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Is the Transnet National Ports Authority due for corporate restructuring?: A study of the imperatives for the Authority's corporate structure and functions.

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This mini dissertation is submitted in partial fulfilment of the requirements for the degree of *Master of Laws* in Maritime Law

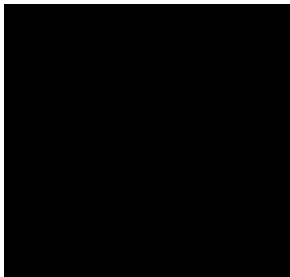
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2025

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I, **Nomfundo Gugulethu Hlophe**, declare that:

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ABSTRACT

This mini dissertation critically analyses the corporate structure and functioning of the Port Authority, which is responsible for the South African port system, which is key to trade, and the country's economy. The current Port Authority is known as the Transnet National Ports Authority ("TNPA"), because it is a division within Transnet SOC Limited. This study considers how this state of affairs came about, looks at the performance of the TNPA, examines the founding legislation for the Port Authority followed by a critical analysis focused on literature and best practices.

The findings point to the legislation, the National Ports Authority Act 12 of 2005 not being aligned with the Commercial Ports Policy in terms of which it was drafted. They also point to the non-implementation of the legislation, specifically in terms of the corporate structure that the Ports Authority should have. Thirdly, the findings are that the TNPA, in its current form, results in a conflict of interest in its relationship with Transnet Ltd and the sister divisions. Thus, the incorrect corporate structure is a contributing factor to the sub-par performance of the TNPA.

This study concludes with recommendations on what the appropriate corporate structure is for the Port Authority, and the corrective measures that government must take, which may not necessarily include introducing new legislation before the policy issues are resolved.

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Thank you Lord! Matthew 19:26: “Humanly speaking, it is impossible. But with God, all things are possible.”

I am grateful to my mother, Thabisile Nxaba, my pillar of strength. I dedicate this work to my children, Awande and Enhle Phakathi. May they be inspired. I am grateful to my siblings, cousins, my friends and everyone who supported my journey. I must also acknowledge my ancestors, oSamela, oThumbeza, Abayeni, izintombi zenda ngonyezi, ezabafokazane zenda ngomnyama!

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CHAPTER 1

1. Introduction

- 1.1 Background
- 1.2 The current Ports Authority
 - 1.2.1 Performance
 - 1.2.2 Corporate Governance
- 1.3 Legislative imperatives
- 1.4 Problem statement
- 1.5 Research questions
- 1.6 Research methodology
- 1.7 Structure

1.1 Background

Transnet SOC Limited (“Transnet Ltd”), is responsible for a majority of the South Africa’s freight system, that is, the railways, ports and pipelines in South Africa. It is currently made up of six operating divisions, including Transnet Freight Rail (“TFR”), Transnet Rail Engineering (“TE”), the Transnet Port Authority (“TNPA”), Transnet Port Terminals (“TPT”), Transnet Pipelines (“TPL”) and Transnet Property. Transnet Ltd is a state-owned public company established in terms of legislation, in terms of which it also functions and performs. Previously, it reported to the Department of Public Enterprises (“the DPE”) and the Department of Transport (“DoT”) until 2024, when the DPE was done away with.

The TNPA is established in terms of the National Ports Act, 12 of 2005 (“the NPA”) but it is not a state-owned company. This is primarily because it does not appear on Schedule 2, neither on Schedule 3 of the Public Finance Management Act, 1 of 1999 (“the PFMA”) which lists the country’s state-owned Companies. Transnet Ltd does appear on the list. The second reason why the TNPA is not a state-owned company is that ostensibly, it is an operating division of Transnet Ltd. The TNPA’s founding legislation requires that it be a private company, later converted to a public company. Whilst this may seem confusing, the intention of the Legislature appears to have been

that the TNPA be a certain form of corporate in which the state has full ownership. The Legislature also intended a separation of roles between the TNPA and Transnet Ltd, as evident from the functions that were allocated to the TNPA in terms of the NPA. The TNPA is responsible for the management of the country's eight commercial ports, which are Cape Town, Durban, East London, Mossel Bay, Ngqura, Port Elizabeth, Richards Bay and Saldanha Bay.¹ Additionally it oversees Port Nolloth. Transnet Ltd is responsible for other aspect of the freight system.

1.2 The current Ports Authority

1.2.1 Performance

Towards the end of 2023 and during the beginning of 2024 owners, shippers, charterers, importers/exporters, stevedores, logistics and forwarding companies, suppliers and consumers experienced one of the worst performances of the Durban and Cape Town Ports in South Africa.² This was due to system malfunction, backlogs and delays which was described as follows:

“Backlogs outside the Port of Durban reached a crisis point between the 23rd and 30th November 2023 when an estimated 79 vessels and more than 61,000 containers were forced to remain at outer anchorage due to operational challenges, equipment failures, and bad weather at the port. The Port of Cape Town has also had its fair share of recent logistical woes, experiencing similar delays at its Container Terminal. This, in turn, led to significant congestion along the Eastern Cape coastline, with an estimated 46,000 containers said to have been stuck outside the Ports of Ngqura and Gqeberha in late November. While the congestion has begun to ease at our ports, reports indicate that it will take until mid-2025 for the Port Terminals to regain optimum functionality.”³

In addition, South African ports ranked amongst the poor performing ports in the world according to the Container Port Performance Index (“the CPPI”). The CPPI uses the experience of primary users as a standard of measure to rank container ports

¹ TNPA, ‘Cape Town Brochure’ available at [https://www.transnetnationalportsauthority.net/OurPorts/Cape%20Town/Documents/\(TNPA\)%20Cape%20Town%20Brochure_lr.pdf](https://www.transnetnationalportsauthority.net/OurPorts/Cape%20Town/Documents/(TNPA)%20Cape%20Town%20Brochure_lr.pdf), accessed on 29 January 2025.

² Arthur J, ‘Navigating troubled waters: Unpacking South Africa’s port challenges and charting a course for transformation’, *Clyde & Co. Market Insights*, 11 January 2024 available at <https://www.clydeco.com/en/insights/2024/01/navigating-troubled-waters-unpacking-aouth-africa>, accessed on 26 November 2024.

³ *Ibid.*

worldwide according to performance. It looks at what is important to ship operators, owners and the whole value chain – the efficiency of the port when receiving ships and handling cargo. According to the CPPI this is a factor which influences a decision in favour of one port over another.⁴ Chapter 2 will consider whether this type of performance is acceptable in lieu of the entity's reported results in terms of revenue generated and own capital investment made.

1.2.2 Corporate governance

State owned entities (“SOE’s”) in South Africa have generally not performed well since their respective establishment.⁵ The main features underlying the poor performance is their inefficiency, maladministration and corruption.⁶ Other reasons for their poor performance include the impact of over-regulation and the complexity of legislation that applies to SOEs.⁷ The TNPA is not exempt, and it has acknowledged the undue regulatory pressure that is upon it. In the 2022 Annual Report, the TNPA records that:⁸

“[t]he regulatory environment pertaining to the business of the National Ports Authority is complex, with a plethora of legislation applicable to its everyday activities. Based on risk assessments, the National Ports Act and the Competition Act will be focused on during 2022/23.”

In addition, until recently the TNPA was reporting to both the Department of Transportation and Department of Public Enterprises whilst also accounting to various regulators including the Ports Regulator.

Another reason that influences the performance of SOE is poor governance. Recently, some of Transnet's corporate governance significant failures are recorded in the Report of the Zondo Commission into State Capture released in finality in June 2022,

⁴ World Bank, 'The Container Port Performance Index 2023 : A Comparable Assessment of Performance based on Vessel Time in Port', available at <http://documents.worldbank.org/curated/en/099060324114539683/P17583313892300871be641a5ea7b90e0e6>, accessed on 25 November 2024, p11.

⁵ Mathebula N and Masiya T, 'Governance Issues and State Capture at Eskom and Transnet: A Kingdon's Multiple Streams Theory for Policy Studies', 2022, *African Journal of Governance and Development*, p147.

⁶ Mbhele N, Corporate Governance in State-Owned Enterprises (unpublished PHD Theses WITS) 2015 p6.

⁷ *Ibid* p45, 170.

⁸ Transnet, National Ports Authority Report for 2022, available at <https://www.transnet.net/InvestorRelations/AR2022/TNPA%202022.pdf>, accessed on 3 June 2024, p2.

in a whole 506 page Volume dedicated to Transnet Ltd within the extensive report.⁹ In a nutshell, hundreds of millions were bled through corrupt procurement for *inter alia*, overpriced locomotives and an increased reliance on consulting and advisory services.¹⁰ This was done by “securing illicit and corrupt influence or control over the decision-making,” particularly over procurement processes and capital expenditure.¹¹ According to the report, the extent of capture implicated even the executive arm of government to which Transnet Ltd accounted. This is just one of the outcomes of not having a clear corporate structure, with clear accountability and reporting lines.¹²

1.3 The legislative imperatives

The founding legislation for the TNPA is the National Ports Act (“NPA”). Section 3 of the NPA provides for the establishment of the Port Authority, but it also envisages that at some point, the Authority is to be registered as a private company, where Transnet Ltd, instead of a Minister of a particular government department would be the sole shareholder. Undergoing this transition, as dictated by section 3, has proved an impossibility for the authorities thus far. Even on 22 June 2021, President Cyril Ramaphosa, together with then Minister of Public Enterprises and the then Minister of Transport, “announced the establishment of the National Ports Authority as an independent, wholly-owned subsidiary of Transnet” in terms of the NPA.¹³ However, to date no such company has been registered. The 2022 Annual Report has no record of the incorporation of the Port Authority.¹⁴ Neither does the 2023 Annual Report.¹⁵ To

⁹ Zondo (CJ), ‘Judicial Commission of Enquiry into State Capture Report: Part 2, Vol 1’, available at https://www.statecapture.org.za/site/files/announcements/674/OCR_version_-_State_Capture_Commission_Report_Part_II_Vol_1.pdf, accessed on 29 January 2025.

¹⁰ *Ibid.*

¹¹ *Ibid* p8.

¹² Kikeri S, ‘Corporate Governance in South African State-Owned Enterprises’ *World Bank Systematic Country Diagnostic: Republic of South Africa* (2019), accessed at <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/798071529303940965/corporate-governance-in-south-african-state-owned-enterprises-background-note-for-the-south-africa-systematic-country-diagnostic> on 26 October 2024 p13.

¹³ Media Statement: ‘President Cyril Ramaphosa announces new reform to improve efficiency of South Africa’s ports and boost investment’, available at <https://www.gov.za/news/media-statements/president-cyril-ramaphosa-announces-new-reform-improve-efficiency-south>, accessed on 4 June 2024.

¹⁴ Transnet, *op cit* fn 8.

¹⁵ Transnet, *National Ports Authority Report for 2023*, available at <https://www.transnet.net/InvestorRelations/AR2023/Transnet%20National%20Ports%20Authority%20Report.pdf>, accessed on 03 June 2024.

date, only the name “National Ports Authority” has been reserved with the Companies and Intellectual Property Commission, but no registration pursued. This implies that the TNPA remains merely a division within the Transnet group and not an independent fully functional SOE.

The second issue is whether the TNPA is enabled to perform its mandates in terms of the founding legislation. Section 11 of the NPA provides that the main function of the Authority is to own, manage, control and administer ports to ensure their efficient and economic functioning. The TNPA’s functions are critical because it manages 2800km of state property and has a budget of billions in revenue.¹⁶ It is central to the facilitation of trade and therefore contributes directly to the growth of the country’s economy. It follows that in order to fulfil these functions, the Port Authority must at the very least exercise control and manage state assets. This is near possible if the provisions of the NPA relating to the vesting of assets are not complied with. The implications are that Transnet Ltd owns the ports. It appears that the implications of non-compliance with the legislation, as is, has some serious implications, which warrants further analysis.

1.4 Problem Statement

There are two reasons why the corporate structure of the Port Authority is relevant and requires attention. As mentioned above, the TNPA is not currently empowered to perform its legislated functions, because technically it does not own or control the state assets it is due to manage. Transnet Ltd does. Section 27 of the NPA provides that once the National Ports Authority (Pty)Ltd is incorporated, then Transnet, the current owner of ports and assets, will transfer ownership to the company, the National Ports Authority (Pty)Ltd. In terms of this section, without the TNPA in its incorporated state, the state assets it is managing, still vest in the predecessor and effectively its parent or holding company, Transnet Ltd. This calls into question whether the Port Authority has the capacity to act as the owner and landlord of all ports. The legislation prescribes that the Port Authority should have a specific corporate structure in order to function, but government has grappled with this for almost two decades. It warrants an examination into what should government do to correct this travesty.

¹⁶ Transnet, *op cit* fn 8.

Secondly, the issue is the conflict of interest that arises from the Port Authority's existing and evidently incorrect corporate structure. The Port Authority as a division of Transnet Ltd, is also the landlord and effectively regulator of the TPT, a sister division within Transnet Ltd, the group holding company. The TPT is currently the TNPA's sole tenant on most of the country's container terminals. The conflict of interest is exacerbated by the fact that Transnet Ltd, the Lessee is also the current owner of the ports. This conflict of interest flies in the face of good corporate governance and is the root cause of the tardy performance at the ports, which has a ripple effect all through to the country's economy. This dire situation warrants a search for a solution.

1.5 Research questions

This mini dissertation will consider the following research questions:

1. When and how was the TNPA established?
2. What is the TNPA's current corporate structure?
3. How has the TNPA performed historically?
4. Is having an appropriate corporate structure relevant to performance?
5. Which corporate structure would enable the TNPA to comply with the legislation and function optimally?

1.6 Research Methodology

This mini dissertation adopts a doctrinal research approach comprising a desktop analysis focusing on primary sources such as primary legislation, regulations, selected case law and scholarly literature to critically analyse the above-mentioned issues. The main primary legislative source is the National Ports Authority Act, 12 of 2005.

Furthermore, this study does not attempt to present empirical analysis, but to describe the current Port Authority's historical performance according to the entity's own records. The data to be analysed is extracted from sources such as presentations to parliament, brochures and Annual Reports.

1.7 Structure

The discussion in this mini dissertation is structured as follows:

1. Introduction;
2. Chapter 2 – addresses the establishment of the TNPA and its performance thus far;
3. Chapter 3 – an analysis of the National Ports Authority Act to show what is mandated by the legislation;
4. Chapter 4 – a consideration of the implications of the non-compliance with the legislation and having the inappropriate corporate structure;
5. Chapter 5 –a consideration of the recommended corporate structure for the Ports Authority;
6. Chapter 6 – Conclusions and Recommendations.

CHAPTER 2

2. The context: the plan for the establishment of the Port Authority vs its performance thus far

2.1 Introduction

2.2 The establishment of Transnet SOC Limited

2.3 The establishment of Transnet National Port Authority

2.3.1 The vision

2.3.2 The corporate vehicle

2.3.3 The main functions of the Port Authority

2.3.4 Governance and administration

2.3.5 The restructuring of Transnet Ltd

2.3.6 The National Ports Bill (2003) and the National Ports Act 12 of 2005

2.4 The current status of the Port Authority

2.5 The performance of the current Port Authority

2.1 Introduction

Purpose and objective are important factors to consider when seeking to identify an organisation's makeup. This Chapter will consider these factors in respect of the Port Authority in relation to Transnet SOC Limited ("Transnet Ltd"), so as to provide the context for the discussion of whether the TNPA is due for corporate restructuring.

Transnet Ltd is currently structured into six divisions, namely Transnet Freight Rail ("TFR"), Transnet Engineering, Transnet National Ports Authority ("TNPA"), Transnet Port Terminals ("TPT"), Transnet Pipelines, and Transnet Property.¹⁷ The Property Division manages the real estate assets including commercial and residential properties, and vacant land.¹⁸ The Pipelines Division operates the pipelines carrying

¹⁷ Transnet SOC Ltd, 'Presentation to the Portfolio Committee on Planning, Monitoring and Evaluation Presentation', 14 August 2024, available at https://static.pmg.org.za/240814_TRANSNET.pdf, accessed on 29 January 2025 p3.

¹⁸ *Ibid.*

refined products, liquid petroleum and methane-rich gas inland and throughout Southern Africa.¹⁹ TPT “[o]perates 16 terminals with 68 berths across seven ports along the South African coastline.”²⁰ The Engineering Division is per its name’s sake and TFR operates the railway network.²¹ The TNPA is the current Port Authority and is responsible for the management of the country’s eight commercial ports, which are Cape Town, Durban, East London, Mossel Bay, Ngqura, Port Elizabeth, Richards Bay and Saldanha Bay.²² Additionally, it oversees Port Nolloth.

The TNPA is technically an organ of state as it is established in terms of the National Ports Act, 12 of 2005 (“the NPA”). However, it does not appear on Schedule 2, neither on Schedule 3 of the Public Finance Management Act, 1 of 1999 (“the PFMA”) which lists the country’s state-owned companies. According to the PFMA, Transnet Ltd is a state-owned company and it currently accounts to the Department of Transport (“DoT”). Ostensibly, the TNPA is an operating division of Transnet Ltd. The TNPA is also Transnet’s landlord, specifically the TPT.²³ This is quite a mangle in terms of corporate structure and accountability lines. Therefore, this chapter looks at how this state of affairs came about. We will firstly consider the timeline between the formation of Transnet and the Port Authority, as well as the present-day status of the Authority. The second part of this Chapter will consider the performance and outcomes of the Port Authority’s current existence, vis a vis what government had initially set out to do.

2.2 The Establishment of Transnet SOC Limited

Initially, the Railways and Harbours Control and Management (Consolidation) Act, 70 of 1957 provided for the administration of all railways, ports, harbours and petroleum pipelines in South Africa. This Act was repealed by the South African Transport Services Act, 65 of 1981 which established the South African Transport Services (“SATS”).

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*

²² TNPA, *op cit* fn1.

²³ Transnet SOC Ltd, *op cit* fn 17, p3.

On 1 April 1990 SATS ceased to exist and Transnet Ltd, a public company was established in terms of section 2 of the Legal Succession to the South African Transport Services Act, 9 of 1989 and acquired most of its property.²⁴ As for pending claims, the Supreme Court of Appeal held that Transnet took over “the whole of its [SATS] enterprise.”²⁵ This meant that all the rights and obligations of SATS were transferred to Transnet and claims could be enforced against Transnet Ltd.²⁶

2.3 The establishment of Transnet National Ports Authority

2.3.1 The Vision

Government’s vision of how it wanted South Africa’s commercial ports to be run was first documented in 2002, with the Department of Transport’s White Paper on Commercial Ports Policy²⁷, followed in 2003 by the National Authority Port Bill.²⁸ Government wanted to establish a commercial ports system from the existing eight ports named above. In terms of the policy document these ports as well as future developments, were to be managed and administered by a National Ports Authority in such a manner as to become competitive in the global economy.²⁹

Competitiveness was high on government’s agenda. According to the 2002 White Paper on Commercial Ports Policy:

“competitiveness is defined as ensuring that the port and transportation system can meet the requirements of its users. Competitiveness is a key aspect that influences South Africa’s place in global markets.”³⁰

²⁴ *Transnet Soc Ltd v Total South Africa (Pty) Ltd And Another 2017 (1) SA 526 (SCA)* at paras 3-4.

²⁵ *Transnet Ltd. v Ngcezula 1995 (3) SA 538 (AD)* at para 3.

