



GOVERNMENT GAZETTE

OF THE

REPUBLIC OF NAMIBIA

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Government Notice

OFFICE OF THE PRIME MINISTER

No. 209 1999

PROMULGATION OF ACT OF PARLIAMENT

The following Act which has been passed by the Parliament and signed by the President in terms of the Namibian Constitution is hereby published in terms of Article 56 of that Constitution.

No. 14 of 1999: Roads Contractor Company Act, 1999.

ACT

To provide for the incorporation of a company to undertake roads construction or maintenance; and to provide for matters incidental thereto.

(Signed by the President on 30 September 1999)

ARRANGEMENT OF SECTIONS

Section

1. Definitions
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BE IT ENACTED by the Parliament of the Republic of Namibia, as follows :-

Definitions

1. In this Act, unless the context otherwise indicates -

“articles” means the articles of association of the Company;

“board” means the board of directors of the Company;

“Companies Act” means the Companies Act, 1973 (Act No. 61 of 1973);

“Company” means the company contemplated in section 2;

“memorandum” means the memorandum of association of the Company;

“Minister” means the Minister responsible for Transport;

“Shareholding Minister” means the Minister or Ministers designated as Shareholding Minister in terms of section 3(2); and

“transfer date” means the date determined by the Minister in terms of section 10(1).

Incorporation of Company

2. (1) The Shareholding Minister shall take the necessary steps for the incorporation of a public company with share capital and the issue of a certificate to commence business under the Companies Act.

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(2) The Shareholding Minister shall on behalf of the State sign the memorandum and the articles of the Company and when the memorandum and articles have been so signed -

- (a) they shall be deemed to comply with the provisions of the Companies Act relating to the signature of the memorandum and articles of a company;
- (b) the Company shall, subject to subsection (5), be deemed to comply with the provisions of the Companies Act relating to the membership of a public company.

(3) The Registrar of Companies defined in section 1 of the Companies Act shall, on receipt of the memorandum and articles referred to in subsection (2), register such memorandum and articles in accordance with the provisions of the Companies Act.

(4) The Company is exempt from the payment of all fees chargeable in terms of the Companies Act which relate to the checking of documents, the reservation and registration of the name of a company or a shortened form thereof, the registration of its memorandum and articles and the issue of a certificate to commence business.

(5) Sections 66, 174, 190 and 344(d) of the Companies Act shall not, while the State is a member of the Company and the total number of members of the Company is less than seven, apply to the Company.

(6) The Shareholding Minister shall, within a period of 28 days after the registration of the memorandum and articles, or any alteration or addition thereto, as the case may be, table such memorandum and articles, or such alteration or addition, as the case may be, in the National Assembly if the National Assembly is then in ordinary session or, if the National Assembly is not then in ordinary session, within a period of 28 days after the commencement of its next ensuing ordinary session.

Shareholding in Company

3. (1) The State shall, on the registration of the Company and subject to subsection (5), be the holder of the shares in the Company.

(2) The President shall in writing designate a Minister or Ministers as Shareholding Minister who shall, on behalf of the State, exercise the rights attached to the shares of which the State is the holder and who shall perform the functions of the Shareholding Minister in terms of this Act.

(3) If more than one Minister is designated under subsection (2), the President -

- (a) shall appoint from among the Ministers so designated a chairperson who shall exercise the rights and perform the functions referred to in subsection (2) in concurrence with the Ministers so designated;
- (b) may determine any other procedural matter regarding the functioning of such body of Ministers.

(4) The President may, in the designation of any individual Minister as Shareholding Minister contemplated in subsection (2), direct that any power or duty conferred or imposed by this Act upon the Shareholding Minister shall, either generally or in relation to any matter specified by the President in such designation, be exercised or performed by the Shareholding Minister in or after consultation with such other Minister or Ministers as may be designated by the President.

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- (5) With the prior consent of the Cabinet -
 - (a) the Shareholding Minister may alienate shares held by;
 - (b) the Company may issue shares in the Company to any person other than,

the State.

