



GOVERNMENT GAZETTE
OF THE
REPUBLIC OF NAMIBIA

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Government Notice

OFFICE OF THE PRIME MINISTER

No. 96

1990

**PROMULGATION OF ACT OF
THE NATIONAL ASSEMBLY**

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

No. 27 of 1990: Foreign Investments Act, 1990.

ACT

To make provision for the promotion of foreign investments in Namibia.

(Signed by the President on 19 December 1990)

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BE IT ENACTED by the National Assembly of the Republic of Namibia, as follows:-

Interpretation.

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

“Bank of Namibia” means the Bank of Namibia established by section 2 of the Bank of Namibia Act, 1990 (Act 8 of 1990);

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“business activity” means any activity engaged in for gain or reward in any part of the economy of Namibia;

“Certificate” means a Certificate of Status Investment issued under this Act;

“company” includes any other body corporate;

“enterprise” means the business or undertaking in which foreign assets are invested and in respect of which a Certificate has been issued;

“foreign assets” includes freely convertible foreign currency, and any currency, credits, rights, benefits or property, whether corporeal or incorporeal, obtained by the expenditure of foreign currency or, except as regards currency of Namibia which has not been obtained by the expenditure of foreign currency, belonging to a foreign national, and the returns derived from such credits, rights, benefits or property;

“foreign national” means -

- (a) a person who is not a citizen of Namibia;
- (b) a company incorporated under the laws of any country other than Namibia;
- (c) a company incorporated within Namibia in which the majority of the issued share capital is beneficially owned by foreign nationals within the meaning of this definition;

“Government” means the Government of Namibia and includes any body or institution established by or under any law;

“the Minister” means the Minister of Trade and Industry;

“Namibian” means a citizen of Namibia and includes a company incorporated under the laws of Namibia in which the majority of the share capital is owned by Namibians within the meaning of this definition.

(2) At any time before a currency for Namibia has been established under section 19 of the Bank of Namibia Act, 1990 (Act 8 of 1990), an investment in Namibia by a foreign national of rand in the currency of the Republic of South Africa shall be deemed to be an investment of foreign assets notwithstanding that rand will during that period also be the currency for Namibia.

PART I

ADMINISTRATION OF ACT AND PRINCIPLES REGARDING FOREIGN INVESTMENT

Administration of Act.

2. Subject to the laws governing the public service, there shall be established in the Ministry of Trade and Industry a division, to be known as the Investment Centre, to assist the Minister in the administration of this Act.

Business activities of
foreign nationals.

3. (1) Subject to the provisions of this section and the compliance with any formalities or requirements prescribed by any law in relation to the relevant business activity, a foreign national may invest and engage in any business activity in Namibia which any Namibian may undertake.

(2) For the purposes of any law governing the establishment and carrying on of any business activity or the taxation of the income, or any other aspect, of any business activity, a foreign national shall be in no different position than any Namibian, except as may be otherwise provided by this Act.

(3) No foreign national engaged in a business activity or intending to commence a business activity in Namibia shall be required to provide for the participation of the Government or any Namibian as shareholder or as partner in such business, or for the transfer of such business to the Government or any Namibian: Provided that it may be a condition of any licence or other authorisation to or any agreement with a foreign national for the grant of rights over natural resources that the Government shall be entitled to or may acquire an interest in any enterprise to be formed for the exploitation of such rights.

(4) The Minister may, by notice in the *Gazette*, specify any business or category of business which, in the Minister's opinion, is engaged primarily in the provision of services or the production of goods which can be provided or produced adequately by Namibians, and, with effect from the date of such notice, no foreign national shall, subject to the provisions of section 7(3), through the investment of foreign assets, become engaged in or be permitted to become engaged in any business so specified or falling within any category of business so specified.

PART II

STATUS INVESTMENTS

Minister's power to issue Certificate of Status Investments.

4. If the investment of foreign assets in Namibia is an eligible investment as defined in section 5, the Minister may, subject to the provisions of this Act, issue a Certificate of Status Investment in respect thereof and the provisions of sections 8 to 13 shall apply in relation to the enterprise in respect of which the Certificate has been issued.

Investments eligible for Certificate of Status Investment.

5. (1) For the purposes of this Act, an investment is an eligible investment -

- (a) if it is an investment, or proposed investment, in Namibia by a foreign national of foreign assets of a value of not less than the amount which the Minister may determine from time to time by notice in the *Gazette* for this purpose;
- (b) if it is a reinvestment, or proposed reinvestment, by a foreign national of the profit or proceeds of sale of an enterprise specified in a Certificate, irrespective of the amount of such reinvestment.