²⁶ *Ibid*; In terms of section 36(6) read with section 37 (2) and Part 6 of Schedule 2 of Act 9 of 1989.

²⁷ Department of Transport, *White Paper on National Commercial Ports Policy*, GN 1409, GG 23715, 8 August 2002 hereinafter the “the White Paper”. An earlier draft was published for comment in 2001 and the final white paper acknowledged inputs from a wide range of industry stakeholders.

²⁸ National Ports Authority Bill B5-2003 and Explanatory Summary of Bill in GG No. 24261, 17 January 2003.

²⁹ The White Paper, *supra* fn 27, p19; The precise vision was as follows: “A system of ports, seamlessly integrated in the transport network, that is jointly and individually self-sustainable through the delivery of high levels of service and increasing efficiency for a growing customer base, enhancing South Africa’s global competitiveness and facilitating the expansion of the South African economy through socially and environmentally sustainable port development.”p11.

³⁰ *Ibid*, p22.

Policymakers were clear that efficiency in the operations of the port was vital. Government entrusted the Ports Authority to “pursue this agenda with vigour” and in return government pledged its support to the Port Authority.³¹ In order for the national ports to be competitive, government understood that the Port Authority had to develop port infrastructure and allocate sufficient resources. However, according to the policy, this development had to take place within the context of the national, provincial and local economic and spatial development initiatives, as well approved policy such as the Reconstruction and Development Programme, transport and economic development policies.³²

According to the policy document there was a need to correct “a legacy of fragmented and monopolistic private sector involvement in ports relating to land allocation and leasing terms.”³³ In addition, government recognised that the existing commercial ports system was one where Transnet Ltd currently owned the real estate of South African ports. The policy noted that one of the undesirable outcomes of having the Port Authority as part of a transport company, which also provided services at the ports through another of its divisions, caused mistrust about port revenues, skewed pricing and the lack of impartiality.³⁴

The policy flagged government’s intention to bring about a new regulatory structure for the governance and running of the Ports.³⁵ It is important to appreciate that this policy was made and had to be implemented in the context of government’s other developmental, strategic, economic and social objectives.³⁶ This included in particular: “constitutional policies; social and economic policies; the national transport policy; and the restructuring policy of the Department of Public Enterprises.³⁷ However, in hindsight, there may not have been enough attention given to ensuring that there was alignment and coordination in the implementation of these overlapping policies.

³¹ *Ibid.*

³² *Ibid*, p20.

³³ *Ibid*, p14.

³⁴ *Ibid*, p13.

³⁵ *The White Paper supra* fn 27.

³⁶ *Ibid*, p7.

³⁷ *Ibid.*

2.3.2 *The Corporate Vehicle*

In terms of corporate structure, the Commercial Ports Policy determined as follows:

“The general corporate characteristics of the envisaged National Ports Authority shall be:

1. A State-owned corporate entity, created in terms of an envisaged Ports Act. As a State-owned enterprise, the National Ports Authority shall be firmly managed in terms of the Public Finance Management Act, 1999;
2. The National Ports Authority shall also operate as a company in terms of the Companies Act, with the State being the only shareholder;
3. The current National Ports Authority within Transnet will be positioned outside Transnet in accordance with the restructuring programme of Transnet, as approved by the Minister of Public Enterprises; and
4. The National Ports Authority will apply the principle of subsidiarity and thus will delegate substantial power for day-to-day management and decision making to the individual port branches. The National Ports Authority shall be responsible for the landowner, control and other functions detailed below.”³⁸

The policy was quite clear on the government of the day’s objectives in terms of corporate structure, namely a Port Authority that was a private company, wholly owned by the State but separate from Transnet Ltd. The comments submitted by the then National Ports Authority (“the NPA”) in response to the National Ports Bill reiterated that while the NPA was a division of Transnet Ltd, the new authority “will effectively be transferred out of Transnet and will be established as a separate company.”³⁹

2.3.3 *The main functions of the Port Authority*

According to the policy, port operations (e.g. stevedoring and terminal operations) were not functions of the Port Authority. The Port Authority was to be the owner of the land, and therefore the landlord. The Authority had to:

“ensure that the licensees (including the Port Operation Division) and concessionaires provide adequate, efficient and affordable terminal operations and port services to all port users.”⁴⁰

³⁸ *Ibid*, p16.

³⁹ National Ports Authority, ‘Comments to the Portfolio Committee on Transport on the National Ports Authority Bill, 2003’, available at <https://static.pmg.org.za/docs/2003/appendices/030305npa.htm>, accessed on 29 January 2025.

⁴⁰ The White Paper, *supra fn 27*, p17.

This is where the possibility of privatisation features. The vision was that the Port Authority would fulfil the role of an economic regulator, which would regulate the operators within the port, including the private sector by controlling port pricing, competition and minimum service levels.⁴¹

2.3.4 Governance and administration

According to the policy, the Port Authority was to report to the DPE through Transnet Ltd.⁴² Both the DoT and DPE were responsible for the implementation of this and other policies.⁴³ The DPE's role would be more far reaching in the day to day running, as policy makers envisioned the DPE guiding the concessioning process including bidding processes.⁴⁴ The responsibility for DoT would be to develop and maintain the relevant policy frameworks and regulatory bodies.⁴⁵

In terms of this policy, legislation would be drafted where the Port Authority would report to a regulatory body created by the DoT, ensuring that the Port Authority ran the ports in a fair and equitable manner.⁴⁶ This was an interim arrangement to manage the situation since the Port Authority, although separate and distinct from the Port Operations division, was still at the time located within Transnet Ltd.⁴⁷ According to policymakers the rationale was that:

“Regulatory oversight is then required to:

1. Monitor the business relationship between Transnet Ltd. and the Ports Authority Division to ensure that Transnet does not derive an unfair advantage over other transport companies, and that revenues generated by the port authority are used to the benefit of the authority, its customers and the national economy (for as long as the port authority is located within Transnet);
2. Monitor the business relationship between the National Ports Authority and the Port Operations Division (for as long as the port authority is located within Transnet) to ensure that the Port Operations Division will not be advantaged and will have the same treatment as other port private terminal operators.

⁴¹ *Ibid*, p18.

⁴² *Ibid*, p15.

⁴³ The White Paper *supra* fn 27, p15.

⁴⁴ *Ibid*.

⁴⁵ *Ibid*, p14.

⁴⁶ *Ibid*, p29.

⁴⁷ *Ibid*, p28.

However, the National Ports Authority itself will, in its own right and as part of its landlord mandate, also provide facilities (and marine services). As it cannot act as its own regulator, it will need to be overseen by an external port regulatory body.”⁴⁸

This was the initially envisioned role of the Ports Regulator. However, later, the Regulator’s role would be more focused on oversight over tariffs and performance.⁴⁹

2.3.5 *The restructuring of Transnet Ltd*

According to the Policy, the foundational principles underlying the new port dispensation were that:

- “1. The current National Ports Authority within Transnet will be positioned outside Transnet in accordance with the restructuring programme of Transnet, as approved by the Minister of Public Enterprises;
2. The National Ports Authority post Transnet end-state will then be established as a new State-owned corporate entity;
3. The ‘National Ports Authority’ will be the landlord of the South African ports and will own all the land and the port infrastructures within the port estates;
4. Greater private sector involvement in operations will be sought through leases and concessions;
5. The allocation of leases or concessions will be open to competitive bidding; and
6. The bidding process will be transparent and based on a set of clearly stated objectives/targets, criteria and measurable deliverables.”⁵⁰

In 2003, a presentation titled ‘Department of Public Enterprises: South African Port Operations Restructuring’ was presented to a joint meeting of parliament’s Labour and Public Enterprises Portfolio’s Committee. This presentation purported to give effect to the Commercial Ports Policy, as discussed above. It explained the need for restructuring of Transnet Ltd and the need for the Ports Regulator: “[t]he overall goal was to make ports perform in such a way that they could contribute to economic development and job creation.”⁵¹ It highlighted “the economic efficiency goals of restructuring, ...ways of increasing the efficiency of port operations and the expected economic benefits from concessioning.”⁵² This meant that the administration of ports

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*, p25.

⁵⁰ *Ibid.*, p14.

⁵¹ The Labour and Public Enterprises Select Committee, *Meeting Report: Transnet Restructuring Progress Report: Briefing*, 21 June 2006 available at <https://pmg.org.za/committee-meeting/7093/>, accessed on 26 November 2024.

⁵² *Ibid.*

had to be separated from the other freight related functions that Transnet Ltd was performing. There were other reasons for restructuring such as the need to pursue the privatisation agenda, but the most prioritised issue was the need to make the ports efficient and competitive.⁵³

This was the birth of the National Ports Authority Bill, 2003.

2.3.6 The National Ports Bill (2003) and the National Ports Act 12 of 2005

As early as 2001, the DOT had already signalled its intention to introduce new transport-related legislation, including a National Ports Bill.⁵⁴ A National Ports Authority Bill was eventually published for comment in January 2003.⁵⁵ The consultation period extended over two years, as consensus could not be found on the form of entity that the Port Authority would be, as well as conflicting interests of the wide group of stakeholders. The challenges and outcomes of the policy and legislative drafting process are discussed in depth in Chapter 3 below.

The process did culminate in the passing of the National Ports Act 12 of 2005, only coming into force on 27 November 2006.

2.4 The current status of the Port Authority

At a meeting of the parliamentary committee responsible for Labour and Public Enterprises in 2006, Transnet Ltd provided a progress update on its overall restructuring, with minimal engagement on the status of the Port Authority.⁵⁶ With regards to the ports, Transnet Ltd simply committed to infrastructural development that it claimed would as an end result turn the inefficiencies at the ports around.⁵⁷ During

⁵³ *Ibid.*

⁵⁴ NCOP: Public Service Committee, *Meeting Report: Committee Programme 2001*, 26 March 2001 available at <https://pmg.org.za/committee-meeting/423/>, accessed on 21 December 2024; Alongside a National Ports Bill government was planning a Rail Safety Regulator Bill {B7 – 2002}, and Airports Company Amendment Bill {B20-2001}.

⁵⁵ National Ports Authority Bill *supra* fn 28.

⁵⁶ The Labour And Public Enterprises Select Committee *op cit* fn 52.

⁵⁷ *Ibid.*

the discussions, there were no queries with regard to the independence of the Ports Authority. A year later in 2007, the Port Authority presented on its performance in 2006, as a division of Transnet Ltd.⁵⁸ The item of restructuring of TNPA's corporate status, more so the restructuring received even less attention in the ensuing years.

The item was raised by the Ports Regulator in one of the parliamentary meetings but not given the specific attention it required. The Regulator is arguably the first accounting point for the Port Authority in respect of the performance of its functions. According to the minutes of said meeting, the Regulator raised the item as follows:

“The Act outlined the mandates and functions of the PR and National Ports Authority (NPA) but it had not been fully implemented as the NPA had not been corporatised.

The PR [Port Regulator] was not yet fully operational in all the mandated areas.”⁵⁹

The minutes of the meeting further record that the following queries were raised against this statement:

“More information was sought on the proposed corporatisation of the National Ports Authority. There was concern about the hearing and appeal processes, the chaos at ports, concerns about licences and the lease agreements at the harbour, which needed to be adjudicated and audited.”⁶⁰

To these queries the Regulator could only respond that:

“it had already put in motion an investigation on some of the issues but was waiting for figures from the National Ports Authority.”⁶¹

In 2010 Transnet Ltd presented its Annual Report to the Transport Portfolio Committee in terms of which it was self-funded, so that funding needed for infrastructure investment came from internally generated funds or amounts borrowed on the capital markets.⁶² The committee was advised that the restructuring that had begun in 2004 was intended to strengthen the balance sheet so that the SOE could access the debt

⁵⁸ Public Enterprises Portfolio Committee, *Meeting Report: Transnet Annual Report: Briefing*, 19 September 2007, available at <https://pmg.org.za/committee-meeting/8362/>, accessed on 21 December 2024.

⁵⁹ Transport Portfolio Committee *Ports Regulator of South Africa Annual Reports 2007/08 and 2008/09* Available at <https://pmg.org.za/committee-meeting/10997/>, accessed on 25 November 2024.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² Public Enterprises Portfolio Committee Meeting Report: Transnet Annual Report 2009/10 13 October 2010, available at <https://pmg.org.za/committee-meeting/12099/>, accessed on 29 January 2025.

capital markets. Transnet Ltd presented that its focus in 2010 however was on the four key areas: safety, volume growth and operational efficiency, improvement on environmental issues, and identifying and addressing regulatory and other risk.⁶³ The question of why the TNPA remained a division of Transnet Ltd had seemingly slipped off the discussion table.

The DPE was tasked with the division of the former Portnet and the restructuring of Transnet Ltd administratively.⁶⁴ The policy determined that

“as part of the restructuring of Transnet Limited, on a date to be fixed by the Minister of Public Enterprises, by notice in the Government Gazette, such property, rights, liabilities and obligations relating to the ports division of Transnet Limited, as determined by the Minister of Public Enterprises, shall be transferred to the envisaged National Ports Authority, as a new State-owned Enterprise”⁶⁵

These actions have not materialised to date.

In 2009 Transnet’s revenue was at R33,6 billion. The DPE reported that “Freight [R]ail and National Ports Authority contributed about 75% of the revenue.”⁶⁶ It was confirmed during the presentation of the Annual Report in parliament that this revenue contribution by the Ports Authority was from its real estate function.⁶⁷ Revenue from other divisions in Transnet Ltd and the heavily criticised inefficiencies of TPT as sole operator of South Africa’s container terminals was the proverbial “elephant in the room.”⁶⁸ According to Transnet’s Annual Report of 2010, it was engaged in a mass capital expenditure programme of over R120 billion over a number of years.⁶⁹ With investment of this value and the TNPA also being a key revenue contributor, that is the probable reason for how the TNPA has remained a division within Transnet Ltd to date.

⁶³ *Ibid.*

⁶⁴ The White Paper *supra* fn 27, p28.

⁶⁵ *Ibid.*

⁶⁶ Public Enterprises Transnet Annual Report 2008/09 briefing 07 September 2009, available at <https://pmg.org.za/committee-meeting/10774/> , accessed on 25 November 2024.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

2.5. The performance of the current Port Authority

In 2009 the TNPA was generating about R7 billion in revenue whilst capital investment was on average at R3.5 billion.⁷⁰ More than a decade later, in the 2023/24 financial year, the TNPA reported that:

“[d]uring the review period, revenue increased by 4,8% to R14,0 billion, up from R13,4 billion in 2023. This growth was largely driven by a 2,5% rise in Cargo Dues revenue, totalling R6,3 billion, and a 2,8% weighted average volume growth. Additionally, Real Estate revenue grew by 4,7% to R4,5 billion, compared to R4,3 billion in 2023.”⁷¹

Compared to 2009, revenue had almost double. If the performance in 2023 is compared to prior years, growth has been steady. According to the integrated financial statements for Transnet, between the years 2020 and 2021, the TNPA generated on average approximately R12 billion in revenue each year.⁷² Meanwhile the TPT generated about R13 billion each year. However, the two years, no more than R5 billion was spent on capital projects by TPT whilst the TNPA spent R2,2 billion.⁷³ This shows that financially the TNPA has performed adequately by maintaining a steady revenue stream, yet investment into capital projects has grown only slightly. The TNPA’s investment into development has been consistently modest. Yet as early as the drafting of the NPA in 2005, inadequate infrastructure investment was recognised as a problem that needed to be addressed.⁷⁴

Based on Transnet’s 2023/24 Integrated Report, the focus in relation to the TNPA was that was becoming an incorporated as subsidiary within Transnet Ltd.⁷⁵ Yet, in late 2023 the state of delays at the Durban Harbour were at crisis level.

⁷⁰ Transnet, ‘Presentation to Portfolio Committee on Public Enterprises: Transnet Annual Results for the Financial Year Ended 31 March 2010’, available at <https://static.pmg.org.za/docs/101014transnet.pdf>, accessed on 18 June 2025, p12.

⁷¹ TNPA, ‘Transnet National Ports Authority Integrated Report 2023/24’, available at, <https://www.bing.com/ck/a?!&&p=7974a607e5d32cf0740462a36a883f56e355a29d54588cf18945b2f61f3484dbJmItdHM9MTc1MDI5MTlwMA&ptn=3&ver=2&hsh=4&fclid=297cb299-39a6-6af1-214e-a76838386bfb&psq=Transnet+National+Ports+Authority+Integrated+Report+2023%2f24&u=a1aHR0cHM6Ly93d3cudHJhbnNuZXQubmV0L2dldEZpbGUuYXNoeD9pZD0zODcw&ntb=1>, accessed on 29 January 2025, p9.

⁷² Transnet, ‘Integrated Report 2021’, available at https://static.pmg.org.za/Transnet_Integrated_Report_2021.pdf?_gl=1*1ukthki*_ga*MJA0MDk2MTY1MS4xNzQ4NTM4OTAy*_ga_EBG7VD75NV*czE3NTAzMjc2NjkkbzUkZzEkdDE3NTAzMjc2NzlkajU3JGwwJGgw, accessed on 29 January 2025, p94.

⁷³ *Ibid.*

⁷⁴ Public Services Sector Committee, *Meeting Report: National Ports Bill: Deliberation And Adoption, 25 May 2005*, available at <https://pmg.org.za/committee-meeting/5131/>, accessed on 26 August 2024

⁷⁵ *Ibid.*, p55, 64, 74, 126.

“Between the 23rd and 30th of November 2023, 79 vessels and more than 61,000 containers were unable to make it to the Port of Durban due to operational challenges, equipment failures and bad weather.”⁷⁶

Cape Town Harbour also experienced delays, which in turn led to congestion along the Eastern Cape coastline, with an estimated 46,000 containers delayed at the Ports of Ngqura and Gqeberha.⁷⁷ The 2023 edition of the World Bank’s Container Port Production Index (“CPPI”) ranked the ports in Durban, Ngqura and, Cape Town 399th, 404th and 405th respectively out of 405 worldwide.⁷⁸ This CPPI ranking meant they were among the worst performing and least competitive globally. However, Transnet Ltd rejected these findings, arguing that there were factual errors in the report. Specifically, it was submitted that

“the Bank incorrectly uses the duration of a vessel’s stay as a measure of container port cargo handling performance, relied on third-party sample data and failed to give a measured terminal access to the data sample for verification prior to publication.”⁷⁹

However, Transnet’s cry of foul was met with little sympathy from industry stakeholders as delays and congestion were not a recent or isolated phenomenon.⁸⁰ This was because although there was slight improvement, South African ports had consistently ranked low in prior years. According to the 2022 CPPI, the port of Durban ranked 341 out of 348 ports overall, with Cape Town ranked 344.⁸¹ According to the 2021 index, Ngqura, Durban and Cape Town were ranked as number 363, 364 and 365 respectively.⁸² This was a cause for alarm because the country’s best performing ports

⁷⁶ Marggraff D and Schoeman M, ‘Navigating the future: South Africa’s maritime interests and the imperative for strategic development’ 15 February 2024, available at https://www.up.ac.za/media/shared/915/event-summary_15-february-2024.zp252663.pdf, accessed on 29 January 2025 p1.

⁷⁷ Arthur J, *op cit* fn 2.

⁷⁸ World Bank, *op cit* fn 4, p26, 46, 61.

⁷⁹ Stoddart E, ‘Transnet says World Bank report giving SA abysmal ports ranking marred by *‘factual errors’*, 12 June 2024 available at <https://www.dailymaverick.co.za/article/2024-06-12-transnet-says-report-giving-sa-poor-ports-ranking-marred-by-errors/>, accessed on 25 November 2024.