Object of Company

4. (1) Subject to the other provisions of this Act, the object of the Company is to undertake work relating to the construction or maintenance of roads in accordance with sound and generally accepted business principles.

(2) The Company may, under section 55 of the Companies Act, make additions to or alter the provisions of its memorandum with regard to the object and powers of the Company, subject thereto that -

- (a) the Shareholding Minister's prior written consent to such additions or alterations have been obtained, which consent shall, together with the special resolution referred to in that section, be lodged with the Registrar of Companies defined in section 1 of that Act; and
- (b) the object mentioned in subsection (1) may not be altered.

Powers and duties of Company

5. (1) The Company may -
- (a) enter into an agreement with any person, body or authority to perform a particular act or render a particular service on behalf of or for the benefit of the Company;
 - (b) obtain indemnity insurance to cover any liability which it may incur;
 - (c) let or subcontract any facility or service it is required or entitled to provide or render,

consistent with the object of the Company.

- (2) The Company shall -
 - (a) utilise the proceeds of the sale of surplus assets to reduce the loan account of the State referred to in paragraph (b) or (c) of section 11(1), until such loan account is fully redeemed;
 - (b) not without the consent of the Shareholding Minister, alienate or in any way encumber any assets of the Company representing more than 10 per cent of the total market value of all the assets of the Company otherwise than in the normal course of business.

Appointment of chief executive officer

6. (1) The board shall, after consultation with the Shareholding Minister, appoint a chief executive officer for such period and on such terms and conditions as the

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board may determine, to serve as the manager of the Company.

(2) The chief executive officer appointed in terms of subsection (1) shall not be a director of the Company, and -

- (a) shall, at the invitation of the board, attend;
- (b) may participate in discussions at; and
- (c) shall not be entitled to vote at,

any meeting of the board.

Performance agreement

7. (1) The Company shall, subject to subsection (3), not later than two months before the commencement of every third financial year of the Company, and in accordance with such procedures as the Shareholding Minister may in writing determine, submit to the Shareholding Minister a draft performance agreement.

(2) The draft performance agreement contemplated in subsection (1) shall contain particulars of -

- (a) the expectations of the Government in respect of the Company's and every subsidiary company's scope of business, efficiency and financial performance;
- (b) the principles to be followed by the Company for the purposes of business planning;
- (c) the Company's dividend policy;
- (d) such measures as may, in the opinion of the Shareholding Minister, be necessary to protect the financial soundness of the Company, including the Company's investment policy and a disclosure of particulars relating to the Company's indemnity insurance, the loans made or granted by the Company and the Company's cover against exchange rate risks;
- (e) the management and financial systems to be implemented by the Company and the principles to be applied in the budgeting for administrative expenditure;
- (f) the procedures to be followed by the Company in relation to -
 - (i) the calling for, evaluation and awarding of tenders; and
 - (ii) the entering into of agreements with any person, body or authority;
- (g) the measures by which the performance of the Company can be assessed, including the measures relating to the Company's -
 - (i) financial performance;
 - (ii) operational and service level performance; and
 - (iii) management of human resources and promotion of sound labour relations; and

- (h) any other matter relating to the performance of the Company's functions under this Act which the Shareholding Minister may require.

(3) The first draft performance agreement contemplated in subsection (1) shall, notwithstanding that subsection, be submitted as provided for in that subsection within a period of two months after the transfer date, or before such later date as the Shareholding Minister may by notice in the *Gazette* determine.

(4) The Shareholding Minister shall, within a period of two months after the receipt of the draft performance agreement contemplated in subsection (1) -

- (a) approve; or
- (b) after consultation with the Company, amend and approve,

the draft agreement.

(5) Upon approval of the draft performance agreement by the Shareholding Minister under subsection (4), the Shareholding Minister and the chairperson of the board shall sign the agreement.

(6) The Shareholding Minister and the Company may, subject to subsection (7), at any time after signature of a performance agreement, amend such agreement.

(7) An amendment to the performance agreement in accordance with subsection (6) shall be in writing and shall be signed by the Shareholding Minister and by the chairperson of the board.

