

REPUBLIC OF SOUTH AFRICA

**SOUTH AFRICAN NATIONAL
WATER RESOURCES
INFRASTRUCTURE AGENCY SOC
LIMITED BILL**

*(As introduced in the National Assembly (proposed section 75 Bill); explanatory summary
of Bill and prior notice of its introduction published in Government Gazette No. 49063 of 1
August 2023)
(The English text is the official text of the Bill)*

(MINISTER OF WATER AND SANITATION)

[B 24—2023]

ISBN 978-1-4850-0888-8

No. of copies printed150

BILL

To provide for the establishment of the South African National Water Resources Infrastructure Agency as a state-owned company and major public entity; to provide for the objects and functions of the Agency; to provide for the governance of the Agency by the appointment of the Board of the Agency; to provide for the appointment of the Chief Executive Officer and Chief Financial Officer of the Agency; to provide for the funds of the Agency, financial reporting and accountability of the Agency; to provide for the transfer of the national water resources infrastructure; to provide for the transfer of the Trans-Caledon Tunnel Authority to the Agency; to provide for the disestablishment of the Trans-Caledon Tunnel Authority; to provide for the powers of the Minister in relation to the Agency; to provide for the making of regulations and to provide for matters connected therewith.

PREAMBLE

RECOGNISING that National Government is responsible for and has authority over the nation's water resources and its use;

ACKNOWLEDGING that it is necessary to ensure that, in relation to water resources development at national level, the required national water resources infrastructure must be developed, operated and maintained efficiently and effectively in a sustainable, equitable and reliable manner in order to make water available to water users, and to water management institutions for further distribution;

ACKNOWLEDGING that the current national water resources infrastructure asset base and associated revenue stream could be better utilised to procure funding for the development, operation and maintenance of national water resources infrastructure required for meeting social and economic needs; and

RECOGNISING that a juristic person wholly owned and controlled by the State to administer, fund, finance, implement, develop, alter, maintain, rehabilitate, refurbish, operate and manage the national water resources infrastructure, to provide advisory services relating to such infrastructure and to do all things necessary to fulfil the functions entrusted to it under this Act, including promoting the State's socio-economic and transformation objectives, must be established to meet the obligations as set out in sections 10, 11, 24, 27(1)(b) and 27(2) of the Constitution in relation to water,

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

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CHAPTER 1
DEFINITIONS AND PURPOSE

Definitions and Interpretation

1. In this Act, unless the context indicates otherwise—	
“ Agency ” means the South African National Water Resources Infrastructure Agency SOC Limited established by section 3;	30
“ Board ” means the Board of the Agency appointed in terms of section 11;	
“ Chief Executive Officer ” means the Chief Executive Officer appointed in terms of section 24(1);	
“ Chief Financial Officer ” means the Chief Financial Officer appointed in terms of section 24(4);	35
“ Companies Act ” means the Companies Act, 2008 (Act No. 71 of 2008);	
“ Constitution ” means the Constitution of the Republic of South Africa, 1996;	
“ Department ” means the national government department responsible for water resource management;	40
“ incorporation date ” means the date of incorporation of the Agency as a state-owned company in terms of section 3;	
“ LHWP Treaty ” means the Treaty in relation to the Lesotho Highlands Water Project between the Government of the Republic of South Africa and the Government of the Kingdom of Lesotho, signed on 24 October 1986, including any subsequent protocols, annexures, amendments and agreements concluded pursuant thereto;	45
“ member ” means an executive or non-executive member of the Board;	
“ Minister ” means the Minister responsible for water resource management;	
“ National Water Act ” means the National Water Act, 1998 (Act No. 36 of 1998);	
“ national water resources infrastructure ” means a government waterwork declared by the Minister as national water resources infrastructure in terms of section 37;	50
“ non-Treaty functions ” means the non-Treaty functions of the TCTA contemplated in clause 24 of the Notice of Establishment, which relate to—	

- (a) fulfilling the Republic of South Africa’s financial obligations in terms of or resulting from the LHWP Treaty including the raising of money, liability and financial risk management;
- (b) receiving all water delivered at the Designated Delivery Point defined in the LHWP Treaty, by the Lesotho Highlands Development Authority and releasing such water at the Designated Outlet Point defined in the LHWP Treaty, to the Department; 5
- (c) performing any additional functions incidental to the release of such water to the Department; and
- (d) performing any other functions that the TCTA may be directed by the Minister to perform in terms of section 103(2) of the National Water Act; 10