⁸⁰ Arthur J, *op cit* fn 2.

⁸¹ The World Bank, ‘The Container Port Performance Index 2022: A Comparable Assessment of Performance based on Vessel Time in Port (Fine)’, available at <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/099051723134019182/p1758330d05f3607f09690076fedcf4e71a>, accessed on 18 June 2025, p55.

⁸² World Bank, ‘The Container Port Performance Index 2021’, available at https://www.researchgate.net/publication/361172959_The_Container_Port_Performance_Index_2021, accessed on 29 January 2024, p11, 48, 58.

were amongst the lowest ranks.⁸³ The implications of this consistent poor performance were a “direct impact on the operating costs of shipping lines.”⁸⁴ With this in mind, this performance was frankly counter to the ideal of competitive commercial ports.⁸⁵

Various stakeholders pointed to a number of possible causes to these problems such as the poor freight rail connection to the ports, labour relations issues and insufficient investment into infrastructure and technological upgrades.⁸⁶ The impact of port inefficiencies is felt not just by ship and cargo owners, current and future trade is affected because when South African ports are not fully operational, cargo is diverted their business to neighbouring competitors, such as the Ports of Maputo, Walvis Bay, and Luanda.⁸⁷ This is how potential revenue is lost, which is counter competitive.

In reaction to this crisis, Transnet Ltd and other stakeholders acknowledged the need to enhance operational performance as follows:

“A significant decline in the operational efficiency of container terminals was observed, exacerbated by adverse weather in KwaZulu-Natal, and the Western and Eastern Cape. TNPA is enhancing its oversight role by implementing mechanisms to improve port efficiencies to international standards.”⁸⁸

However, notably none of the proposed solutions towards recovery from the crisis made mention of the need to strengthen the existing system of oversight, by correcting the corporate structure of the Ports Authority or addressing its conflicted positioning within Transnet Ltd.⁸⁹

⁸³ Petterson D, ‘SA’s Ports amongst the worst in the world’ *Civil Engineering(Journal)* May 2023 Vol 81, Issue 4.

⁸⁴ Arthur J, *op cit* fn 2.

⁸⁵ This study is limited to high level assessment of performance in relation to policy and legislative objectives, not intending to engage the subject of maritime economics.

⁸⁶ Mchunu V, *op cit* fn 67.

⁸⁷ Arthur J, *op cit* fn 63.

⁸⁸ TNPA, ‘Transnet National Ports Authority Integrated Report 2023/24’, available at, <https://www.bing.com/ck/a?!&&p=7974a607e5d32cf0740462a36a883f56e355a29d54588cf18945b2f61f3484dbJmItdHM9MTc1MDI5MTlwMA&ptn=3&ver=2&hsh=4&fclid=297cb299-39a6-6af1-214e-a76838386bfb&psq=Transnet+National+Ports+Authority+Integrated+Report+2023%2f24&u=a1aHR0cHM6Ly93d3cudHJhbnNuZXQubmV0L2dldEZpbGUuYXNoeD9pZD0zODcw&ntb=1>, accessed on 29 January 2025, p2.

⁸⁹ *Ibid.*

It is the Port Authority that is after all tasked with managing the performance of operations at the port.⁹⁰ The Port Authority should be the one with the capacity to identify challenges timeously and recommend remediation, alternatively hold the poor performing operators accountable for the resultant dysfunction of the port system. While the TNPA's corporate structure alone does not present a panacea to productivity problems, it is time to reconsider the freight, and the conflicted relationship between the TPT and the TNPA as sister divisions of Transnet Ltd. The ensuing Chapter 3 considers the legislative position on this issue.

⁹⁰ See Chapter 6, National Ports Act, discussed in depth in Chapter 3 of this mini dissertation.

CHAPTER 3

3. The legislation: A detailed analysis of the National Ports Authority Act, 12 of 2005

- 3.1 Introduction
- 3.2 The policy and legislative drafting process
- 3.3 The relevant provisions of the National Ports Act
 - 3.3.1 Purpose and objectives of the National Ports Act
 - 3.3.2 Establishment and corporate structure of the National Ports Authority
 - 3.3.3 Conversion of the National Ports Authority
 - 3.3.4 Transfer of assets and liabilities
 - 3.3.5 Governance and administration of the National Ports Authority
- 3.4 Implications of non-compliance
- 3.5 The draft amendment bill and way forward
- 3.6 Developments in 2024

3.1 Introduction

The National Ports Authority Act, 12 of 2005 regulates the establishment of the National Ports Authority and the Ports Regulator. It provides for the administration of the country's ports by the National Ports Authority. The country's ports are currently managed by the Transnet National Ports Authority ("the TNPA"). This chapter looks at how the Legislature intended the TNPA to be established and to function. This is necessary because from chapter 2 of this study, it is evident that the TNPA, along with other state-owned entities, is not performing optimally. The objective of chapter 3 will be met using a detailed analysis of the founding provisions for the Port Authority, and the intention of the legislature as evidenced by parliamentary deliberations on both policy and the draft legislation. This will be followed by a consideration of whether practically, there is compliance with the legislated imperatives for the Port Authority. This chapter will also explore the implication of non-compliance, which is to say, whether the TNPA operating under an incorrect corporate structure could be directly linked to its poor performance.

3.2 The policy and legislative drafting process

In 2001 the Transport Portfolio Committee deliberated on the Draft Commercial Ports Policy, which was to provide the principles and direction on how the ports were to be managed.⁹¹ The different stakeholders, including the Department of Transport (“DoT”), identified that there were various shortcomings in the policy, similar to the issues that are the subject of this mini-dissertation. The appropriate corporate structure was queried, as well as if the intention was privatisation. The majority of stakeholders agreed that this model was common in the developed countries at the time and was directly linked to the efficient and prosperous function of the ports.⁹² Clarity was sought on the role of the Authority, its relationship with Transnet, and the port operators, as a landlord. The multiple government department reporting points were lamented.⁹³

In January 2003, the DoT announced its intention to table a National Ports Authority Bill.⁹⁴ As promised, the National Ports Authority Bill B5-2003 was introduced in the National Assembly and presented in public hearings during February 2003.⁹⁵ The Parliamentary Committee on Transport was briefed that the bill as presented sought to:

“establish a national ports authority and establish the functions of this authority. Its objectives are to promote and improve the efficiency and performance of the management and operation of ports as well as to strengthen the State's capacity to separate operations from the "landlord" function within ports.”⁹⁶

At that time, government envisaged the Port Authority to be the National Ports Authority Limited, with simply the State as the sole shareholder.⁹⁷ The assets previously held by the National Ports Authority, a division of Transnet Ltd, would vest in the Authority.⁹⁸ Transnet Ltd was not in support of the format of the bill, *inter alia* advocating for a transitional period before the Ports Authority was corporatised, because its incorporation would render Transnet effectively ‘insolvent’.⁹⁹ The

⁹¹ The White Paper *supra* fn 27.

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ Sections 3 and 4 of the National Ports Bill B5-2003.

⁹⁸ Section 27 of the National Ports Bill B5-2003.

⁹⁹ National Assembly *supra* fn 78.

Committee was vested with issues of the impact of the restructuring which Transnet Ltd would be undergoing, the possibility of privatisation and the impact of multiple reporting points for the Port Authority.¹⁰⁰ Port users raised their concerns with regards to the ownership of the ports and Transnet's monopoly.¹⁰¹ In March 2003, during the consultation processes, organised business expressed concerns on corporate governance issues such as the authority to appoint Boards, whilst organised labour was duly concerned about impact of the restructuring on jobs and benefits.¹⁰²

In 2003, the National Assembly's Transport Committee held at least fifteen engagements to deliberate on the bill, including a public hearing. At least three meetings to consider the bill were convened in 2004. The National Council of Provinces ("NCOP") similarly engaged extensively during 2003 and 2004. Simultaneously the DPE parliamentary committees were deliberating on the restructuring of Transnet Ltd, which necessarily involved the breakaway of the Ports Authority. General elections were held in South Africa in April 2004.

Also in 2004, the DoT sought to table an amended bill.¹⁰³ The bill was henceforth to be named the National Ports Bill, incorporating various amendments that had been made to the 2003 version of the Bill.¹⁰⁴ The amended bill introduced the concept of the National Ports Authority of South Africa ("NPA of SA"), a private company. This version gave the Minister the discretionary power to convert the company into a public company.¹⁰⁵ In terms of functions, a few categories of services were clarified.¹⁰⁶ Although the intention to register a private company was clear, this version of the Bill was still flawed, as the Port Authority was still defined as the National Ports Authority

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² Transport Portfolio Committee *Meeting Report: National Ports Authority Bill: Public Hearings of 5 March 2003* available at <https://pmg.org.za/committee-meeting/2188/>, accessed on 21 December 2024; Public Services Sector Committee, *op cit* 75.

¹⁰³ National Ports Authority Bill B5B-2003, and Transport Portfolio Committee, *Meeting Report: Amendments to National Ports Authority Bill: Department briefing*, 20 October 2004, available at <https://pmg.org.za/committee-meeting/4163/>, accessed on 26 August 2024.

¹⁰⁴ Transport Portfolio Committee, *Meeting report: National Ports Authority Bill: Adoption*, 18 November 2004, available at <https://pmg.org.za/committee-meeting/4323/>, accessed on 21 December 2024.

¹⁰⁵ Section 4(1)(a) read with section 3(5) of the National Ports Authority Bill B5B-2003; Transport Portfolio Committee *supra* fn 87.

¹⁰⁶ *Ibid.*

Limited. The title 'Limited', at the time was used in the description of public companies, which at the time, were listed companies.¹⁰⁷ This indicates that the corporate structure that the Port Authority was to have, was not clear at all.

During the hearings, Transnet Ltd argued that Clause 4(1)(b) [the conversion clause] should be deleted as the TNPA would remain part of the Transnet Group. The motivations ranged from the clause being superfluous, to this being aligned with Transnet's strategy in respect of the balance sheet and investment. At this stage the Committee agreed.¹⁰⁸ This version of the Bill addressed other shortcomings and challenges identified in the initial bill such as no transitional arrangements when the Port Authority would be removed from Transnet, nor for when it was corporatised into a public company. The revised bill introduced a super regulator to focus on economic matters, improve efficiency of the ports and manage competition, because government now envisioned a controlling body with operations run independently.¹⁰⁹ Thus, in March 2005, the revised National Ports Bill, version B5D- 2003 was tabled, replacing the National Ports Authority Bill, version B5C-2003.¹¹⁰ It aimed to address the shortcomings identified above.

In its presentation to the Public Services Sector Committee in May 2005, the DoT highlighted the need to increase investment, ensuring that the ports were competitive

¹⁰⁷ □The Companies Act, 61 of 1973.

¹⁰⁸ Transport Portfolio Committee, *Meeting Report National Ports Authority Bill: hearings*, 3 November 2004, available at <https://pmg.org.za/committee-meeting/4237/>, accessed on 26 August 2024.

¹⁰⁹ NCOP Public Services Select Committee *Meeting Report: National Ports Bill: Department briefing of 10 March 2005*, available at <https://pmg.org.za/committee-meeting/4921/>, accessed on 21 December 2024; The somewhat convoluted progress of the bill is recorded in this Minute as follows:

“Mr H Smuts (State Law Advisor) replied that the first round of the Bill had been presented before the last elections. The Bill had been amended by the Portfolio Committee and that version was known as B5B-03. It still had to be approved by the NCOP when the second parliamentary term ended. All unfinished bills lapsed. With the start of the third parliamentary term, the Bill had been revived with the amendments included. However it was sent back to the National Assembly and not to the NCOP. The National Assembly had adopted some more amendments and these were contained in Bill 5C. The document B5D incorporated those amendments.

The Chairperson pointed out that the Department had introduced the Bill to the Portfolio Committee. The Portfolio Committee had made amendments and it had been referred to the NCOP. The Select Committee had adopted it, and the Bill had been withdrawn. With the revival of the Bill, the National Assembly had introduced further amendments and it was now back with the Select Committee.”

¹¹⁰ This was following the change of administration following the 2024 national and provincial elections.

and on par with international standards.¹¹¹ The DoT also highlighted the conflict of interest resulting from the role of Transnet Ltd as owner of the land and at the same time an operator on said land.¹¹² This state of affairs, affected investor confidence. Inadequate infrastructure investment was also recognised as problematic. The Bill, according to the DoT pursued the original policy objectives, which were to separate the Ports Authority from Transnet Ltd, for it to be an independent state-owned company that would create opportunities for the country's socio-economic development.¹¹³ The concerns of organised labour were concurrently being raised, however noting that the restructuring which would lead to the Port Authority being a stand-alone state entity, would ignite significant investment in much-needed infrastructure and promote economic development."¹¹⁴

By October 2005, the concerns of members of parliament were neither necessarily focused on corporate structure nor capacity, but on board appointments, location of the Ports Regulator's office and economic transformation.¹¹⁵ After this long and gruelling consultation process, the Bill, now known as the National Ports Act 12 of 2005, was assented to by the President in 2005, and came into force on 27 November 2006. It must be noted that in this process, little attention was given to the correct corporate structure, but more so to the placement of the Port Authority i.e. its independence or not, from Transnet Ltd.

3.3 The relevant provisions of the National Ports Act

3.3.1 Purpose and objectives of the National Ports Act

The objectives of the National Ports Act, 12 of 2005 ("the NPA") are to:

- "(a) promote the development of an **effective and productive South African ports industry** that is capable of contributing to the economic growth and development of our country;

¹¹¹ Public Services Committee, *op cit* fn75.

¹¹² *Ibid.*

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ Public Service Select Committee *Meeting report: Ports Restructuring: Transport Department Briefing* 25 October 2005, available at <https://pmg.org.za/committee-meeting/5863/>, accessed on 25 November 2024.

- (b) establish appropriate institutional arrangements to support the governance of ports;
- (c) promote and improve **efficiency and performance** in the management and operation of ports;
- (d) enhance transparency in the management of ports;
- (e) strengthen the State's capacity to-
 - (i) **separate operations from the landlord function within ports;**
 - (ii) encourage employee participation, in order to motivate management and workers
 - (iii) facilitate the development of technology, information systems and managerial expertise **through private sector involvement** and participation; and promote the development of an integrated regional production and distribution system in support of government's policies." [own emphasis]"¹¹⁶

From this section, it could not have been spelt out clearer that the TNPA was due to be separate and independent of Transnet Ltd.

3.3.2 *Establishment and Corporate Structure of the National Ports Authority*

Chapter 2 of the NPA deals with the establishment and incorporation of a National Ports Authority, as a company.

Section 3 of the NPA provides that:

“Process before establishment of Authority

- 3.(1)(a) From the date this Act comes into effect until the date determined by the Shareholding Minister in terms of section 27(1), the National Ports Authority of South Africa-
- (i) is for all purposes deemed to be the Authority;
 - (ii) and must perform the functions of the Authority as if it were the Authority.
- (b) For the purposes of paragraph (a) any reference in this Act to the Authority, the Board of the Authority and any functionary of the Authority must be construed as a reference to National Ports Authority of South Africa and the divisional board and any functionary thereof, respectively, unless it is clearly inappropriate.
- (c) Any appointment to the divisional board or of any functionary of National Ports Authority of South Africa made after the commencement of this Act, must be made in terms of this Act.

¹¹⁶ Section 2, National Ports Act.

- (2) As soon as this Act takes effect the Shareholding Minister must ensure that the necessary steps are taken for the incorporation of the National Ports Authority of South Africa as a company contemplated in subsection (3).
- (3) The Registrar of Companies must-
- (a) register the memorandum and articles of association and incorporate National Ports Authority of South Africa under the name “**National Ports Authority (Pty) Ltd**” with Transnet as the sole member and shareholder;
- (b) issue to that entity the necessary documents to enable it to conduct business as a corporate entity.
- (4)(a) On the date determined by the Shareholding Minister in terms of section 27(l), all assets, liabilities, rights and obligations of Transnet in respect of National Ports Authority of South Africa vest in National Ports Authority (Pty) Ltd.
- (b) From the date contemplated in paragraph (a) until the date on which the Authority becomes the successor to National Ports Authority (Pty) Ltd as contemplated in section 4, National Ports Authority (Pty) Ltd-
- (i) is for all purposes deemed to be the Authority; and
- (ii) must perform the functions of the Authority as if it were the Authority.”

The National Ports Authority of South Africa is defined in section 1 as “the business unit or division of Transnet Ltd which immediately prior to the commencement of the Act constituted and was known as the “National Ports Authority of South Africa””. The National Ports Authority (Pty) Ltd is defined as “the Transnet subsidiary company contemplated in section 3(2).”

3.3.3 Conversion of the National Ports Authority

Following the express intention to incorporate the National Ports Authority (Pty) Ltd as a company set out section 3(2) read with 3(3) of the NPA, section 4 continues as follows:

“Conversion of Authority

- (1) Notwithstanding sections 32, 66, 190 and 344(d) of the Companies Act, on a date after the incorporation of National Ports Authority (Pty) Ltd, and with the concurrence of the Minister, the Shareholding Minister may take the necessary steps to convert the company into a public company, styled “National Ports Authority Limited”, vested with the authority to own, manage, control and administer ports within the Republic.
- (2) Where National Ports Authority (Pty) Ltd is converted as contemplated in subsection (1), the State’s rights as a shareholder of the Authority are to be exercised

by the Shareholding Minister and, where required by this Act, with the concurrence of the Minister.”

The challenge with this section, as to why it cannot be implemented as is, even in future is discussed in detail in 4.2.1.1 below. Essentially, the section is no longer aligned to contemporary corporate law, namely the Companies Act, 71 of 2008, because it still refers to corporate structures based on the repealed Companies Act, 61 of 1973.

3.3.4 Transfer of Assets and Liabilities

Section 3(3) and (4)(a) of the NPA provides that:

“(3)The Registrar of Companies must-

(a) register the memorandum and articles of association and incorporate National Ports Authority of South Africa under the name “National Ports Authority (Pty) Ltd” with Transnet as the sole member and shareholder;

(b) issue to that entity the necessary documents to enable it to conduct business as a corporate entity.

(4) (a) On the date determined by the Shareholding Minister in terms of section 27(l), 35 all assets, liabilities, rights and obligations of Transnet in respect of National Ports Authority of South Africa vest in National Ports Authority (Pty) Ltd.”

The legislation is quite specific on the type of corporate structure, even detailing what will suffice as proof of incorporation.

3.3.5 Governance and Administration of the National Ports Authority

The following sections detailing the administration of the Ports Authority, as a company, ensue:

“5. Authority’s memorandum and articles of association

6. Non-application of provision of Companies Act

7. Certain provisions of Companies Act may be declared inapplicable to Authority

8. Authority’s financial year

9. Judicial management and liquidation”

Similarly, these sections are not aligned to the contemporary corporate law. For example, the Act refers to the Authority’s memorandum and Articles of Association, whereas currently, the Memorandum of Incorporation is the company’s constitution.

Chapter 3 places the country's ports under jurisdiction of the Port Authority and details the functions of Port Authority.¹¹⁷ In terms of section 11(1) of the Act, the main function of the Port Authority is to own, manage, control and administer ports to ensure their efficient and economic functioning.

