate governance and that they should deliver the services. Despite the efforts by government the public enterprises environment appears to remain in distress. This could be attributed to several factors to name a few, political interference in the management of the public enterprise. Typical and most recent examples of political interference in Public Enterprises can be seen in Air Namibia, Namibia University of Science and Technology and Namibia Airports Company. This study therefore intends to address this gap by providing an overview of role-players needed to ensure good corporate governance.

In *Road Fund Administration v Government of the Republic of Namibia and Others*[9] where the line Minister had instructed the board of directors not to suspend the Chief Executive Officer of the Road Fund Administration, the Court held that, the centre piece of corporate governance and corporate entities is the fact that a board must be independent and must not be subject to the dictates of shareholders or in this particular instance, cabinet ministers. This case is a clear indication that where the shareholder has exceeded its powers, the court will protect those empowered by legislature.

In *Anhui Foreign Economic Construction v Minister of Works and Transport*[10] where the Minister was instructed by the President to cancel a tender awarded to the Applicant, the Court held that, It

[8] Isle of Wight Railway Co v Tahourdin (1883) 25 ChD 320 (CA).
[9] [2011] NAHC 219 par 28.
[10] [2016] NAHCMD 265 par 42.

is crystal clear that the Minister's power to supervise public entity or to issue directives to public enterprises must be done subject to the terms of the Constitution and any other law governing the public enterprise.

In both of the above-cited cases, the line Ministers were sternly criticised by the Court for their interference and disregard of the autonomy of the public enterprises in question namely, the Road Fund Administration and Namibia Airports Authority.

In Namibia the private sector developed a Corporate Governance Code for Namibia (NamCode) while in South Africa the King Commission on Corporate Governance was developed for Johannesburg Stock Exchange listed companies. The purpose of NamCode which is a reproduction of the King Report III is to ensure that there is uniformity in the corporate structures and governance of listed companies. Namibia has a total of eighty seven public enterprises of which each has its own enabling legislation. These different enabling Acts provide for the appointment of the boards of directors by the line Ministers.

One of the classical cases that revealed undue interference of shareholders in a public enterprise was when the Minister of Higher Education interfered with the appointment of the appointment of the Vice-Chancellor of University of Science and Technology (NUST). It was reported that, the Minister, of higher education in Namibia Kandjii-Murangi directed the NUST's highest decision-making body on 22 May 2019 to cancel the process of re-advertising the post of Vice-Chancellor until further notice.[11] Further, the minister was quoted as having said that, "I will not let them go ahead and re-advertise while there are issues that have not been ironed out."[12] The above-

[11] Ndeyanale, E. 2019. *"NUST council defies minister"*. *Confidante*, 3.
[12] Nghinomenwa, E. & Ngutjinazo, O. 2019. *"Kandjii-Murangi digs in over Nust"*. Available at www.namibian.com.na; [Accessed: 7 June 2019].

mentioned comments in the public domain denote an impression that the line minister seems to be bestowed power to undermine and interfere in the decisions of the board of directors in the management matters of the institution. If there is an appointed board of directors to manage the affairs of public enterprises, the board should be allowed to exercise their autonomy in decision making. It would be improper for the Minister to instruct an independent structure to perform or omit certain functions. Further, such comments by the Minister undermine the authority and autonomy of the board of directors. Therefore, ministers should guard against issuing such condemning statements.

In Namibia it was reported in the local print media that, Gawanas-Vugs, who was acting board chair of Namibia Airports Company (NAC), was removed by Transport and Works Minister John Mutorwa and replaced.[13] This report created an impression in the public domain that the Minister of had the mandate to actually dismiss a board member without according the affected member an opportunity to make representations. Further, the actions of the Minister indicate the lack of legal protection of the board of directors from the executive.

In South Africa during the commission of inquiry into state capture, Barbara Hogan the former Minister of Public Enterprises stated that, insulation of public enterprises from political interference is extremely important and international literature argues that one of the greatest risks that state-owned enterprises face is political interference in the execution of their duties.[14] Hogan further stated that the Minister of Public Enterprises is not supposed to run state-owned companies, but rather provide oversight as a shareholder.[15] The above contentions by former Minister Hogan

---

[13] Ngaevarue Katjangua. 2018. *Gawanas-Vugs fired from NAC board. Available at www.namibian.com.na* [Accessed: 29 Oct 2018].
[14] Penwell, D. 2018. "Insulate state-owned companies from political interference", Available at www.timeslive.co.za [Accessed: 20 May 2019].
[15] Ibid.

are indicative to Namibia that there should be clear segregation of duties between the Minister and board of directors. After the board of directors of a public enterprise have been appointed, the ministers should not be seen to direct and influence the decisions of the boards of directors in the day-to day affairs of public enterprises.

It would be a very difficult task for this study to try and trace the origins of corporate governance; however, what is known is that it has been in existence for a long time. Morck and Stejer,[16] argue that corporate governance has been in existence since the 16th century with varying degrees in different countries. It is against this background that the government should develop a legal framework to ensuring the protection of the boards of directors in the management of the affairs of these public enterprises. Boards of directors play a vital function in corporate governance and performance of public enterprises. The boards of directors have an ultimate responsibility, including through its fiduciary duty, to develop corporate strategies and overseeing the PE's performance. In this position, the board acts fundamentally as a buffer between the state as a shareholder, and the company and its executive management. Boards play a central function in corporate governance and performance of state-owned enterprises.[17] According to the Organisation for Economic Co-operation and Development (OECD) recommendations, the board should be charged with a duty to act in the interests of both of the state and the company.[18] The board has an ultimate responsibility, including through its fiduciary duty, for developing corporate strategies and overseeing SOE performance. In this capacity, the board acts fundamentally as an

[16] Morck, R, Stejer, L. 2005. *The Global History of Corporate Governance: An Introduction*. Chicago: University of Chicago Press, p11.
[17] Ibid, p7.
[18] OECD.2018. Professionalising Boards of Directors of State-Owned Enterprises: Stocktaking of National Practices.

intermediary between the state as a shareholder, and the company and its executive management.[19] This study tries to establish whether Namibia has a clear legislative autonomy framework for the board of directors of public enterprises and whether the appointing Minister has any legal right to determine the manner in which the public enterprise should be operated on a day-to-day basis.

1.2 STATEMENT OF THE PROBLEM

Namibia does not have a legal framework on the autonomy of the boards of directors of public enterprises. Each enabling Act of the public enterprise provides for the appointment of the board of directors and even stipulates the duration of tenure. However, there is no legislative framework on the autonomy of the boards of directors after their appointment. Therefore this study interrogated the power of the Minister of oversight and the requirement for autonomy of the boards of directors of public enterprises. Therefore, these boards of directors should function free from political interference. It is therefore, crucial to investigate whether there is sufficient legal insulation for the appointed boards of directors against undue political interference into the affairs of public enterprises. Further, section 4[20], appears to empower the Public Enterprises Minister than the boards of directors thereby eroding the autonomy of the board of directors of public enterprises.

[19] Ibid, p7.
[20] Public Enterprises Act 1 of 2019.

1.3 OBJECTIVES OF THE STUDY

The aim of this study is to establish whether there is any legal framework for the protection of the boards of directors against political interference. Such an analysis therefore, compelled a study into the nature of corporate governance. Therefore, the study aims to:

1. To establish whether there is legal insulation framework for appointed boards of directors of public enterprises against political interference.
2. To provide recommendations for the improvement of the Public Enterprises Governance Act 1 of 2019.

It is thus the aim of this study to assist broadly in the debate on the need to develop a legal framework upon which boards of directors of public enterprises in Namibia are protected against undue political interference.

1.4 RESEARCH QUESTIONS

The articulation of the pertinent research questions in this study was intended to construct meaning and highlight the inter-relatedness between the research problem and the research objectives. The focus of this study is on exploring issues of legislation, institutional relationships based on the rule of law, and the extent to which boards of directors of public enterprises are autonomous.

The main research question is whether boards of directors are autonomous. Accordingly, the following research question was viewed as pertinent to the study due to its thematic association with, both the research topic and its attendant research processes:

1.4.1 What is corporate governance?

1.5 HYPOTHESIS

Separation of the positions of the board of directors and the Minister leads to better Public Enterprise autonomy. The board leadership structure of a public enterprise is considered to have an important impact on the enterprise's performance. Separation of the position of the board of directors and the Minister would allow the managerial and oversight arms of the enterprise to function independently and therefore more efficiently.

1.6 THEORETICAL FRAMEWORK

The theoretical framework of this study provided the researcher with a background for arranging the investigation of the identified research problem. The conceptual framework itself is informed by issues raised in the literature review. The researcher considered different definitions of corporate governance and the autonomy of boards of directors of public enterprises. The Organisation for Economic Co-operation and Development (OECD) defines corporate governance as *"Corporate governance involves a set of relationships between a company's management, its board, its shareholders and other stakeholders. Corporate governance also provides the structure through which the objectives of the company are set, and the means of attaining those objectives*

and monitoring performance are determined.[21] It is the relationship between the board of directors and the shareholder in public enterprises that is of interest for this study. King IV defines independence as a matter of law, a duty to act with independence of mind.[22] This definition supports this study because independence of the mind means ability to think separate from any other authority. This study will adopt this independence of mind as the autonomy sought by the study.

1.7 SIGNIFICANCE OF THE STUDY

It is the first study in Namibia focusing on the need for a legal framework protecting the autonomy of boards of directors of public enterprises. It further provides recourse for aggrieved appointed boards of directors of public enterprises. The appointed board of directors will work with confidence.

1.8 LIMITATIONS OF THE STUDY

Ideally, the study should have interrogated all public enterprises that the political shareholder had interfered in. However, due to limited resources, time and literature, the study was confined to five entities that have been in the media due to the controversies that surrounded the manner in which

[21] OECD (2015), G20/OECD Principles of Corporate Governance, http://dx.doi.org/10.1787/9789264236882-en .
[22] King Report.2016,p28.

line ministries intervened in the operations of the boards of directors. Therefore, the study is purely based on court judgments in Namibia and South Africa and media reports. Lastly, the researcher could not put more emphasis on the Public Enterprises Governance Act 1 of 2019 though signed into law; it had not been implemented for the period of this study.

1.9 METHODOLOGY

This study was conducted through a critical analysis of relevant Namibian and foreign legislation which is pertinent to the legal framework that alluded to the autonomy of boards of directors from the appointing authority thereby, promoting the principles of corporate governance. The study relied on primary and secondary sources such as case law, legislation, journal articles, corporate governance guidelines and newspaper articles. International and regional instruments that provide principles of good corporate governance for public enterprises were scrutinised to establish international best practices.

1.10 CHAPTER OUTLINE

Chapter 1: This chapter provides for the introduction, statement of the problem, objectives of the study, hypothesis, significance of the study, limitation of the study, and methodology.

Chapter 2: Provides literature review.

Chapter 3: Analyses the legal framework of corporate governance in the Namibia and an overview of selected public enterprises.

Chapter 4: An analysis of the autonomy of the board of directors. A number of case law is provided with the common law jurisdiction.

Chapter 5: Provides a comparative analysis of corporate governance between Namibia and South Africa. This chapter is more of statutory comparisons. The aim is to point out the similarities and important differences between the two countries legal and regulatory framework and ultimately to find an answer to the main problem in this thesis.

Chapter 6: Summarises the main arguments of this study and provides the findings and make recommendations.

1.11 ETHICAL CONSIDERATIONS

This study did not use human participants in collecting data; rather, primary and secondary data that is available in the public domain was utilised. However, this data was analysed as objectively as possible to avoid ridiculing the persons and organisations that were involved in certain case law. Moreover, the researcher did not manipulate or misrepresent data to suit his personal views. Likewise, in order to address the issue of research ethics, plagiarism was avoided, thereby; all information borrowed from literature was accurately cited and referenced. To compound the above explanations, the researcher did not have any revealed/ unrevealed conflict of interest that could have affected the findings and interpretation of the study thereof.

The study topic is a legal analysis and the primary ethical principles of study were followed during and after the study. This mainly refers to the treatment of the study subjects and the handling of information. The approach that was developed as it relates to ethics was as follows:

a. Respect for persons: this refers to the respect that was afforded to study subjects; any confidential information obtained will be provided on anonymous basis.

At the initial stages of the study, the study intended undertaking a mixed method. However, this approach was amended due to challenges with the availability of the study participants.

1.12 CONCLUSION

This chapter argued that public enterprises in Namibia hold a critical place in the economy thus principles of good corporate governance should be promoted if these entities are expected to benefit the Namibian economy. Governments in general, should create enabling environments for boards of directors for them to exercise their expertise without political interference. This chapter provided an introduction into the study, statement of the problem, objectives, hypothesis, and significance of the study, limitations and delimitations of the study. It is further, argued that it is necessary for parliament to develop legal framework for the protection of board of directors of public enterprises.

CHAPTER 2

LITERATURE REVIEW

2.1 INTRODUCTION

The previous chapter provided the context of the study and its intended aims and objectives. This chapter interrogated the required nature of autonomy or independence of boards of directors. The autonomy of boards of directors of public enterprises is tested against court decisions. It further, discusses the historical nature of corporate governance. This is achieved through the analysis of case laws. This chapter will further interrogate the selection and appointment of board of directors, the composition of the board of directors and features of good corporate governance.

2.2 INDEPENDENCE OF BOARDS OF DIRECTORS

Although it is accepted that some form of government involvement is indispensable for the effective attainment of the objectives of public enterprises, it is generally accepted that the intervention based on public policy, political or national interest should not clash with commercial interests to the extent of compromising the efficient performance of the enterprises. It is therefore recommended that, to improve the efficiency of the boards, the government should minimise its interference in the operations of the public enterprises and confine its intervention only to strategic and essential issues. Essentially, the role of the government should be to develop the policy framework, set the long term mandates and develop performance contracts with specified

economic, financial and performance requirements. Thereafter, the board and management should be afforded the opportunity to exercise their own independent judgment in the management of the public entity and to function in a professional manner.

In *McBride v Minister of Police and Another*[23] the court defined independence of institutions were persons are appointed to serve with autonomy, as *"Independence primarily means that ... bodies should be shielded from undue political interference.* This definition appears to be very close to what this study intends to illustrate. Independence should be seen as ability to stand alone or to be distinguished as an individual.

In *Gramophone and Typewriter Ltd v Stanley*[24] the Court held that, shareholders cannot, even by a majority at a general meeting, interfere with the exercise of the powers placed in the hands of the directors by the articles of association of the company. This is type of independence required by boards of directors of public enterprises. This autonomy requires accountability and the appointed persons will have a sense of responsibility of the institutions they are appointed to serve. King Report IV contextualises the relevance of independence as a matter of law, a duty to act with independence of mind.[25] The Report further states that the overriding concern as reflected by Principle 7 is whether the governing body is knowledgeable, skilled, experienced, diverse and independent enough to discharge fully its governance role and responsibilities.[26] This means that the board of directors is assumed to possess the required skills to an extent that appointing authority should afford it its autonomy in decision making.

---

[23] *[2015] ZAGPPHC 830, [2016] 1 All SA 811 (GP); 2016 (4) BCLR 539 (GP).*
[24] *[1908] 2 KB 89, 98.*
[25] King IV. 2016. Report on Corporate Governance for South Africa,p28.
[26] Ibid, p28.

