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THE PRESIDENCY

No. 792

4 August 2005

It is hereby notified that the President has assented to the following Act, which is hereby published for general information:—

No. 12 of 2005: National Ports Act, 2005



AIDS HELPLINE: 0800-123-22 Prevention is the cure

GENERAL EXPLANATORY NOTE:

- [] Words in bold type in square brackets indicate omissions from existing enactments.
- Words underlined with a solid line indicate insertions in existing enactments.

(English text signed by the President.)
[Assented to 31 July 2005.]

ACT

To provide for the establishment of the National Ports Authority and the Ports Regulator; to provide for the administration of certain ports by the National Ports Authority; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

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CHAPTER 1

5

DEFINITIONS AND OBJECTS OF ACT

Definitions

1. (1) In this Act, unless the context indicates otherwise—
- “agreement” includes any form of concession or partnership;
 - “Authority” means, subject to section 3, National Ports Authority Limited, 10 contemplated in section 4;
 - “Board” means the board of directors of the Authority contemplated in Chapter 4;
 - “Companies Act” means the Companies Act, 1973 (Act No. 61 of 1973);
 - “concession” means a concession agreement entered into in terms of section 56;
 - “family member” means a parent, child or spouse of a person, and includes a 15 partner living with that person as if they were married to each other;
 - “Harbour Master” means an employee of the Authority contemplated in section 74(3);
 - “incorporation date” means the date on which the Authority is incorporated as a 20 company in terms of section 4;
 - “Legal Succession Act” means the Legal Succession to the South African Transport Services Act, 1989 (Act No. 9 of 1989);
 - “licence” means a licence to provide a port service or operate a port facility, issued in terms of section 57 or deemed to be held in terms of section 65 and “licensed” 25 must be interpreted accordingly;
 - “licensed operator” means a person licensed, or deemed to be licensed, to provide a port service or operate a port facility;
 - “Minister” means the Minister of Transport or a duly appointed representative;
 - “National Ports Authority (Pty) Ltd” means the Transnet subsidiary company 30 contemplated in section 3(2);
 - “National Ports Authority of South Africa” means the business unit or division of Transnet which immediately prior to the commencement of the Act constituted and was known as the “National Ports Authority of South Africa”;
 - “National Port Consultative Committee” means a committee set up in terms of 35 section 82;
 - “navigational aids” means lighthouses, radio navigational aids, buoys, beacons and any other device or system used to assist the safe and efficient navigation of vessels;
 - “off-shore cargo handling facility” means an off-shore facility within or beyond 40 the port limits used for the transfer of cargo from a vessel to the land and vice versa;
 - “partnership” includes a public-private partnership and a public-public partnership;
 - “PFMA” means the Public Finance Management Act, 1999 (Act No. 1 of 1999);
 - “pilot” means a person licensed in terms of section 77 to provide pilotage services;
 - “port” means any of the ports of Richards Bay, Durban, East London, Nqura, Port 45 Elizabeth, Mossel Bay, Cape Town, Saldanha Bay, Port Nolloth or a port which has been determined as such in terms of section 10(2);

“Port Consultative Committee” means a committee appointed in terms of section **81**;

“port infrastructure” means the basic structure of a port, including breakwaters, seawalls, channels, basins, quay walls, jetties, roads, railways and infrastructure used for the provision of water, lights, power, sewerage and similar services; 5

“port repair facilities” means dry docks, vessel repair facilities within a port and any other facilities which are designated as such by the Authority by publication in the *Gazette*;

“port services” means stevedoring, cargo handling, terminal operations, storage of cargo within a port, tug services, floating crane services, berthing services, fire fighting, security, radio and radar services, waste disposal, vessel repairs and any other services provided within a port which are designated as such by the Authority by notice in the *Gazette*; 10

“port terminal” means terminal infrastructure, cargo-handling equipment, sheds and other land-based structures used for the loading, storage, transshipment and discharging of cargo or the embarkation and disembarkation of passengers; 15