Chapter 4 of the Act provides for the governance, administration and operation of the Port Authority namely the appointment of the Board and staff as well as asset management. From this chapter, the focal point for this study is section 27(1) and (2) which provide that:

“Transfer of ports, land and other rights and obligations

27.(1)(a) On a date after the commencement of this Act, determined by the Shareholding Minister by notice in the Gazette, National Ports Authority (Pty) Ltd becomes the successor to National Ports Authority of South Africa. (b) The date contemplated in paragraph (a) must be determined after consultation with the Minister and with the concurrence of the Minister of Finance.

(2) On the date determined in terms of subsection (1), Transnet must transfer to National Ports Authority (Pty) Ltd the business of the National Ports Authority of South Africa and-

(a) all land and immovable property relating to the business of National Ports Authority of South Africa and owned by Transnet will vest in the National Ports Authority (Pty) Ltd; and

(b) all movable property and all liabilities, rights and obligations of Transnet relating to the National Ports Authority of South Africa as determined by the Shareholding Minister will vest in National Ports Authority (Pty) Ltd.”

3.4 Implications of non-compliance

The TNPA is often referred to and treated as an organ of state because it is established in terms of the NPA. Yet there are so many glaring inconsistencies between its practical existence and what the Legislature intended. The TNPA does not appear on either Schedule 2 or on Schedule 3 of the Public Finance Management Act, 1 of 1999 (“the PFMA”) which lists the country's State-Owned Entities (“SOE's”). Section 3 of the NPA paved the way for the establishment of the Port Authority, a successor in title to the NPA of SA, which was a division within Transnet Ltd. The section envisages that this

¹¹⁷ Specifically, in terms of section 10.

succeeding Authority is to be registered as a private company, where Transnet Ltd, instead of a Minister, would be the sole shareholder.¹¹⁸ The shareholding minister means the Minister of Public Enterprises. This Minister, in terms of section 4, has the powers to convert the private company Port Authority into a public company.

There have been numerous declarations by government that the Ports Authority would be registered as a company, regardless of whether it is public or private.¹¹⁹ However, to date no such company has been registered. Only the name “National Ports Authority” has been reserved with the Companies and Intellectual Property Commission, but no registration pursued. Yet, in 2023, an inaugural board of directors was appointed.¹²⁰ The cart left the horse behind.

The Ports Authority conundrum is manifold. It raises questions as to whether the Port Authority should be a division within Transnet Ltd, a primary private company, a public company, or a private company that is subsidiary of Transnet. It is clear that the legislation directs that it be a private company that is a subsidiary of Transnet Ltd. However, the shareholder’s option to convert it to a public company where they are the sole shareholder in terms of section 4 is a spanner in the works. The sole shareholder according to section 4 is the Minister of Public Enterprises. It begs the question whether there can be sound corporate governance where there is no clear shareholder(s), and the reporting lines within a corporate group structure are blurred.

Aside from the fact that no company has been incorporated as the National Ports Authority in accordance with the provisions of section 3, the next concern is whether the current Port Authority, the TNPA, is duly authorised to be managing the ports. The significance of this that the assets being managed are 2800km of state property, and

¹¹⁸ Sub-section 3(3)(a).

¹¹⁹ Media Statement: President Cyril Ramaphosa announces new reform to improve efficiency of South Africa’s ports and boost investment, *op cit* fn 13.

¹²⁰ Media Statement issued by Dept of Public Enterprises: ‘Minister Pravin Gordhan announces appointment of Transnet National Port Authority Board of Directors’, 10 October 2023, available at <https://www.gov.za/news/media-statements/minister-pravin-gordhan-announces-appointment-transnet-national-port>, accessed on 26 August 2024.

a budget of R13 billion in revenue.¹²¹ The issue was brought into the fore in 2019, in the *Siyakhuphuka*¹²² case. The judgment in this case turned on the disclosure of a certain confidential report to the Minister of Transport on the problem with the TNPA not being incorporated. The Court found that the report was crucial, it spoke “to the question of the lack of independence of the National Ports Authority and the non-corporatisation of Transnet, being one of the grounds of review.”¹²³ The required disclosure in this particular case was granted, but the actual report was never made public. It merely triggered speculation that the TNPA, as a division or subsidiary of Transnet Ltd, could not perform its functions impartially, in relation to sister divisions or sister companies within Transnet.¹²⁴ *Siyakhuphuka* is one of the competitors to the Transnet Port Terminals (“TPT”), a division of Transnet Ltd that operates and exercises a monopoly over container terminal operations in South African ports. The argument has always been that the TNPA, acts more favourably in awarding business to, regulating, and in charging its own.¹²⁵

It is submitted that the more serious question, is whether the current Ports Authority, the TNPA is enabled, by the legislation, to own, manage, control and administer ports. If one accepts that in order to fulfil these functions, the TNPA must at the very least exercise control and manage these State assets the gravity of the situation becomes clear. TNPA is not a separate company, and the provisions of the NPA relating to the vesting of assets (section 27) have not been complied with. In terms of this section, after incorporation, Transnet Ltd was due to transfer the assets previously held by the NPA of SA (as referred to in section 3), to the NPA (Pty) Ltd. If there is no NPA (Pty) Ltd, does this mean that the NPA of SA still exists and holds the assets? Is it the same organisation that is masquerading as the TNPA? Or does Transnet Ltd hold the assets by virtue of it being the transferor in terms of subsection 27(2), as a result of no transfer having taken place?

¹²¹ Transnet National Ports Authority *op cit* fn15, p7 and 9.

¹²² *Siyakhuphuka Investment Holdings (Pty) Ltd v Ports Regulator of South Africa* 2018 JDR 0679 (KZD).

¹²³ *Ibid* at paras 33.

¹²⁴ Venter L, ‘New report raises questions about legitimacy of TNPA contracts’ Freight News 10 May 2019, available at New report raises questions about legitimacy of TNPA contracts | Freight News, accessed on 26 August 2024.

¹²⁵ *Ibid*.

3.5 The draft amendment bill and the way forward

In 2018, the legislature did not use an opportunity to correct the deficiencies discussed above when the National Ports Amendment Bill, 2018 was introduced for comment.¹²⁶ The object of this bill was the Ports Regulator. It was to ensure a degree of autonomy of the activities and responsibilities of the Ports Regulator of South Africa (“the PRSA”), to ensure, the ability of the PRSA to effectively execute its mandate. Again in 2019, a bill was tabled, but which did not deal with any of the above identified defects.¹²⁷ None of these amendment bills were passed.

In September 2023, a fresh draft bill that attends to the governance issues of the TNPA was introduced. The DoT introduced a National Ports Amendment Bill, 2023 to maritime stakeholders for comment. Its purpose, according to the Bill, was to:

“amend the National Ports, Act 12 of 2005 so as to align with the international and domestic policy developments and performance trends impacting on South African ports, to provide for certain definitions, to repeal certain provisions and to provide for matters connected therewith.”

In terms of Rule 333 of the current parliamentary rules, bills that are still pending as at the last sitting of the term of the National Assembly or when it is dissolved, will lapse.¹²⁸ It remains to be seen if and in what format it is resuscitated following the general elections of 2024. As is, the bill was seeking to bring to life a comprehensive Ports Authority of South Africa and to “address areas that have been problematic in implementing e.g. corporatisation.”¹²⁹ However, the objects are watered down to provide for appropriate institutional arrangements to support the governance of ports, where previously they were to establish and maintain a port governance structure.¹³⁰ The object of keeping operations separate from the landlord function is removed.¹³¹

¹²⁶ National Ports Amendment Bill, 2018 GN 355, in GG No. 41731 22 June 2018.

¹²⁷ National Ports Amendment Bill, 2019 GN 372 of 2019, in GG No. 42574 11 July 2019.

¹²⁸ *National Assembly Rules* 9th Edition available at https://www.parliament.gov.za/storage/app/media/Rules/NA/2016-09-28_NA_RULES.pdf, accessed on 12 January 2025.

¹²⁹ GN 2010 of 2023, in GG No. 49220 9 September 2023.

¹³⁰ Section 2(2)(b).

¹³¹ Section 2(2)(e)(i).

The Bill proposes that Section 3 of the NPA be amended to read as follows:

- “3.(1) The Ports Authority of South Africa is hereby established with memorandum and articles drafted according to the provisions of the Companies Act.
- (2) From the date this Act comes into effect the Transnet National Ports Authority of South Africa-
- (i) is for all purposes deemed to be the Authority; and
 - (ii) must perform the functions of the Authority as if it were the Authority.
- (b) For the purposes of paragraph (a) any reference in this Act to the Authority, the Board of the Authority and any functionary of the Authority must be construed as a reference to Ports Authority of South Africa.”

This is an attempt to simplify the way forward with the establishment of a National Ports Authority of South Africa, but as a private company. Yet, the confusion remains because of the wording of section 3(2) which still refers to the TNPA and recognises that entity as the official Authority over the ports. It remains unclear whether the intention is to establish a private company, or some other form of entity.

In the new draft bill, it is the DoT, not Transnet Ltd that is to be the sole shareholder. With regards to the rest of section 3, the drafters’ intentions are to have a National Ports Authority of South Africa (Pty) Ltd registered. The option to convert the private company into a public company is removed. In section 27, whilst trying to cure the defect regarding the vesting of assets, the drafters still encounter challenges. The amendment to section 27(1) and (2) reads as follows:

- “Section 27 of the principal Act is hereby amended by-
- (a) the substitution for paragraph (a) of subsection (1) of the following paragraph:

“(a) On a date after the commencement of this Act, determined by the **[Shareholding]** Minister by notice in the Gazette, National Ports Authority (Pty) Ltd becomes the successor to National Ports Authority of South Africa.
 - (b) the substitution for paragraph (b) of subsection 2 of the following paragraph:

“(b) all movable property and all liabilities, rights and obligations of Transnet relating to the National Ports Authority of South Africa as determined by the **[Shareholding]** Minister will vest in National Ports Authority (Pty) Ltd.”

The amending section still presupposes that the NPA of SA actually exist or ever existed.

3.6 Developments in 2024

There are consequential amendments to the NPA effected by the Economic Regulation of Transport Act 6 of 2024,¹³² which is yet to take effect. The amendments are specific to the PRSA. In January 2024, the draft State Enterprises Bill, 2024 was tabled.¹³³ The Bill established a holding company called the State Asset Management SOC, to be the shareholder in entities listed in Schedule A of the bill, which includes Transnet Ltd. According to item 2.9 of the Explanatory Memorandum:

“the Schedule only lists companies and it is envisaged that other commercial state entities which are not companies would first be corporatised by amendment to their enabling legislation and that that legislation would ensure that a mechanism is included to add them to the Schedule so that they might be transferred to SAMSOC in due course. A similar expectation exists in terms of those commercial state enterprises which require legislative enablement so that they may be unbundled or restructured.”

One must deduce that the Port Authority must therefore fall within those that are yet to be incorporated.

The NPA bill, 2023, in its current draft form is clear that the intention is to establish the National Ports Authority of South Africa (Pty) Ltd. At this stage of amending section 27, it must have become apparent that it would be glaringly confusing if the subsections referred both to a “National Ports Authority of South Africa” (the predecessor) and the “National Ports Authority of South Africa Pty Ltd” (the successor) simultaneously. Thus, the “South Africa” is omitted, and the successor is referred to as simply the “National Ports Authority (Pty) Ltd”. The bill remains in draft form. Whilst the confusion remains, it is evident that the problems that were there in 2001, 2003 and 2005 regarding the corporate structure of the port authority that the legislation sought to address then, still remain. For progress and meaningful reform, there must be an understanding of the options of corporate structure available. This is discussed in Chapter 4 below.

¹³² Published in GG 50799, 11 June 2024.

¹³³ Published in GG No. 49978 of 9 January 2024.

CHAPTER 4

- 4. The relevance of corporate structure for the Ports Authority
 - 4.1 Overview
 - 4.1.1 Problem Statement
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 - 4.2 Corporate Structures in South Africa
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4.1. Overview

4.1.1 Problem Statement

The TNPA, the current Ports Authority, is responsible for the management all ports in the country. In terms of corporate structure, it is currently a division within Transnet Ltd, amongst other freight related divisions. One of the divisions of Transnet, TPT leases the port terminals for use from its sister division, the TNPA. This may be a conflict of interest. This lease may be excusable for being a state-to-state transaction.

From Chapter 3, instead, we understand that the enabling legislation, the NPA currently does not support the TNPA holding such a corporate structure, of being a division. The NPA requires that the Port Authority be registered as a private company separate from Transnet Ltd albeit with the State as its sole shareholder and convert to a public company at a later stage.

The way that the TNPA is governed also demonstrates that it is not an independent and fully functional state-owned entity. In this regard, the first complication is that the TNPA is not a standalone state-owned entity. Currently, the TNPA even accounts under the umbrella of Transnet Ltd. The second complication is that the TNPA is also meant to function as the regulator to Transnet, specifically its sister divisions, TPT and TFR. In other words, TPT and TFR should be accounting to the TNPA, as the manager of the ports. This manager role aims to ensure the ports function optimally. Afterall, this is the TNPA's main performance outcome, in terms of legislation and in terms of its own strategic mandate.¹³⁴

Is it possible that there is a link between the poor performance of the ports, and the TNPA's inability to manage the port's users especially TPT? Could the TNPA's hands be tied by its lack of authority, in the sense of an independent state-owned entity, on equal footing with Transnet Ltd and any of its divisions? The problem could even be greater than the TNPA's state of non-incorporation, extends to a lack of actual authority to manage the state's assets as a landlord.

4.1.2 Research questions

Of the research questions that this mini dissertation seeks to answer, the ultimate questions which must be answered are:

1. Is having an appropriate corporate structure relevant to performance?

¹³⁴ See TNPA, *National Ports Plan 2019*, available at <https://www.transnetnationalportsauthority.net/Documents/NPP%202019%20presentation.pdf>, accessed on 17 January 2025; TNPA, *National Port Development Framework Plans Update 2022*, available <https://www.transnetnationalportsauthority.net/Infrastructure%20and%20Port%20Planning/Documents/Port%20Development%20Framework%20Plans%20Update%202022.pdf>, accessed on 17 January 2025.

2. Which corporate structure would enable the TNPA to comply with the legislation and function optimally?¹³⁵

The following paragraphs and upcoming Chapter 5 attempt to answer these questions relying on the legislation, policy positions, parliamentary discussion and academic views in the literature.

4.2 Corporate Structures in South Africa

4.2.1 Key Concepts

The below concepts are defined to provide clarity and context for the purposes of the analysis to be conducted in this Chapter 4 and Chapter 5.

4.2.1.1 Corporate Structure

Corporate structure in this mini dissertation broadly refers to the law governing the existence of corporations in any format. South Africa's statutory corporate law was in place from 1973 until a review process culminated in the 2008 Companies Act.¹³⁶ The purpose of the overhaul was to ensure that the formation of a corporation will be simple and flexible by minimising the formalities and administrative burdens and rationalising the regulation of companies.¹³⁷

There are five possible corporate structures that a business could take in South Africa, namely: a trust, close corporation, partnership, sole proprietorship and a company.¹³⁸ It is the characteristics of the business that determine what structure it has or should have.¹³⁹ This mini-dissertation is focused on the Port Authority, and a wide variety of options are available, not just corporatisation. Corporatisation in this context is where:

“the legal status of a public port enterprise is changed to the legal status of a private company although the public sector retains ownership. All assets and land leasing

¹³⁵ Research questions 4 and 5 at para 1.5 above.

¹³⁶ Act 71 of 2008, repealing most parts of the Companies Act 61 of 1973.

¹³⁷ Knight P, 'Keep it simple and set it free: The new ethos of corporate formation' *Acta Juridica* 2010 p3.

¹³⁸ Cassim, F. et al, *Law of Business Structures* 2nd Edition (2021) p2.

¹³⁹ *Ibid.*

rights are transferred to this private company although land ownership remains with the port authority.”¹⁴⁰

Commercialisation, on the other hand, is where a port has

“autonomy in its decision making without transforming it into a private company. It adopts the accounting and management principles of private firms to become more efficient and profitable.”¹⁴¹

Privatisation involves:

“the transfer of ownership of assets from the public to private sector or the application of private capital to fund investments in port facilities, equipment and systems.”¹⁴²

It is also possible to have a hybrid of structures, for example incorporated state-owned companies or listed state-owned companies.¹⁴³ The key to the structure lies in the governance and operating model that the entity has selected. The founding documents are an important source of this information.

4.2.1.2 A company

A company is a distinctive structure, whereby it is a juristic person, thus a separate legal entity, apart from its shareholders.¹⁴⁴ Section 19(1)(b) of the Companies Act, 71 of 2008 (“the Companies Act”) provides that a company has all of the legal powers and capacity of natural person, except for acts that are not possible for a juristic person for example marriage. A company’s constitution is its Memorandum of Incorporation which stipulates the perimeters of its authority and capacity. A company may sue and be sued in its own name, and the company is liable for its own debt. The shareholders are generally not liable.¹⁴⁵ It follows that the assets and profits also belong to the company. A company has perpetual succession.¹⁴⁶ The Companies Act provides for various types of companies, some of which are highlighted below.

¹⁴⁰ Zulu J, *The Political Economy of Port Institutional and Pricing Reform in South Africa* (unpublished MCom Thesis UCT) 2014. p19.

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

¹⁴³ Mutamba J, *A Framework for the Turnaround of State-owned Companies in South Africa* (unpublished PHD Theses WITS) 2020 p14.

¹⁴⁴ Cassim, F. et al, *op cit*, fn147.

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

4.2.1.3 A private company

In terms of section 8(2)(b) of the Companies Act, a private company is a company that is not a state-owned company; and its Memorandum of Incorporation “prohibits it from offering any of its securities to the public; and restricts the transferability of its securities.” Its name bears the expression “Proprietary Limited” or its abbreviation, “(Pty) Ltd.”¹⁴⁷ This is an obvious clash within the NPA. The TNPA cannot be a (Pty) Ltd and have the state as the sole shareholder, because in terms the above-quoted definition in the Companies Act, a private company is one that is not “wholly” state owned.

4.2.1.4 A state owned company/entity/enterprise

Governments worldwide establish state owned companies aiming to engage in commercial activities in order to boost the country’s economy. ¹⁴⁸ Section 1 of the Companies Act defines a state-owned entity as follows:

“an enterprise that is registered in terms of this Act as a company, and either—

- (a) falls within the meaning of “state-owned enterprise” in terms of the Public Finance Management Act, 1999 (Act No. 1 of 1999); or
- (b) is owned by a municipality, as contemplated in the Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000), and is otherwise similar to an enterprise referred to in paragraph (a).” The name of a state-owned company ends with “SOC Ltd.”¹⁴⁹

The definitions contained in the PFMA are much broader, encompassing a national government or provincial business enterprise, an entity, board, commission, company, corporation, fund which has any of these characteristics:

- “(a) is a juristic person under the ownership control of the national executive;
- (b) has been assigned financial and operational authority to carry on a business activity;
- (c) as its principal business, provides goods or services in accordance with ordinary business principles;
- (d) is financed fully or substantially from sources other than the National Revenue Fund; or by way of a tax, levy or other statutory money; or it is

¹⁴⁷ Section 11(3)(c)(ii).

¹⁴⁸ Mathebula N and Masiya T, *op cit* fn 5,p146-163.

¹⁴⁹ Section 11(3).

- (i) “established in terms of national legislation;
- (ii) fully or substantially funded either from the National Revenue Fund, or by way of a tax, levy or other money imposed in terms of national legislation; and
- (iii) accountable to Parliament.”

