

Streamlining the state-owned entities landscape within the overarching legislative framework

Summary

State-owned entities (SOEs) in South Africa operate within a framework of multiple pieces of legislation which are at times in conflict with the broad strategic thrust of the state. The current SOE landscape ranges from fragmented frameworks to an array of parent entities, subsidiaries and sub-subsidiaries. The Companies Act 71 of 2008, Public Finance Management Act 29 of 1999 (PFMA) and Municipal Finance Management Act 56 of 2003 (MFMA), amongst others, regulate these entities together with other regulations that have sector-specific requirements. South Africa has made strides in reforming the SOE landscape but to date the environment is still beset with challenges, especially in governance, oversight, job creation and skills development. Despite attempts to harmonise the SOE landscape, it is unclear how many SOEs exist in South Africa (PFMA, Schedule 1, 2, 3A–C).

Because the number of SOEs is not known, it is difficult to monitor and measure their success and impact in fulfilling the developmental aspirations of the state. A legal and policy

framework is essential for ensuring that SOEs are effective and focused on the broad strategic developmental imperatives of the state as reflected in the National Development Plan: A Vision for 2030 (Vision 2030). In this policy brief, I outline the major challenges that arise in the current SOE landscape. Against these challenges, I argue for the development of an overarching legislative framework which will bring SOEs in alignment with and in service of the country's national priorities.

Introduction

On 12 May 2010, then State President Jacob Zuma announced the appointment of the Presidential State-Owned Entities Review Committee (PRC) to review the role of SOEs (Chabane 2010). While it was acknowledged that the entities were the drivers of the formal sector of the economy – provided the platforms for much of the country's economic growth – and were responsible for the delivery of many of the social goods and services necessary for ensuring quality of life for all, it was clear that the legislative and policy framework underpinning the functioning of the SOEs was fragmented.

This fragmentation constrained the entities in their efforts to respond as effectively as possible to the socioeconomic development mandate of the state.

The Constitution of the Republic of South Africa 1996 enshrines the right to equality of all South Africans and makes provision for the state to take specific measures to redress historical imbalances. A range of Acts and prescribed policies were introduced to address this constitutional imperative (Bronstein & Olivier 2011). The Constitution is aimed at dismantling the machinery of apartheid and transforming society in all areas, including education, the arts, health care and the justice system. Key values and principles found in the Constitution gave rise to affirmative action, black economic empowerment, gender equity and environmental policies. These principles and values have an inherent influence on legislation and policies that impact SOEs.

The PRC's report was concluded in 2012. Five years later, however, the SOE landscape has not improved. Why? This policy brief gives an account of critical legislative and policy challenges confronting SOEs. Unless the legislative framework for SOEs is revisited, the situation will remain the same – if not worsen. The conclusion drawn and recommendations made need urgent attention.

Current SOE legislative framework

The South African legislative and policy framework under which SOEs operate is fragmented and often contradictory; therefore, it does not facilitate the execution of the fiduciary duties of these entities satisfactorily. Arguably, the current legislative and policy framework constrains many SOEs from performing their developmental,

strategic and socioeconomic functions. For example: When one considers the current scenario, one finds SOEs operating under different legislation. When it comes to the appointment of CEOs, directors and/or executive managers, all these Acts (e.g. the PFMA and Companies Act) have different provisions. Because of the confusion created by the relevant provisions, service delivery is compromised. For example, the Companies Act stipulates that shareholders appoint the board and the board subsequently appoints the CEO; however, this is a problem for SOEs because the Cabinet approves a CEO's appointment, thus rendering the board powerless in this regard (Kanyane & Sausi 2015: 33).

National SOEs such as Eskom, the South African Broadcasting Corporation, Denel, the National Home Builders Registration Council and the South African Bureau of Standards operate under the PFMA. This also applies to provincial SOEs, including the Gauteng Tourism Authority, Free State Development Corporation, Richards Bay Industrial Development Zone, and Mpumalanga Tourism and Parks Agency. In contrast, municipal entities such as Johannesburg City Parks, the Mandela Bay Development Agency and the Rustenburg Water Services Trust are subject to the provisions of both the MFMA and the Companies Act.

These SOEs are also subject to a plethora of legislative frameworks stemming from the PFMA Treasury Regulation 16, which provides for national and provincial government institutions to enter into public-private partnership agreements. Studies carried out by the Department of Public Enterprises point out incongruence between the PFMA and Companies Act. It is important to note that the Companies Act, PFMA and MFMA were a stopgap not originally meant as a means to grapple with

the specific issues confronting public entities on a day-to-day basis.

Underlying inconsistencies

The Department of Public Enterprises (Kanyane & Sausi 2015: 34) is the government shareholder representative that has oversight responsibility for some Schedule 2 SOEs such as Transnet Limited, South African Airways (SAA), Eskom, the Pebble Bed Modular Reactor, Denel, Alexkor Limited, the South African Forestry Company Limited and Ariviakom (Pty) Ltd. Others fall under their lead ministries, for example Airports Company South Africa falls under the Ministry of Transport, the Central Energy Fund falls under the Department of Energy and the Armaments Corporation of South Africa falls under the Ministry of Defence.

Overall, this multiplication of line accountabilities unnecessarily complicates sector policy development, co-ordinated implementation and the achievement of desired outputs. These complexities make it difficult to share resources and to develop synergies. In addition, there is currently no clear or apparent methodology as to how SOEs are placed within their lead ministries. For example, Airports Company South Africa resides under the Department of Transport and SAA under the Department of Public Enterprise. This begs the question whether SAA is a commercial or transport outfit or both.