In the first case in an independent Namibia that dealt with administrative independence of statutory institutions, the *Road Fund Administration v Government of the Republic of Namibia and Others,*[27] the Court held that, *"in the case of public enterprises where legislation makes provisions for the establishment of a board different considerations apply. It is not in my view within the powers of the Minister to assume the functions of the board and to make executive decisions which are reserved for decision and determination by the board".* It is this is type administrative independence required by board of directors to be autonomous and discharge its duties. This type will autonomy will accord the board to make decisions which they may be held accountable. Without, the free mind as expressed herein, the board of directors will not assume full responsibility over the enterprises they are supposed to manage.

While in *New National Party v Government of the Republic of South Africa & others,*[28] the court held that, *"Administrative independence", implies that there will be [no] control over those matters directly connected with the functions which the Commission has to perform under the Constitution and the Act.* When board of directors are able to exercise free judgment, they simultaneously assume responsible and accountable for their decisions.

However, the independence from political interference literature appears to be lacking in public enterprises. Literature on the boards of directors' independence is limited. The independence required within the scope of this study, is the ability of boards of directors of public enterprises to make decisions based on the needs of the entity without any influence and interference from political shareholders.

---

[27] *[2011] NAHC 219.*
[28] *[1999] ZACC 5; 1999 (3) SA 191 (CC).*

Public enterprises in Namibia are created by an Act of Parliament and the establishing Act provides for the appointment of board of directors to manage and control the affairs of the enterprise. It appears from observation that after the appointment of the board of directors by line ministers, the ministers still assume the functions of the board or actually direct the board of directors on how they should manage the enterprise rather than providing an oversight and policy directions. The unilateral power to appoint board of directors by line ministers and even with the consultations with the Minister of Public Enterprises lacks higher accountability. Appointment of board of directors should be done by a parliamentary committee composed of differing views from political parties represented in parliament. The logic behind this appointment procedure is to ensure that not only are boards of directors accountable to political appointees but to the public. This procedure will create a transparent platform.

2.3 CORPORATE GOVERNANCE

In Namibia, the majority of the public entities are established through an Act of Parliament. The specific Act provides the main objective of establishing the public entity, how it should be governed and stipulates the functions, powers and duties of the entity. The Act further stipulates the entity's main objectives, functions, powers and duties. The establishing Acts make various provisions aimed at ensuring that the public entities are properly governed. There is no universally accepted definition of corporate governance. The concept of corporate governance has been defined and analysed from different angles, the consequence being that consensus on a common definition has not been achieved.

Academics and business practitioners approach corporate governance from different perspectives. Certainly, these viewpoints are not ideology-free, considering the inherent levels if contestation and pressure between the shareholders and boards of directors. Corporate governance framework typically comprises elements of legislation, regulation, self-regulatory arrangements, voluntary commitments and business practices that are the result of a country's specific circumstances, history and tradition.[29] Organisation for Economic Co-operation and Development (OECD) further argues that the desirable mix between legislation, regulation, self-regulation, and voluntary standards will therefore, vary from country to country.[30] The legislative and regulatory elements of the corporate governance framework can usefully be complemented by soft law elements based on the "comply or explain" principle such as corporate governance codes in order to allow for flexibility and address specificities of individual companies.[31] Therefore, corporate governance has been in existence for a long time, but prior to the 1990s the term "corporate governance" was rarely used.[32] However, in the Namibian context, before this the nature of corporate governance was somewhat different from what is known today. Organisation for Economic Co-operation and Development (OECD) defines corporate governance as:[33]

> *"a set of relationships between a company's management, its board, its shareholders and other stakeholders. Corporate governance also provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined".*

---

[29] Ibid, p15.
[30] Ibid, p15.
[31] Ibid, p15.
[32] Mongalo, T. 2003. "The emergence of corporate governance as a fundamental research topic in south Africa" *South Africa Law Journal,* Volume (120):174.
[33] OECD, "OECD G20/OECD Principles of Corporate Governance" p11.

While, King Report IV defines corporate governance as the exercise of ethical and effective leadership by the governing body towards the achievement of the following governance outcomes, ethical culture, good performance, effective control and legitimacy.[34] This show the intensity and interest in the importance of corporate governance. In the previous two decades, corporate governance has emerged as an important topic in light of worldwide corporate failures and scandals. The frequent corporate failures due to overlooking corporate governance have put pressure on public enterprises to effectively put into practice corporate governance practices.

Corporate governance and legal compliance in the Namibian public enterprises sector has turned to be at the centre of the government agenda as the populace is progressively demanding accountability from public enterprises. Therefore, it gives the impression that the Namibian government has responded to the call for accountability by establishing the new Public Enterprises Ministry and enacting the new Public Enterprises Governance Act of 2019 (PEGA).

Corporate governance came into prominence throughout the world by the Cadbury Committee. While in Namibia through the King Reports in South Africa (King I Report in 1994, King II Report in 2002, King III Report in 2010 and King IV in 2016). The term governance may be defined from two angles, an internal perspective, meaning the practices of the board and the external angle this being from the institutional context.[35] The external approach seems to advance that governance culture is conditioned by the prevailing political and economic considerations.[36] However, corporate governance is a living phenomenon because of its dynamism due to changing political and economic environment.

---

[34] King IV.2016. Report of Corporate Governance for South Africa.
[35] Governance Barometer: Policy guidelines for good governance, http://www.gdrc.org/u-gov/governance-understand.html; [Accessed 05 September 2019].
[36] Ibid, 23.

All the above efforts appear to have a similar denominator in which they strive to provide a universal set of acceptable principles to ensure better regulation and legislative framework for the public enterprises environment. These guidelines encourage the shareholder especially in public enterprises to develop an enforceable legal framework protecting the interest of the shareholder and the directors. However, what appears evident is the lack of a straightforward regulatory framework or guidelines protecting boards of directors in public enterprises from undue political interference by the shareholder, being the executive.

2.4 SELECTION AND APPOINTMENT OF BOARD OF DIRECTORS

The performance of an enterprise depends largely on the capabilities and performance of its board.[37] It is therefore, imperative that the appointed boards of directors should have relevant qualifications, background, experience, integrity, diverse skills and/or specialised knowledge to effectively contribute to the organisation's business growth.[38] The directors should be able to relate well with all stakeholders and have the ability to translate their knowledge and experience to the benefit of the organisation in which they would have been appointed.[39] Recent corporate governance codes specify numerous conditions related to appropriate an number of directors, diversity in terms of gender and race, their type, requisite skills and recommended restrictions on factors such as age and the number of boards on which directors should sit.[40] Also, the different

[37] Ngoe A. 2011. The Effect of Board Structure on the Performance of Quoted Companies at the Nairobi Stock Exchange. p3.
[38] OECD. 2012. Board of Directors of State-Owned Enterprises: An Overview of National Practices, pp27-28.
[39] Argüden, Y. 2010. *Measuring the Effectiveness of Corporate Governance*. Available at www.knowledge.insead.edu; [Accessed: 14 June 2019].
[40] King III Report, principle 2.18.

codes have strongly advocated for increased transparency in the selection and appointment of board members of public enterprises. A well-defined legal framework for the appointment of the board of directors for public enterprises should be established for the sake of good governance. This legal framework would then provide guidelines and functions of the appointed board of directors.

However, it has been found that, in a number of developing countries, transparent selection of competent board members and creation of effective boards may not be easily achievable.[41] This appears to be mostly as a result of the absence of specific guidelines for the identification and selection of directors and political interference in the board appointment process. Vagliasindi[42] argues that the other established challenge has been that, in some cases, skilled persons are not willing to be appointed to public enterprise boards of directors because of the excessive interference by governments in the operations of the public enterprises which renders the boards ineffective and also for fear of the reputational damages associated with being a board member in a poorly performing public enterprise. This appears to be also applicable in Namibia as it was recently reported in the local media that, "Angula is known for being plain-spoken, and has over the years put down her foot when politicians tried to meddle into operations of organisations she led. The Namibian reported last year that she resigned from the state-owned Namibia Post and Telecom Holdings (NPTH) because she rejected political pressure to approve a N$1,1 billion network tower deal".[43]

---

[41] OECD. 2013. Corporate Governance Boards of Directors of State-Owned Enterprises An Overview of National Practices: An Overview of National Practices.

[42] Vagliasindi, M. 2008. *The Effectiveness of Boards of Directors of State Owned Enterprises in Developing Countries, "World Bank Policy Research Working Paper 4579 of 2008*. Available at www.ideas.repec.org; [Accessed: 12th June 2019].

[43] Mongudhi, T. & Haufiku, M. 2019. "Angula resigns from finance ministry". Available at https://www.namibian.com.na; [Accessed: 05th September 2019].

2.5 COMPOSITION OF THE BOARD OF DIRECTORS

The appointment and composition of board of directors should be directed by certain principles and guidelines; that are sensitive to the diversity of skills of prospective board members. Board composition is essential to its proper functioning and effective performance.[44] Most corporate governance promoters acknowledge that board effectiveness is dependent on a properly composed board in terms of diversity, experience, skills and judgments of individual directors and the ways in which they relate as a board in seeking to accomplish organisational objectives.[45] According to Roberts *et al*, board effectiveness is related to the degree to which non-executives acting individually and collectively is able to create accountability within the Board in relation to both strategy and performance.[46] Therefore, it is fundamental for board members to have interpersonal skills such as being able to work in a group and respecting each other's views if the board is to be effective. The board members should also have skills and experience that enable them to significantly contribute to deliberations and respond to the desires of the enterprise. Thus, the composition of the boards of directors in terms of a suitable combination of skills, knowledge and experience (e.g. professional backgrounds and industry experience), board independence and diversity is important in enhancing the effectiveness of any given board of directors.

---

[44] Frederick, W. 2011. Enhancing the Role of the Boards of Directors of State-Owned Enterprises, p15.
[45] Roberts J, McNulty T and Stiles P. 2005. "Beyond Agency Conceptions of the Work of the Non-Executive Director: Creating Accountability in the Boardroom" 16 *British Journal of Management*, Volume (16/5):26.
[46] Ibid, p25.

2.6 FEATURES OF GOOD CORPORATE GOVERNANCE

This section of the literature review endeavours to provide features of good corporate governance. In doing so, the section will compare and contrast the Corporate Governance Code for Namibia (NamCode), King Report IV and the Public Enterprises Governance Act 1 of 2019. NamCode is based on King III and provides guidance to all Namibian corporate entities on various governance related aspects.[47] It would appear therefore, that the shareholder of the public enterprises is obliged to be guided by these principles. The NamCode principles apply equally to board of directors of public enterprises and should be applicable to line Ministers as representative shareholder of the government. However, NamCode like the King Reports does not boast any legal force and cannot be enforced in the governance of public enterprises in Namibia. However, NamCode provides a list of best practice principles to assist and guide directors to make the right choice for their entities.[48]

According to NamCode which is a reproduction of King Report III the importance of the role of the board of directors with regards to corporate governance is emphasised by the fact that Chapter One is entitled "Boards and Directors". It is not the aim of this study to discuss the King Reports in detail. However, the King Report III has implications to this study as it alludes to the role and function of boards of directors. Hence, the following is a brief summary of the "Role and function of the board" as described in Chapter One of King Report III:[49]

---

[47] Deloitte. 2016. The Corporate Governance Code for Namibia. https://www.deloitte.com; [Available: 05th September 2019].
[48] Ibid.
[49] King Report III, chapter 1.

1) The board should be the central mechanism for corporate governance. This should be accomplished by managing relationships between the board itself, the company and all the relevant stakeholders. The endurance and success of the company should be a key concern for the board. Stakeholder involvement in the company must be a reality.
2) The board must be involved in the creation and implementation of the company's strategy. This must be integrated with the reality of risk which the company faces. Finally the board is required to ensure the sustainability of the company's success.
3) The board is responsible for the risk management procedures of the company. This involves the setting of the company's risk appetite, overseeing the risk management procedure, as well as setting up a risk committee when necessary to do so.
4) The board must act in the best interests of the company. This involves both the common law duties of care and skill as well as the fiduciary duty to act in good faith. The Report states that a director could be held personally liable for monetary damages incurred by the company as a result of the director's failure to uphold common law duties.
5) The board must ensure that financial reporting is carried out in a reliable and honest manner.
6) The board must ensure that the company has procedures in place with regards to compliance with relevant laws and regulations.
7) It is the duty of the board to ensure that business rescue proceedings are taken up as soon as the company is distressed.

Though the NamCode alludes to the same functions and roles as stipulated above, it appears that the executive does not respect the central function of boards of directors of public enterprises. It should have been the basis upon which Namibia could have developed a legal framework to ensure

that an enforceable instrument is crafted. However, it appears that Namibia took a backward step with the enactment of the Public Enterprises Act 1 of 2019. Section 4[50] provides that:

> (1) Subject to this Act, the functions of the Minister are -
>
> (a) to make determinations referred to in subsection (2);
>
> (b)...
>
> (c) to develop common policy frameworks for the operations of public enterprises, including policy on issues relating to human resources, assets and finance;
>
> (d) to determine criteria for the performance measurement and evaluation of public enterprises, and develop appropriate means for monitoring their performance;
>
> (e) ...
>
> (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 officer, and between its chief executive officer and senior management staff of the public enterprise concerned;
>
> (iii) ..., chief executive officers and other senior management staff of public enterprises;
>
> (iv) benefits for employees of public enterprises generally;

[50] Public Enterprises Governance Act 1 of 2019.

(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;

(f) ...;

(g) to advise a relevant Minister on the removal of any member of a board from office in accordance with, and on any ground provided for in, its establishing law or document or, in the case of a member of a board of a state-owned company, in accordance with and on any ground provided for in the Companies Act;

(h) to furnish a relevant Minister with any comments he or she may wish to make in relation to an integrated strategic business plan, annual financial and business plan or annual budget of a public enterprise submitted to that Minister for approval and provided to the relevant Minister for information and comment;

(i) 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;

(j) 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;

(k) to submit to Cabinet for decision any proposed restructuring plan prepared and approved by the Minister under Chapter 5 in relation to any public enterprise identified by Cabinet for restructuring; and

(l) to perform any other function entrusted to the Minister by or under this Act or any other law.

(2) Despite the provisions of any other law, the Minister has the power to determine, in consultation with Cabinet -

(a) …;

(b) the number of persons to be appointed as executive members, if any;

(c) that alternate members must be appointed;

(d) the requisite qualifications, experience or skills of persons to be eligible for appointment as members of the board;

(e) the term of office of the members of the board, either in relation to members generally or members holding particular positions on the board;

The stipulations above contrast the good corporate governance principles of OECD to which Namibia ascribed. The shareholders function is that of an oversight role of formulating the regulatory framework and the appointment of the board of directors. It will serve no purpose for a public enterprise to have a board of directors who are incapacitated by the shareholder. The purpose of appointing board of directors in public enterprises is to house different expertise in one institution to promote innovation and independent reasoning to the betterment of the public enterprise. Therefore, the Public Enterprises Governance Act of 2019 appears not to be good law.

2.7 RESEARCH GAPS

The corporate governance is fast gaining prominence replacing government controls in public enterprises. According to literature review, public enterprises constitute a large entity in Namibia, however they are often criticised of being inefficient. Over the years the government of Namibia has taken steps to improve the performance of public enterprise. Unfortunately, with respect to current status of corporate governance research and more specifically on the legislative autonomy of boards of directors there are several gaps in research. Over the years, the research on corporate governance has increased, with focus on functions of boards of directors while others focused on theories of corporate governance. However, research on the autonomy of boards of directors is scarce. This study attempts to fill the gaps by analysing the current corporate governance practices in Namibia and South Africa.