This is a wide net encompassing most SOE’s, but sadly appears to encompass Transnet Ltd, not the TNPA because is arguably not a separate juristic person.

The definition of the Presidential Review Committee on State-Owned Entities (“PRC”) is even wider than that in the PFMA. The PRC was established in 2010 and completed its mission in 2013 producing a report that addresses “issues such as the legislative mandates, ownership models, governance and management reporting and accountability frameworks; as well as funding requirements of the SOEs.”¹⁵⁰ The PRC notes that having many different definitions highlights the challenge of having a multiplicity of laws that SOE’s have to report to as well as resistance thereto.¹⁵¹ The PRC Report defines an SOE as a public entity as defined in the PFMA, including national and provincial public entities; and municipal entities.¹⁵² A statutory corporation is an SOE that:

- “Provides basic and essential services;
- Manifests a hybrid of commercial and non-commercial activities;
- Lends itself to a cross-subsidisation mandate;
- and
- Is wholly State-owned.”¹⁵³

Further, the report differentiates “commercial” and “non-commercial SOE’s as follows:

A “non-commercial entity is an SOE which is predominantly dependent on the State for financial sustainability, through:

- Budget vote transfers;
- Subsidies and grants;
- Special tax arrangements;
- Multilateral institutions and donor funding;

¹⁵⁰Mbhele N, *op cit* fn 6, p5.

¹⁵¹ The Presidency *Presidential Review Committee on State-Owned Entities 2013 Volume 2, P75.*

¹⁵² *Ibid*, P12.

¹⁵³ *Ibid*.

- Fundraising and sponsorships;
- Limited income stream; and
- Constitutional or State policy mandates.”¹⁵⁴

A “commercial entity is a SOE that:

- Commands market-related revenues;
- Has a balance sheet capability;
- Has ability to post surplus or profit;
- Maintains and replenishes market capitalisation autonomously from the State; and
- Has State contracts with the entity for non-commercial mandates.”¹⁵⁵

The report directs that the term ‘state-owned enterprises’ must be used to refer to incorporated and non-incorporated commercial entities, and the name ‘public entities’ must be used to refer to all non-commercial entities. A State-owned enterprise is a legal entity created by the State to undertake commercial activities on behalf of the owner, government. Their legal status would vary, from being a part of government to being public companies with the State as a shareholder. State-owned enterprises should refer to business entities established by national, provincial or local governments, whose supervisory officials are from the government. This definition should include, *inter alia*:

- “Wholly (100%) State-funded entities; Partially State-funded entities, including:
- 50+1% single-majority holding by the State;
 - 50+1% majority shareholding together with the DFIs [Development Financial Institutions] and/or PIC [Public Investment Corporations]; and
 - where the State owns significant share equity in the entity or company.”¹⁵⁶

This is distinguished from a ‘public entity’ which is an entity that is created and owned by government to undertake certain functions of government with the purpose of improving service delivery and other forms of public benefits to citizens.¹⁵⁷ On the other hand, a ‘State-owned entity’ is a generic term used inclusively to denote all types of entities, commercial and non-commercial, as applied in this review.”¹⁵⁸ Mutamba

¹⁵⁴ *Ibid*, P10.

¹⁵⁵ *Ibid*, P11.

¹⁵⁶ *Ibid*, P48; 50.

¹⁵⁷ *Ibid*, p48.

¹⁵⁸ *Ibid*, p 50.

interprets the PRC report to “imply that SOCs [State-owned companies] are operated for profit or surplus to be self-sustaining.”¹⁵⁹ So the difference between a SOC and SOE is that the latter is a broader category that includes non-commercial entities, whilst SOC are composed of the commercialised structures, described above.

SOEs are creatures of statute in that they have to abide by the Constitution, the PFMA and their founding legislation.¹⁶⁰ However, SOC's, as companies must also comply with the Companies Act, and are together with public companies allocated greater accountability requirements.¹⁶¹ The Act does however provide for SOCs to be exempted from the application of the Act.¹⁶² Nevertheless, overall, the regulation of both SOE's and private companies is similar in terms of the Companies Act.¹⁶³ An SOE's distinction is found in their “design, mandates and accountability frameworks in terms of the added legislation applicable to the State.¹⁶⁴ The common factor is the responsibility of the Board to ensure that good corporate governance is adhered to.¹⁶⁵ Another critical distinguishing factor is ownership. For an entity to be ‘owned’ by the State, government must possess substantial control of the company through the majority ownership of shares.¹⁶⁶

The PFMA defines 'ownership control', in relation to an entity, as:

“the ability to exercise any of the following powers to govern the financial and operating policies of the entity in order to obtain benefits from its activities:

- (a) To appoint or remove all, or the majority of, the members of that entity's board of directors or equivalent governing body;
- (b) to appoint or remove that entity's chief executive officer;
- (c) to cast all, or the majority of, the votes at meetings of that board of directors or equivalent governing body; or

¹⁵⁹ Mutamba J, *op cit* fn152, p16-17.

¹⁶⁰ Mofokeng T, 'Good Corporate Governance Affirms the Board (Led By The Chairperson) as the Focal Point of Governance and the Courts Have No Mandate to Undermine this Principle' (2020) 6 (1) *Journal of Corporate And Commercial Law & Practice*, p75.

¹⁶¹ Section 34 and Chapter 3.

¹⁶² Section 9.

¹⁶³ Mbhele N, *op cit* fn 6, p45.

¹⁶⁴ *Ibid*, p45.

¹⁶⁵ Mofokeng T, *op cit* fn 169, p75.

¹⁶⁶ Mathebula N and Masiya T, *op cit* fn 5, p146-163

(d) to control all, or the majority of, the voting rights at a general meeting of that entity.”¹⁶⁷

This could possibly be the reason why board appointments in SOE’s are a point of interest for the politicians – it’s a matter of ‘power’.

Overall, the PRC Report indicates that government has grasped the issues, but there are parts where the report derails. A state-owned company is defined as follows:

“government enterprises are “private” companies registered in terms of section 32 of the Companies Act, 1973 over which the State exercises ownership control, or in which the State has a material interest.”¹⁶⁸

Recognising the need to clarify the classification of SOE in order to facilitate the easier compliance by SOE’s, the PRC recommended as follows:

- “The creation of a State-owned entities Act (a single source for SOE governance and shareholding);
- Formation of an SOE Council of Ministers;
- Formation of the central SOE authorities (for commercial entities and for Development Finance Institutions);
- Development of a State-ownership Policy;
- Formation of the central remuneration authority for SOEs;
- Non-commercial SOEs and statutory corporations remain within line function ministries.
- The formation of a principled SOE governance framework; and
- Consider appointing an executive authority to establish a framework for economic regulation and to oversee harmonisation and the implementation of core regulatory principles. it is also necessary to standardise regulatory methodologies.”¹⁶⁹

None of these recommendations have been implemented to date.

4.2.1.5 A public company

A public company is a profit company that is not a state-owned company, a private company or a personal liability company.¹⁷⁰ It is a company that can offer its securities to the public, .i.e.. sell shares to the public.¹⁷¹ The shareholders of the company may

¹⁶⁷ Section 1.

¹⁶⁸ The Presidency, *op cit* fn 160, p197-8.

¹⁶⁹ *Ibid.*

¹⁷⁰ Section 1 Companies Act.

¹⁷¹ Cassim, F. et al, *op cit*, fn 147, p94.

also freely transfer their securities.¹⁷² The trading of securities occurs more often, and reputedly safer on trading platforms on which the public company may be listed, such as the Johannesburg Stock Exchange.¹⁷³ Currently (2024), the sole state owned company which is listed on the Johannesburg Stock Exchange is Telkom SOC Ltd.¹⁷⁴

4.2.1.6 Corporate Governance

Corporate governance is the manner in which entities, whether private or state owned are controlled and governed.¹⁷⁵ Good corporate governance associates with the structures and system in place that enable an entity to operate like a well-oiled machine in terms of its purpose and objectives, and mitigates the risk of poor corporate governance. In South Africa poor corporate governance has exhibited with the advent and perpetuation of state capture.

The elements of control and governance mean that it is the shareholders and directors who are key stakeholders responsible for ensuring good corporate governance in an entity.¹⁷⁶ The performance outcomes of SOE's generally and the Port Authority specifically, discussed in Chapter 2 demonstrate that corporate governance is lacking in SOE's. However:

“the ownership, governance and management challenges of the SOEs are not unique to South Africa. However, the dominating discourse involving performance of SOEs is based on their inefficiency, maladministration, and at worst, fraud and corruption. Issues relating to maladministration, corruption, rent-seeking and ultimately non-delivery point to weakness in the governance arrangement and ownership model”.¹⁷⁷

¹⁷² *Ibid*, p95.

¹⁷³ *Ibid*, p95-6.

¹⁷⁴ JSE, *Listed Companies*, available at <https://clientportal.jse.co.za/companies-and-financial-instruments/issuer-profile?issuermasterid=2252>, accessed on 11 November 2024.

¹⁷⁵ Mofokeng T, *op cit* fn 169, p66; “Corporate governance in South Africa was first institutionalised with the publication of the King Report on Corporate Governance in 1994 and, in 2002, the second King Report on Corporate Governance for South Africa (King II). The King Reports heralded a new era by codifying the behaviour that is expected from corporations in order to protect and enhance shareholder value...The main purpose behind corporate governance was to have a structure and predictable behaviour that would ensure the shareholders that their investments were protected and also to ensure that companies were managed like good corporate citizens. Later iterations of the King Code, King III released in 2009 and the ground-breaking King IV, which was released in November 2016, have confirmed South Africa's place as a global leader in governance thinking and have placed the country firmly at the forefront of nations adopting superior governance standards.” P67.

¹⁷⁶ Zikhali N, ‘The Myth of a Central Role by Institutional Shareholders in Corporate Governance’, (2022) 8(1), *Journal of Corporate, Commercial Law & Practice*, p6-7.

¹⁷⁷ Mbhele N, *op cit* fn 136, p6.

It is for this reason that the corporate structure of an entity is important, because it symbolises the existence and functionality of the accountability systems of the entity.

4.2.1.7 Policy, National Development Plans, Budget and Performance

Currently, SOEs operate on the basis of performance plans and targets as per the country's national strategic plan, the National Development Plan ("NDP") ("Vision 2030"). Since the advent of democracy, the South African government tried to be upfront on its role in the country's macro-economic policy."¹⁷⁸ "The Reconstruction and Development Programme (RDP), introduced in 1994 was a state interventionist strategy aimed at addressing poverty and deprivation in line with the welfarist policy adopted by the ANC led government."¹⁷⁹ This was replaced by the Growth, Employment and Redistribution ("GEAR") strategy in 1996.¹⁸⁰

"The GEAR strategy signalled a move towards neoliberal economic policy with an emphasis on the privatisation of State-Owned Enterprises, financial and fiscal austerity and the reduction of government expenditure... From 2010, the New Growth Path document was released as the blueprint for the future economic and socio-economic development strategy and also provided the basis for the adoption of the current National Development Plan ("NDP") in 2012/2013."¹⁸¹

Unfortunately the NDP is not explicit to state how SOEs are to go about triggering and boosting infrastructural development and therefore transformation.¹⁸² The government has thus far relied heavily on the concept of public private partnerships, as a means to bring the private sector into participating in the socio-economic development whilst achieving transformation. The NDP was focused on the appropriate regulatory framework to facilitate PPP's but not the implementation plan and not leaving room for any other means of attaining the desired development.¹⁸³

In furtherance of this objective, government's attempts to restructure SOE's have been documented in additional policy documents such as National Framework Agreement

¹⁷⁸ Gumede N and Asmah-Andoh K, 'Prescriptions of the National Development Plan for State-Owned Enterprises in South Africa: Is Privatisation an Option?' (2016) *Journal of Public Administration* Vol 51(2) p267.

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*

¹⁸² Mathebula N and Masiya T, *op cit* fn 5, p154.

¹⁸³ Gumede N and Asmah-Andoh K, *op cit* fn 188, p273.

("NFA"); the 1999 Inter-Ministerial Cabinet Committee on the Restructuring of State Assets ("IMCC"); and the 2000 Accelerated Policy Framework on Restructuring of SOEs ("APFR").

"The APFR addresses the following critical issues: government's vision on restructuring; the economic and social effects of transformation; promoting appropriate regulatory frameworks; and improving corporate governance, ethics and probity."¹⁸⁴

President Jacob Zuma in 2010 established the Presidential Review Committee to review and advise on the governance of SOEs following failures of entities such as Eskom and the SABC.¹⁸⁵ The PRC recommendations, summarised above did not progress into a policy review process, but the State Enterprises Bill, 2024 was drafted. The Presidency recently briefed parliament on the Bill as follows:

"The President would appoint the board members. This was one of the recommendations set out in the State Capture Commission report, where it said that a panel should be set up. The majority of the members would be those who were not part of the executive team. A national strategy would be developed and would be tabled in Parliament. There was a requirement in the legislation that the shareholder must table a report on the commercial sustainability of the SOEs, including developmental objectives, annual reports, and financial statements. All of this would be tabled in Parliament, along with the subsidiaries. The Minister and the holding company could be called at any time to account. Accountability mechanisms had been included in the Bill... There was a legal hierarchy of legislation. Sometimes, a decision has to be made as to which legislation precedes the other during conflict. This Bill was specific to SOEs, while the Companies Act was not. Clause 22 states that if there was a conflict between the PFMA and this Bill on issues of borrowing, accountability or reporting, the PFMA would supersede the Bill. Over the years, there have been complaints from SOEs about the PFMA because they were not able to be as commercially agile as they were supposed to be. These SOEs were not able to make decisions on time, especially those in the commercial environment. If these SOEs were supposed to be commercially sustainable and compete in the market, an enabling environment had to be created, but at the same time, there should be the necessary checks and balances to ensure accountability. There were a lot of accountability provisions in the legislation"¹⁸⁶

¹⁸⁴Mbhele N, *op cit* fn 136, p5.

¹⁸⁵ *Ibid.*

¹⁸⁶ National Assembly, *Meeting Report: National State Enterprises Bill: Department, Planning, Monitoring and Evaluation briefing & processing; DPME, Brand SA, Stats SA Audit Outcomes; with*

This synopsis accurately reflects the current administration's intentions, yet ideally these should be documented in policy first. Putting legislation first and concurrently implementing the legislation is akin to putting the cart before the horse, creating a breeding ground for conflict areas.

4.2.2. *The relevance of corporate structure and governance to performance*

4.2.2.1 Governance and administration

The common theme in the discussion of key concepts as related to state owned entities is that there are challenges emanating from how they are run and the multiplicity of legislation to comply with. The multiplicity of legislation in turn creates multiple compliance obligations and multiple reporting points.

“It has been noted that SOEs report to multiple oversight entities which include parliamentary portfolio committees, National Treasury, line function departments and general public mainly through the civil society organisations. Reporting and accountability are the cornerstone of good governance.”¹⁸⁷

The converse is lack of oversight, which means SOE are unruly, do not perform their dues and are susceptible to phenomenon such as state capture.

These challenges are a worldwide phenomenon in SOE's, with historical roots where SOE's were traditionally treated as part of government even when commercial in nature. The challenges that come with have multiple supervisory agencies or reporting points that SOE's currently face is also inherited.¹⁸⁸ This multiplicity is problematic in that practically, as Mbhele points out, the implications are that:

“multiple reporting is time-consuming. Information from these entities is not homogenous, and is required at different intervals and in different formats. Therefore, communication and reporting efficiency are the critical success factors of productivity

Deputy Minister, 11 October 2024, available at <https://pmg.org.za/committee-meeting/39609/>, accessed on 17 January 2025.

¹⁸⁷ Mbhele N, *op cit* fn 132p46; 170; Mbhele writes: “It has been noted that SOEs report to multiple oversight entities which include parliamentary portfolio committees, National Treasury, line function departments and general public mainly through the civil society organisations. Reporting and accountability are the cornerstone of good governance.”

¹⁸⁸ Wong S, 'The state of governance at State-Owned Enterprises. Private Sector Opinion, (2018). Vol. 40, *World Bank*, accessed at <https://documents1.worldbank.org/curated/en/564891520946563480/pdf/NWP-State-of-Governance-PSO-40-PUBLIC.pdf>, on 26 October 2024, p4.

within the reporting system. SOEs find it difficult to balance the interest of all the stakeholders without compromising effectiveness and efficiency”¹⁸⁹

The PRC Report recommended that the governance and administration of commercial SOE’s to be centralised, whilst line function departments retain oversight of the non-commercial SOE’s. In this way, SOE’s will be given the space ‘to do business’, by reducing the bureaucracy. Hopefully, this shift in focus will translate to improved performance.

4.2.2.2 Policy and Mandates

Where there is no overarching or cross-cutting policy, an additional burden of multiple mandates to fulfil is also created. It is for this reason that for example, the TNPA remains unincorporated as intended by both policymakers and the legislature – the dual and overlapping roles of the Department of Transport and Department of Public Enterprises conflicted due to lack of coordination.

A mandate was defined by the PRC as the primary purpose for the existence of a SOE.¹⁹⁰ It follows that if an organisation is not clear on its purpose, it will not perform as purposed. According to Mbhele, frequent policy changes or lack of policy mean that:

“adherence to expected corporate governance standards becomes more difficult to achieve in the context of factors such as the changing environment and the sheer size of SOEs; as well as the complex legislative environment and its associated bureaucracy.”¹⁹¹

Yet the directors are still expected to perform as mandated, legislated or agreed in performance agreements (also known as “social compacts” in the context of government and SOE’s). The lack of clear mandates is thus a major contributing factor to the failure of SOE’s.

The seventh democratic administration in South Africa is primed for the task of revisiting policy and mandates and making meaningful adjustments. The President

¹⁸⁹ Mbhele N, *op cit* fn 6, p170.

¹⁹⁰ The Presidency, *op cit* fn 160, p11.

¹⁹¹ Mbhele N, *op cit* fn 6, p6-7.

has already done away with the Department of Public Enterprises. However, the incoming administration has resuscitated the National State Enterprises Bill [B1-2004].¹⁹² Ideally, government should focus on rationalising the overlapping policies, prior to penning new or amendment legislation. The Bill is however progressive in that it implements some of the recommendations of the PRC Report with regards to the management of SOE's. If the discussion of the Bill does proceed, it is advisable that there be alignment between the overarching SOE legislation and the founding legislation of the specific SOE's.

4.2.2.3 Capacity to act

In chapter 3, the concept of a corporate structure was clarified, together with related concepts such as that of a company, which is distinctive in that it has a separate legal *persona*. Thereafter, the different types of companies such as private, public, non-profit and state owned, were outlined. The common thread between these types of companies is that there is a particular governance model. This is how the company is run, and by whom. Generally, the engine of any company is the board of directors. In terms of the Companies Act, directors in SOE's and private companies are similarly accountable. But SOE's tend to be more complicated than private companies in terms of size, complexity of regulation and reporting obligations, as well as mandates.¹⁹³ Mbhele describes the requirements on directors of SOE's, as exceptionally different, pointing out that "some go beyond the ordinary duties of directors provided by the Companies Act of 2008."¹⁹⁴ This is another potential contributing factor to the failure of boards to perform as purposed in SOE's specifically. This is important because a company, as a corporate structure can only act i.e.. exercise its capacity, through a board of directors. For further emphasis, such a board must also be clear on what is expected from it. In SOE's, mandates for the board are essentially comprised of the shareholder/entity compacts or performance agreements.