(2) Where the investment is for the acquisition of shares in a company incorporated in Namibia, the investment shall, notwithstanding that the value thereof is equal to or exceeds the amount determined under subsection (1)(a), qualify as an eligible investment only if -

- (a) not less than ten per cent of the share capital of the company is held or will, following the investment, be held by the foreign national making the investment; or
- (b) the Minister is satisfied that the foreign national making the investment is or will be actively involved in the management of the company.

(3) Where the investment is for the acquisition of a participating share in an unincorporated joint venture, the investment shall, notwithstanding that the value thereof is equal to or exceeds the amount determined under subsection (1)(a), qualify as an eligible investment only if -

- (a) not less than ten per cent of the participating share of the joint venture is held or will, following the investment, be held by the foreign national making the investment; or
- (b) the Minister is satisfied that the foreign national making the investment is or will be actively involved in the management of the joint venture.

Application for a Certificate of Status Investment.

6. (1) A foreign national may apply to the Minister for a Certificate of Status Investment in respect of an investment which qualifies as an eligible investment in terms of section 5.

(2) An application for a Certificate of Status Investment shall be in the prescribed form, which shall require such information from the applicant as may be necessary to enable the Minister to consider applications in accordance with subsection (3).

(3) In considering an application for a Certificate of Status Investment, the Minister shall have special regard to -

- (a) the extent to which the proposed investment is likely to contribute towards Namibia's development objectives;
- (b) the extent to which the enterprise in which the proposed investment is to be made will utilize Namibian resources, including labour and natural resources so as to contribute to the economy, by, *inter alia* -

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- (i) increasing employment opportunities in Namibia;
 - (ii) providing for the training of Namibians;
 - (iii) earning or saving foreign exchange;
 - (iv) generating development in the less developed areas of Namibia;
- (c) the extent to which the enterprise in which the proposed investment is to be made will contribute to the advancement of persons within Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws and practices or will facilitate the implementation of policies and programmes aimed at redressing social, economic or educational imbalances in the Namibian society;
- (d) the extent to which the enterprise in which the proposed investment is to be made will make provision for equal opportunities for women;
- (e) the impact which the activities of the enterprise in which the proposed investment is to be made is likely to have on the environment and, where necessary, the measures proposed to deal with any adverse environmental consequences.

Grant of a Certificate of Status Investment.

7. (1) If the Minister is satisfied that the investment in respect of which application for a Certificate is made will promote the interests of Namibia, the Minister may issue a Certificate in respect thereof.

(2) Every Certificate shall state -

- (a) the name of the foreign national to whom it is granted;
- (b) the name of, and give a description of, the enterprise in which the investment is or is to be made;
- (c) the amount or value of, and give a description of, the foreign assets invested or to be invested and, if they have not yet been invested in the enter-

prise, the period or periods within which they shall be invested;

- (d) the proportion of the foreign assets invested or to be invested to the total assets of the enterprise, and where the investment involves the acquisition of shares in a company, particulars of the shareholding;
- (e) that the implementation of such of the proposals forming part of the application for the Certificate as are set out in the Certificate shall constitute an obligation of the holder of the Certificate and a condition of the continued validity of the Certificate; and
- (f) such other matters as the Minister may deem necessary or expedient for the purposes of this Act.

(3) A notice by the Minister under section 3(4) shall not affect the validity of any Certificate issued before the date of such notice in respect of any enterprise which is an enterprise specified in such notice or which falls in any category of business so specified, or any right, privilege or benefit accorded by this Act to the holder of such a Certificate.

Availability of foreign
currency for certain pay-
ments.

8. (1) Notwithstanding the provisions of any other law, the Bank of Namibia shall ensure that there is available for purchase by the holder of a Certificate, at the request of that holder, freely convertible foreign currency which the holder may use without any restriction -

- (a) to repay, in accordance with a schedule approved by the Bank of Namibia, the principal sum of any loan in foreign currency, the proceeds of which formed part of the foreign assets invested in the enterprise, and to pay, subject to the prior payment or the retention of any tax which may be due thereon, the interest and service charges on such a loan as they fall due;
- (b) to pay licence fees and royalties to persons ordinarily resident outside Namibia in respect of any intellectual property which is employed in

connection with the enterprise, where such payments are due under an agreement which has been approved under any law relating to the transfer of technology or under an agreement approved by the Minister, with the concurrence of the Bank of Namibia, and specified in the Certificate.

(2) The provisions of subsection (1) shall, until the date of publication of the notice referred to in subsection (2) of section 18, have effect subject to the provisions of subsection (1) of that section.

Availability of foreign currency for transfer of profits and proceeds of sale.