2.8 CONCLUSION

Three major areas were considered as crucial in improving board effectiveness, namely its autonomy, selection and appointment and composition. These three aspects were considered especially to ascertain how they should be structured and managed to enable the boards of public enterprises to efficiently discharge their legal duties.

The literature analysis above emphasised on the significance of corporate governance as the foremost determinant of the efficiency of public enterprises. Administrative autonomy of the boards of directors of public enterprises is defined as the independence to make decisions without

being influenced by the appointing authority. It is this independence which is being advanced by this study to be accorded to the appointed board of directors. The executive must not assume administrative functions of the board. Secondly, the executive must not make executive decisions which are reserved for decision and determination by the board. Once this basic principle is understood, then boards of directors of public enterprises will be seen to be autonomous or independent.

On corporate governance, the Organisation for Economic Co-operation and Development (OECD) definition was adopted as a set of relationships between a company's management, its board, its shareholders and other stakeholders. Corporate governance also provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined. Thirdly, the selection of the board of directors should be based on merit. Merit should comprise the diverse knowledge composition of the individuals to serve as board of directors.

CHAPTER 3

PUBLIC ENTERPRISES IN NAMIBIA

INTRODUCTIONS

The previous chapter dealt with the literature review to create the stage for understanding the study. It further emphasised the need for autonomous operations. This chapter will discuss the birth of an independent Namibia, the development of corporate governance and the creation of public enterprises. Furthermore, this chapter will further set the stage for an understanding of the historical background and policy issues of State Owned Enterprises (Public Enterprises) as well as the fundamental duties of board of directors. Lastly, it will discuss the negative effects of the Public Enterprises Governance Act 1 of 2019

3.1 NAMIBIA'S CORPORATE GOVERNANCE FRAMEWORK

Namibia gained her independence in 1990 through the United Nations Resolution 435. The country's first few years of independence were pigeonholed by laborious policy making efforts to address inequalities and injustices created by policies before the dawn of independence. Therefore, it appeared logical for the government to develop the legal framework or foundation for the establishments of several public enterprises. Since then, Namibia has implemented a number of policies for the economic and social upliftment of her citizenry which were to be championed by the just established public enterprises.

The Namibian Companies Act of 2004 does not define public enterprises. However, the State-Owned Enterprise Governance Act of 2006 provided a schedule of list of state owned enterprises therefore, creating no doubt as to which enterprises are state-owned. However, the Public Enterprises Governance Amendment Act of 2016 created confusion as to what defined a Public Enterprise, the amendment Act of 2016 defines a state-owned enterprise or state owned company or any other enterprise as an entity established under any law or in terms of any other instrument, and the purpose of which is to advance any interest of the public.[51] The new Namibian Public Enterprises Governance Act of 2019 defines a public enterprise as a body declared under section 2(1) to be a public enterprise.[52] While a state-owned company is defined as a company in which the State is the sole or majority shareholder or a company created pursuant to the provisions of a law in order to fulfil a public or regulatory function.[53] The Organisation for Economic Co-operation and Development (OECD) defines a State-Owned Enterprise as "any corporate enterprise recognised by national law as an enterprise, and in which the state exercises ownership."[54] This study adopted the OECD definition because it fits with the Namibian public enterprise ownership.

3.1.1 THE STATE OF GOVERNANCE IN NAMIBIAN PUBLIC ENTERPRISES

A report compiled by Deloitte in 2012,[55] shows that public enterprises do not have enough representation of qualified board members while public institutions are dominated by political

[51] Government of Namibia, Public Enterprises Governance Amendment Act, sec. 2.
[52] Government of Namibia Public Enterprises Act, sec 1.
[53] Ibid. sec 1.
[54] OECD, "OECD Guidelines on Corporate Governance of State-Owned Enterprises" 15.
[55] Deloitte & Touché. 2013. *Framing the Future of Corporate Governance*. Available at www.deloitte.com [Accessed: 13 June 2019].

appointments, a situation that compromises efficiency. It was further reported that the worst institutions in terms of adopting sound and well-crafted corporate governance policies in Namibia are the state-owned enterprises.[56] Moreover, the report noted that public enterprises lack a clear demarcation between the duties of the appointing officer, the management and the Board.[57] If this report is anything to go by, it literally means that the Namibian parliament should therefore enact the required legislation to bridge the above mentioned gap. This is necessary to ensure that Namibia is on par with the requirements of best practices of good corporate governance.

3.1.2 LEGAL FRAMEWORK APPLICABLE TO PUBLIC ENTERPRISES

Namibia has a very large number of public enterprises in comparison to its population size and it is for this reason that it is crucial that these enterprises are properly governed to ensure sustainability. Under *Article 32(3) (g),*[58] the President is empowered to establish and dissolve such Government departments and ministries as the President may at any time consider necessary or expedient for good government in Namibia. However, this power does not extend to public enterprises. The power to establish public enterprises is within Parliament itself. There are about eighty nine (89) public enterprises in Namibia and each with its own enabling Act and procedure for the appointment and dismissal of board of directors.

When the new Public Enterprises Ministry was formed, President Hage Geingob's objective was and is still to ensure that the public enterprises are held accountable for their actions and to ensure

[56] Ibid, p6.
[57] Ibid, p6.
[58] The Constitution of the Republic of Namibia.

supervision and monitoring. The President further argued that the ministry's ultimate goal was to ensure that the public enterprises sector is sustainable and contributes to economic development, citizens' welfare and the realisation of Vision 2030 goals.[59]

It was further reported in the local media that, the new governance model addresses the current problem where ministries become the "coach, referee and a player" since they are lawmakers, policymakers, regulators, implementers and controllers.[60] The Minister of Public Enterprises would be responsible for supervising at least eighteen strategic profit-driven state-owned businesses which are involved in electricity, road construction, petroleum, information technology, telecommunications and transport industries.[61]

The Public Enterprises Governance Act[62] adoption of a hybrid system is of serious concern because it is a perpetuation of the current state of affairs where board of directors are not protected. The Act provides for the appointment of the boards of directors both for none commercial and commercial public enterprises. Unfortunately, there is no insulation against undue political inference. *Section 25*[63] If the Minister (after consultation with the relevant Minister in the case of a non-commercial public enterprise or an extra-budgetary fund) considers it necessary or desirable for any reason, the Minister may direct that a special investigation be conducted in relation to any matter concerning the business, trade, dealings, affairs, assets or liabilities of a public enterprise. *Section 26*[64] The Minister may appoint a staff member or, one or more other persons as special investigators, on such terms and conditions as are determined and specified by the Minister in the

---

[59] Shinovene Immanuel. 2016. *Jooste gets business SOEs. Available at* www.namibian.com.na [Accessed: 17 Jan 2017].
[60] Ibid, p1.
[61] Ibid, p1.
[62] Act 1 of 2019.
[63] Ibid, sec 25.
[64] Ibid, sec 26.

instrument of appointment or as varied by a later instrument, to conduct an investigation referred to in section 25.

The Public Enterprises minister is further empowered to disregard the functions and powers of duly appointed boards of directors. *Section 30(2)*[65] in addition drags public enterprises into unplanned expenses as it empowers the minister to direct the board to pay an investigation bill. If the Minister is of the opinion that the whole or any part of the expenses of or incidental to an investigation should be paid by the public enterprise the affairs of which were investigated, the Minister may in writing direct the enterprise to pay such amount, within the timeframe and in the manner specified.

3.1.3 AN OVERVIEW BOARD OF DIRECTORS

Principle 6[66] provides that the governing body should serve as the focal point and custodian of corporate governance in the organisation. Therefore it is the responsibility of the board to sanction the organization's strategy, develop directional policies, appoint, supervise and remunerate senior executives and to ensure accountability of the company to the shareholder. It is incontrovertible that the boards of directors of a company are the essential pivot upon which the management of companies rest. The roles, duties and importance of Company Directors cannot be over emphasized.

[65] Ibid, sec 26.
[66] King Report IV.

Typically, boards of directors are appointed by the shareholder on their individual expertise to protect and grow the investment by the shareholder. In public enterprises, the board of directors are appointed by the shareholder, the government, to ensure that they direct and control the enterprises they are appointed to serve. Chokuda,[67] argues that even though shareholders should be allowed the flexibility to craft a company constitution that addresses their company specific needs, the fundamental principle that should underlie the corporate decision-making trajectory is that the business and affairs of the corporation should be managed by or be under the direction of the board of directors. Similarly, the government crafts the enabling statutes for public enterprises a right inherit of parliament, the business affairs should be managed by or be under the direction of the board of directors without undue influence from the shareholder in the case of government from the line minister.

3.1.3.1 DUTY TO AVOID A CONFLICT OF INTEREST

The court in *Phillips v Fieldstone*,[68] confirmed that, the directors' fiduciary duty to avoid a conflict was distilled into two related principles namely, the no-conflict rule and the no profit rule. The no conflict rule entailed that the director had a duty to avoid a conflict of personal interests while the import of the latter rule was that the director had a duty not to make a profit from his position as a director.

---

[67] Chokuda, T. 2017. *The Protection of Shareholders' Rights versus Flexibility in the Management of Companies: A Critical Analysis of the Implications of Corporate Law Reform on Corporate Governance in South Africa with specific reference to protection of shareholders*. Cape Town: University of Cape Town, p11.

[68] *2004(3) SA 465 (SCA) 479 para 31.*

At the centre of the above court decision is the directors' duty of loyalty and fidelity to the company which is the cornerstone of the common law fiduciary directors' duty to avoid a conflict of interest. It should be noted that the scope of the statutory duty of the director to avoid conflict is an extension of the common law and wider in application. If the company is involved in the construction business the director must inform the company if he/she has a construction business. This applies to Namibian public enterprises sector, if a board of directors has been constituted it is assumed that the appointing authority had done due diligence check on the suitability of the persons. It is against this background that the appointed board of directors should be afforded autonomy in the dealings of the public enterprises they are appointed to manage.

3.1.3.2 DUTY OF DISCLOSURE

It is a legal duty that any appointed person to service as a board of director should declare his/her business interest. This requirement is crucial in the future dealings of the public enterprise. This duty is part of the common law and has been emphasised in several court decisions. If board of directors do not declare their business interest in advance, it creates an impression that they might not be honest in their dealings. If the public enterprise they are appointed to service is in construction, it would be prudent to declare to the appointing authority that they have some construction interest. In *Novick v Comair Holdings Ltd*[69] the court held that, the fair dealing rule required a director to inter alia, reveal any information which he has, and knows that those acting for the company do not have, if it is information likely to influence the company's decision

[69] *1979 (2) SA 116 (W) 153.*

in a particular matter. This requires the director to inform the company of any material information which might have an effect on the company. Materiality is in the context of how closely related the information to the business environment.

In *Robinson v Randfontein Estates GM Co Ltd,*[70] the court held that, one of the strategies employed by corporate law in an attempt to constrain conflicts of interest is the imposition upon directors of fiduciary duties to the company. This means that the director must avoid putting himself/herself in a situation where his/her personal interest stands in conflict, or potential conflict, with his/her duties to the company.[71] It would appear that in Namibia some directors might have advanced their interests above those of the employer. This view point can be supported by the famous *State V Lameck* case, though the case is being adjudicated under the Anti-Corruption Act.

3.1.3.3 DUTY TO ACT WITH CARE, SKILL AND DILIGENCE

In *re Brazilian Rubber Plantations and Estates Ltd,*[72] appears to be the genesis of the directors' duty of care and skill development. The court held that a director's duty requires him 'to act with such care as is reasonably to be expected from him, having regard to his knowledge and experience. *Fisheries Development Corporation of SA Ltd v Jorgensen*[73] affirmed the English interpretation that no special business skills are required. In *African Claim and Land Co Ltd v W J Langermann,*[74] the court held that, the common law requiring directors to exercise their powers with reasonable

---

[70] *1921 AD 168 at 177.*
[71] Ibid, pp177-178.
[72] *[1911]1 Ch. 425.*
[73] *1980 (4) SA 156 (W) at 166.*
[74] *1905 TS 494 at 504.*

care and skill is another tool designed to make directors accountable to shareholders. This duty is owed to the company[75] and, while it is aimed at the protection of the company it also protects the shareholder.

It is evident from the foregoing that the test for the degree of care and skill required at common law has two aspects, namely, subjectivity and objectivity, objective in the context that the case which is reasonably expected from a person with his/her knowledge and experience are to be considered, subjective to the extent of the particular director's knowledge and experience which influences the level of care that can be expected. However, this overemphasis of the subjective test aspect led to criticism that common law sets a very low standard of care and skill for directors.[76] However, it is beyond this study to detail the critics.

3.2 FUNCTIONS OF THE BOARD OF DIRECTORS IN SELECTED PUBLIC ENTERPRISE

In Namibia, the majority of the public enterprises are established through an Act of Parliament. This specific Act provides the main objective of establishing the public enterprise, how it should be governed and stipulates the functions, powers and duties of the enterprise. To attempt to give precise roles of public enterprises will be a failure because the roles are so vast as to the purpose and objectives of the enabling Acts. However, there is consensus on some of the elements. Apart

[75] *Ex parte Stubbs No: In re Wit Extension Ltd 1982 (1) SA 526 (W) at 532.*
[76] Jones, E. 2007. *"Directors' duties: negligence and the business judgment rule". South African Mercantile Law Journal*, Volume (326: 335).

from the fiduciary duties, the common law also attempts to make directors accountable to the shareholders by imposing upon them the duty to act with reasonable care and skill in the management of the company's affairs.[77] Therefore, boards of directors are laden with an array of duties by law and these duties are applicable in public enterprises space. *Section 2*[78] defines a state-owned enterprise or state-owned Company or any other enterprise established under any law or in terms of any other instrument, and the purpose of which is to advance any interest of the public. There are three major distinct types of public enterprises namely, educational, regulatory functions and profit making/commercial public enterprises. However, this study will limit itself to the three commonly known public enterprises (educational, regulatory and commercial enterprises).

Namibia's public enterprises are categorised as educational, regulatory, extra-budgetary and commercial enterprises. The three categories to be discussed in this study will fairly represent picture comprehensive synopsis upon which the public enterprises' environment in Namibia seem to operate. Governance challenges experienced by these public enterprises appear to be uniform irrespective of the category of the public enterprise.

3.2.1 NAMIBIA FINANCIAL INSTITUTIONS SUPERVISORY AUTHORITY ACT OF 2001

The preamble of the enabling Act provides that Namibia Financial Institutions Supervisory Authority is established to exercise supervision over the business of financial institutions and over

[77] *African Claim and Land Co Ltd v W J Langermann 1905 TS 494 at 504; Fisheries Development Corporation of SA Ltd v Jorgensen 1980(4) SA 156(W) at 166.*
[78] Public Enterprises Governance Amendment Act 8 of 2015.

financial services. *Section 2*[79] provides that, there is established a juristic person. Therefore, a board of directors is appointed to manage the affairs of the entity. *Section 3*[80] is well-defined in terms of what is expected from the board of directors and it provides that, (a) to exercise supervision, in terms of this Act or any other law, over the business of financial institutions and over financial services; and (b) to advise the Minister on matters related to financial institutions and financial services, whether of its own accord or at the request of the Minister. It is very clear that it is the Authority to advise the Minister not the Minister advising the entity. However, the Ministerial control may be exerted through several mechanisms such as the approval of the public enterprises' corporate plans and budgets. The government should clearly articulate its expectations for the public enterprise performance. This can be included in the Performance Agreements with the board of directors. Such agreements help the government and the public enterprise to align objectives. Further, the Minister can convey the government's expectations for public enterprise performance and targets through mandate letters and meetings with the Board Chair, thereby ensuring the direction of the public enterprise aligns with government policy. Further, the Minister is empowered by legislation to issue policy directives on specific issues.