In relation to ports, there are three important possibilities to consider in relation to South Africa's Port Authority's mandate. Firstly, that the TNPA and its corporate

¹⁹² National Assembly *op cit* fn 169.

¹⁹³ Mbhele N, *op cit* fn 6, p46.

¹⁹⁴ *Ibid.*

structure was controversial in relation to board appointments, because the shareholder would be the one with the valuable task of appointing the members of the board to act on its behalf, i.e. the TNPA could be captured. Secondly, it was important that beyond commercial prowess, the Port Authority had to fit into and contribute to the socio-economic developmental agenda. Thirdly, it is possible that the national and cross cutting objective of restructuring SOE's at the time to address 'privatisation' could have been a major contributing factor to the structure adopted by the TNPA.

In this regard, the literature indicates that there are various models which South Africa could have followed in terms of how the port could operate as an SOE. According to Mbhele, the agency theory advocates for tighter control mechanisms in the form of legislation and regulation, but this cannot rectify the circumstance where the "stewards of SOEs have failed to act in the best interests of the shareholder."¹⁹⁵ He laments: "besmirching reports of corruption and maladministration continues to proliferate the public domain."¹⁹⁶ Mathebula and Masiya shared this view, that most SOE's in South Africa are unable to fulfil their developmental directives due to governance failures and state capture.¹⁹⁷ One may question how this situation comes into existence when SOE's are more regulated in terms of specific goals and performance milestones than private companies, for example in the form of the NDP. The NDP states that SOEs play or at least need to be at the centre of development and transformation. The answer, it is submitted, is that with the development mandate comes a budget, where it is the State that funds operations and projects. Sadly, SOE's that rely on the public purse are unlikely to become self-sufficient.

Yet, authority over pricing is one of the means an entity can demonstrate its commercial viability or at least ensure its revenue generation capacity. The discussion of the TNPA's performance in Chapter 2 demonstrated that financially it is performing well by generating revenue. However, it is not performing well though in terms of capital investments, which is a matter of governance. Related issues in relation to ports are identified in the 2021 Container Port Performance Index as follows:

¹⁹⁵*Ibid*, p6-7.

¹⁹⁶ *Ibid*.

¹⁹⁷ Mathebula N and Masiya T, *op cit* fn 5, p146.

“poorly performing ports are characterised by limitations in spatial and operating efficiency, limitations in maritime and landside access, inadequate oversight and poor coordination between the public agencies involved, resulting in a lack of predictability and reliability. The result far too often is that instead of facilitating trade, the port increases the cost of imports and exports, reduces competitiveness, and inhibits economic growth and poverty reduction.”¹⁹⁸

Such views are not far-fetched. A study of the TNPA’s pricing between its establishment and 2012 found the following:

“Port stakeholders criticise TNPA for: abusing its monopoly power; hindering global competitiveness; not taking into cognisance the state of the country’s economy; charging prices which are higher than inflation; creating an environment which does not support job creation; being inconsistent and non-compliant with the national policies; not applying cost-based pricing principles; not having a justifiable pricing methodology; low productivity and inefficiency; inconsistent and unreasonable pricing of products; and poor service delivery and port security.”¹⁹⁹

On the other hand the TNPA is vilified for attempting to be revenue generating instead of more socialist in its operations, e.g. by retaining employees even in the face of insolvency.²⁰⁰ This is another contributing factor to why the restructuring agenda consultations with organised labour were so long drawn and intense during the drafting of the Act, 2001-2005 and beyond.²⁰¹

The other end of the spectrum is that the ports must generate sufficient revenue to fund maintenance to existing infrastructure and to fund future development. As mentioned above, ports are the key role player in the supply chain and commercial trade, which translates to economic development.²⁰² According to Isaacs, the return

¹⁹⁸ World Bank, *op cit* fn 85, p14.

¹⁹⁹ Gumede S and Chasomeris M, ‘Maritime Port Pricing and Governance in South Africa: Trends and Stakeholder Comments’ *Journal of Economic and Financial Sciences* April 2015 8(1), p 60.

²⁰⁰ *Ibid*, p 47-62

²⁰¹ The Labour and Public Enterprises Select Committee, *op cit* fn 52; See also NCOP: Labour And Public Enterprises Select Committee And Public Enterprises Portfolio Committee, *Consultation With Organised Labour: Briefing*, 17 September 2003, available at <https://pmg.org.za/committee-meeting/2889>, accessed on 25 November 2024;

NCOP: Public Services Select Committee *op cit* fn92;

Public Services Sector Committee, *op cit* fn 75;

Public Service Select Committee *op cit* fn 124.

²⁰² Meyiwa and Chasomeris M, ‘Restructuring Port Governance In South Africa’, *Journal of Economic and Financial Sciences* October 2016 9(3), p855.

on investment for prioritising the maintenance of assets, improves efficiency.²⁰³ He goes on to assert that:

“[t]he TNPA is required to ensure that the concrete infrastructure assets [in the ports it manages] are in a safe and reliable state for the daily operations in order to generate revenue for the country.”²⁰⁴

Aside from generating profits, generally the expectation is that SOEs must be able to finance the performance of their functions from their own revenue base. In respect of ports, the Port Authority should be funding its key function in terms of section 11 of the NPA which is the development and maintenance of the ports. Furthermore, SOE’s are to be:

“financially viable and desist from constantly requesting financial rescue from the State. Financial viability necessitates that SOEs should establish their most reliable source of revenue without depending on the State’s financial rescue.”²⁰⁵

The capital expenditure on assets in turn will translate into competitiveness of the ports and economic development. If this is not implemented, the port authority’s mandate will not be achieved. The choice is either implementation or to revert to the drawing board to set new policy and mandates. Implementation necessarily includes giving the Port Authority the leeway to levy cost reflective, profit generating pricing. The Ports Regulator is in place and is adequate as a check and balance for this suggested leeway.

Lastly, the correct corporate structure is relevant to the Port Authority’s capacity to perform the majority of the functions contained in section 11 of the NPA, namely the landlord functions. In Chapter 3, the legislative analysis revealed that section 27 read with section 3 of the NPA provides that once the National Ports Authority (Pty) Ltd (“the NPA”) is incorporated, then Transnet Ltd, the current owner of ports and assets, will transfer ownership to the company, the National Ports Authority (Pty) Ltd. The legislation is specific to require the Port Authority to hold a very specific corporate structure. This specification operates like a suspensive clause, in that the vesting

²⁰³ Isaacs B, *Review of Transnet National Ports Marine Concrete Infrastructure Asset Management and Maintenance* (unpublished MEng Theses UCT) 2019, p8-9.

²⁰⁴ *Ibid.*

²⁰⁵ Mbhele N, *op cit* fn 6, p170.

cannot take place to an entity that is not the National Ports Authority (Pty) Ltd. For the current TNPA this means that in its unincorporated state, the State assets it is managing, still vest in the predecessor. The predecessor is Transnet Ltd, which is effectively its parent or holding company. The Port Authority's capacity to act as the owner and landlord of all ports is therefore questionable. Lawmakers must consider, in future proposed amendments the need for alignment between the corporate structure selected and the vesting of asset ownership provisions.

4.2.3 *The status quo at the Port Authority*

4.2.3.1 Legal status

The entity known as the South African Transport Services ceased to exist on 1 April 1990.²⁰⁶ Transnet Ltd took over its role, in terms of rights, title and assets. This was in terms of section 3(2) read with section 2 (establishment of Transnet) of the Legal Succession to the South African Transport Services Act 9 of 1989.²⁰⁷ All the rights and obligations of SATS were transferred to Transnet.

This means that the ports, all currently vest in Transnet Ltd, a conflicted lessee and operator of key port terminals, as opposed to the intended independent regulator and landlord, which is the Port Authority. There are pending complaints with the secondary regulator to the Port Authority, the Competition Commission, against the TNPA, TFR and TPT, as divisions of Transnet Ltd that their pricing was excessive and anti-competitive.²⁰⁸ This conflicted relationship has glaringly endured for a long time, and government must be decisive on its standpoint, otherwise retract the competitive commercial ports policy framework it put forward in 2002.

In addition, the current Port Authority, the TNPA does not have a separate legal status to Transnet Ltd. Technically, this means that the TNPA cannot sue and be sued in its

²⁰⁶ *Transnet Ltd v Ngcezula supra* fn 25 at para 3.

²⁰⁷ *Transnet Soc Ltd v Total supra* fn 24.
at paras 3-4.

²⁰⁸ *Transnet Annual Financial Statements 2023*, available at <https://www.transnet.net/InvestorRelations/AR2023/Transnet%2031%20March%202023%20final%20AFS.pdf>, accessed on 17 January 2025.

own name. Yet the Institution of Legal Proceedings Against Certain Organs of State Act, 40 of 2002 specifically recognises the Port Authority. The Act defines an 'organ of state' as:

- “(a) any national or provincial department;
- (b) a municipality contemplated in section 151 of the Constitution;
- (c) any functionary or institution exercising a power or performing a function in terms of the Constitution, or a provincial constitution referred to in section 142 of the Constitution;
- (d) the South African Maritime Safety Authority established by section 2 of the South African Maritime Safety Authority Act, 1998 (Act 5 of 1998);
- (e) The South African National Roads Agency Limited contemplated in section 3 of The South African National Roads Agency Limited and National Roads Act, 1998 (Act 7 of 1998);
- (f) National Ports Authority Limited, contemplated in section 4 of the National Ports Act, 2005, and any entity deemed to be the National Ports Authority in terms of section 3 of that Act.”

Indeed, with effect from 26 November 2006, Act 40 of 2002 was amended by the coming into effect of the National Ports Act.²⁰⁹

Sonnekus interrogates how Transnet is a separate legal entity, it being a limited company, and as much as that makes it an organ of state as defined in some legislation, it is not one for the purposes of Act 40 of 2002.²¹⁰ This means that it is not entitled to some of the protection offered by this Act.²¹¹ This becomes relevant when parties who contract with Transnet claim performance or delictual claimants seek to hold Transnet Ltd liable.²¹² This, Sonnekus argues was done intentionally by the Legislature.²¹³

²⁰⁹ Proc R48 in GG 29421 of 26 November 2006, read with s18 of Act 12 of 2005.

²¹⁰ Sonnekus J, 'Shielding of Parastatals against Claims for Performance: An Unwarranted Digression from Legal Principles' *SALJ* (2011) p.305. But see *Transnet v Ngcezulu supra* fn 25 where prior to the National Ports Act it was accepted that Transnet was entitled to notice under Act 40 of 2002.

²¹¹ Sonnekus J, *op cit* fn 220, p.303

²¹² *Ibid*, p297; 299 -301.

²¹³ *Ibid*, p310-311; Interestingly he observes as follows:

“Notwithstanding the stated intention to restrict and limit extraordinary protection that runs counter to the underlying principle contained in s 34 of the Constitution only to certain (and not all) organs of state, the legislature found it necessary explicitly to make provision in the National Ports Act for the inclusion of the National Ports Authority Limited, contemplated in s 4 of the National Ports Act, and any entity deemed to be the National Ports Authority in terms of s 3 of that Act, to be brought under the shield of this protection provided by the special limited notice period of merely six months in s 3. This was therefore a deliberate inclusion, three years after the promulgation of the original Act on 28

The reality though is that this protection is not available to the existing Ports Authority, which is the TNPA.

The Act is specific to refer to the “National Ports Authority Limited, contemplated in section 4 of the National Ports Act, 2005, and any entity deemed to be the National Ports Authority in terms of section 3 of that Act”, which is not yet in existence. To put it simply, the exempted entity is named in Act 40 of 2002 without any ambiguity. The protection cannot be imputed to another entity, unless of course the TNPA is covered by the latter deeming provision. Either way it must be accepted that this is a shaky legal status to behold. With regards to the views shared above in relation to Transnet Ltd, it is submitted that Act 40 of 2002 does cover Transnet Ltd in its application, because it would fall under sub-section (b) of the definitions: ‘any functionary or institution exercising a power or performing a function in terms of the Constitution.’ Nevertheless, this study is beneficial in that it exposes the State’s own confusion on the status to be accorded to the Ports Authority.

The second application of law which exhibits the confusion on the classification of the Ports Authority is the access to business rescue, as opposed to seeking a bailout from the State. Chapter 6 of the Companies Act provides for business rescue as a means to assist a (any) company to survive as a going concern, by managing creditors. It is not a remedy available to unincorporated companies though. Mpofu and Moolman state:

“The rationale behind excluding unincorporated business entities from business rescue legislation seems to be that they lack legal personality”²¹⁴

November 2002, of the National Ports Authority Limited into the fold of the restricted and limited definition of ‘certain organs of state’ with effect only from 26 November 2006. It is significant that the legislature did not similarly provide for the inclusion of Transnet Ltd or all the other parastatals encountered in South African law. Transnet Ltd could for all purposes be classified as a sister company to the National Ports Authority Limited, both of which are ‘related descendants’ of the old South African Railways and Harbours. The deliberate non-inclusion of Transnet Ltd at that stage supports the interpretation that the exclusion of Transnet Ltd was not an oversight, because then it would have been within the powers of the legislature to remedy the oversight along with the inclusion of Portnet Ltd three years later — but it refrained from doing so.”

²¹⁴ Mpofu K and Moolman H, ‘A Comparative Assessment of the Treatment of Unincorporated Business Entities in Financial Distress In South Africa’ (2023) 35 *SA MERC LJ*, p160.

So, if the TNPA were ever illiquid and insolvent, it would not have the advantage of accessing business rescue proceedings, because it is merely a division of Transnet Ltd, and not incorporated as a company, in terms of the Companies Act.

4.2.3.2 Commercial Status

A concession agreement can be defined as a transaction where a private entity (“concessionaire”) leases assets from the State, on a medium to long term basis, and they contribute to capital projects and other investments, in exchange for keeping the revenue which is generated from the use of the assets and returning the assets to the State upon expiry of the lease.²¹⁵ To government the biggest advantage is that concessions allow government to shift investment costs to the private sector. In South Africa, these transactions are generally known as ‘public-private partnerships.’²¹⁶ The concessionaire and the port authority as the landlord will enter into agreements to govern their relationship. Whatever the terms, it must be emphasized that the characteristics of concessioning is that the concessionaire absorbs the risk of operating the assets in exchange for revenue generated, and secondly the State retains ownership.²¹⁷

It is for this reason that Transnet Ltd has always emphasized the importance of the TNPA to its balance sheet. Of R11 billion revenue generated by the TNPA in 2022, R9 billion of that was from contracts with customers.²¹⁸ Real estate income comprised only just above a billion rand.²¹⁹ This signifies the potential of concessioning to be economically beneficial, as was initially intended by lawmakers. Another reason why Transnet Ltd is so invested into the TNPA is because of capital investment made over the years, which it believes that it must recoup. However, it can be argued that Transnet assumed this role beyond its scope and mandate on its own terms and cannot delay implementing the legislative imperative of separating the Ports Authority from itself. Whether it can recoup the increase in asset value (contemplated in the

²¹⁵ Zulu J, *op cit* fn149 p20.

²¹⁶ *Ibid*, p21.

²¹⁷ *Ibid*.

²¹⁸ Transnet *op cit* fn 218, p56.

²¹⁹ *Ibid*.

asset transfer) that will follow incorporation of a Ports Authority is a separate question, outside the scope of this mini dissertation.

4.2.3.3 Governance Status

The aim of any commercial business is to generate profit. If the TNPA is to be a state business enterprise, it must be vested with the authority to generate profit. The resuscitation of the National Ports Amendment Bill will inevitably resuscitate the debates from the drafting of the Act itself, because these issues remain unresolved. The first issue is that of simple compliance. The legislation has been in place for sufficient time, for it to be either implemented or revised. The non-compliance is inexcusable and should be remedied soonest, because government should expect a comprehensive consultation process as with the passing of the Act. Secondly, within the context of corporate structure, the TNPA's accounting point must be clarified. Is it to or via Transnet Ltd, or directly to the DoT, on equal footing with Transnet Ltd? This potentially eliminates the conflict of interest that was discussed in above, regards Transnet Ltd being the landlord to itself currently.

Thirdly, the transfer of assets from Transnet to the TNPA must occur; it is a matter of compliance with the legislation. Furthermore, it is a matter of capacitating or fully empowering the Port Authority's function to manage the ports. This will capacitate the Port Authority to necessarily budget for the capital assets it reflects off its own balance sheet. It can even be in a position to be self-sustaining by generating sufficient revenue from short and long term leases. Whichever the funding sources, the Port Authority must budget for the maintenance of capital assets.²²⁰ This is a priority matter because delays in turn affect the economy. When funding/budget is not available, there will be delays in the necessary maintenance and repairs.²²¹ The proposed solution is that the Port Authority, as a commercial business enterprise, albeit state-owned, should generate its own revenue, for maintenance and to be self-funded or at least co-funded by its shareholder(s). Only a competent, driven and authorised board of directors may achieve such results, in business terms. It is for this reason that the corporate structure

²²⁰ Isaacs B, *op cit* fn213, p64.

²²¹ *Ibid*, p67.

of a business enterprise is of significance. The corporate structure of the Port Authority has been demonstrated in this discussion to be crucial to the question of which objective(s) it will prioritise at the end of the day. Will it be the social development of communities; port productivity and economic development or sustenance of a larger SOE group holding company?

CHAPTER 5

5. The appropriate corporate structure for the Ports Authority

- 5.1 Synopsis
- 5.2 Current Trends
 - 5.2.1 Port Doctrines
 - 5.2.2 State Capture
 - 5.2.3 SOE's as catalysts for socio-economic development
 - 5.2.4 Privatisation
- 5.3 Critical Analysis
- 5.4 Findings
- 5.5 Conclusion

5.1 Synopsis

The main objectives of this mini dissertation were to determine whether the Ports Authority is in the correct corporate structure as the TNPA, as a division of Transnet Ltd, or whether it is due for restructuring. Chapter 4 defined key concepts for this purpose including a discussion of the various types of entities and company forms the Ports Authority could take up and the government regulation applicable. The linkage between the performance of the entity and the corporate structure it holds was also discussed. This chapter 5 considers the good practices that the Port Authority can mirror, the pitfalls to avoid, and the influential political themes, all as factors that play a role in the determination of an appropriate corporate structure. This will be followed by a critical analysis of the problem statement in relation to the possible options, concluding with findings and recommendations.

5.2 Current Trends

5.2.1 Port doctrines

The port doctrine can be defined as the administration of the port, that is, its form and structure.²²² Port doctrine is important because it influences the pricing policies and the efficiency of ports.²²³ Meyiwa and Chasomeris explain that it is about the political

²²² Meyiwa and Chasomeris M, *op cit* fn 212, p855.

²²³ *Ibid.*

landscape of the time, the reigning policy on ports, trade and economic development including the pressure to compete with the world.