Revisiting the legislative framework

As South Africa's economic strategy and policy development has changed since 1994, the framework under which SOEs operate must be revisited. Given that the Department of Public Enterprises was set up before 1994 by the De Klerk government in preparation for the privatisation of state-owned assets before the advent of democracy, it could

be argued that it is built on an outdated privatisation model. The SOE landscape must be holistically aligned in support of the Industrial Policy Action Plan 2010 as well as Vision 2030.

Although there is agreement that the system needs to be streamlined, there are contesting arguments about the governance of SOEs. The Department of Public Enterprises, for example, made public pronouncements about creating a “super ministry” for SOEs (SOEs Policy Dialogue Report 2012: 10). Another view argues for the adoption of a sector-based arrangement for SOEs. These contrasting views have not been scientifically tested in the public domain and the issue is yet to be explored and resolved in a manner that properly balances all stakeholders’ interests.

The inherent contradictions in the legal framework for SOEs have also brought about abuses of the subsidiarity principle. According to this principle, subsidiaries are established to perform only tasks that cannot be performed effectively by their parent entities. In many instances, subsidiaries of SOEs are not transparent and their financial records are not integrated into the financial reports of their parent entities, making it difficult to audit and monitor the vast number of subsidiary companies established by SOEs. Some subsidiaries, including those listed in Schedule 3 of the PFMA in the respective provinces, abuse the subsidiarity principle by creating entities which fall more properly under the remit of other institutions. These extensions are clearly an abuse of the subsidiarity principle, since they are taking advantage of the fact that they have less stringent reporting requirements. Further confusion arises when the parent entity is non-commercial but all its subsidiaries are commercial outfits with fiduciary duties. In short, the current subsidiarity

arrangement creates a haven for corruption to thrive in SOEs.

Conclusion and recommendations

The review of the legislative and policy framework for SOEs in South Africa demonstrated that SOEs are subjected to a multiplicity of policy and legislative mechanisms which, at some point, are not only inconsistent but also onerous. The current legislative framework is fraught with difficulties and challenges that hinder SOEs from functioning optimally. There is a need for a complete overhaul of the SOE sector. The streamlining and rationalisation of the legislative framework should be considered a matter of importance. In this process, legislative and policy efficiency should guide the streamlining and rationalisation process. The ultimate aim is to devise and implement a single and coherent overarching legislative framework that provides for a sector-based classification of SOEs with zero overlaps and duplications. The focus should facilitate the ability of SOEs optimally to fulfil the developmental agenda of the state.

To this end, three interconnected recommendations are proposed:

1. There is a need for a single SOE Act to resolve apparent contradictions, gaps and duplications. SOEs should be immersed in a seamless environment, but should remain sector based with clear subsidiarity and fiduciary restrictions. In the single Act, the board could be given more powers in line with the Organisation for Economic Co-operation and Development’s best practices (OECD 2015).
2. The state, as an active shareholder, should exercise its ownership rights in respect of SOEs by holding the board accountable for its obligation to provide strategic direction in achieving the objectives of the

entity in accordance with the shareholder’s strategic intent as articulated in the shareholder compact or the founding legislation. The board should be given the required operational autonomy to achieve the defined objectives free from political interference by the shareholder ministry.

3. To this end, it is highly recommended that the establishment of an independent monitoring and compliance agency similar to the French Government Shareholding Agency should be considered.

It is clear that there is a need for SOEs to be streamlined and harmonised under an overarching and seamless Act of Parliament and independent monitoring and compliance agency.

References

- Bronstein, V & Olivier, M (2011) An evaluation of the regulatory framework governing state-owned enterprises in the Republic of South Africa. Unpublished research paper, HSRC SOEs Research Project
- Chabane, C (2010) Statement by Minister Collins Chabane on the TOR and Review Framework and Methodology of the Presidential Review Committee, Cape Town
- Kanyane, MH & Sausi K (2015) Reviewing state-owned entities’ governance landscape in South Africa, *African Journal of Business Ethics*, 9(1):28–41
- OECD (Organisation for Economic Co-operation and Development) (2015) *OECD Guidelines on Corporate Governance of State Owned Enterprises*. Paris: OECD Publishing. See <http://www.oecd.org/corporate/guidelines-corporate-governance-SOEs.htm> (accessed 8 March 2018)
- SOEs Policy Dialogue Report (2012) Policy dialogue on issues of SOEs’ legislation, regulation and governance frameworks. HSRC

Report on State-Owned Entities
Policy Dialogues to the Royal
Netherlands Embassy on behalf of
the Presidential Review Committee

Acknowledgement

This policy brief draws from the findings of the study conducted by the Presidential Review Commission led by the HSRC on issues of SOE governance and performance as well as the article by MH Kanyane and K Sausi (2015) entitled "Reviewing state-owned entities' governance landscape in South Africa".

POLICY BRIEF AUTHOR

Modimowabarwa Kanyane, D.Admin;
Research Director, Democracy, Governance
and Service Delivery (DGSD) HSRC; Professor
Extraordinaire, Tshwane University of
Technology; Affiliate of the University of
Fort Hare

Enquiries to
Modimowabarwa Kanyane:
bkanyane@hsrc.ac.za