“prescribe” means prescribe by regulation;

“regulation” means any regulations promulgated under this Act;

“Regulator” means the Ports Regulator established by section **29**;

“Shareholding Minister” means the Minister of Public Enterprises or a duly appointed representative; 20

“South African Maritime Safety Authority” means the authority established by section 2 of the South African Maritime Safety Authority Act, **1998** (Act No. **5** of **1998**);

“terminal infrastructure” means terminal buildings, workshops, substations, surfacing, rail sidings and terminal operations and infrastructure for the provision of water, lights, power, sewerage and similar services within terminal boundaries; 25

“terminal operations” means services provided at a port terminal, consisting of handling cargo, storing cargo, transshipment of cargo and delivering cargo to vessels and services related thereto; 30

“this Act” includes the regulations made by the Minister, the rules made by the Authority, and the directives made by the Regulator;

“Transnet” means Transnet Limited, the company contemplated in section **2** of the Legal Succession Act;

“vessel” means any water navigable craft or structure and includes a seaplane and a non-displacement craft. 35

(2) Nothing contained in this Act must be construed as conferring on the Authority any right of ownership in, or authorising the Authority to provide, services or facilities which are provided in terms of the Telecommunications Act, **1996** (Act No. **103** of **1996**).

Objects of Act 40

2. The objects of this Act 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;
- (b) establish appropriate institutional arrangements to support the governance of ports; 45
- (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; 5
 - (iii) facilitate the development of technology, information systems and managerial expertise through private sector involvement and participation; and
- (f) promote the development of an integrated regional production and distribution system in support of government's policies. 10

CHAPTER 2

ESTABLISHMENT AND INCORPORATION OF AUTHORITY

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— 15
- (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 National Ports Authority of South Africa and the divisional board and any functionary thereof, respectively, unless it is clearly inappropriate. 20
- (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. 25
- (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; 30
 - (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(1), all assets, liabilities, rights and obligations of Transnet in respect of National Ports Authority of South Africa vest in National Ports Authority (Pty) Ltd. 35
- (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— 40
- (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.
- (c) For the purposes of paragraph (b) 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 (Pty) Ltd and the board and any functionary of that company, respectively, unless it is clearly inappropriate. 45

(d) Any appointment to the board or of any functionary of National Ports Authority (Pty) Ltd must be made in terms of this Act.

Conversion of Authority

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. 5

(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. 10

Authority’s memorandum and articles of association

5. (1) The memorandum and articles of association of the Authority must be drawn up in such a manner that the contents thereof are consistent with this Act. 15

(2) In the event of any conflict between a provision of the memorandum or articles of association on the one hand, and a provision of this Act on the other hand—

(a) the provision of this Act prevails; and

(b) the provision of the memorandum or articles of association only has legal effect if this Act is amended so as to remove the conflict. 20

Non-application of provision of Companies Act

6. A provision of the Companies Act does not apply to the Authority if—

(a) any special or contrary arrangement is provided for in this Act; or

(b) the Minister of Trade and Industry has issued a declaration under section 7. 25

Certain provisions of Companies Act may be declared inapplicable to Authority

7. (1)(a) The Shareholding Minister may request the Minister of Trade and Industry to declare any provision of the Companies Act to be inapplicable to the Authority.

(b) The request must be fully motivated by the Authority.

(2)(a) The Registrar of Companies must publish particulars about the request and the motivation contemplated in subsection (1), by notice in the *Gazette*. 30

(b) In such notice, the Registrar must invite interested persons to submit representations to a person named in the notice within the period stipulated in that notice.

(3)(a) After having considered the representations contemplated in subsection (2), if any, the Minister of Trade and Industry may, by notice in the *Gazette*, declare the whole or any part of the provision concerned to be inapplicable to the Authority with effect from the date stipulated in that notice. 35

(b) The Minister of Trade and Industry may only issue the declaration if satisfied on reasonable grounds that the inapplicability of that provision to the Authority — 40

(i) will contribute to the Authority’s efficiency;

(ii) will not reduce or limit the Authority’s accountability as a public institution or reduce the transparency of its functioning and operations; and

- (iii) will not be prejudicial to the rights, interests or claims of the Authority's creditors or employees or to the rights or interests of any other person.