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South Africa does not really abide by a specific doctrine but borrows from the few that exist described below. The European (Continental) doctrine favours government economic development goals, in that the role of the port is not just to generate profits but to contribute to the economy by facilitating trade.²²⁵ With respect to the Asian Port Doctrine, “the central government plays the role of infrastructure constructor, terminal pricing maker and facilitator.”²²⁶ The Anglo-saxon doctrine is that the port must generate profits, therefore the tariffs are set such that returns are yielded from investment made into the construction and development of the ports.²²⁷ According to Gumede and Chasomeris, it appears that:

“South Africa has elements of all three contesting port doctrines. In essence, South Africa’s ports are financed and managed using a mix of elements from the European and Asian doctrines, but appear to be attempting to charge tariffs according to the Anglo-Saxon doctrine.”²²⁸

The above view on port doctrines is expressed in relation to pricing model. In relation to ownership there is no specific port ownership policy. South Africa currently associates with a dual model of ownership policy, catering for situations in which there would be at least two ministries that the SOE would report to.²²⁹ Until recently the dual system was that the TNPA reported to the Department of Transport and to the

²²⁴ *Ibid*; Meyiwa and Chasomeris write: “The pricing of port services is not purely an accounting concept. The import and export tariffs charged, and their justification, may not find reasoning purely in economic terms. The competitiveness and protection of local industry in any developing country is influenced by political decisions beyond just macroeconomic policy and nowhere else is this better demonstrated than in the governance and operations of a country’s maritime ports (Bennathan & Wishart, 1983). Knowing that the pricing of port services, the policies underpinning governance of ports, and the tariffs charged therein are not an exact science, certain political objectives, modes of operation and economic practices throughout the history of sea trade by dominant maritime nations do, nonetheless, point to several characteristics that are common among maritime nations and regions of the world.”

²²⁵ *Ibid*, p856.

²²⁶ *Ibid*, p861.

²²⁷ *Ibid*, p856.

²²⁸ Gumede S and Chasomeris M, *op cit*, fn 209, p 47-62.

²²⁹ Mbhele N, *op cit* fn 6, p29.

Department of Public Enterprises, with Transnet the third hand in the balance. In this regard, Mbhele expresses the view that:

“Although the dual model is practiced in South Africa, its success hinges on a strong governance arrangement between different ministries, without which a lack of capacity to hold the Board accountable may lead to multi-principal agency problems.”²³⁰

Mbhele goes on to advocate for performance management and monitoring as the means to manage risk and improve performance. Mbhele does however acknowledge that multiple reporting frameworks cause SOEs to function in “compliance mode”.²³¹ This is problematic because the focus is then on compliance rather than performance against targets or at the very least towards socio-economic development.

5.2.2 State capture

A breeding ground for state capture is where the system permits shareholders to arbitrarily interfere with the board of directors' authority, and that interference is further based on self-interested motives.²³² This was the case in the capture of Transnet Ltd as documented in the Zondo Commission Report on State Capture. According to the report, “the capturing of Transnet involved the restructuring of governance and weakening of internal controls.”²³³ This was done through controlling the appointment of Board members, senior executives and other decision-makers not for the best interests of the SOE, but for ulterior purposes such as personal financial gain.²³⁴ The report records that at Transnet, funds were sourced by these select and interested parties for various projects including the purchase of locomotives, cranes and IT systems, some of which did not materialize, where pricing was overly inflated and the regulated procurement processes were not complied with in the acquisitions.

²³⁰ *Ibid.*

²³¹ *Ibid.*

²³² Zikhali N, *op cit* fn 186, p9-10.

²³³ Zondo (CJ), *op cit* fn 9, p 18; “State capture at Transnet involved a systematic scheme of securing illicit and corrupt influence or control over the decision-making. Corrupt actors sought to gain control over staff appointments and governance bodies to influence large procurements and capital expenditure by changing procurement mechanisms (such as the use of confinements rather than open tenders), the altering of bid criteria to favour corrupt suppliers, and the payment of inflated costs and advance payments.” At p8 of the Report.

²³⁴ *Ibid*, p456.

In order to manage the risk of state capture, both the entity (therefore the Board) and the shareholders must take governance seriously. One of the recommendations that emanated from the Commission was that:

“Good governance at board level across all SOEs begins with the appointment of individuals who possess the necessary competency, skills and expertise to provide leadership and guidance in attainment of the SOE's objectives.”²³⁵

This form of risk management is the responsibility of both of these stakeholders. Specifically, for SOE's, the correction of state capture is not a matter of legislation, it is also a matter of the proper and beneficial exercise of executive powers and function, adequate oversight and where necessary review and redress. Certainly, in terms of the Constitution, the PFMA and the enabling legislation the checks and balances are in place and merely require administration and political will to ensure that the Ports Authority operates as it should.

5.2.3 SOE's as catalysts for socio-economic development

One of the main reasons why government wants to have ownership control and especially control over infrastructural development is the direct linkage between ports, trade and the country's economy.²³⁶ According to Zulu, when comparing different ports worldwide, on the one end of the spectrum you have governments wholly owning and controlling ports, down to operations. On the other end of the spectrum, you have a semi- or fully privatised ports.²³⁷ This is often according to the reigning national policy, but generally the trend is that ports are adjusting to and adopting privatisation models.²³⁸ There are multiple such models available, and a full discussion thereof is beyond the scope of this mini-dissertation, but is briefly considered in section 5.2.4 below.

The significant budget held by the TNPA signifies the substantial stake in the economy. The main assets at play are the concrete assets of the State, across the 8 ports which can be utilised to generate real estate rental income. The TNPA currently does this,

²³⁵ *Ibid* p457.

²³⁶ Zulu J, *op cit* fn 149, p16.

²³⁷ *Ibid*.

²³⁸ *Ibid*.

but its major lessee is the TPT, which is the TNPA's sister division. It brings into question competitiveness, and signals government's complete about-turn from the privatisation agenda. This leaves advocates for socio-economic development disappointed.

The only reprieve is that when it comes to policy, government has been and continues to be consistent in that SOE's are catalysts for socio-economic development. The expectation remains "that SOEs deliver on broader developmental goals and that they support the transformation and competitiveness of the economy."²³⁹ This is not just in South Africa. Wong writes that "a major challenge for many SOEs is that they are charged with expansive social responsibilities."²⁴⁰ South Africa has its own historical prejudices it is still trying to address, and so it is near impossible to ignore social concerns and needs. Recognising this weakness, it means when reviewing the transport policy, there is a need to be mindful of and specific as to what government's intentions with regards to which classification the Port Authority should fall under, "commercial" or "non-commercial" SOE. In terms of socio-economic development, the possibilities are far greater than creating employment. If the country's ports can improve the experience of trading in South Africa through its ports, that is huge step towards investment and trade growth, which will by default result in employment and other socio-economic benefits.

5.2.4 Privatisation

In their analysis, Gumede and Asmah-Andoh noted that:

"The South African government's White Paper on Privatisation, 2006, notes that privatisation means the systematic transfer of the performance of functions and the provision of public services from the public to the private sector, where the production and consumption of services are regulated by the market and price mechanisms (Parker & Saal, 2003:37). Such arrangements can take many forms, including the use

²³⁹ Kikeri S, *op cit* fn12, p2.

²⁴⁰ Wong S, *op cit* fn 198 p10; For example: "Oil giant Saudi Aramco, for example, has carried out a wide range of activities to support the surrounding communities and the development of the broader economy, from operating schools and running hospitals to constructing a new university on behalf of the Saudi Arabian government. Recently, the government assigned the company a major role in developing the country's non-oil economic sectors."

of consultants and the outright sale of public assets to domestic or foreign investors.”²⁴¹

However, as Wong points out, privatisation is not yet a norm for SOE’s on the African continent even though globally it is a current trend.²⁴² Some of the challenges she notes are the regulatory complexity, poor governance, socio-political risks that are unique to SOE’s.²⁴³ The Organisation for Economic Co-operation and Development (“OECD”) has issued its own report on privatisation in which it echoes these views adding that it depends on a country’s size of economy, which privatisation often motivated by changing market conditions.²⁴⁴

²⁴¹ Gumede N and Asmah-Andoh K, *op cit* fn 188, p267.

²⁴² Wong S, *op cit* fn 198, p3.

²⁴³ *Ibid*; Wong notes: “Notwithstanding the privatization waves in recent decades, governments remain major owners of commercial enterprises in many parts of the world. According to a 2009 survey, 25 OECD2 member countries—encompassing a wide range of developed and emerging markets—held stakes in more than 2,000 state-owned enterprises (SOEs) with a total value of \$1.2 trillion and accounting for 15 percent of aggregate GDP (World Bank Group 2014, 4). In reality, the impact of SOEs is likely to be greater than those statistics suggest, because many operate in infrastructure industries—telecommunications, transportation, financial services, and so forth. This means that their performance, good and poor, will have substantial knock-on effects across the economy. While efforts to strengthen the governance of SOEs have lagged behind progress made in the private sector, governments in developed and emerging countries have sought to catch up in recent years. Getting governance right at SOEs—including those listed on stock exchanges and therefore subject to the same regulations as privately owned firms—is daunting because of the added complexity of their operating model. The unique challenges facing SOEs include, among other things, the need to balance commercial and policy objectives, the risk that political masters will abuse their authority over SOEs for self-interested reasons, and fewer tools available to incentivize and discipline employees.”

²⁴⁴ OECD, ‘Privatization and broadening of ownership of State-Owned Enterprises’ 2018, accessed at https://www.oecd-ilibrary.org/finance-and-investment/privatisation-and-the-broadening-of-ownership-of-state-owned-enterprises_2b94c510-en on 26 October 2024, p50; “Motives for privatisation are similar across countries, but certain tendencies can nevertheless be ascertained. Two of the main dividing factors are; 1) whether the privatising country has a large and sophisticated economy, and 2) whether or not the government has issued a state ownership policy. Where an ownership policy exists, the privatisation of an SOE will typically be justified by the fact that the company no longer falls within the rationale for state ownership established by the policy. In mature economies, the rationales for ownership are mostly limited to the need to remedy market failure and to provide goods and services for which there is no likely private supplier. Privatisation has typically been motivated by changing market conditions where SOEs operate, typically including the entrance of private competitors. An overview of national motives for privatisation is provided in Table 2.1. In emerging economies, the rationales for ownership are sometimes defined more broadly, and may, for instance, include the role of SOEs in national development strategies, the provision of a broader palette of public services, safeguarding national ownership of enterprises and, especially in post-transition economies, an ongoing effort to rebalance the public and private shares of the productive economy. Countries also differ with respect to the “rigour” they apply when assessing what to do with an SOE no longer fully complying with the stated rationale for ownership. Many governments would tend to see such companies as merely “candidates” for privatisation. At the other extreme, a country such as Germany conducts a two-yearly review of its portfolio of SOEs during which it must be justified why each company should remain in state ownership, failing which it will be privatised.”

In South Africa, as noted by Gumede and Asmah-Andoh, privatisation has been on the policy agenda but lacked clear implementation targets and review cycles. They state that the objective of privatisation was even included in the NDP as a means to combat the unending bailouts to SOE's, based on the premise that privately owned companies performed better.²⁴⁵

According to the OECD there are various other factors that influence the selection of a privatisation method, including the size of the SOE and the maturity of the country's economy.²⁴⁶ Thus, it may actually be South Africa's developmental state, the past imbalances and sheer size of the SOE may be militating against rapid privatisation.

The private sector operates as a free market. Competition is high. Trade is fast paced. Risks are shared. Returns, are correspondingly high. Economic activity is high and has the potential to translate into economic development and growth. In these high stakes described above, the key role-players are investors, in particular:

"Institutional investors are ...specialised financial institutions that manage savings collectively on behalf of small investors toward a specific objective in terms of an acceptable risk, return, maximisation, and maturity of claims. Common examples of institutional investors include but are not limited to bank trusts, insurance companies, investment companies, pension funds, sovereign wealth funds, private equity funds, hedge funds, commercial trusts, and mutual funds, among others."²⁴⁷

It has been suggested that institutional investors have an important role to play in the governance of corporations.²⁴⁸ In the case of state-owned companies, Zikhali

²⁴⁵ Gumede N and Asmah-Andoh K, *op cit* fn 188, p267; "The thrust of the NDP, too, included the privatisation of SOEs and the reduction of government spending on the argument that public ownership generates inefficiencies because it encourages governments to bail out or subsidise inefficiently managed SOEs (National Treasury, 2012). Privatisation involves the transfer of ownership rights of SOEs to private shareholdings and is based on the argument that privately owned companies perform better financially than SOEs. The adoption and implementation of the policy was, therefore, a strategy intended as a remedy for poor economic performance and to reduce a "waste" of government funding and improve financial discipline required for efficient management.

²⁴⁶ OECD, *op cit* fn 256, p47; "Privatisation methods have varied according to the size of the SOEs privatised and the relative maturity of the economy in which the privatisation took place. The post-transition economies, as well as Mexico, have mostly sold off rather small SOEs through trade-sale auctions to strategic private investors. Most other countries have relied on share offerings to privatise large companies and trade sales to privatise smaller firms. Privatisation through management buy-outs has become rare, but still occurs. A more unusual case is found in the Czech Republic where companies have been thrown off the State's balance sheet by transferring them to municipalities"

²⁴⁷ Zikhali N, *op cit* fn 186, p6-7.

²⁴⁸ *Ibid.*

proposes that they have the potential to keep the State accountable and improve the governance and administration of SOCs.²⁴⁹ The stakes are higher, including the State's own Government Employee Pension Fund, not to mention the values involved. Institutional investors are additionally subject to financial services legislation, with strict compliance requirements.

Regardless of the type of investor, all investors pursue returns. Therefore, for privatisation to be achieved, a key element will be private investment. Wong highlights other key imperatives for successful privatisation as incorporation of the SOE, a central reporting points, clear ownership objectives and rights as well division of roles.²⁵⁰

The key role of corporate structure is to strengthen the governance of SOEs, and this may be pursued through incorporation.²⁵¹:

"Incorporation signals to politicians, civil servants, and the general public that an SOE is a commercial entity that is formally separate from government and subject to the legal constitutional requirements of private sector peers, including in how authority is distributed among shareholders, the board of directors, and management."²⁵²

Ideally, the SOE operates at arm's length from government, and the SOE's board of directors must exercise their responsibility of oversight of the company management and company business affairs.²⁵³ Importantly, referring to Norway and others, Wong states that incorporation of a limited liability company signals that the State relinquishes its right to directly influence the enterprise's day-to-day operations.²⁵⁴ Moreover, meaningful SOE reform requires an "independent and professional board."²⁵⁵

²⁴⁹ *Ibid.*

²⁵⁰ Wong S, *op cit* fn 198, p5.

²⁵¹ *Ibid.*

²⁵² *Ibid.*

²⁵³ *Ibid.*

²⁵⁴ *Ibid.*

²⁵⁵ Wong S, *op cit* fn 171; Wong elaborates that an independent and competent board needs the following:

"Efforts to strengthen boards have encompassed the following:

- Explicit commitment by the government to respect the board's authority,
- Empowering the board to make executive appointments,
- Increasing independent directors' presence on the board and professionalizing the nomination process. The OECD calls on governments to grant SOEs "full operational autonomy to achieve their

In closing it is imperative for South Africa to have a clear policy on the ownership and governance of the SOE because this is the core of decision-making especially on fiscal matters.

“In countries without an ownership policy, the decision to privatise can sometimes be more ad-hoc or opportunistic. Fiscal concerns are often cited, whether to raise revenues from the privatisation itself, or to stop fiscal haemorrhaging from certain loss-making SOEs. Also, the need to improve functioning of the privatised company itself, including its access to capital, sometimes plays a role. And, especially in post-transition economies, the need to improve the functioning of the private economy through a transfer of corporate assets is sometimes cited.”²⁵⁶

These imperatives highlight the need first to focus on a clear policy and then address the amendment or development of legislation.

Moving forward two port reform options are available to South Africa:

“Modernisation of port administration: This enables the alteration of the organisation without changing national policy. It entails the introduction of suitable systems, working practices or equipment to port administration to improve port performance.

Liberalisation or deregulation of port services: This enables the participation of private companies by removing government rules and regulations that previously allowed public sector to operate.”²⁵⁷

According to Wong:

“it is possible for a supervisory agency to “exercise both regulatory and ownership responsibilities, even when an SOE operates in a sector with private sector competitors.”²⁵⁸

defined objectives” and to allow their boards to carry out their delegated responsibilities and to respect their independence (OECD 2015a, 20).

Under the OECD Guidelines for SOEs, key board responsibilities include the following:

- Assuming ultimate responsibility for the enterprise’s performance,
- Providing strategic guidance within the framework of the overall corporate objectives,
- Establishing appropriate performance indicators and identifying key risks,
- Developing and overseeing effective risk management,
- Monitoring disclosure and communication processes,
- Assessing and monitoring management performance,
- Deciding on chief executive officer remuneration,
- Appointing and, where necessary, removing the chief executive officer and developing effective succession plans for key executives.”

²⁵⁶ OECD, *op cit* fn 256, p16.

²⁵⁷ Zulu J, *op cit* fn 149, p18.

²⁵⁸ Wong S, *op cit* fn 198, p3; In the banking sector, for example, the central bank may be the majority shareholder of a lending institution as well as its regulatory supervisor.

The possibilities are there, but in South Africa entities such as the SABC and Eskom have shown that monopolies need to be effectively regulated, in order to protect consumers and balance the interests of investors.²⁵⁹ It is submitted that whilst government still grapples with the status and authority of the Port Authority, the CPPI ratings and overall outlook for the competitiveness of the ports, are worsening.

5.3. Critical Analysis

The 2002 Commercial Ports Policy was clear that:

“The key guiding principles underlying the new port dispensation are:

5. The current National Ports Authority within Transnet will be positioned outside Transnet in accordance with the restructuring programme of Transnet, as approved by the Minister of Public Enterprises;
6. The National Ports Authority post Transnet end-state will then be established as a new State-owned corporate entity;
7. The ‘National Ports Authority’ will be the landlord of the South African ports and will own all the land and the port infrastructures within the port estates;
8. Greater private sector involvement in operations will be sought through leases and concessions;
9. The allocation of leases or concessions will be open to competitive bidding; and
10. The bidding process will be transparent and based on a set of clearly stated objectives/targets, criteria and measurable deliverables.”²⁶⁰

The lack of clarity on what should be done by government in order to stabilise the Ports Authority and enable it to function as originally intended stems from the lack of understanding of existing policy and legislation, together with no implementation thereof. The behaviour in SOE’s tends to replicate, across the globe. However, there are countries that are able to overcome the challenges. Wong writes that “In countries such as Finland, New Zealand, Norway, and Sweden, the government will periodically review and disclose its rationale for the continuing ownership of SOEs and any changes in its ownership policy.”²⁶¹ She adds that “In Finland, government even categorises the SOEs into their purposes i.e. those for “strategic interest, financial interest, and state companies with a special assignment.”²⁶²

²⁵⁹ Mbhele N, *op cit* fn 6, p169.

²⁶⁰ The White Paper *supra* fn 27, p11.

²⁶¹ Wong S, *op cit* fn 198, p7.

²⁶² *Ibid.*

South Africa is just as capacitated as the above-mentioned countries. The PRC Report, available for use since 2013 has not been implemented and the challenges evidently are continuing. The report acknowledges that the South African government must provide clear policy directives and mandates to SOE's. The report classifies SOE's in terms of purpose and characteristics. There must be coordination where there is overlap. In the case of the TNPA, the SOE Policy by the Department of Enterprises certainly did not override or set aside the Commercial Ports Policy of 2002. Neither policy has been implemented fully to date. Nor has the legislation been implemented, specifically the provisions of the National Ports Authority. For the reigning government to introduce legislation that exacerbates the challenge of having to register the Ports Authority as a public company may not be a solution.