“**Notice of Establishment**” means the Notice of Establishment of the TCTA published under Government Notice No. 2631 in Government *Gazette* number 10545, dated 12 December 1986, as amended by Government Notice No. 277 in Government Gazette No 21017, dated 24 March 2000, which constitutes its enabling legislation; 15

“**prescribed**” means prescribed by regulation under this Act;

“**Public Finance Management Act**” means the Public Finance Management Act, 1999 (Act No. 1 of 1999);

“**subsidiary**” means a subsidiary as contemplated in section 3 of the Companies Act;

“**TCTA**” means the Trans-Caledon Tunnel Authority, a major public entity listed in Schedule 2 of the Public Finance Management Act and a body corporate established in terms of the Notice of Establishment, with powers to implement international agreements in terms of section 102 of the National Water Act and perform any additional functions as directed by the Minister in terms of sections 74 and 103(2) of the National Water Act; 20 25

“**TCTA’s Treaty functions**” means the functions that the TCTA must perform in terms of clauses 21 to 23 of its Notice of Establishment;

“**Water Services Act**” means the Water Services Act, 1997 (Act No. 108 of 1997);

“**Water Treaty**” means any international agreement entered into by the South African Government and a foreign government relating to— 30

- (a) investigating, managing, monitoring and protecting water resources;
- (b) regional co-operation on water resources;
- (c) acquiring, constructing, altering, operating or maintaining a waterwork; or
- (d) the allocation use and supply of water.

“**water user**” means a person or institution authorised to use water in terms of the National Water Act; and 35

“**waterwork**” means a waterwork as defined in section 1 of the National Water Act.

(2) When interpreting a provision of this Act, any reasonable interpretation which is consistent with the purpose of this Act as stated in section 2, must be preferred over any alternative interpretation which is inconsistent with that purpose. 40

(3) Any directive or notice given in terms of this Act must be in writing.

Purpose of Act

2. The purpose of this Act is—

- (a) to establish a juristic person under the full ownership and control of the State in order to acquire, dispose of, fund, provide, maintain, operate, manage and secure funding of national water resources infrastructure in an efficient and cost-effective manner to meet the social and economic developmental needs of current and future water users within the framework of national government policy and in accordance with sections 10, 11, 24, 27(1)(b) and 27(2) of the Constitution; 45 50
- (b) to provide for the continued performance of the Treaty and non-Treaty functions currently being performed by the TCTA; and
- (c) to serve and to achieve the development and transformation objectives of government through representation, service delivery and social and economic development. 55

CHAPTER 2

ESTABLISHMENT OF AGENCY

Establishment of Agency

- 3.** (1) There is hereby established a juristic person to be known as the South African National Water Resources Infrastructure Agency SOC Limited. 5
- (2) Schedule 2 of the Public Finance Management Act will be amended by the Minister responsible for Finance to include the listing of the Agency as a major public entity.
- (3) The Minister must take the necessary action for the incorporation of the Agency as a company in terms of the Companies Act. 10
- (4) The State is the sole shareholder of the Agency upon incorporation and at any time thereafter.
- (5) The powers and duties of the State as the sole shareholder of the Agency must be exercised and performed by the Minister subject to any limitations provided for in this Act. 15
- (6) The Minister may not, except as provided for in an Act of Parliament, sell or otherwise dispose of any shareholding of the Agency.
- (7) The relationship between the Minister as representative shareholder, as contemplated in subsection (4) and the Agency, must be defined in a shareholder's compact entered into between the Minister and the Agency in terms of section 16. 20
- (8) The Agency is a water management institution as defined in section 1 of the National Water Act, and is deemed an established body for purposes of section 102 of the National Water Act, with powers to implement international agreements and perform any additional functions as directed by the Minister in terms of sections 74 and 103(2) of the National Water Act. 25
- (9) The Companies Act and the Public Finance Management Act apply to the Agency.

Memorandum of Incorporation of Agency

- 4.** (1) The Memorandum of Incorporation of the Agency must be consistent with this Act.
- (2) Notwithstanding the provisions of the Companies Act, an amendment to the Memorandum of Incorporation affecting any provision of this Act does not have any legal force and effect unless and until the relevant provision of this Act has been amended accordingly and has come into effect. 30

Application of Companies Act to Agency

- 5.** (1) The provisions of the Companies Act apply to the Agency, subject to subsection (2). 35
- (2) Notwithstanding sections 5(4) and 9 of the Companies Act, a provision of the Companies Act does not apply to the Agency in circumstances where because of any special or contrary arrangement made by this Act, such a provision is clearly inappropriate or inapplicable. 40