Authority's financial year

8. The Authority's financial year runs from 1 April in any year to 31 March in the following year, both days included. 5

Judicial management and liquidation

9. Despite any other law, the Authority may not be placed under judicial management or liquidation, except if authorised by an Act of Parliament enacted specifically for that purpose.

CHAPTER 3 10

PORTS UNDER JURISDICTION OF AUTHORITY AND FUNCTIONS OF AUTHORITY

Ports under jurisdiction of Authority

10. (1) All ports fall under the jurisdiction of the Authority.

(2) The Minister may by notice in the *Gazette* determine ports in addition to the ports contemplated in subsection (1) which fall under the jurisdiction of the Authority. 15

(3) The Minister may, after consultation with the Authority, review, vary or extend the boundaries of ports and must consult with the municipality concerned if such review, variation or extension affects the municipal boundaries.

(4) When exercising the powers referred to in subsections (2) and (3), the Minister must— 20

- (a) follow an open and transparent process, which must include a viability study and a strategic environmental impact assessment; and
- (b) obtain Cabinet approval.

Functions of Authority 25

11. (1) The main function of the Authority is to own, manage, control and administer ports to ensure their efficient and economic functioning, and in doing so the Authority must—

- (a) plan, provide, maintain and improve port infrastructure;
- (b) prepare and periodically update a port development framework plan for each port, which must reflect the Authority's policy for port development and land use within such port; 30
- (c) control land use within ports, and has the power to lease land under such conditions as the Authority may determine;
- (d) provide or arrange for road and rail access within ports; 35
- (e) arrange for services such as water, light, power and sewerage and telecommunications within ports;
- (f) maintain the sustainability of the ports and their surroundings;
- (g) regulate and control— 40
 - (i) navigation within port limits and the approaches to ports;

- (ii) the entry of vessels into ports, and their stay, movements or operations in and departures from ports;
 - (iii) the loading, unloading and storage of cargo and the embarkation and disembarkation of passengers;
 - (iv) the development of ports; 5
 - (v) off-shore cargo-handling facilities, including navigation in the vicinity of such facilities;
 - (vi) pollution and the protection of the environment within the port limits;
 - (vii) the enhancement of safety and security within the port limits;
 - (h) ensure that adequate, affordable and efficient port services and facilities are provided; 10
 - (i) exercise licensing and controlling functions in respect of port services and port facilities;
 - (j) ensure that any person who is required to render any port services and port facilities is able to provide those services and facilities efficiently; 15
 - (k) promote efficiency, reliability and economy on the part of the licensed operators in accordance with recognised international standards and public demand;
 - (l) promote the achievement of equality by measures designed to advance persons or categories of persons historically disadvantaged by unfair discrimination in the operation of facilities in the ports environment; 20
 - (m) prescribe the limits within which and the levels to which dredging may be carried out in the ports and the approaches thereto;
 - (n) provide or arrange for tugs, pilot boats and other facilities and services for the navigation and berthing of vessels in the ports; 25
 - (o) provide, control and maintain vessel traffic services;
 - (p) promote the use, improvement and development of ports;
 - (q) advise on all matters relating to the port sector, port services and port facilities:
 - (r) promote greater representivity, in particular to increase the participation in terminal port operations of historically disadvantaged persons; 30
 - (s) exercise the licensing of the erection and operation of off-shore cargo-handling facilities and services relating thereto;
 - (t) discharge or facilitate the discharge of international obligations relevant to ports; 35
 - (u) facilitate the performance of any function of any organ of state in a port;
 - (v) promote research and development in the spheres of port services and facilities.
- (2) The Authority may—
- (a) undertake any other activities within a port that encourage and facilitate the development of trade and commerce for the economic benefit and interest of the national economy; 40
 - (b) collaborate with educational institutions for the promotion of technical education regarding port services and facilities;
 - (c) provide any service, including a port service or the operation of a port facility, which is required for the safe, efficient and orderly operation or management of a port; 45
 - (d) **perform** such other functions as may be necessary in order to achieve the objects of this Act;
 - (e) encourage and facilitate private and public sector investments and participation in the provision of port services and facilities; 50
 - (f) enter into agreements in terms of this Act.