It is clear that government wants the Ports Authority to operate as a commercial enterprise. Also, government still desires that it wholly own this enterprise, including ownership and control over the rights the entity has. This is a clear position from the PRC report. A commitment to involving the private sector through concessions has not been revoked. The process need only be facilitated or completed. The legislation must align with the policy of the day. The policy may need to be amended, to ensure alignment with the policy on SOE's and findings together with recommendations of the PRC. Too often complex, voluminous and costly research and reports are produced by government, but in the end are not utilised. Various factors including change of political climate/leadership, influence this. However, South Africa cannot afford to remain unclear on its stance to commercial ports any longer given their vital role in the economy.

5.4 Findings

Firstly, to clear the confusion of what the appropriate structure for the Ports Authority is, one must accede to the legislation. The **rules of interpretation direct that legislation,** upon promulgation trumps policy.²⁶³ In terms of the legislation, the starting point is that the Ports Authority is already a State-owned entity. This is by reference to the definition

²⁶³ Section 39 of the Constitution directs that a purpose interpretation must be given to statutes i.e.. give effect to the spirit, purport and objects of the legislation.

of a state-owned entity as set out in the PFMA, mentioned above. It certainly meets the characteristics contained in the definitions in the PFMA. An SOE must be a juristic person under the ownership control of the national executive that is assigned financial and operational authority to carry on a business activity, and this business is done in accordance with ordinary business principles and is financed fully or substantially from the public purse. Alternatively, the entity must be established in terms of national legislation, be funded by the public purse and accountable to Parliament. The Port Authority is established in terms of founding legislation, the National Ports Act and receives equitable share funding from government, albeit through Transnet Ltd currently. The current TNPA is a division within Transnet Ltd, therefore it is not a juristic person. This means that it aligns more with the definition in section 1 of the PFMA, of a 'national public entity,' and not of 'national government business enterprise' which requires the entity to be a juristic person. Once the Ports Authority is incorporated, whether into a state-owned company or a private company, it may fulfil the requirements to be a national government business enterprise, because then only will it be a juristic person.

In terms of section 8(2)(b) of the Companies Act, a private company is a company that is not a state-owned company; and its Memorandum of Incorporation “prohibits it from offering any of its securities to the public; and restricts the transferability of its securities.” Its name bears the expression “Proprietary Limited” or its abbreviation, “(Pty) Ltd.” This is an obvious clash within the NPA. The TNPA cannot be a (Pty) Ltd and have the state as the sole shareholder, because in terms the above-quoted definition in the Companies Act, a private company is one that is not “wholly” state owned.²⁶⁴ Therefore, ownership will have to be part private, part State, the latter being the majority. In this way, government may enjoy the benefit of the flexibility of the corporate whilst the private investor also enjoys maximum risk returns.

For the Port Authority to be a state-owned company', it will have to be registered in terms of the Companies Act and listed as a public entity in Schedule 2 or 3 of the PFMA. The requirements for registration according to the CIPC are as follows:

²⁶⁴ Section 11(3)(c)(ii).

“State-owned companies may only be incorporated on a CoR15.1 B. State-owned companies must at all times have at least 3x director (unless Mol indicated a higher minimum number of directors). 3x audit committee members (unless MOI indicates a higher number of audit committee members), 1x juristic or natural company secretary that must be resident in the Republic and 1 juristic or natural auditor.”²⁶⁵

The long form Memorandum of Incorporation must be submitted together with supporting documents. Secondly a General Notice must be promulgated amending the schedules to PFMA for the Port Authority appear thereon. Currently, only the Ports Regulator appears in Schedule 3, and Transnet Ltd in Schedule 2. This will rectify the issue of status, if the appropriate structure for the Port Authority is to be a state-owned entity.

On the other hand, for the Port Authority to be registered a public company (as contemplated in the conversion provision, section 4 of the National Ports Authority, the requirements are identical to those to register a state-owned company. This is said in light of the current provisions of the National Ports Act, specifically section 4 which provides for the Port Authority to convert to a public company as follows:

“4(1) Notwithstanding sections 32, 66, 190 and 344 (d) of the Companies Act, on a date after the incorporation of National Ports Authority (Pty) Ltd, and with the concurrence of the Minister, the Shareholding Minister may take the necessary steps to convert the company into a public company, styled 'National Ports Authority Limited', vested with the authority to own, manage, control and administer ports within the Republic.

(2) Where National Ports Authority (Pty) Ltd is converted as contemplated in subsection (1), the State's rights as a shareholder of the Authority are to be exercised by the Shareholding Minister and, where required by this Act, with the concurrence of the Minister.”

Sadly, the sections referred to in section 4(a) above, sections 32(Formation of a company), 66 (liability of members when shareholding is under quota), 190 (requirements for special resolutions) and 344 (circumstances for winding up), are all

²⁶⁵ CIPC *Guidance Note 2 of 2011 Registration of Companies* R.648 of GG 35618 of 3 May 2011 p7.

from the repealed Companies Act 61 of 1973. In terms of this repealed Companies Act, a public company was one that was not a private company, had share capital, had at least 7 shareholders, or 2 if the company was a wholly owned subsidiary and the memorandum of articles stated that it was a public company.²⁶⁶ This is problematic. It could be that at the time the drafters were influenced by the privatisation narrative as could be seen in the discussion of policy provisions above. The possible scenario envisioned by the drafters may have been that Transnet Ltd would be the majority shareholder where the TNPA is its subsidiary, and the other shareholder would be a private company. One can only speculate on this.

In terms of the recent draft Amendment Bill to the National Ports Act, the intention is to substitute the existing section 1, with the requirement that CIPC must register the memorandum and articles of association and incorporate the Ports Authority of South Africa (Pty) Ltd with the Department of Transport (and not Transnet Ltd) as the sole member and shareholder. The Bill intends to repeal section 4 of the National Ports Act. Clearly, the incorporation of the Ports Authority as a public company is no longer on the agenda. The intention is to register a private company. This means that as a juristic person it will also be under the ownership control of the executive, the Department of Transport. This will qualify it as a 'national government business enterprise,' due to be listed under schedule 3 of the PFMA.

For clarity, ownership control does not rule out private shareholding. In relation to an entity, it means the ability to exercise any of the following powers to govern the financial and operating policies of the entity in order to obtain benefits from its activities; the power to appoint or remove the majority of the Board and Chief Executive Officer, as well as the majority voting power.²⁶⁷ The germane key word is "majority". The name has already been reserved, though the reservation may have expired at this stage. The main aspect is the finalisation of the memorandum of incorporation which is effectively the company's constitution. This opportunity can be utilised to rationalise the compliance requirements of the new 'PASA', the Ports Authority of South Africa (Pty) Ltd. Any misgivings about who will have oversight over this private company, are

²⁶⁶ Section 1.

²⁶⁷ Section 1 PFMA.

addressed by the existence of primarily the Regulator, and all-over regulatory bodies such as the Department of Transport and in turn Parliament, Treasury, and Auditor General. The conflict of interest with Transnet Ltd as a user and lessee will have been eliminated.

5.5 Conclusion

Mutamba states:

“Policy reviews have the potential to streamline the way SOCs are structured, operated, governed, and managed, engendering efficiency and productivity improvements to ensure sustainable operations.”

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Government should not be diving headfirst into legislative drafting but clarifying its intentions and mandate for SOE's. The last policy review which culminated only in the PRC report as a baseline established:

“that the government intends to keep SOCs under its ownership and, therefore, best possible approach to address poor performance is through business turnaround initiatives.”²⁶⁹

Since government intends to retain control of SOEs, it must be decisive as the shareholder in dealing with subpar performance, including that of the executive. The incorporation of the Port Authority has reflected as a key performance outcome in many plans and compacts of both the DoT and the DPE over the years but not materialised. This is another signal that multiple reporting points are problematic and must be rationalised.

It is common cause that there is an urgent need to amend the National Ports Act. The fact that it still refers to the repealed Companies Act, more than a decade after the implementation of the new Companies Act in May 2011 is a travesty. The first step towards recovery is to implement the PRC report, *mutatis mutandis* of course. In respect of corporate structure, the core from the recommendations is summed up as follows:

“Following the identification of the need to reform the regulatory landscape of SOE's in the PRC Review, the formation of a special task team to focus on the following:

²⁶⁸ Mutamba J, *op cit* fn152,p282.

²⁶⁹ *Ibid*.

Suggested key components of the action plan are as follows: Priority reforms and/or clarifications to existing policies, for example:

- Defining the State's ownership role: e.g. separation of functions; identification of key ownership functions; review of roles and responsibilities of different parties; steps to enhance coordination;
- Elaborate on ownership arrangements...
- Developing a framework to enabling SOEs to operate commercially: e.g. identification of non-commercial obligations; costing and financing of such functions; evaluation and disclosure of such functions;
- Identifying necessary changes to the legal framework: e.g.: development of state ownership framework; ... improvements to Companies Code; possible corporate governance code;
- Charting approach and reform mechanisms: e.g. distinguish between updates and amendments to existing laws and elimination or complete replacement of legal documents. Allowing appropriate action to be taken for unviable companies e.g. exit the market/liquidation."²⁷⁰

This blueprint by Kikeri is clear and beneficial as a roadmap for addressing the ongoing controversy related to the Port Authority's corporate structure.

²⁷⁰ Kikeri S, *op cit* fn12, p15.

CHAPTER 6

6. Conclusion

- 6.1 Summary
- 6.2 Desired Impact
- 6.3 Recommendations
- 6.4 Closing remarks

6.1 Summary

Ports provide marine and cargo-working infrastructure facilities to port users who fall into two broad sets of economic actors – “vessel owners whose assets utilise the former infrastructure and cargo-owners whose goods pass through the latter infrastructure with the use of cargo distribution as well as cargo- handling services”²⁷¹

Ports are the main link in a country’s logistic supply chain, they are the infrastructure and facilities in order to enable trade.²⁷² The port network extends to road and rail for transporting goods to and from the hinterland.²⁷³ It is common cause that ports must function well in order for basic goods and services to trade, but optimally in order for there to be a competitive edge. As mentioned in chapter 2, under the discussion of the performance of the current Ports Authority, ports do also compete for business, and currently South African ports are at the rear end of rankings, with trade already diverting to competitor ports in the region.

Chapter 2 also focused on the establishment and the performance of the Ports Authority in its current structure. The analysis in that chapter drew from the policy documents and changes thereto which influenced the legislation and the administration of the Port Authority. The conclusion from that chapter was that in addition to managing the ports, the Ports Authority should also own all the ports infrastructure, but these are currently owned by Transnet Ltd. Another conclusion was

²⁷¹Zulu J, *op cit* fn 149, p11.

²⁷² Isaacs B, *op cit* fn213, p3.

²⁷³ *Ibid*; Zulu J, *op cit* fn 149, p11.

that backlogs and delays at the ports are detrimental to the country's economy because of the economic loss and poor investor outlook.

Chapter 3 looked at how the Ports Authority was to be established and operated. According to the National Ports Act, the legislature intended for the Port Authority to be a private company, where Transnet Ltd, instead of the Minister of a particular government department would be the sole shareholder. This has not occurred to date, notwithstanding several announcements and attempts by government. The TNPA, the current Port Authority remains a division, not even a subsidiary, within Transnet Ltd. In 2023, a Bill was introduced, that still provides for the Ports Authority to be incorporated as a private company but for the Department of Transport to be the shareholder. Evidently there is confusion or lack of consensus on what corporate structure is appropriate for the Port Authority.

Chapter 4 unpacked the relevant business structures proposed for the Port Authority over the years and looked at the implications of the various options. The chapter reviewed the existing academic commentary on state-owned companies, generally, and specifically the governance of ports. Factors influencing government policy and practices as well as the current trends were considered. A critical analysis was utilised to identify and recommend the appropriate corporate governance structure for South Africa's Port Authority. It also considered what government needs to do to fulfil the task it set for itself over twenty years ago, which is to secure the independence of the Ports Authority, in order for it to function at its optimal.

In essence, this mini dissertation focused on the appropriate corporate structure of the Ports Authority and the impact of that structure on the performance of the Authority. The recommendations that are derived from this exercise are specific to what is the appropriate structure drawing from policy, legislation and best practices according to the literature. The advantages and disadvantages of the various options that are available were considered, including a focus on state ownership. However, the scope of this mini dissertation did not extend to other reasons that affect the performance of the Port Authority and other challenges it may be facing.

The Ports Authority is the administration that runs the whole port system. From the findings in Chapter 4 and 5 above, these are the conclusions that can be drawn:

1. The corporate structure is a major influential factor to the current poor state of operations and performance at South Africa's ports;
2. One of the major causes of this, is that the Ports Authority lacks the capacity to fulfil the functions of a Ports Authority, in that it does not own the property it is managing and is due to manage;
3. The conflict of interest between it and Transnet Ltd should not be ignored as it is a symptom of poor corporate governance;
4. The correction of this state of affairs is long overdue because as mentioned above, the strategic importance of ports cannot be downplayed.

6.2 Desired Impact

The existing Transport Policy is due for review, and the incoming administration is ripe for the task. Mutamba advises that “policy reviews have the potential to streamline the way SOCs are structured, operated, governed, and managed, engendering efficiency and productivity improvements to ensure sustainable operations.”²⁷⁴ Just like the PRC Report, research lies dormant alongside comments on draft legislation. These investments of time and expertise must be filtered, debated and where germane utilised. The common goal of government, stakeholders, academics, port users and beneficiaries, is that the South African economy must thrive. This will only be achieved if clear common deliverables are documented, with clear roles, and clear reporting lines for the role-players. There is no logical reason why the incorporation of the Ports Authority has been a target for both the Department of Transport and Dept of Public Enterprises for many years, and it has not been achieved so far. Both departments had the necessary resources to fulfil the task of registering the Ports Authority as private company, which despite being a legislated requirement, is to date not completed. This is despite an appropriate oversight mechanism (Parliament) being in place to monitor this. Reports were submitted to parliament on this performance failure, yet the remedial action is an amendment bill. The bill effectively provides for

²⁷⁴ Mutamba J, *op cit* fn152, p282.

the registration of the Port Authority as a private company, but under a different name. The port authority (Pty) Ltd will no longer be converted into a public company. The desired impact is that aside from the corrective action necessary to improve intergovernmental relations, government must always focus on the basics, as that is the key to compliance. The incorporation of the Ports Authority as per policy and legislation need not be a mammoth task.

6.3 Recommendations

The PRC identified the need to review and amend the regulatory framework (policy, legislation, protocols and the relationship with each) in order to clarify government's intentions with regards to SOE's.²⁷⁵ Privatisation may still be on the agenda. From the discussion of the characteristics of a private company in Chapter 4, the main challenge for the TNPA to be a (Pty) Ltd was that in terms the definition in the Companies Act, a private company is one that is not "wholly" state owned. The way forward, as mentioned above, is that registering the Ports Authority as a private company allows for part private ownership, so long as the majority ownership control lies with the State, as espoused in the findings discussed in the findings in Chapter 5.

There are also various models of structuring privatisation such as public private partnerships ("PPP's"). This avenue that Transnet is already pursuing is regulated by the PFMA, specifically Treasury Regulation 16.²⁷⁶ Their biggest advantage is that PPPs allow for flexibility in terms of investment into capital projects whilst ensuring returns for the investor. An amendment to the Regulations took effect on 1 June 2025 to further relax the regulation of PPP's so as to encourage uptake.²⁷⁷ The detailed discussion on PPP's is beyond the scope of this mini dissertation, save to state that this would be useful considering the port authority's port maintenance obligations and expansion goals.

²⁷⁵ Kikeri S, *op cit* fn12, p15.

²⁷⁶ National Treasury Public Private Partnerships Practice Note Number 02 of 2004.

²⁷⁷ Amendments to PFMA Treasury Regulation 16 in Gazette Notice 5841 of 7 February 2025; National Treasury, 'Media Statement: National Treasury Regulation 16 (NTR 16) Amended', available at https://www.treasury.gov.za/comm_media/press/2025/2025021301%20Media%20Statement%20-%20National%20Treasury%20Regulation%2016%20Amended.pdf, accessed on 18 June 2025.

6.4 Concluding remarks

There is the need to amend the National Ports Act which must be treated with the urgency it deserves. The fact that it still refers to the repealed Companies Act, more than a decade after the implementation of the new Companies Act in May 2011 is a travesty. However, this process should not precede a policy review. A revised policy on ports and the Port Authority as a unique and specific SOE must be put in place first. Then later, once legislation is rationalised and updated, at the point of implementation and actual performance of goals and mandate, there is a need for effective oversight. Evidently from the state capture report it is possible for connected and influential politicians to undermine statutory restrictions and other safeguards put in place to protect SOEs and their mandate. It cannot be overstated that the highest level of government must demonstrate a clear and unwavering commitment to preventing such political intrusion. Furthermore, the formal governance mechanisms must operate efficiently.²⁷⁸ A private company that is not profitable, does not exhibit good corporate governance and which compromises the country's socio-economic development goals, is an eyesore. What South Africa needs as a bare minimum in its pursuit for economic competitiveness and the fruits thereof, is good corporate governance i.e. competent appointments according within the appropriate corporate structure coupled with a commitment to both regulatory compliance and competitive performance.

In summary the recommendations made in this mini dissertation towards correction of the Port Authority's corporate structure, focus on the implementation of existing government policy, alternatively policy revision, especially since a new national government is in place since May 2024.

1. The PRC's Report, as a ready-made and comprehensive resource must be utilised to define *inter alia*, the ownership policy over the Ports Authority. The desires of the current policy in place (The 2002 Commercial Ports Policy) are that the shareholder role is performed by the Department of Public

²⁷⁸ Wong S, *op cit* fn 198, p17.

Enterprises. There must be alignment, since the new desire according to the amendment Bill is for the Department of Transport to be the sole shareholder. The port Authority's mandate must similarly be clearly defined. Whether and if so, how the Authority will be affected by the State Enterprises Bill must be clarified;

2. Government's intention must be crystallised into meaningful legislative changes. To regain the trust of traders and investors and so restore the former glory of South African ports, government must create certainty, especially in terms of the Port Authority's identity and authority;
3. Once its identity crisis is resolved, and therefore its confidence, the Port Authority should exercise its authority to regulate the ports in an efficient, profit-generating manner. This will necessarily involve the implementation of appropriate pricing methods and equitable regulation of and enforcement on all users/lessees, to improve service standards and raise self-funding for development.

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Ms Nomfundo Gugulethu Hlophe (216074658)
School Of Law
Howard College

Dear Ms Nomfundo Gugulethu Hlophe,

Original application number: 00027264

Project title: Is the Transnet National Ports Authority due for corporate restructuring? A study of the imperatives for the Authority's corporate structure and functions.

Exemption from Ethics Review

In response to your application received on 2 August 2024, your school has indicated that the protocol has been granted **EXEMPTION FROM ETHICS REVIEW**.

Any alteration/s to the exempted research protocol, e.g., Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through an amendment/modification prior to its implementation. The original exemption number must be cited.

For any changes that could result in potential risk, an ethics application including the proposed amendments must be submitted to the relevant UKZN Research Ethics Committee. The original exemption number must be cited.

In case you have further queries, please quote the above reference number.

PLEASE NOTE:

Research data should be securely stored in the discipline/department for a period of 5 years.

I take this opportunity of wishing you everything of the best with your study.

Yours sincerely,

[Redacted signature]

Mr Matthew Blain Kimble
pp Academic Leader Research
School Of Law

UKZN Research Ethics Office
Westville Campus, Govan Mbeki Building
Postal Address: Private Bag X54001, Durban 4000
Website: <http://research.ukzn.ac.za/Research-Ethics/>

Founding Campuses:  Edgewood  Howard College  Medical School  Pietermaritzburg  Westville

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