9. (1) Notwithstanding the provisions of any other law but subject to subsections (3) and (4) of this section, the Bank of Namibia shall ensure that there is available for purchase by the holder of a Certificate, at the request of that holder, convertible foreign currency which the holder may use without any restriction -

- (a) for the transfer out of Namibia of the profits of the enterprise or, where the enterprise is carried on as a branch operation by a company which is a foreign national, for the payment to the head office of the company of remittances out of funds representing the branch profits, after deduction or retention in either case of any tax due;
- (b) where an investment to which a Certificate relates is an investment in a company, for the payment to shareholders or stockholders ordinarily resident outside Namibia of dividends out of the profits of the enterprise, after deduction of any tax due;
- (c) where the enterprise or any part of the undertaking carried on by the enterprise is sold to any person ordinarily resident in Namibia, for the transfer out of Namibia of the proceeds of such sale;
- (d) where the enterprise is a company which has reduced its share capital in accordance with the provisions of the laws relating to companies, for the transfer out of Namibia of the sum by which the capital is so reduced.

(2) No provision of any law relating to exchange control shall apply to foreign currency which is the proceeds of the sale by the holder of a Certificate of the enterprise or any part of the undertaking carried on by the enterprise to a person not ordinarily resident in Namibia.

(3) Where, as evidenced by the Certificate, the foreign assets invested or to be invested in the enterprise constitute only a proportion of the total assets of the enterprise -

(a) the provisions of paragraphs (a), (c) and (d) of subsection (1) shall apply only to the like proportion of the profits, proceeds of sale or sum, as the case may be, referred to therein;

(b) the provisions of subsection (2) shall apply only to the like proportion of the proceeds of sale referred to therein.

(4) If, in the opinion of the Bank of Namibia, the amount of foreign currency required to give effect to paragraph (c) or (d) of subsection (1) in respect of any enterprise would have a significant adverse effect on the external payments liabilities of Namibia, the appropriate foreign currency may be made available by such number of instalments of such amounts and at such intervals as the Bank of Namibia may determine.

(5) The provisions of this section shall, until the date of publication of the notice referred to in subsection (2) of section 18, have effect subject to the provisions of subsection (1) of that section.

Retention of foreign currency obtained from sale of exported goods.

10. (1) A Certificate may, on such terms and conditions as may be prescribed therein, provide for the retention outside Namibia by the holder of the Certificate of any payment, or a proportion of any payment, in foreign currency for goods produced by the enterprise or any undertaking carried on by the enterprise which are exported from Namibia.

(2) Where a provision as contemplated in subsection (1) is made, no requirement of any law for the repatriation of the proceeds of the sale of goods exported from Namibia or for persons to offer such foreign currency to the Bank of Namibia or the Government shall apply to the foreign currency representing any payment or proportion of any payment referred to in subsection (1).

Compensation in case of expropriation.

11. (1) No enterprise, or part of an undertaking carried on by an enterprise, or interest in or right over any property forming part of such undertaking shall be expropriated except in accordance with the provisions of Article 16(2) of the Namibian Constitution.

(2) Where an enterprise or any part of an undertaking carried on by an enterprise, or any interest in or right over any property forming part of such undertaking is expropriated, the Government shall pay to the holder of the Certificate just compensation for such expropriation without undue delay and in freely convertible currency.

Obligations of holder of Certificate.

12. (1) The holder of a Certificate shall -

- (a) bring to Namibia and invest in or apply for the benefit of the enterprise, the foreign assets to which the Certificate relates within the time or times provided in the Certificate;
- (b) carry out the obligations agreed between the Minister and the holder and specified in the Certificate;
- (c) carry out such other obligations of the holder as are specified in the Certificate.

(2) If the holder of the Certificate fails to carry out the obligations referred to in this section within the time or periods, if any, specified in the Certificate, the Certificate may be cancelled in accordance with the provisions of section 15.

Settlement of disputes in respect of Status Investments.

13. (1) If a person to whom a Certificate is to be issued under section 7 so elects, the Certificate shall provide that any dispute between the holder of the Certificate and the Government in respect of -

- (a) any issue relating to the amount of, or any other matter in connection with, any compensation payable in a case of an expropriation as provided in section 11;
- (b) the validity or continued validity of the Certificate,

shall be referred for settlement by international arbitration.

(2) Where a Certificate provides for the settlement of disputes by international arbitration, arbitration shall be in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law in force at the time when the Certificate was issued, unless by agreement between the Minister and the foreign national to whom the Certificate is to be issued, another method of settling the dispute has been chosen and the Certificate so provides.