(3) The Authority may enter into any agreement with any other statutory body or organ of state in order to co-ordinate and harmonise the performance of functions similar or related to those of the Authority.

(4) The Authority as an operator of last resort must do everything reasonably necessary for the effective and economic management, planning, control and operation of ports. 5

(5) The Authority must—

(a) annually report to the Minister, and for that purpose section 44 applies with the necessary changes; and

(b) submit a copy of that report to the Shareholding Minister. 10

Aims of Authority

12. The Authority must, in all its activities, aim to—

(a) conduct business in a manner designed to achieve the objects of this Act and which does not jeopardise the national interest; 15

(b) remain financially autonomous;

(c) enable the port users to access the port system in the most efficient way possible;

(d) satisfy all reasonable demands for port services and facilities;

(e) co-ordinate the general activities of the ports;

(f) ensure that orderly, efficient and reliable port services, including safe and secure cargo-storage and cargo-handling facilities, are provided to port users; 20

(g) promote the development and expansion of port services and facilities elsewhere in the world in collaboration with other countries and international organisations in a manner consistent with the objectives of this Act;

(h) promote and undertake the necessary measures to enhance safety and security of life and property in ports; 25

(i) integrate biophysical, social and economic issues in all forms of decision-making with regard to port development and operations.

Co-operative governance

13. (1) To give effect to the principles of co-operative governance and inter-governmental relations contemplated in Chapter 3 of the Constitution, all organs of state as defined in section 239 thereof must co-operate with one another in order to— 30

(a) ensure the effective management of all ports;

(b) ensure the effective oversight of ports; and

(c) co-ordinate the performance and minimise the duplication of functions. 35

(2) The Authority must conclude a memorandum of understanding with the relevant organs of state to give effect to the co-operation contemplated in subsection (1).

(3) The Minister must, by notice in the *Gazette*, publish any co-operative memorandum of understanding concluded in terms of subsection (2).

CHAPTER 4 40

BOARD, STAFF AND ASSETS OF AUTHORITY

Composition of Board

14. (1) Subject to subsection (7), the Board consists of a minimum of seven and a maximum of 13 members, appointed by the Shareholding Minister after consultation with the Minister. 45

(2) The members of the Board must have special knowledge or experience that would be of value to the Authority in the performance of its functions, in such fields as—

- (a) management of ports;
 - (b) international trade;
 - (c) corporate management;
 - (d) maritime transport;
 - (e) commerce, finance and legal and economic matters; 5
 - (f) transport and logistics, ships agency, clearing and forwarding.
- (3) The Shareholding Minister must appoint one member of the Board as the chairperson.
- (4) The Board must elect a deputy chairperson from among its members.
- (5) Members of the Board may not represent particular interests of a certain group, but must promote the harmonious development and improvement of the ports to the benefit of all users and the economy. 10
- (6) In selecting persons for appointment to the Board, cognisance must be taken to the objects of this Act and the functions of the Authority.
- (7) The board of National Ports Authority (Pty) Ltd, as it existed immediately prior to the date on which the Authority becomes the successor to National Ports Authority (Pty) Ltd, constitutes the first Board of the Authority and must be deemed to have been appointed in terms of this Act. 15

Nomination and appointment of members of Board

15. (1) (a) The Shareholding Minister must call for nominations through the national media. 20
- (b) Subject to sections 14 and 17, the Shareholding Minister must appoint a member of the Board from among the persons nominated.
- (2) (a) Whenever a position on the Board becomes vacant, the Shareholding Minister may appoint any person to serve for the unexpired period of the term of office of the previous member irrespective of when the vacancy occurs. 25
- (b) The person contemplated in paragraph (a) must preferably have special knowledge and experience, contemplated in section 14(2).

