

Employment Court reinforces application of Mwongozo Code

The Employment and Labour Relations Court recently¹ reinforced governance of state corporations must align with the Code of Corporate Governance for State Corporations. This code also called the Mwongozo Code is the law on how CEOs of state corporations are appointed.

The court was asked to decide who between the board of a state corporation and the relevant cabinet secretary should appoint the CEO. In 2021 a state corporation board started recruitment of a permanent CEO to fill a four-year gap. During that period, the relevant cabinet secretary seconded various officers to act as CEO. After interviews, the board of the state corporation recommended appointment of the best candidate. The cabinet secretary declined the recommendation and extended the acting CEO's tenure leading to the case.

The Court's Decision

In allowing the petition, the Court relied on the Mwongozo Code which places the responsibility of recruiting and appointing the CEO of the state corporation on its board. The court found recommendations of a state corporation board on the best candidate for CEO were mandatory.

The board's recommendations overrode any objections the cabinet secretary may have and accordingly had to be implemented. Furthermore, the authority to appoint someone in acting capacity cannot be used to undermine the speedy appointment of a competent person in full capacity.

State corporations have corporate autonomy and are not departments of their ministries. Therefore, a ministry may only audit the affairs of state corporations operates under it through the inspector general.

Impact of the Decision

By enforcing the governance framework set out in the Mwongozo Code, the court strengthened corporate governance in state corporations. Good corporate governance is integral to the ability of state corporations to deliver on their objectives and effectively administrate the public programs they manage.

The Mwongozo Code seeks to improve governance of state corporations through the global benchmarks of good governance developed by the Organization for Economic Co-operation and Development. When the code was issued in January 2015, it was clear state corporations were at varied stages of applying best corporate governance practices.

The code sought to accelerate good corporate governance of state corporations through a 'comply or explain' approach. It prescribes mandatory standards and how they should be applied, as the court reminded everyone in this decision.

Conclusion

Non-compliant state corporations risk compliance litigation which diverts key resources delaying execution of program objectives. The Mwongozo Code is neither a mere guideline nor a box-ticking affair — it is legally binding and requires carefully planned pragmatic solutions to comply with. State

¹ ELRC Pet. No E133 of 2013]

corporations need practical advice and relevant training to enable their boards steer and ensure compliance.

At Qwasha we believe in the role of good corporate governance for long-term sustainability and growth. We simplify compliance by training and advising boards, auditing and advising on compliance, and assisting with recruitment and onboarding of directors. Reach out on info@qwasha.co.ke for assistance.