(3) A Certificate which makes provision for international arbitration shall constitute the consent of the holder of the Certificate and the Government to submit to arbitration in the manner provided in the Certificate, and any award rendered in any such arbitration shall be final and binding on the holder of the Certificate and the Government.

(4) Nothing in this section shall be construed -

- (a) in a case where a Certificate does not make provision for the settlement of disputes by international arbitration, as impairing or limiting the right of the holder of such Certificate, in the event of a dispute, to any remedy available to the holder in any competent court in Namibia;
- (b) in a case where a Certificate does make provision for the settlement of disputes by international arbitration, as precluding the holder and the Minister from agreeing that any particular dispute shall not, as provided in the Certificate, be referred to international arbitration, but be heard and finally determined by any competent court in Namibia.

Amendment and transfer
of a Certificate.

14. The Minister may, with the consent, or on application, of the holder of a Certificate, as the case may be, amend a Certificate issued under this Act or transfer the Certificate to any other foreign national.

Cancellation of a Certificate.

15. (1) Where -

- (a) the holder of a Certificate, or any person who acted on behalf of any applicant for a Certificate, is convicted of an offence under section 16 of this Act;

- (b) it is established to the satisfaction of the Minister that a Certificate was issued in consequence of incorrect information supplied by the applicant, or a person who acted on behalf of an applicant for a Certificate; or
- (c) the holder of a Certificate -
 - (i) fails or neglects to implement the proposals forming part of the application for the Certificate, as set out in the Certificate; or
 - (ii) fails or neglects to comply with any other obligation referred to in section 12,

the Minister may give the holder of the Certificate written notice to show cause, within thirty days or such longer period as may be specified in the notice, why the Certificate should not be cancelled.

(2) If a person to whom notice is given under this section fails to comply with the notice, or fails to satisfy the Minister as to why the Certificate should not be cancelled, or in a case referred to in paragraph (c) of subsection (1), fails to satisfy the Minister that any past failure was not due to his or her fault and that adequate steps are being taken to comply with the requirements of the Certificate, the Minister may cancel the Certificate, but such cancellation shall not affect the right of the holder of the Certificate to refer any dispute relating to such cancellation to international arbitration or to the courts of Namibia in accordance with section 13.

PART III

MISCELLANEOUS

Offences.

- 16.** Any person who -
- (a) in or in connection with an application for a Certificate under this Act; or
 - (b) for the purpose of obtaining or retaining any foreign currency as provided for in this Act,

makes any statement which he or she knows to be false or does not believe to be true, or knowingly furnishes any false information, shall be guilty of an offence and liable on conviction to a fine not exceeding R100 000 or to imprisonment for a term not exceeding ten years, or to both such fine and such imprisonment.

Regulations.

17. The Minister may make regulations prescribing -

- (a) the form and manner in which applications for Certificates shall be made, the information which shall accompany such applications and any fee payable on such applications;
- (b) the form and manner in which applications for or returns relating to foreign currency shall be made and the information which shall accompany such applications or returns;
- (c) the circumstances in which reports shall be made on the progress made in implementing the obligations of the holder of a Certificate and the information to be furnished in such reports;
- (d) such other matters as the Minister may deem necessary or expedient to prescribe for the purposes of this Act.

Temporary provision relating to foreign exchange.

18. (1) Until the date of publication of the notice referred to in subsection (2), the provisions of sections 8 and 9 shall be construed as though they had been amended or modified to the extent necessary to take account of the obligations of the Government -

- (a) under the Bilateral Agreement between the Governments of the Republic of Namibia and the Republic of South Africa, dated 4 April 1990, and any amendment or modification thereof; and
- (b) in the event of Namibia becoming a party to the Multilateral Monetary Agreement existing between the Governments of the Kingdom of Lesotho, the Kingdom of Swaziland and the Republic of South Africa, also under that agreement and any amendment or modification thereof.

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(2) As soon as -

- (a) a currency for Namibia has been established under section 19 of the Bank of Namibia Act, 1990 (Act 8 of 1990); and
- (b) the agreements referred to in subsection (1) have expired or have been terminated or are no longer in effect so as to impose on the Government of Namibia obligations relating to the management of foreign exchange transactions,

the Minister shall, by notice in the *Gazette*, declare that the provisions of subsection (1) of this section, subsection (2) of section 8 and subsection (5) of section 9 have expired and thereafter those provisions shall be of no further force or effect.

Application.

19. The provisions of this Act relating to Status Investments shall apply to any investment of foreign assets in Namibia, irrespective whether such investment was made before or after the commencement of this Act.

Short title and commencement.

20: (1) This Act shall be called the Foreign Investments Act, 1990 and shall come into operation on a date to be fixed by the President by Proclamation in the *Gazette*.