Annual report

8. (1) The Company shall, in addition to any record, statement or report required in terms of Chapter XI of the Companies Act, and within a period of six months after the end of each financial year of the Company, submit to the Shareholding Minister a report on the activities of the Company during that financial year, which annual report shall include -

- (a) the audited and approved financial statements contemplated in that Chapter in respect of all the business of the Company, including a balance sheet and an income and cash flow statement; and
- (b) a report on -
 - (i) the Company's performance in relation to the Company's performance agreement contemplated in section 7; and
 - (ii) such other matters as the Shareholding Minister may in writing require.

(2) The Shareholding Minister shall, within a period of 28 days after the receipt of the annual report referred to in subsection (1), table such report, together with the relevant performance agreement contemplated in section 7, including any amendment made to such agreement, in the National Assembly, if the National Assembly is then in ordinary session or, if the National Assembly is not then in ordinary session, within a period of 28 days after the commencement of its next ordinary session.

Power of Shareholding Minister to demand information

9. Notwithstanding any other law, the Shareholding Minister may at any time by notice in writing require the Company to furnish him or her with such information relating to the affairs of the Company as he or she may reasonably require for the purpose of the performance of his or her functions in terms of this Act, and which information so required he or she specifies in such notice.

Transitional provisions

10. (1) Subject to the further provisions of this section and section 11, the Minister shall, after consultation with the Shareholding Minister and the Minister responsible for Finance and on such conditions as the Minister may determine, transfer to the Company, with effect from a date determined by the Minister by notice in the *Gazette*, such assets, liabilities, rights or obligations of the State which relate to or are connected with the construction and maintenance of roads by the Department of Transport of the Ministry responsible for Transport, as may, in the opinion of the Minister, be required by the Company for the effective achievement of its objects: Provided that such assets, liabilities, rights or obligations shall be specified in such notice, including the value of each item so specified as determined in terms of subsection (8).

(2) Notwithstanding any other law, the Company shall, with effect from the transfer date, be vested with the ownership of the assets and rights and be charged with the liabilities and obligations transferred or assigned to it by virtue of subsection (1).

(3) A certificate issued by the Minister in which it is stated that any State land or a servitude or other real right or lease or any other asset or right described in such certificate has been transferred to the Company in terms of subsection (1), shall be sufficient proof that the asset or right so described vests in the Company.

(4) Upon the submission of a certificate referred to in subsection (3) to the Registrar of Deeds appointed in terms of section 2 of the Deeds Registry Act, 1937 (Act No. 47 of 1937), or to any other person in charge of any other office where a register or record of the ownership of or entitlement to an asset or right described in such certificate is being kept, the Registrar or such person, as the case may be, shall make such entries in or on any relevant register, title deed or other document in his or her office or submitted to him or her as may be necessary to effect the transfer contemplated in that subsection in the name of the Company.

(5) Notwithstanding any other law or the common law, no servitude or other right of any kind in respect of State land transferred to the Company in terms of subsection (1) shall be acquired by prescription.

(6) The Company shall be substituted for the State as a contracting party in respect of any agreement transferred to the Company in terms of subsection (1), without such substitution bringing about a novation of such agreement.

(7) Any litigation, including arbitration proceedings, in respect of which the cause of action arose before the transfer date and to which any State authority is a party by virtue of its undertaking of roads construction or maintenance work, shall be conducted by or against the State, as the case may be.

(8) The value and the net asset value of the assets, liabilities, rights and obligations transferred in terms of subsection (1) shall be determined by the Minister with the concurrence of the Minister responsible for Finance.

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(9) For the purposes of the Income Tax Act, 1981 (Act No. 24 of 1981), or of any other law in terms of which a tax or levy may be imposed, it shall be deemed that -

- (a) expenses were actually incurred by the Company in acquiring the assets, liabilities, rights and obligations transferred to it in terms of subsection (1); and
- (b) notwithstanding any other law, the expenses referred to in paragraph (a), including the cost of the assets, are equal to the value determined in terms of subsection (8).