Section 10(1),[81] provides that, there shall be a board of the Authority which, subject to this Act, shall manage and control the affairs of the Authority and exercise the powers conferred and perform the duties imposed on the Authority by this Act or any other law. This Act promoted a clear demarcation of duties and responsibility between the minister and the board. *Section 17,*[82] provides that the board must *(a)* consult with the Minister in the exercise of powers conferred upon

[79] Namibia Financial Institutions Supervisory Authority Act of 3 of 2001.
[80] Ibid.
[81] Ibid.
[82] Ibid, sec 17.

and the performance of duties assigned to it by this Act or any other law as the Minister may determine; and *(b)* directly consult with the Minister in connection with any other matter that the board wishes (own emphasis) to bring to the attention of the Minister. This appears to mean that the boards of directors have discretion to consult the minister, it is not the minister making the decision but rather those empowered to do so. These are the requirements for good governance which provides for institutional independence of the board of directors. These are the checks and balances to ensure protection of the board of directors against undue interference. It is a well-established and settled principle in our law that where a statutory instrument provides for the board it is the board which is empowered to manage the affairs of the statutory institution. In *Anhui Foreign Economic Construction v Minister of Works and Transport,*[83] the court held that it is crystal clear that the Minister's power to supervise parastatals or to issue directives to parastatal enterprises must be done subject to the terms of the Constitution and any other law governing the parastatal enterprise.

3.2.2 NAMIBIA UNIVERSITY OF SCIENCE AND TECHNOLOGY ACT 7 OF 2015

Section 7(1),[84] provides that, the governance and general control and executive power of the University and of all its affairs and functions, and the administration of its property, are vested in the Council of the University. Simply said, the appointed council members who are equivalent to board of directors in regulatory or commercial public enterprises are empowered to make decisions in relation to the affairs of the Namibia University of Science and Technology without undue

[83] *[2016] NAHCMD 265, para 42.*
[84] Namibia University of Science and Technology Act 7 of 2015.

influence of the appointing authority. If such simple protocol is not observed, the injury to good governance is immeasurable. Ideally, it is the board under the oppression remedy that they may approach the court for protection against such undue influence. It was further reported that, the Minister of Higher Education in Namibia Kandjii-Murangi directed the University of Science and Technology's highest decision-making body on 22 May 2019 to cancel the process of re-advertising the post of vice chancellor until further notice.[85] Such actions of the minister are a pure violation of the enabling statute of the university. In this particular instance, the chairperson of the council was able to alert the minister that the minister was not empowered to give such directives to the council. If the minister pursues to achieve her objectives beyond her powers, the council is empowered to approach court for an interdict under the oppression remedy.

3.2.3 UNIVERSITY OF NAMIBIA ACT 18 OF 1992

Section 9(1),[86] provides that, the government and executive authority of the University shall be vested in the Council of the University. This is another effective example of a balanced check and balances statute which guarantees institutional independence. Institutional independence promotes good governance and allows for sense of belonging. Once board of directors assumes this sense of having a stake in the public enterprise, it would provide a natural incentive that each member must serve to his/her best ability because it will boil down to the nurturing of individual reputation. This view point seems to be sound within a university where great academic minds are found. If the

[85] Ndeyanale, E. 2019. "NUST council defies minister".
[86] University of Namibia Act 18 of 1992.

shareholder was to encroach on the council unduly, it would undermine the quality of education the institution is offering due to vast rich varying ideas which forms a vibrant institution.

However, this well crated enabling Act is being threatened by *section 4*[87] which place more powers on the Minister of Public Enterprises. The above section seems to empower the Minister more than the council which ordinarily must perform the duties of managing the institution under the oversight of the Minister.

3.2.4 NAMIBIA WILDLIFE RESORTS COMPANY ACT 3 OF 1998

The functions of the board where substituted with those found in the Public Enterprises Governance Act 2 of 2006 which was later amended in 2015 and repealed with the Public Enterprises Governance Act 1 of 2019. No functions of the board are provided in both the amendments of 2015 and the 2019 Act. With the advent of the Public Enterprise Act of 2006, it appears that boards' powers were being curtailed. The Act obliterated all powers of the public enterprises and retained them with the executive. However, the law of statute interpretation allows for this specific enabling Act to find precedence despite the fact that a general statute has been amended. Therefore, when interpreting the Namibia Wildlife Resorts Company Act of 1998, it will not be interpreted under PEGA because it is not specific. It would appear therefore; that the Public Enterprises Governance Act of 2019 was designed to or purports to regulate aspects of Namibia Wildlife Resorts Company and this cannot be the intention of Parliament, therefore, the functions of the board in the founding Act should remain unchanged. The reasoning for this is that

[87] Public Enterprises Governance Act 1 of 2019.

no statute should be above another but statutes are enacted to or designed to complement each other.

3.2.5 PUBLIC ENTERPRISES GOVERNANCE ACT 1 OF 2019

The Act appears to be obsolete as it does not take cognisance of the tremendous strides that have transpired as far as the development of the laws of good governance. This Act is a classic example of power concentration into the hands of the shareholder representative, the Public Enterprises Minister. *Section 1,*[88] provides for the definition of board as in relation to a public enterprise, this means that the board of directors or other governing body of the public enterprise. The Act empowers the minister than the directors and it would appear that the directors will perform their duties as per the minister's directives.

Section 4[89] clearly empowers the minister with the management functions which are reserved for the board of directors. The Act further does not provide for any demarcations of duties between the minister and the board of directors, therefore, this Act is inappropriate for the advancement of good corporate governance in public enterprises in Namibia.

3.3 CONCLUSION

This chapter outlined the historical development of corporate governance in Namibia from 1990. It further discussed the underlying factors for the creation of state owned entities. This chapter further provided the cardinal duties of the board of directors and the similarities between the five

[88] Public Enterprises Governance Act 1 of 2019.
[89] Ibid, sec 4.

selected Public Enterprises. It further shows the movement from State Owned Enterprises (SOE) to Public Enterprises by the creation of Public Enterprises Act 1 of 2019.

The President is empowered by the constitution to establish and dissolve ministries as the President may at any time consider being necessary or expedient for the good government of Namibia. However, this constitutional power does not extend to public enterprises. Public enterprises are established by Parliament and only Parliament can table the repeal laws of any public enterprise. To achieve the National development goals and Vision 2030, good corporate governance is encouraged to ensure that the public enterprises are sustainably. The hybrid governance adopted by the Public Enterprise Governance Act concentrates too much power with the shareholder representative which is inconsistence with good corporate governance.

This legislative move is against tenets of good governance because the shareholder representative will act as the coach and referee. Good corporate governance principles as stated and adopted in Namibia by NamCode demands that the board of directors should be independent from the shareholder. If the shareholder is dissatisfied with the board of directors, either by breach of the above common law duties or statutory duties, there are remedies at his/her disposal to find an amicable solution therefore, it is beyond any doubt that boards of directors should be provided with some legal protection from the shareholder not to be used as vehicles to benefit the appointing authority in their personal capacities.

CHAPTER 4

AUTONOMY OF THE BOARD OF DIRECTORS OF PUBLIC ENTERPRISES

INTRODUCTION

This chapter will draw literature from the United Kingdom, case law from South Africa and other jurisdictions. English law which later took hold in the Cape Province was also transferred to South West Africa Namibia today.

The purpose of this chapter is to interrogate the meaning of autonomy of the board of directors from a broader perspective. Namibia's corporate governance is heavily influenced by the United Kingdom which colonised South Africa. South Africa transplanted this influence to Namibia when she was given the mandate over the territory under the League of Nations. It is this inter-linked corporation that this study has used to rely on the UK legislation and South African case law. Further, Namibia falls within the common law jurisdiction therefore naturally; UK legislation and case law are persuasive and pertinent in legal disputes in Namibia. This analysis is crucial in this study because it provides a holistic understanding of the need for autonomy for the board of directors.

4.1 OVERVIEW OF BOARD OF DIRECTORS AUTONOMY

The powers of a company are divided between the board of directors and the shareholders in a general meeting or a shareholders' meeting, and each organ has its own separate sphere of

authority.[90] The annual general meeting (AGM) is recognised as the premier mouthpiece of the company and that the directors are subject to the control of the company. In the case of public enterprises, the government is normally the sole shareholder and a minister is appointed as the shareholder representative.

In the United Kingdom (UK) in the *Isle of Wight Railway Co v Tahourdin,*[91] concerned a company established by an Act of Parliament and subject to the provisions of the Companies Clauses Consolidation Act of 1845. Section 90 of that Act provided that the directors had powers of management and superintendence of the affairs of the company and that the exercise of such powers was subject to the control and regulation of any general meeting specially convened. A general view was then held under the reasoning of *Isle of Wight case* that in relation to all companies, including those incorporated under the then Companies Act of 1862, that a company in a general meeting had the power to direct and control the board in relation to the conduct of the company's affairs. However, the general rule developed into one which provided that, unless unambiguously empowered to do so by the constitution of the company, the shareholders in general meeting could not control the directors' exercise of their powers, nor exercise the powers conferred on the directors.[92] Therefore, it was held in the *Isle of Wight Railway* case that the board of directors is bound by the instructions of the shareholders' meeting in carrying out their functions; this case was no longer regarded as good authority.[93]

---

[90] *Cape United Sick Fund Society and Others v Forrest and Others 1956 (4) SA 519 (A); Wessels & Smith v Vanugo Construction (Pty) Ltd 1964 (1) SA 635 (O) at 637.*

[91] *(1883) 25 ChD 320 (CA).*

[92] *Scott v Scott [1943] 1 ALL ER 582; Breckland Group Holdings Ltd v London and Suffolk Properties Ltd and Others [1989] BCLC 100.*

[93] Isle of Wight Railway Co v Tahourdin (1883) 25 ChD 320 (CA).

In *Automatic Self Cleansing Filter Syndicate Company Limited v Cuninghame*[94] the question before the Court was whether the shareholders in a shareholders' meeting had the power to direct the course of action to be pursued by the directors or whether the directors could refuse to do what the shareholders in a shareholders' meeting directed to do. The Articles of association of Automatic Self Cleansing Filter Syndicate Company Limited empowered the company to sell its undertaking to another company having similar objects. The directors of the company were empowered to sell or otherwise deal with any of the companies formed for the purpose of acquiring such assets, and directing the directors to carry the sale into effect. The directors were of the opinion that the sale of the company's assets on the proposed terms would benefit the company. The directors accordingly, refused to carry out the sale into effect. The Court of Appeal held that, on the construction of the articles of association of the company, which provided that the management of the business and control of the company were vested in the directors, the directors could not be compelled to comply with the resolution of the shareholders. The court distinguished *Automatic Self Cleansing Filter Syndicate Company Limited v Cuninghame from Isle of Wight Railway Co v Tahourdin* that directors were not merely agents of the general meeting, subject to the direction by the general meeting on any matter.[95]

In *Gramophone and Typewriter Ltd v Stanley*[96] the Court held that, shareholders cannot, even by a majority at a general meeting, interfere with the exercise of the powers placed in the hands of the directors by the articles of association of the company. The Court further held that directors are not servants to obey directions given by the shareholders and they are not agents appointed by

[94] *[1906] 2 Ch. 34.*
[95] Ibid, sec 46.
[96] *[1908] 2 KB 89, 98.*

and bound to serve the shareholders as their principals.[97] The court opinion resonates well with the objective of this study that board of directors of public enterprises should be accorded the same protection against the ministers as government shareholder representatives.

In the Court of Appeal in *Salmon v Quin and Axtens Ltd*[98] adopted the mainstream view enunciated in *Gramophone and Typewriter Ltd v Stanley.*[99] The court further held that directors are persons who may by the regulations be entrusted with the control of the business and who may be disposed of that control only by the alteration of the company's constitution.[100] The court further held that any other construction would be disastrous because it might lead to interference by a bare majority very inimical to the interests of the minority who had come into the company on the footing that the business should be managed by the board of directors. It follows in public enterprises that the minister as the shareholder representative cannot give directions or interfere with the affairs of any such public enterprises. If the government is dissatisfied with the board of directors, there is a legislative means to remove such directors. However, according to this ruling, the directors have a legal right to assert their rights against the illegal actions of the shareholder.

In *James North (Zimbabwe) (Pvt) Ltd v Mattinson*[101] the court held that,

> *If powers of management are vested in the directors, they and they alone can exercise these powers. The only way in which the general body of the shareholders can control the exercise of the powers vested by the articles in the directors is by altering their articles or, if opportunity arises under the articles, by refusing to re-elect the directors of whose*

---

[97] Ibid. pp105-106.
[98] *[1909] 1 Ch. 311 (CA), 319.*
[99] Ibid 96.
[100] Ibid 98.
[101] *1990 (2) SA 229 (ZHC), 237.*

actions they disapprove. They cannot themselves usurp the powers which by the articles are vested in the directors any more than the directors can usurp the powers vested in the articles in the general body of shareholders.

In the Namibian public enterprise narrative, the shareholder cannot assume the powers reserved for the board of directors who are appointed under a legal instrument and neither can the shareholder amend the Act to suit short term objectives of a single minister. However, parliament may amend the establishing Act if the Act is incapable to achieve its objective that is the power reserved for parliament not a shareholder representative.

In *Scott v Scott*[102] the Court held that a resolution of shareholders purporting to interfere with the management of the directors was invalid. Similarly, the cabinet may not push for the enactment of an Act to relegate the autonomy of the board of directors in the Roads Contractor Company. Therefore, the passing of the Judicial Management Act for RCC is a relegation of the autonomy of the board of directors of the public enterprise. In *Breckland Group Holdings Ltd v London and Suffolk Properties Ltd and Others*[103] the Court held that, the jurisdiction to conduct the business of the company was vested in the board of directors, and that the shareholders in a shareholders' meeting could not intervene.