Functions of Board

16. (1) The Board represents the Authority and all actions performed by the Board in terms of this Act and within its authority are deemed to be actions of the Authority. 30
- (2) The Board—
- (a) approves the strategic and business plans of the Authority, including budgets, pricing mechanisms policy and financing arrangements;
 - (b) institutes the necessary control measures to ensure that the Authority is managed and operated in accordance with sound business principles; 35
 - (c) approves port reform measures, including concession agreements contemplated in section 56;
 - (d) ensures that small and medium-sized enterprises owned by historically disadvantaged groups have an equitable opportunity to participate in the operations of facilities in the ports environment; 40
 - (e) appoints and enters into a performance contract with the chief executive officer of the Authority;
 - (f) sets criteria and policy for the effective execution of the Authority's regulatory and control functions; 45
 - (g) evaluates the overall policy for the development, improvement and extension of ports;
 - (h) approves the sale, acquisition and long-term lease of property in ports;
 - (i) approves the long-term lease of land;
 - (j) maintains sound relations with the State and other industry stakeholders; 50
 - (k) approves contracts for major works and purchases subject to section 54 of the PFMA;

- (l) approves the appointment of senior executive employees of the Authority; and
 (m) gives effect to the Government's national commercial ports policy.

(3) Nothing in subsection (1) precludes the Board from performing any function reasonably necessary for the effective and economic management, planning, operation and control of ports and which is not in conflict with this Act. 5

(4) Under no circumstances should land within ports owned by the Authority be sold.

Persons disqualified from membership of Board

17. A person may not be appointed or remain a member of the Board if such a person—

- (a) is not a citizen of South Africa; 10
 (b) is an unrehabilitated insolvent;
 (c) has been declared by a court to be mentally ill;
 (d) has been convicted of an offence, whether in the Republic or elsewhere, committed after the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993), took effect, and sentenced to imprisonment without the option of a fine; 15
 (e) has been convicted—
 (i) whether in the Republic or elsewhere, of theft, fraud, forgery, perjury or any other offence involving dishonesty; or
 (ii) has been convicted of an offence under this Act; 20
 (f) has any financial interest in the business of any port;
 (g) is otherwise disqualified from serving as director in terms of the Companies Act.

Terms of office of members of Board

18. (1) The chairperson and the other members of the Board hold office for a period determined by the Shareholding Minister, but not exceeding three years. 25

(2) (a) The chairperson may be reappointed for further periods not exceeding three years each.

(b) The other members of the Board may be reappointed to ensure continuity, but may not serve for more than six consecutive years. 30

(3) The Shareholding Minister must remove a member of the Board from office—

- (a) for failing to perform his or her functions diligently;
 (b) for failing to comply with section 19(1), (2) or (3);
 (c) for being absent without good reason from three consecutive meetings of the Board without the permission of the chairperson; or 35
 (d) for misconduct.

(4) A member of the Board may resign by giving one month's written notice to the Shareholding Minister.

(5) A member of the Board is appointed on such terms and conditions and is entitled to such remuneration as the Shareholding Minister may, with the concurrence of the Minister of Finance, stipulate in that member's letter of appointment. 40

(6) The Shareholding Minister may extend the terms of office of members of the Board upon the expiry of their terms of office for such period as may be necessary, not exceeding three months, to finalise the appointment of a new board.

Disclosure of interest by members of Board 45

19. (1) A member of the Board must, upon appointment, submit to the Shareholding Minister and the Board a written statement in which it is declared whether or not that member has any direct or indirect financial interest which could reasonably be expected to compromise the Board in the performance of its functions.

(2) A member of the Board may not be present at, or take part in, the discussion of or the taking of a decision on any matter before the Board in which that member or his or her family member, business partner or associate has a direct or indirect financial interest. 50