(10) Notwithstanding any other law, no additional sales levy, sales tax, stamp duty, transfer duty, or any other levy, tax or duty, or registration fee payable in terms of any law relating to the acquisition or transfer of assets or rights shall be payable in respect of the transfer of assets or rights by the State to the Company in terms of subsection (1).

(11) Notwithstanding any other law, the Minister may, on or before the transfer date, in consultation with the Prime Minister and in accordance with an agreement concluded with the Company, transfer to the Company any staff member in the Public Service as defined in section 1 of the Public Service Act, 1995 (Act No. 13 of 1995), but subject to such member's consent.

(12) Notwithstanding section 13(2) or any other law, the Minister may, with the concurrence of the Shareholding Minister and the Minister responsible for Finance, during the period between the commencement of this section and the transfer date take such steps or authorise such thing to be done, or perform any function or authorise the Company to perform any function in terms of this Act, as may be necessary to promote -

- (a) the transfer to the Company of the assets, liabilities, rights or obligations mentioned in subsection (1);
- (b) the undertaking of roads construction and maintenance work on a commercial basis;
- (c) the management of the Company.

Issue of additional shares to State

11. (1) The Company shall as consideration for the transfer to the Company of the assets, liabilities, rights and obligations in terms of section 10(1), to the value referred to in section 10(8), or for the provision of working capital, either -

- (a) issue to the State additional fully paid-up shares; or
- (b) create a loan account in favour of the State; or
- (c) issue such shares and create such loan account,

to the value determined by the Minister in consultation with the Minister responsible for Finance and the Company, and such value shall be deemed to be reasonable consideration for such shares or working capital.

(2) The Company is exempt from the payment -

- (a) of any stamp duty in respect of shares issued to the State;
- (b) of any moneys in terms of section 75 of the Companies Act in respect of the

creation of, or increase in, the share capital of the Company, while the State is the sole shareholder of the shares of the Company.

Winding-up and judicial management

12. The Company shall not be wound up or placed under judicial management except under the authority of an Act of Parliament.

Disclosure of interest

13. (1) A director of the Company who has a direct or indirect interest in any agreement entered into or to be entered into by the Company, or in any matter which is in conflict with, or is likely to be in conflict with, the interests or objects of the Company, shall as soon as possible after the relevant facts have come to his or her knowledge, disclose the nature, extent and full particulars of his or her interest at a meeting of the board, in accordance with the procedure provided in sections 234 and 241 of the Companies Act.

(2) Full particulars of the disclosure made at a meeting in terms of subsection (1) shall be recorded in the minutes of such meeting.

(3) A director of the Company who contravenes or fails to comply with any provision of subsection (1) shall be guilty of an offence and on conviction be liable to a fine not exceeding N\$8 000 or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

(4) If a person referred to in subsection (3) is in terms of that subsection convicted of an offence, or is convicted of an offence, or is convicted of an offence in terms of any provision of the Companies Act, the Court convicting such person shall summarily inquire into, and determine the monetary value of, any advantage or potential advantage which such person has or could have gained in consequence of such offence or from any agreement referred to in subsection (1) or as a result of any agreement entered into by the Company relating to any matter referred to in subsection (1).

(5) Any person referred to in subsection (4) shall on conviction, and in addition to any fine or imprisonment imposed in terms of subsection (3) or of section 441 of the Companies Act, as the case may be, be liable to a fine not exceeding three times the value of the advantage or potential advantage determined in terms of subsection (4), or to imprisonment for a period not exceeding 15 years or to both such fine and such imprisonment.

(6) Notwithstanding any provision of section 92 of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), a magistrate's court may impose the penalties prescribed by subsections (3) and (5).

(7) For the purposes of this section-

- (a) an interest of a director of the Company includes an interest of such director's spouse, parent, child or business partner; and
- (b) a reference to a director of the Company includes a reference to the chief executive officer appointed in terms of section 6 and an alternate director of the Company.

Short title and commencement

14. (1) This Act shall be called the Roads Contractor Company Act, 1999,

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and shall, subject to subsection (2), come into operation on a date to be determined by the Minister by notice in the *Gazette*.

- (2) Sections 5 to 9 and 11 shall come into operation on the transfer date.
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