With regard to the sharing of power between the board of directors and the shareholders, Namibia emulated the South African law and has been predisposed by the position adopted by the UK courts. In *Wessels & Smith v Vanugo Construction (Pty) Ltd*[104] the Court held that the business of the company shall be managed by the directors, entailed that the entire management of the

[102] *[1943] 1 ALL ER 582.*
[103] *[1989] BCLC 100,106.*
[104] *1964 (1) SA 635 (O), 635.*

company rests solely in the hands of the directors. In *Van Tonder v Pienaar*[105] and *John Shaw & Sons (Salford) Ltd v Shaw*[106] the court held that if the powers of management are vested in the directors, they and they alone can exercise them. In *LSA UK Ltd (formerly Curtainz Ltd) and Others v Impala Platinum Holdings Ltd and Others*,[107] the Supreme Court of held that the board of directors and the general meeting are both organs of the company, each having its own original powers, and that the directors do not receive their powers as agents of the company. In Namibia, the Companies Act[108] does not provide for the powers of the board of director, however, the powers of the board of directors are coined in each enabling Act of the public enterprise. It can therefore, be argued that the Companies Act 28 of 2004 is in unison with Western Cape High Court's decision in *Pretorius v PB Meat (Pty) Ltd*[109], *Navigator Property Investments (Pty) Ltd v Silver Lakes Crossing Shopping Centre (Pty) and Others*[110] and *Kaimowitz v Delahunt and Others*[111] which affirmed that the ultimate power in a company is now with the board of directors, and not with the shareholders. Since the board's power is derived from statute, it is to a lesser extent subject to the shareholder dictates. In *Mbethe v United Manganese of Kalahari (Pty) Ltd*[112] in the context of a discussion on the derivative action, the court remarked that a company derives its power to commence litigation from section 66(1) of the Companies Act. The court further commented that the power conferred on the board of directors by s 66(1) to manage the business and affairs of a company includes the power to decide whether to embark upon litigation. This power is synonymous with the powers conferred upon the board of directors of public enterprises in

[105] *1982 (2) SA 336 (SE), 341.*
[106] *[1935] 2 KB 113 (CA), 134.*
[107] *2000 JDR 0187 (SCA).*
[108] 28 of 2004.
[109] *[2013] ZAWCHC 89, 25.*
[110] *[2014] JOL 32101 (WCC), para 31.*
[111] *2017 (3) SA 201 (WCC), para 12.*
[112] *2016 (5) SA 414 (GJ) para 62.*

Namibia; consequently, there should not be any ministerial interference in the management affairs of these enterprises. This approach is also adopted by the United States of America which has a long standing principle of corporate law which provides that the power to manage the company is conferred on the board of directors by statute. This approach is director-centric and is known as the division of powers model because the statute expressly divides powers between shareholders and the directors.[113]

In *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd*[114] the Court held that the board of directors is regarded as the directing mind and will of the company. This position was further affirmed in *Canada and Dock Co v The Queen 1985 SCR 662 and AL Mostert NO v Old Mutual Life Assurance Co (SA) Ltd* (not reported). Under good corporate governance board of directors are given greater autonomy by the shareholder, while the shareholder continues to have an oversight function.

However, there was a backward step in 1945; when the Cohen Committee recommended that shareholders be given greater powers to remove directors with whom they are dissatisfied[115]. The Cohen report appears to have formed the foundation upon which section 184 of the UK Companies Act of 1948 was crafted and this section was synonymous with the similar section in the South Africa Companies Act of 1973 to which Namibia applied. Section 184 empowers the shareholders to remove a director from office by ordinary resolution, notwithstanding any provisions in the constitution of the company. However, this criterion in Namibia can only be attributed to commercial public enterprises as none-commercial public enterprises have no provision for annual

---

[113] Welling, Smith & Rotman. 2014. *Canadian Corporate Law: Cases, Notes & Materials* 116-117; Bruner, *Corporate Governance in the Common-Law World: The Political Foundations of Shareholder Power* 36-65.
[114] *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd [1915] AC 705 (HL) 713.*
[115] Cohen Report 6659 para 130.

general meeting where the shareholder could remove a director therefore, directors in these enterprises are left on the discretion of the line minister. This discretional power appears to be the main reason for executive/political interference in the affairs of public enterprises.

The question might arise whether the minister in removing the board of directors is involved in an administrative matter or executive function. This question was resolved in several Court decisions in South Africa of which decisions have a persuasive impact in Namibia. In *Molefe and Others v Minister of Transport and Others,*[116] the Court held that, the Minister's process of removing the concerned directors could only have been rational if the Minister had, before taking that decision, afforded the concerned directors an opportunity to be heard before their removal. Both our common law and the rule of law require a hearing to precede the undertaking of any drastic steps against the individual.[117] Therefore the Court held that the Minister's appointment and dismissal of the members of the Board constitutes administrative action as it involves the implementation of national legislation.[118] The Minister derives the power to act, neither from the Constitution nor from any provision of the Constitution but from a statute of Parliament.[119] The Court further affirmed that, it is an unalienable principle of our law that preceded even both the Constitution and PAJA that everyone is entitled to present his or her case.[120] This is called the *audi alterim partem* rule. It extends even to the powers that the Minister exercises in terms of the Constitution. In their book South African Legal System and Its Background the authors, HR Hahlo and Ellison Kahn, stated the following at p.62 about this principle of *audi alterim partem* rule:

"In an old English case Biblical authority to this effect is given: Even God himself did not

---

[116] *[2017] ZAGPPHC 120, para 40-41.*
[117] Ibid, p40.
[118] Ibid, p41.
[119] Ibid, p41.
[120] Ibid, p41.

pass a sentence on Adam, before he was called upon to make his defence. Adam ("says God") where art thou? Hast thou not eaten of the tree, whereof I commanded thee thou shouldst not eat."

This position is inconformity with Article 18 of the Namibian Constitution and should prevail before a minister decides to remove a board of directors.

It must be stressed that in *Minister of Defence and Military Veterans v Motau and Others*[121] the Constitutional Court did not order the reinstatement of the two directors who had been removed by the Minister of Defence and Military Veterans from the board of directors in circumstances where the removal by the Minister had been procedurally defective. However, the circumstances surrounding the removal of the directors in this case are distinguishable from the removal of a director by the board of directors which is in breach of its fiduciary duties.

4.2 LEGAL INSULATION FROM SHAREHOLDER INTERFERENCE

In *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd*[122] the Court held that the board of directors is regarded as the directing mind and will of the company. Therefore, if board of directors are regarded as the directing mind of an enterprise, they should be given autonomy to oversee entities they are entrusted with to their expert judgement. The basic understanding is that when boards of directors are being appointed, they are appointed on merit based on their different

[121] *2014 (5) SA 69 (CC).*
[122] *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd [1915] AC 705 (HL) 713.*

individual expertise. In *New National Party v Government of the Republic of South Africa & others,*[123] the court held that:

> *"Administrative independence", implies that there will be [no] control over those matters directly connected with the functions which the Commission has to perform under the Constitution and the Act. The Executive must provide the assistance that the Commission requires "to ensure (its) independence, impartiality, dignity and effectiveness". This principle is applicable to public enterprises administration and management.*

In *SOS Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation SOC Limited and Others*[124] the court held that the Minister represents the sole shareholder, the court further held that it is the Parliament, not the Minister that represent the public interest and performs an oversight role on behalf of the public. In *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another,*[125] the court explained the difference between parliamentary oversight and that which the Executive exercises as follows:

> *"Under our constitutional scheme, Parliament operates as a counter-weight to the Executive, and its committee system, in which diverse voices and views are represented across the spectrum of political views, assists in ensuring that questions are asked, that conduct is scrutinised and that motives are questioned."*[126]

---

[123] *[1999] ZACC 5; 1999 (3) SA 191 (CC).*
[124] *[2017] ZAGPJHC 289.*
[125] *[2014] ZACC 30.*
[126] *Glenister II at para 239 and para 243.*

African countries in general, often lack robust corporate governance laws, regulations and oversight mechanism to hold SOEs accountable, ensure transparency in operations and promote business efficiency.[127] It would appear therefore that in many cases, even if such corporate governance frameworks may be present, they lack enforceability mechanisms. Insulation from political interference is extremely important and international literature posits that one of the greatest risks that state-owned enterprises face is political interference in the execution of their duties.[128] If boards of directors do not have a legal shield against interference by the shareholder, boards of directors might be used as vehicles or instruments of the appointing authority. During the state capture commission of inquiry in South Africa, the former Minister of Public Enterprises stated that, "the Minister of Public State-Owned Enterprises, is not supposed to run state-owned companies, but rather provide oversight as a shareholder."[129] It would appear that ministers as appointing authority tend to dictate to the directors, it is assumed that refusal to heed to the ministers instructions might lead to the removal of the director concerned or the wholesome removal of the board.

In *Ex Parte Russlyn Construction (Pty) Ltd*[130] the court drew the distinction between the power to control the business of the company and the broader power to control its affairs. The court further stated that the power to manage all affairs of the company's business is a concept wider than the power to manage the company's business alone. It is further argued in this study that Namibia appears to lack an effective legal and regulatory framework to support the independence and

---

[127] Gumede, W. 2018. *Lessons for South Africa's SOEs from other African countries*;Available at www.news24.com; [Accessed: 03 June 2019].
[128] Dhlamini, P. 2018. *Insulate state-owned companies from political interference;* Available at www.timeslive.co.za; [Accessed: 20 May 2019].
[129] Former South Africa Public Enterprises Minister.
[130] *1986 (1) SA 33 (D) at 36H.*

autonomy of public enterprises appointed board members. Independence in the context of this study is defined as the freedom to make decisions without being controlled or from undue political/executive influence by the appointing authority. This adopted definition is crucial because appointed boards of directors are appointed to serve on merit therefore; they should be accorded the freedom to make decisions for the public enterprises they are appointed to lead. Common law courts have defined institutional independence in several instances. Therefore, administrative independence is a pre-requisite in every institution where the legislature has created instruments for the running of the affairs of such bodies or institutions.

In the first case in an independent Namibia that dealt with administrative independence of statutory institutions, the *Road Fund Administration v Government of the Republic of Namibia and Others,*[131] the applicant was a public enterprise created by Act of Parliament Act 18 of 1999. The court was called upon when the shareholder (appointing authority) the Minister had issued certain instructions to the Applicant pursuant to the Applicant's decision to suspend officials, including the Chief Executive Officer and to institute disciplinary proceedings against them. The Court held that,[132]

> *"in the case of public enterprises where legislation makes provisions for the establishment of a board different considerations apply. The board is established to make the executive decisions. It is not in my view within the powers of the Minister to assume the functions of the board and to make executive decisions which are reserved for decision and determination by the board"*

[131] *[2011] NAHC 219.*
[132] Ibid, p12.

The Court was simply pronouncing that the minister should exercise his/her oversight function and should not dictate to the board. Secondly, this case clearly prepared fertile ground for the development of the Namibian jurisprudence on the autonomy of board of directors of public enterprises. However, ministers appear not to understand their oversight functions, therefore, they encroach onto management affairs of the enterprises.

In *Anhui Foreign Economic Construction v Minister of Works and Transport,*[133] the background facts are, on 10 June 2014 the third respondent ("Namibia Airports Company" a statutory body established by Parliament Act 1998) placed an advertisement in the local printed media calling for interested parties or bidders to express their interest relating to a project for the upgrade and expansion of the Hosea Kutako International Airport in Windhoek. The Board of Directors of the Namibia Airports Company endorsed a recommendation by the Board's Tender & Technical Committee to award the contract for the project to the applicant. The contract was cancelled upon the instructions from the shareholder. The Court held that in relation to the decision to instruct the Namibia Airports Company to discontinue all activities relating to the upgrade of the Hosea Kutako International Airport that:[134]

> *It is now axiomatic that the Republic of Namibia is a Constitutional State and in a Constitutional State the principle of legality reigns supreme. What this means is that all State institutions and public officials (there is no denial that the Minister is a public official) may act only in accordance with powers conferred on them by law.*

[133] *[2016] NAHCMD 265.*
[134] Ibid, para 34.

The Court further held that,[135] it is crystal clear that the Minister's power to supervise public enterprise or to issue directives to public enterprises must be done subject to the terms of the Constitution and any other law governing the public enterprise. One of the terms of the Constitution is Article 18 which demands that administrative bodies and administrative officials to act fairly and reasonably and to comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation. The relevant legislation in this case is the Airports Company Act, 1998.

In *President of the Republic of Namibia and Others v Anhui Foreign Economic Construction Group Corporation Ltd and Another,*[136] an appeal case of the Anhui Foreign Economic Construction Group Corporation Ltd and Another case above, the court held that, [N]either the Permanent Secretary nor the Ministry had any authority to make the award. The court arrived at this conclusion after considering that Namibia Airports Company was a statutory creation which statute had conferred administrative powers to a board of directors and only the board of directors was empowered to award the tender not the Minister or the Permanent secretary of the ministry.

In *Molefe & Others v Minister of Transport & Others,*[137] the court confirmed that, the board, as in other corporations, enjoys the right to control and manage the corporation. The board referred herein is the board of directors as appointed to serve the public enterprise. It is clear that the courts will not shy away from declaring any political interference by shareholder representatives invalid and illegal.

---

[135] *Anhui Foreign Economic Construction v Minister of Works and Transport [2016] NAHCMD 26, para 42.*
[136] *[2017] NASC 7 at 44.*
[137] *[2017] ZAGPPHC 120.*

In *New National Party v Government of the Republic of South Africa & others*[138], the court held that,[139]

> *"administrative independence", implies that there will be [no] control over those matters directly connected with the functions which the Commission has to perform under the Constitution and the Act. The Executive must provide the assistance that the Commission requires "to ensure (its) independence, impartiality, dignity and effectiveness". This principle is applicable to public enterprises administration and management.*

In *General Council of the Bar of South Africa v Jiba and Others,*[140] the court defined independence of the prosecution authority which is akin to the independence of the appointed board of directors as:

> *"The prosecutorial discretion to institute and to stop criminal proceedings should be exercised independently, in accordance with the prosecution policy and the policing directive and be free from political, public or judicial interference."*

In *New National Party v Government of the Republic of South Africa and Others*[141] the court by a dissenting judgment held that,

> *..."administrative independence", implies that there will be control over those matters directly connected with the functions which the Commission has to perform under the Constitution and the Act. The executive must provide the assistance that the Commission requires "to ensure [its] independence, impartiality, dignity and effectiveness". The*

---

[138] *[1999] ZACC 5; 1999 (3) SA 191 (CC).*
[139] Ibid, p16.
[140] *[2016] ZAGPPHC 833, [2016] 4 All SA 443 (GP); 2017 (1) SACR 47 (GP; 2017 (2) SA 122 (GP).*
[141] *[1999] ZACC 5; 1999 (3) SA 191; 1999 (5) BCLR 489.*

department cannot tell the Commission how to conduct registration, whom to employ, and so on; but if the Commission asks the government for assistance to provide personnel to take part in the registration process, government must provide such assistance if it is able to do so.

If the above arguments are observed to the latter, only then could the appointed board of directors be considered independent. This kind of judiciary activism is necessary that the Parliament should then develop regulatory framework to protect the appointed board of director's autonomy. It seems that due to the political nature of the appointment of the boards of directors, these directors at times are hesitant or unwilling to challenge the interference by the minister/executive.

In *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others*[142] the Court remarked that, "oppressive" appears to cover conduct of a more wider kind than conduct which is "unfairly prejudicial to" or that "unfairly disregards the interests of" the applicant. In *Off-beat Holiday Club and Another v Sanbonani Holiday Spa Shareblock Ltd and Others*[143] the court stated that interpreting section 163 of the Companies Act in a way which advances the remedy rather than limits it, is consistent with the purposes of the Companies Act in section 7 of balancing the rights and obligations of shareholders and directors within the company, and encouraging the efficient and responsible management of companies. This adopted interpretation is in consistence with the spirit of institutional independence.

In *Off-beat Holiday Club and Another v Sanbonani Holiday Spa Shareblock Ltd and Others* above, the Constitutional Court stated as follows: "Fairness is the criterion by which a court must decide

---

[142] *2015 (5) SA 179 (WCC) para 55.*

[143] *2017 (5) SA 9 (CC) para 27and Smyth and Others v Investec Bank Ltd and Another [2018] 1 All SA 1 (SCA) para 20. In Harilal v Rajman and Others [2017] 2 All SA 188 (KZD).*

whether it has jurisdiction to grant relief. The test of fairness is an objective one."[144] In *Peel and Others v Hamon J & C Engineering (Pty) Ltd and Others*[145] the Court observed that a careful consideration of the interpretation given by our courts to the provisions of section 252 of the Companies Act 61 of 1973 and the provisions of section 163 of the Companies Act (which is section 260(1) of the Namibian Companies Act 2004) shows a continuing intention by the legislature to broaden the relief in these provisions rather than to limit them. In *Count Gotthard SA Pilati v Witfontein Game Farm (Pty) Ltd and Others,*[146] the High Court found that the concept of interests included interests not flowing from the Memorandum of Incorporation of the company but from an understanding or agreement between the parties. *Section 11(1),*[147] provides that, the relevant Minister must, within ninety days from the date on which a board has been constituted, and with due regard to any directives laid down by the Minister under section 4(1)(e), enter into a written governance agreement with the board of a public enterprise. Therefore, this provision on all four is within the definition of an understanding or agreement to which directors are permissible to claim the protection from Court against the shareholder.

4.3 CONCLUSION

This chapter provided an analysis of autonomy of board of directors. It is concluded therefore, that, administrative independence means that all control of the affairs of the public enterprise must be left in the hands of the board of directors. It further requires restraint by the appointing authority

---

[144] Ibid 20.
[145] *2013 (2) SA 331 (GSJ), para 52.*
[146] *[2013] 2 All SA 190 (GNP), para 17.*
[147] Public Enterprises Governance Act 1 of 2019.

from giving instructions as far as the management of the public enterprises are concerned. It is therefore, prudent to conclude that if the public enterprise has a legitimate board of directors, such directors are the only legal persons authorised to manage and control the affairs of the public enterprise. The chapter further provided authoritative case law which supports the view that Ministers should not be allowed in relegate the autonomy of the board of directors.

CHAPTER 5

COMPARISON OF SOUTH AFRICA AND NAMIBIA'S CORPORATE GOVERNANCE FRAMEWORKS

5.1 INTRODUCTION

The Namibian legal system is characterized by legal pluralism. It is a consolidation of Westminster-style Constitutional law, Roman-Dutch common law, and international law. Namibia was colonised twice; first by the Germans from 1884 to 1915 and then by the South Africans from 1915 to 1989.[148] The era of German colonial rule did not leave substantial traces in the legal system. The legal transition from German to South African administration was bridged by the Proclamation Martial law 15 of 1915 and its successive amendments, German law remained enforced unless specifically repealed.[149] The legitimacy of South African occupation can be traced to Article 22 of the Covenant of the League of Nations.[150] South Africa was mandated to promote to the utmost the material and moral well- being, and the social progress of the inhabitants of the territory.[151] South West Africa (pre-independence Namibia) as a class C mandate was subject to consummate legislative, administrative and judicial regulation by the Union of South Africa. An important feature of the South African administration was the creation of a stable legislative framework. An important milestone in the history of South African colonial rule is the Administration of Justice Proclamation (SWA) 21 of 1919. It made Roman Dutch law, as existing

[148] Geraldo, GM. and Scoffers, I. 2007. Researching Namibian Law and the Namibian Legal System. Windhoek. University of Namibia, page 1.
[149] Ibid.
[150] Ibid.
[151] Ibid.

and applied in the Cape Province as at 1 January 1920, the common law of South West Africa. Therefore, jurisprudence in South Africa was authoritative in South West Africa. This is still applicable to date as decisions of the Cape Provincial Division and the Appellate Court of South Africa before 1990 are applicable in Namibia. Roman Dutch law in the Cape, which is known as common law, was based on the Roman-Dutch law of the original Dutch settlers, in other words the interpretations of Roman law by authors such as Hugo Grotius and Johannes Voet.[152]

The President of South Africa Mr Cyril Ramaphosa was quoted during the state of the nation address as having said that, many of our public enterprises are experiencing severe financial, operation and governance challenges, which has impacted on the performance of the economy and placed pressure on the fiscus.[153] All the above statements draw attention to the need for a holistic legal approach to corporate governance in public enterprises. It is trite that if procedures and rules are followed to the later there are always minimum risks of failure. To address the perceived failures in public enterprises, the government as the shareholder should develop procedures against itself thereby, protecting the individuals entrusted to manage its interests and assume the oversight responsibilities.

Corporate governance law is constantly improved to keep with best practices in the world and the shifting business environment. It is thus vital that, whenever a country resolves to enact legislation or put in place regulatory systems, they are harmonious with international best practices. As the King Committee on Corporate Governance observed, companies are governed within the framework of the laws and regulations of the country in which they operate.[154] There can therefore,

---

[152] Ibid.
[153] Hutchings, M. 2018. *Cyril Ramaphosa elected as president of South Africa after Zuma departure*. Available at www.ewn.co.za [Accessed: 19 Feb 2018].
[154] King Report II, 2002. The Introduction.

be no single generally applicable corporate governance model especially in view of the fact that countries differ in culture, regulation, law and generally the way business is conducted.[155]

5.2 COMPARISON OF SOUTH AFRICA AND NAMIBIA'S CORPORATE GOVERNANCE FRAMEWORKS

As already argued in the preceding chapters; due to historical and geographical closeness, Namibia's economy relies heavily on South Africa with which it has close political, economic and cultural ties. Namibia was a mandate of South Africa through the League of Nations thereby became a province of South African. As a result of this arrangement, South African statutory instruments became part of the legal system of the then South West Africa (Namibia today) and have been influential in the establishment of Namibian statutory instruments and courts have referred to South African case law/precedents in passing court judgements. The Roman Dutch law, the legal system governing business enterprises in Namibia originated from that which was operating in the Cape Province of South Africa.

In attempting to shed light on the close linkages between the two countries, this section compares and contrasts the Namibian corporate governance framework to that of South Africa with special reference to selected corporate governance aspects. During the period of apartheid in South Africa, the level of corporate governance was compromised because the economic and trade sanctions imposed by the United Nations resulted in the country facing difficulties in interacting with the

[155] Claessens S and Yurtoglu B. 2012. *Corporate Governance and Development - An Update (Global Corporate Governance Forum Focus.* Available at http://www.ifc.org; [Accessed: 15 June 2019].

global economy.[156] This resulted in the country's "corporate practices, laws and regulation" not conforming to international standards and businesses and regulators disrespecting good corporate management and professional ethics.[157]

5.3 AN OVERVIEW OF THE SOUTH AFRICAN CORPORATE GOVERNANCE FRAMEWORK

Historically, the South African corporate governance framework has emulated that of the United Kingdom in that it has two systems namely; the legal sources (which include legislation and case law)[158] and non-binding codes of best practice to guide corporate behaviour. The country acknowledges that effective corporate governance requires a balance between allowing directors to run the company in the way they consider best for the stakeholders, while providing stakeholders with some protection against a board that ignores its responsibilities and is not held properly accountable.[159] The Institute of Directors of South Africa (IoDSA) appears to have been one of the first bodies to be actively involved in the promotion of good corporate governance in South Africa mostly through its integral role in the development of the King Report on Corporate Governance (King Reports I-IV) which forms the basis of the debate on corporate governance in South Africa. To enhance its efforts, the IoDSA established the Centre for Directorship and Corporate

---

[156] Afolabi AA. 2015. *Examining Corporate Governance Practices in Nigerian and South African Firms*. Available www.eajournals.org, [Accessed: 15 June 2019].

[157] Ibid, p12.

[158] Hendricks E Towards. 2010. Good Corporate Governance in South Africa: Private Enforcement versus Public Enforcement Unpublished Thesis, University of Cape Town, 13.

[159] Muswaka L. 2013. "Corporate Governance under the South African Companies Act: A Critique" (2013) 3(3) *World Journal of Social Sciences*, Vol 3/3: 11-19.

Governance, which disseminates information on corporate governance developments around the globe in addition to providing technical training on directorship and board effectiveness.[160] The main sources of corporate governance in South Africa are the Constitution of the Republic of South Africa (Act 108 of 1996), Acts of Parliament, particularly the Public Finance Management Act (PFMA) 1 of 1999 and Companies Act 71 of 2008, the Johannesburg Stock Exchange (JSE) Listings Requirements and common law with rich and extensive case law pertaining to corporate governance.

Similarly, in Namibia all the above are applicable with the inclusion of the NamCode principles which are a replica of the King Reports and OECD principles of good corporate governance. Further, Namibia relies heavily on the establishing Acts just like in South Africa with the exclusion of the South African Public Finance Management Act. Namibian public enterprises are not listed on Namibia Stock Exchange therefore; the applications of NSX rules will not find application in public enterprises.

5.3.1 CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA

The Constitution acknowledges the importance of good governance.[161] Chapter 10 of the Constitution aims to promote good corporate governance by providing for; inter alia, economic

[160] The Institute of Directors (IoDSA). 2012. *Governance Assessment Instrument, Information*. Available at www.iodsa-gai.co.za; [Accessed: 15 June 2019].

[161] Nevondwe L, Odeku KO and Tshoose CI .2014. Promoting the Application of Corporate Governance in the South African Public Sector. *Journal of Social Sciences*, Vol 40/2: 261-275.

and effective use of resources, and high standard of professional ethics, transparency, fairness and accountability in the administration of all organs of state and public enterprises.

The Namibian constitution is silent on good corporate governance; therefore, it is not a constitutional matter. It could therefore, be argued that because of the absence of a constitutional duty, corporate governance in public enterprises is considered a second tier requirement. Shareholder representatives are likely not to consider the seriousness of the need for good corporate governance principles.

5.3.2 COMPANIES ACT

The Companies Act 71 of 2008 repealed the Companies Act 61 of 1973 and made certain amendments to the Close Corporations Act 69 of 1984. The Act is not a complete codification of the company law applicable to companies regulated by it and common law principles have been referred to where necessary. In this respect, it appears from the introductions that the English law has played a significant role in South Africa. As a result, many of the English company law rules have been readily accepted in South African law especially in respect of directors' fiduciary duties.

Namibia has a long statutory links history with South Africa. Before the realisation of the Companies Act of 2004, Namibia shared the same Companies Act of 1973 with South Africa. It appears that only a few sections are different between the Namibian Companies Act of 2004 and the South African Companies Act of 2008. However, provisions of the South African Companies law of 2008 have persuasive effect when courts are called upon to interpret the Companies Act of 2004. This is so because of the close legal similarities between the two Acts.

5.3.3 PUBLIC FINANCE MANAGEMENT ACT 1 OF 1999

The Public Finance Management Act 1 repealed the Reporting by Public Enterprises Act 93 of 1992. The PFMA aims "to secure transparency, accountability, and sound management of the revenue, expenditure, assets and liabilities" of departments, public enterprises, constitutional institutions and provincial legislatures.[162] *Sections 46*[163] gives managerial and operational autonomy to the public enterprises and it adopted several principles from the King Reports to promote the effectiveness of public enterprise boards.[164] The PFMA plays an important role in regulating good corporate governance practices and presents more comprehensive standards for reporting and accountability through embracing an approach to financial management in public enterprises that requires performance in service delivery and economic and efficient deployment of state assets and resources.[165] It further appears that it is mandatory for enterprises to comply with the provisions of the PFMA and the Act imposes sanctions for non-compliance.

Namibia will rely on the enabling Act, Treasury Act and the Procurement Act of 2015 for any other good corporate governance matters. However, it would appear that the enabling Act of the public enterprise take precedence.

---

[162] Public Finance Management Act 1 of 1999, Preamble, sections 2 and 3.
[163] Ibid, sec 46.
[164] Ibid, sec 46.
[165] Madue SM. 2007. *Public Finance Management Act, 1 of 1999 – A Compliance Strategy*. Available at www.uir.unisa.ac.za; [Accessed: 15 June 2019].

5.3.4 ACTS ESTABLISHING PUBLIC ENTERPRISES

It appears that the majority of South African public enterprises were established through an Act of Parliament.[166] The Act specifies the main objective of establishing the respective public enterprises, how they should be governed and the Act further stipulates the functions, powers and duties of the enterprise. There is a strong legislative similarities between Namibia and South Africa, Namibia's public enterprises are a creation of Parliament with the exception of a very few public enterprises such as the Windhoek Country Club and Resorts, Epangelo Mining just to name a few, but generally nearly all public enterprises are created by Act of Parliament.

5.3.5 KING REPORTS ON CORPORATE GOVERNANCE

The concept of corporate governance was officially introduced in South Africa in March 1992, with the formation of the King Committee on Corporate Governance.[167] The Committee drew recommendations which resulted in the adoption of the King I Report on Corporate Governance. Bekink[168] posited that the King I Report aimed to inspire the highest standard of corporate governance in South Africa and served as "a reference point for policy makers in the examination and development of legal and regulatory frameworks for corporate governance". In 2002,

---

[166] South African Civil Aviation Authority Act 40 of 1998, South African National Roads Agency Limited Act 7 of 1998 and Eskom Conversion Act 13 of 2001.

[167] Scholtz H and Smit AR. 2015. "Factors Influencing Corporate Governance Disclosure of Companies Listed on the Alternative Exchange (AltX) in South Africa)" (*South African Journal of Accounting Research*, Vol 29/1:29-50.

[168] Bekink M. 2008. "An Historical Overview of the Director's Duty of Care and Skill: From the Nineteenth Century to the Companies Bill of 2007" *South African Mercantile Law Journal*, Volume (20): 95–116.

following the adoption of a new Constitution and economic developments locally and internationally, the King I Report was revised, and King II Report on Corporate Governance (hereinafter referred to as King II Report) was published.

The anticipated new Companies Act and changes in international corporate governance trends since the release of the King II Report necessitated the issuance of the King III Report (hereinafter referred to as King III Report) in September 2009.[169] Muswaka[170]wrote that King III Report became effective from March 2010 and applies to all enterprises regardless of their nature, size or form of incorporation or establishment. In contrast to the previous Reports, the King III moves from a "comply or explain" approach to a principles-based "apply or explain" approach. The King III Report thus advocates for a balance in corporate governance between allowing directors to run the company in the way they consider as best for the stakeholders, while providing stakeholders with some protection against a board that disregards its responsibilities and is not held accountable.[171]

Since the King III Report publication, there has been important corporate governance and regulatory developments have taken place locally and internationally. As a result, the Institute of Directors in Southern Africa has spearheaded the development of the King IV Report. The King IV appears not to represent a substantial departure from the philosophy underpinning King III" but just redefines some concepts. It should be noted that the King Reports are enforceable in *South*

---

[169] De Beer F and du Toit DH. 2015. "Human Resources Managers as Custodians of the King III Code" (2015) 18(2) *South African Journal of Economic and Management Sciences*, Volume (18/2): 206-217.
[170] Muswaka L. 2015. "Corporate Governance Best Practices Vital for Good Corporate Citizenship: Guidance from King III" *World Journal of Social Sciences*, Volume (3/4): 25-35.
[171] Moyo NJ. 2010. South African Principles of Corporate Governance: Legal and Regulatory Restraints on Powers and Remuneration of Executive Directors, 85.

African Broadcasting Corporation (SABC) Ltd & Another V Mpofu[172] found that companies and their boards are required to measure up to the principles set out in the King Report. The court further observed that the board and its directors are ultimately accountable and responsible for the performance and affairs of the company as required by the King Report on Corporate Governance for South Africa 2002.

5.3.6 PROTOCOL ON CORPORATE GOVERNANCE IN THE PUBLIC SECTOR

The new South African Government seems to have observed that the control and governance of public enterprises was not based on any standardized principles or rules. As a result, the South African Department of Public Enterprises published the Protocol on Corporate Governance in the Public Sector with a view to inculcate the principles of good corporate governance in public enterprises. In contrast to the King Reports, "which cover a wide spectrum of enterprises in both private and public sectors, the Protocol aims to provide guidance specifically to the public sector.

5.3.7 ROLE OF THE BOARD

Historically, South African company law focused on the shareholder wealth maximisation approach and obliged directors to employ their powers for the benefit of the company.[173] But, the

---

[172] *South African Broadcasting Corporation (SABC) Ltd & Another V Mpofu (2009) 4 All SA 169 para 29-30 and Minister of Water Affairs and Forestry V Stilfontein Gold Mining Co Ltd and Others (2006) (5) SA 333 (W).*

[173] Muswaka L. 2015. "Shareholder Value versus Stakeholders' Interests– A Critical Analysis of Corporate Governance from a South African Perspective". *Journal of Social Sciences,* Volume (43/3): 217-225.

country has progressively developed the idea of an inclusive approach to corporate governance to ensure that directors act in the interests of all relevant stakeholders.[174] In carrying out their various duties, the directors are guided by common law, several statutes, the company's Memorandum of Incorporation and corporate governance instruments like the King Reports and the Protocol. Although boards of directors' duties in South Africa have traditionally been largely regulated by the common law, in a change of approach, the Companies Act has partially codified these duties by specifically setting a standard of directors' conduct.

5.3.8 SELECTION AND APPOINTMENT OF BOARD MEMBERS

South Africa has recognised the importance of appointing directors in a transparent and objective way. Section 66[175] provides that a company may appoint a person who satisfies the requirements for election as a director to serve as a director of the company. To minimise the risks of corporate failure as a result of unethical conduct and mismanagement by directors, while section 69[176] disqualifies certain persons from appointment as a director. The Acts that established public enterprises also seek to ensure that board members are appointed transparently and based on merit. In the appointment of the members of the board, the Minister must aim to achieve a reasonable balance of expertise and knowledge of the relevant industry. The Minister is then required to submit a list of the names of at least fifteen suitable candidates or of all potential candidates, if less than fifteen candidates apply, to the relevant committees of Parliament. The committees should

[174] Muswaka L. 2013. "Corporate Governance under the South African Companies Act: A Critique". *World Journal of Social Sciences*, Volume (3/3):11-19.
[175] Companies Act 71 of 2008.
[176] Ibid, sec 66.

consider the applications and shortlist at least ten candidates to the Minister. Only after this process has been completed, can the board be appointed by the Minister.

To minimise political interference in the operations of the public enterprise, if a person, who is a political office bearer, accepts an appointment in terms of the Act, he or she must vacate the political office before the appointment takes effect. In addition, the majority of the members of the board must not be in the full-time service of the State. The period of appointment as a board member differs with each public enterprise. *Section 7(3)*[177] provides that to achieve continuity, it is provided that a third of the board members or a number as near to a third of the members as possible must be reappointed at the expiry of a board's term of office.

The Namibian corporate governance system with regards to board appointment is not very different from that of South Africa. The Namibian framework, unlike that of South Africa, provides for a formal appointment without parliamentary committee process. The Minister is vested with powers to appoint members and make a recommendation to cabinet. If cabinet is satisfied, such appointed shall be announced by the Minister. However, the Public Enterprises Governance Act of 2019 has shifted the appointment from the line Minister to the Minister of Public Enterprises Ministry in consultation with the line minister who requires appointing board members. Further, the Act empowers the Minister of Public Enterprises Ministry to appoint boards of directors of commercial enterprises.

[177] Section 7(3) of the Construction Industry Development Board Act.

5.3.9 COMPOSITION OF BOARD

According to OECD[178] universally, it has been accepted that, for a board to be effective, it should be properly balanced in terms of power, skills, independence and diversity. The Companies Act and the company's Memorandum of Incorporation set the minimum qualifications to be satisfied by directors.[179] In South Africa the enabling Acts that established public enterprises require that the boards of the respective enterprises should be composed of directors with relevant qualifications and experience. Further, to complement the statutes, the King III Report and the Protocol recommend that the board should be composed of properly qualified and experienced people, the majority of which should be competent non-executive directors, with a sufficient number of the non-executive directors being independent. The King Report III also recommends that at least one third of the non-executive directors should rotate every year and any independent non-executive director serving more than nine years should be subjected to a rigorous review of his independence and performance by the board. The board should include a statement in the integrated report regarding the assessment of the independence of the independent non-executive directors.

Unlike to the provisions of the South African instruments, the Namibian instruments have no clear procedure or guidelines to increase board effectiveness. To promote gender equality, as in South Africa, Namibia has enacted legislation, created a Ministry of Gender and ratified a number of international agreements that seek to promote gender equality. Nonetheless, Namibia appears to be lagging behind South Africa in so far as promoting the independence of the board of director.

---

[178] OECD Principles of Corporate Governance.
[179] Companies Act 71 of 2008.

5.4 CONCLUSION

Both Namibia and South Africa have adopted comparable frameworks to promote good corporate governance practices in their respective countries and align their business practices with regional and international corporate governance standards. However, Namibia appears to lagging behind as far as the empowerment of the boards of directors with the enactment of the Public Enterprises Governance Act 1 of 2019 which has empowered the minister of Public Enterprise with board of directors' power. The Institute of Directors has played a fundamental role in promoting good corporate governance in both jurisdictions. The two countries have imitated the United Kingdom's corporate governance system that comprises of legal and regulatory sources and a system of non-binding codes of best practice.

Internationally recognised corporate governance codes like the OECD Principles of Corporate Governance and CAGG Guidelines have influenced corporate governance developments in both jurisdictions. In addition, both countries subscribe to a number of corporate governance initiatives specifically targeted towards improving African countries' corporate governance standards, for example, as New Partnership for Africa's Development (NEPAD), African Peer Review Mechanism (APRM), Africa Governance Forum (AGF) and African Corporate Governance Network.

Overall, both countries recognise that, for boards of public enterprises to be effective, there is need for clarity and director education on the role of the board, the board selection process should be transparent and based on merit, the board should be properly composed in terms of expertise, independence and diversity, the board remuneration should be fair and performance related and

the performance of the board should be evaluated regularly. The countries have also put in place enforcement mechanisms ranging from punishment (fines or imprisonment) of individual directors, disqualification of directors and removal of individual directors or the whole board for misconduct or poor performance in terms of relevant legislation.

CHAPTER 6

CONCLUSION AND RECOMMENDATIONS

6.1 INTRODUCTION

This chapter provides a conclusion and summary of the recommendations emanating from chapters 2, 3, 4 and 5. The recommendations are aligned in order to provide a unified proposal with regards to the autonomy of board of directors' governance structure in Namibia. The recommendations further take into account the lessons derived from governance reforms of South Africa.

Whilst it is acknowledged that some form of government involvement is indispensable for the effective attainment of the objectives of public entities, it is generally accepted that the intervention based on public policy, political or national interest should not clash with commercial interests to the extent of compromising the efficient performance of the entities. It is therefore recommended that, to improve the efficiency of the boards, the government should minimise its interference in the operations of the public entities and confine its intervention only to strategic and essential issues. Essentially, the role of the government should be to develop the policy framework, set the long term mandates and develop performance contracts with specified economic, financial and performance requirements. Thereafter, the board and management should be afforded the opportunity to exercise their own independent judgment in the management of the public entity and to function in a professional manner.

However, this is only attainable when government is fully dedicated to a system of autonomous control by boards and when the state and board have a clear and common understanding of their

roles, in an environment of regular communication and trust. An independent public entity monitoring and advisory unit is essential in enabling government to provide arm's length management and oversight of public entities.

6.2 CONCLUSIONS

The following conclusions are made based on the analysis of literature and the results from the study. Despite the existence of a comprehensive corporate governance framework, Namibia's public entities have not been spared from the challenges that have been universally experienced by public entities in other countries. In essence, the research findings revealed that efforts to enhance the effectiveness of boards of public entities and promote good corporate governance within the entities are adversely affected by a number of issues.

Firstly, in practice, boards are not fully empowered to perform their responsibilities. This due to multiple and conflicting organisational objectives, excessive interference by the government, lack of autonomous powers by the board, lack of director training and development, and absence of a proper working framework to guide the boards. As a result, directors lack the powers and commitment that is required to make meaningful and constructive contributions to the running of the business.

Secondly, the legal and regulatory framework governing the appointment of board members has loopholes that have adversely impacted on the effectiveness of boards. Board members are appointed for the wrong reasons and therefore lack the necessary skills and expertise to effectively direct the respective entities towards achieving their goals. The main challenge is that the

framework in place defines the person responsible for appointing the boards ("the Responsible Minister in consultation with the Minister of Public Enterprises") but there are no clear guidelines on academic and professional qualifications and the framework does not specify the process that has to be followed.

The criteria used in the appointment and dismissal of directors of public entities have therefore not been disclosed to the public. This gives the appointing authorities the opportunity to flout the rules and regulations by appointing board members for their political allegiance and other improper reasons which in turn deprive the public entities of appropriate autonomy. Another challenge is the limited number of persons with adequate and relevant skills in the management of public entities which has resulted in multiple directorships that incapacitate directors to exert their best efforts. The framework guiding the appointment of public entities boards has therefore not significantly assisted the boards to effectively carry out their responsibilities.

While Namibia has an adequate legislative and regulatory framework to enable the practice of good corporate governance, the challenge in creating a fully working corporate governance environment still lies in the implementation of these guidelines and legislative provisions and enforcement of the corporate governance principles. This is primarily due to lack of will power and institutional capacity constraints. The country's public enterprises have not been spared from these challenges as they have performed poorly due to a number of factors, one of which is the ineffective discharge of duties by boards and undue political interference by the executive/shareholder. The poor board performance has been attributed to obscure roles of boards, multiple and contracting objectives, subjective board appointment processes, limited director expertise, poor composition of boards and too much ministerial involvement in operational issues.

The study also established that Namibia and South Africa share common features in terms of the frameworks they have put in place to promote good corporate governance in public enterprises. Both countries have continued to experience public enterprises challenges despite the existence of corporate governance codes. The common challenges experienced by the countries in respect of public enterprise boards include, among others, lack of board role clarity, insufficient experienced and dedicated human resources especially in the running of public enterprises, poorly composed boards, the undue meddling in the execution of board duties by the responsible ministries which incapacitates the board to objectively exercise its judgment and come up with sound strategies and decisions, poor regulatory oversight by the responsible authorities and poor enforcement mechanisms.

Regardless of the similarities, the results of the study show that South Africa have significantly performed better than Namibia with regards to the development of corporate governance codes and guidelines, implementation of good corporate governance principles and enforcement of compliance. Even-though South Africa has performed better than Namibia, she remains weak in the enforcement of the good governance guidelines. There is a similarity between Namibia and South Africa in that boards of directors in both countries are not adequately protected against the meddling of the shareholder. This is evidenced by several court decisions in which the court was never shy to declare the interference by shareholder representative invalid and illegal.

6.3 RECOMMENDATIONS

The research highlights a number of crucial aspects of non-conformance to best practice in Namibia's public entities. Based on the above research findings, this section lays down some

recommendations that could enhance the effectiveness of the boards of Namibian public entities and alleviate some of the problems being encountered by the entities. These recommendations may be useful to the Namibian government political leaders and public entity directors to improve the corporate governance framework in public entities.

The weaknesses of the Namibia's corporate governance structure have been highlighted in this study and it is important that recommendations are provided for the sake of advancement and implementation of best practices in good governance in public enterprises. There is need to infuse the OECD guidelines and lessons derived from South Africa in the operations of boards of directors in Namibia. Whereas, it is acknowledged that some form of government intervention is necessary for the successful achievement of the objectives of public enterprises, it is commonly accepted that the intervention based on public policy, political or national interest should not clash with commercial interests to the extent of compromising the efficient performance of the enterprises.

6.3.1 INSULATE BOARD OF DIRECTORS FROM STATE INTERVENTION

It is therefore recommended that, to improve the effectiveness of the boards, the government should minimise its interference in the operations of the public enterprises and restrict its intervention only to policy issues. The advantage of this is that public enterprises will be managed in a private sector-like environment. Fundamentally, the role of the government should be to develop the policy framework. Thereafter, the board and management should be afforded the opportunity to exercise their own independent judgment in the management of public enterprise

and to function in a professional manner. However, this is only achievable when government is fully committed to a system of autonomous control by boards and when the state and board have a clear and common understanding of their roles.

It is further recommended that, to minimise excessive government interference, all relevant stakeholders (e.g. policymakers and shareholder representatives) should be subjected to training on corporate governance and be regularly updated on latest developments. Also, where civil servants are appointed to boards of public enterprises, training is vital to educate them on the importance of not allowing their role in the public service compromise their independent judgment with respect to the public enterprise. Similarly, the boards have to be trained on how to balance government or national interests with the interests of the public enterprises as well on good corporate governance in general. But, it is important to note that training may not be sufficient as a solution on its own hence, the need for trained individuals to implement what they would have been trained to do and also for follow up mechanisms to establish whether the training is achieving the desired results.

6.3.2 DEVELOP A LEGAL FRAMEWORK FOR THE AUTONOMY OF THE BOARD OF DIRECTORS

The best way of restricting governmental or political interference in the nomination of public enterprise boards and increasing their independence and professionalism is to put in place structured and clearly skill-based nomination systems, making sure that the ultimate selection criterion is transparent and based on competency and proven professionalism. Namibia could

consider learning from South Africa's *Handbook for the Appointment of Persons to Boards of State and State Controlled Institutions* and develop her own handbook that is appropriate for the Namibian context. It is further recommended that, in addition to relevant qualifications and expertise, the persons to be appointed as board members should be of good financial standing. This is to ensure that the appointees do not end up seeking to benefit from the enterprise as if they were employees and engaging in unethical activities for financial gain as is the current status quo in some public enterprises. Prospective board members should be asked to declare assets before appointment.

6.3.3 AMEND SECTION 4 OF PEGA 1 OF 2019

Amend section 4 of the Public Enterprises Governance Act 1 of 2019. The purpose of the amendments is to limit the powers of the Minister of Public Enterprises. The sections should read as below.

6.3.3.1 There shall be a Parliamentary Committee on Public Enterprises which shall be responsible for the appointment of boards of directors of public enterprises.

6.3.3.2 The Parliamentary Committee shall exercise an oversight responsibility on behalf the shareholder

6.3.3.3 The boards of directors shall report directly to the Parliamentary Committee

6.3.4 CREATE A PARLIAMENTARY PUBLIC ENTERPRISES COMMITTEE

The best way of limiting governmental or political interference in the nomination of public entity boards and increasing their independence and professionalism is to put in place structured and clearly skill-based nomination systems, making sure that the ultimate selection criterion is transparent and based on competency and proven professionalism.

It is further recommended that the parliament should create an independent parliamentary committee or committee comprised of qualified experts that is charged with the responsibility of selecting and appointing board members based on a transparent and objective criteria approved by the government. The parliamentary committee should be responsible for development of the selection criteria, identification of the needs of the public enterprise, creating a database of potential board candidates, assessing and vetting potential candidates, monitoring boards' composition for appropriateness and making suitable recommendations to cabinet for approval. In addition, to preserve the independence of board members, it is recommended that the board should not be dismissed by the line minister without the parliamentary committee's consideration of the circumstances surrounding the dismissal. This move is likely to regulate the influence and abuse of power over the boards by the respective ministers. However, it is important to note that although a structured nomination system may depoliticise the nomination process, no technique is full proof and all can be subverted by individuals who may be determined to impose their candidate on the board. It is, therefore, paramount that the government should genuinely be supportive of the objective of appointing appropriately qualified and experienced individuals as board members of public enterprises. The government can also consider seeking the services of professional bodies like accounting and legal institutions to assist in the nomination of persons to be appointed as

directors to the boards of public enterprises. The advantage of using professional organisations is that they have access to a wider pool of potential directors with more diverse backgrounds, an important characteristic of boards.

This study strongly argues that it is the quality of individual directors that play a significant role in the effectiveness of public enterprise boards. Yet, despite the importance of their role as directors, there seems to be a general lack of adequate attention to the proper induction and development of these directors to make them competent in conducting their responsibilities in a professional manner. It is therefore, recommended that more effort should be directed towards professionally developing individuals that are engaged as directors through comprehensive formal induction and training so that they become competent to act as such. It is also imperative that adequate resources should be channelled towards training facilities and programs for corporate directors. In addition, all potential directors should be enlightened on the necessity for training and continual development as well as encouraged to attend the induction and training sessions so that they are capacitated to effectively discharge their duties. This would also ensure that the country has a reasonable pool of appropriately qualified and independent directors especially in cases where directors are required to have specialist knowledge such as those who serve on the audit committee of a board.

In conclusion, what has been clear in this study is a lack of political insulation for board of directors against the appointing authority. Further, for public enterprises to move to a new level, the Boards of public enterprises should have the necessary authority, competencies and objectives to carry out their functions of strategic guidance and monitoring of management. They should act with integrity and be held accountable for their actions. The shocking and debilitating corporate governance issues resulting from this precarious state of affairs have been alluded to in detail in this study.

Namibia must develop a political insulation mechanism to ensure that political interference is eliminated in the affairs of public enterprises where an appointed board is in existence. A high level committee of experts should be established to assist the government in developing a solid board appointment manual for all public enterprises. It is hoped that the proposals made herein may be of value in advancing the debate and restoring good governance in Namibia's state owned enterprises.

6.3.5 FURTHER STUDY

This study signals government and all other stakeholders to areas of corporate governance practices in the Namibian public enterprises that warrant attention. It further contributes to the scarce academic literature on board of directors' protection against political interference in public enterprises in Africa in general, and in Namibia's public sector in particular. It is therefore, hoped that this study could assist other students to further investigate other complexities encountered by public enterprises' boards in effectively discharging their duties. The study also has the potential to assist policy makers to develop laws and regulations which will improve the performance of the enterprises as well as the directors and their advisers to develop and maintain effective boards.

REFERENCES

Morck, R, Stejer, L. 2005. *The Global History of Corporate Governance: An Introduction.* Chicago: University of Chicago

Case Law

Affordable Medicines Trust v Minister of Health [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC)

African Claim and Land Co Ltd v W J Langermann 1905 TS 494

Anhui Foreign Economic Construction v Minister of Works and Transport [2016] NAHCMD 265

Automatic Self Cleansing Filter Syndicate Company Limited v Cuninghame [1906] 2 Ch. 34

Ben-Tovin v Ben-Tovin and Others 2001 (3) SA 1074 (C)

Breckland Group Holdings Ltd v London and Suffolk Properties Ltd and Others [1989] BCLC 100

Cape United Sick Fund Society and Others v Forrest and Others 1956 (4) SA 519 (A)

Count Gotthard SA Pilati v Witfontein Game Farm (Pty) Ltd and Others [2013] 2 All SA 190 (GNP)

Democratic Alliance v Minister of Public Enterprise and Others; Economic Freedom Fighters v Eskom Holdings Limited and Others; Solidarity Trade Union v Molefe and Others [2018] ZAGPPHC 1

Development Corporation of SA Ltd v Jorgensen 1980(4) SA 156(W)

Ex Parte Russlyn Construction (Pty) Ltd 1987 (1) SA 33 (D)

Ex parte Stubbs No: In re Wit Extension Ltd 1982 (1) SA 526 (W)

Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd 1980 (4) SA 156 (W)

Glenister v President of the Republic of South Africa & others [2011] ZACC 6; 2011 (3) SA 347 (CC)

Gramophone and Typewriter Ltd v Stanley [1908] 2 KB 89

Harilal v Rajman and Others [2017] 2 All SA 188 (KZD)

In re Brazilian Rubber Plantations and Estates Ltd [1911]1 Ch. 425

Isle of Wight Railway Co v Tahourdin (1883) 25 ChD 320 (CA).

James North (Namibia) (Pvt) Ltd v Mattinson 1990 (2) SA 229 (ZHC)

John Shaw & Sons (Salford) Ltd v Shaw [1935] 2 KB 113 (CA)

Kaimowitz v Delahunt and Others 2017 (3) SA 201 (WCC)

Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd [1915] AC 705 (HL) 713

LSA UK Ltd (formerly Curtainz Ltd) and Others v Impala Platinum Holdings Ltd and Others 2000 JDR 0187 (SCA)

Marshall's Valve Gear Co v Manning, Wardle & Co Ltd [1909] 78 LJ Ch. 46

Mbethe v United Manganese of Kalahari (Pty) Ltd 2016 (5) SA 414 (GJ)

selected Public Enterprises. It further shows the movement from State Owned Enterprises (SOE) to Public Enterprises by the creation of Public Enterprises Act 1 of 2019.

The President is empowered by the constitution to establish and dissolve ministries as the President may at any time consider being necessary or expedient for the good government of Namibia. However, this constitutional power does not extend to public enterprises. Public enterprises are established by Parliament and only Parliament can table the repeal laws of any public enterprise. To achieve the National development goals and Vision 2030, good corporate governance is encouraged to ensure that the public enterprises are sustainably. The hybrid governance adopted by the Public Enterprise Governance Act concentrates too much power with the shareholder representative which is inconsistence with good corporate governance.

This legislative move is against tenets of good governance because the shareholder representative will act as the coach and referee. Good corporate governance principles as stated and adopted in Namibia by NamCode demands that the board of directors should be independent from the shareholder. If the shareholder is dissatisfied with the board of directors, either by breach of the above common law duties or statutory duties, there are remedies at his/her disposal to find an amicable solution therefore, it is beyond any doubt that boards of directors should be provided with some legal protection from the shareholder not to be used as vehicles to benefit the appointing authority in their personal capacities.

McBride v Minister of Police and Another [2015] ZAGPPHC 830; [2016] 1 All SA 811 (GP); 2016 (4) BCLR 539 (GP)

Minister of Defence and Military Veterans v Motau and Others 2014 (5) SA 69 (CC)

Molefe and Others v Minister of Transport and Others [2017] ZAGPPHC 120

National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another [2014] ZACC 30

Navigator Property Investments (Pty) Ltd v Silver Lakes Crossing Shopping Centre (Pty) and Others [2014] JOL 32101 (WCC)

New National Party v Government of the Republic of South Africa & others [1999] ZACC 5; 1999 (3) SA 191 (CC)

Novick v Comair Holdings Ltd 1979 (2) SA 116 (W) 153

Peel and Others v Hamon J & C Engineering (Pty) Ltd and Others2013 (2) SA 331 (GSJ)

Pharmaceutical Manufacturers Association of SA & another: In Re Ex Parte President of the Republic of South Africa & others ZACC 1; 2000 (2) SA 674

Phillips v Fieldstone Africa (Pty) Ltd and Another [2003] ZASCA 137; [2004] 1 All SA 150 (SCA)

President of the Republic of Namibia and Others v Anhui Foreign Economic Construction Group Corporation Ltd and another [2017] NASC 7

Pretorius v PB Meat (Pty) Ltd [2013] ZAWCHC 89

Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others2010 (2) NR 487 (SC)

re El Sombrero Ltd [1968] Ch. 900

Road Fund Administration v Government of the Republic of Namibia and Others [2016] NAHCMD 265

Robinson v Randfontein Estates Gold Mining Co Ltd 1921 AD 168

S.O.S Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation (SOC) Limited and Others [2018] ZACC 37; 2018 (12) BCLR 1553 (CC); 2019 (1) SA 370 (CC)

Salmon v Quin and Axtens Ltd [1909] 1 Ch. 311 (CA)

Smyth and Others v Investec Bank Ltd and Another [2018] 1 All SA 1 (SCA)

SOS Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation SOC Limited and Others [2017] ZAGPJHC 289

Transvaal Cold Storage Co Ltd v Palmer 1904 TS 4

Van Rooyen v The State 2002 5 SA 246 (CC).

Van Tonder v Pienaar 1982 (2) SA 336 (SE)

Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others2015 (5) SA 179 (WCC)

Wessels & Smith v Vanugo Construction (Pty) Ltd 1964 (1) SA 635 (O)

Journal and Articles

B. E. ARONSON, B.E. 2010. "Learning from Toyota's Troubles: Board Oversight, Board Structure, and Corporate Scandals in Japan", *ZJAPANR / J.JAPAN.L* Vol.30, P67

Frederick, W. 2011. Enhancing the Role of the Boards of Directors of State-Owned Enterprises, p 15

Jones, E. 2007. "Directors' duties: negligence and the business judgment rule", *South African Mercantile Law Journal*, Volume. 326, P335

Malan K. 2014. "Reassessing Judicial Independence and impartiality against the backdrop of judicial appointments in South Africa", *PER / PELJ,* Vol.17, P5 *http://dx.doi.org/10.4314/pelj.v17i5.05*

Mongalo, T. 2003. "The emergence of corporate governance as a fundamental research topic in south Africa" *South Africa Law Journal,* Vol. 120, P174

Muswaka L. 2013. "Corporate Governance under the South African Companies Act: A Critique", *World Journal of Social Sciences,* Vol. 3/3, PP11-19

OECD. 2014. Guidelines on the governance of state owned enterprises for Southern Africa

OECD. 2018. Professionalising Boards of Directors of State-Owned Enterprises: Stocktaking of National Practices

Roberts J, McNulty T and Stiles P. 2005. "Beyond Agency Conceptions of the Work of the Non-Executive Director: Creating Accountability in the Boardroom", *16 British Journal of Management,* Vol.16/5, P26

Vagliasindi, M. 2008. The Effectiveness of Boards of Directors of State Owned Enterprises in Developing Countries,

Welling, Smith & Rotman. 2014. Canadian Corporate Law: Cases, Notes & Materials.

World Bank .2014. Corporate Governance of State-Owned Enterprises. A toolkit. DOI: 10.1596/978-146-0222-5. Washington DC.

Thesis

Chokuda, T. 2017. *The Protection of Shareholders' Rights versus Flexibility in the Management of Companies: A Critical Analysis of the Implications of Corporate Law Reform on Corporate Governance in South Africa with specific reference to protection of shareholders*. Cape Town: University of Cape Town

Hendricks E Towards. 2010. *Good Corporate Governance in South Africa: Private Enforcement versus Public Enforcement* Unpublished Thesis, University of Cape Town,

Moloi, Steven. 2008. *Assessment of Corporate Governance in the annual reports of South African listed companies*, Dissertation, University of South Africa

Kangueehi, T. (2007). *The Performance of State-Owned Enterprises in Namibia.* (Master Thesis, University of Namibia, 2007).

Websites

Afolabi AA. 2015. *"Examining Corporate Governance Practices in Nigerian and South African Firms"* Available www.eajournals.org, [Accessed: 15 June 2019]

Argüden, Y. 2010. *"Measuring the Effectiveness of Corporate Governance"* (Research Paper published by INSEAD Business School of the World in April 2010) available at www.knowledge.insead.edu; [Accessed: 14 June 2019]

Bob Tricker and Chris Mallin. 2010. *"Is director independence so important?"* Available at www.corporategovernanceoup.wordpress.com; [Accessed: 14 June 2019]

Bruner, C.2014. *"Corporate Governance Theory and Review of Board Decisions"*, 66UCLAL.REV.DISC.87 Available at www.digitalcommons.law.uga.edu; [Accessed: 17 October 2018]

Cadbury Report. 1992. *A Report of the Committee on the Financial Aspects of Corporate Governance*. Available at www.ecgi.org; [Accessed: 16 June 2019].

Claessens S and Yurtoglu B. 2012. *Corporate Governance and Development - An Update (Global Corporate Governance Forum Focus*, Available at http://www.ifc.org; [Accessed: 15 June 2019]

Cottarelli C. 2011. *Revenue Mobilization in Developing Countries*, Available at www.imf.org; [Accessed: 14 June 2019],

Cronin, P. 2012. *et al Corporate Governance for Main Market and AIM Companies*, Available at www.londonstockexchange.com; [Accessed: 13 June 2019]

Deloitte & Touché. 2013. *Framing the Future of Corporate Governance*. Available at www.deloitte.com; [Accessed: 13 June 2019]

Dhlamini, P. 2018. *Insulate state-owned companies from political interference*, Available at www.timeslive.co.za; [Accessed: 20 May 2019]

Gumede. 2018. *Lessons for South Africa's SOEs from other African countries*, Available at www.news24.com; [Accessed: 03 June 2019]

Hutchings, M. 2018. *Cyril Ramaphosa elected as president of South Africa after Zuma departure*, Available at www.ewn.co.za; [Accessed: Feb 2018]

Madue SM. 2007. *Public Finance Management Act, 1 of 1999 – A Compliance Strategy* Available at www.uir.unisa.ac.za; [Accessed: 15 June 2019]

Ndanki, K. 2014. *Geingob proposes new ministry.* Available at www.namibian.com.na; [Accessed: Nov 2016]

Ngaevarue Katjangua. 2018. *Gawanas-Vugs fired from NAC board.* Available at www.namibian.com.na; [Accessed: 29 Oct 2018]

Nghinomenwa, E. & Ngutjinazo, O. 2019. *Kandjii-Murangi digs in over Nust*, Available at www.namibian.com.na; [Accessed: 07 June 2019]

Nicholas J. Price. 2018. "What Is the History of Corporate Governance and How Has It Changed?" Available at www.insights.diligent.com; [Accessed: 29 September 2019]

Organisation for Economic Co-operation and Development (OECD).2004. *Principles of Corporate Governance*, Available at www.oecd.org; [Accessed: 16 June 2019].

Penwell, D. 2018. *Insulate state-owned companies from political interference*, Available at www.timeslive.co.za; [Accessed: 20 May 2019]

Price, J. 2018. *What Is the History of Corporate Governance and How Has It Changed?* Available at www.insight.dilegent.com; [Accessed: 12 June 2019]

Shinovene Immanuel. 2016. *Jooste gets business SOEs*. Available at www.namibian.com.na; [Accessed: 17 Jan 2017]

The Institute of Directors (IoDSA). 2012. *Governance Assessment Instrument, Information*, Available at www.iodsa-gai.co.za; [Accessed: 15 June 2019]

Vagliasindi, M. 2008. *The Effectiveness of Boards of Directors of State Owned Enterprises in Developing Countries, World Bank Policy Research Working Paper 4579 of 2008*, Available at www.ideas.repec.org; [Accessed: 2th June 2019]

Legislation

Namibia Financial Institutions Supervisory Authority, Act of 2001

University of Namibia Act, 18 of 1992

Namibia University of Science and Technology Act, 7 of 2015

Namibia Wildlife Resorts Company Act, 3 of 1998

Constitution of the Republic of Namibia

Namibia Companies Act, 28 of 2004

Public Enterprises Governance Act, 1 of 2019

State-Owned Enterprises Governance Act, 2 of 2006

Newspapers

Ndeyanale, E. 2019. *"NUST council defies minister,"* in *The Confidante*, 29 May 2019.

Nghinomenwa, E. & Ngutjinazo, O. 2019. *"Kandjii-Murangi digs in over Nust". The Namibian,* 07 June 2019.