Objects of Agency

- 6.** The objects of the Agency are to develop and manage national water resources infrastructure to—
- (a) ensure a sustainable, equitable and reliable supply of water from national water resources infrastructure; 45
 - (b) meet obligations set out in sections 10, 11, 24, 27(1)(b) and 27(2) of the Constitution and national and regional social and economic objectives of national policy;
 - (c) utilise its asset base and cash-flow to raise funds to develop national water resources infrastructure for social and economic development purposes; 50
 - (d) provide, operate and maintain the national water resources infrastructure and fund the costs thereof;
 - (e) perform the Treaty and non-Treaty functions currently being performed by the TCTA as more fully set out in the shareholder's compact; and

- (f) perform any other functions that the Minister may direct it to perform in terms of section 103(2) of the National Water Act.

Functions of Agency

7. (1) The Agency must, in order to fulfil its objects—
- (a) produce every five years a strategic plan which must— 5
 - (i) ensure that the Agency provides, operates and maintains the national water resources infrastructure that is sustainable, equitable and reliable;
 - (ii) be consistent with national water policy including the national water resource strategy produced by the Department in terms of Part 1 of Chapter 2 of the National Water Act; and 10
 - (iii) be approved by the Minister, after consultation with the Department and other key stakeholders;
 - (b) provide, operate and maintain national water resources infrastructure in a manner that takes account of national development objectives, including the mitigation of climate change and other risks to a reliable water supply; 15
 - (c) secure funding and, where necessary, the refinancing of national water resources infrastructure;
 - (d) collect water use charges due to it in terms of Chapter 5 of the National Water Act and the pricing strategy established by the Minister in terms of section 56 of the National Water Act; 20
 - (e) attract, develop and maintain appropriate skills;
 - (f) achieve and sustain efficient and effective water supply to all water users that it supplies;
 - (g) create jobs in the national water resources infrastructure development process in compliance with National Development Plan and the New Growth Path Framework; 25
 - (h) manage an asset inventory and information system associated with the national water resources infrastructure;
 - (i) ensure the safety of the dams vested in it, in accordance with the procedure set out in Chapter 12 of the National Water Act; 30
 - (j) ensure sustainable, equitable and reliable development of national water resources infrastructure;
 - (k) establish compliance, fraud and loss prevention mechanisms to ensure that the integrity of the Agency is maintained;
 - (l) enter into agreements with— 35
 - (i) water users; and
 - (ii) other parties for purposes of maintaining and sustaining reliable national water resources infrastructure;
 - (m) acquire or dispose of, subject to any applicable legislation, any right, title or interest in movable or immovable property as may be necessary for the Agency to fulfil its objects and functions; 40
 - (n) perform legal acts, including the instituting or defending of any legal action or debt collection;
 - (o) obtain by agreement, in writing, the services of any person, including any organ of state for the performance of any specific act, task or assignment for and on behalf of the Agency; and 45
 - (p) if it will not prejudice the capacity of the Agency to perform the functions for which it was established, the Agency may, subject to suitable financing arrangements that have been made, perform additional functions which may include, but are not limited to, providing water management institutions and water service authorities or water service providers as defined in the National Water Act and the Water Services Act with— 50
 - (i) management services;
 - (ii) financial services;
 - (iii) training; and 55
 - (iv) other support services.
- (2) In performing its functions, the Agency must—
- (a) be customer-orientated;
 - (b) ensure compliance with national water policy; and
 - (c) act according to its social, economic and constitutional responsibilities in 60 terms of the Constitution.

(3) The Agency must perform the TCTA's LHWP Treaty and non-Treaty functions, requirements, financial and other obligations in accordance with the provisions of the Notice of Establishment, the LHWP Treaty and directives given to the TCTA by the Minister.

(4) The Agency must promote the development of projects that meet social needs and must facilitate suitable financial arrangements for the funding thereof. 5

(5) The Agency may perform any functions inside or outside of the Republic to implement any Water Treaty subject to suitable financial arrangements having been made.

(6) The Agency may only perform functions and undertake operations in another country that are unrelated to the function of supplying water to the Republic if it fully recovers the costs of doing so by— 10

(a) charging a fee;

(b) claiming costs; and

(c) claiming disbursements, for so performing, from that country. 15

CHAPTER 3

GOVERNANCE OF AGENCY

Governance and composition of Board

8. (1) The Agency acts through its Board.

(2) The Board— 20

(a) is the accounting authority of the Agency; and

(b) is responsible for the strategic direction of the affairs of the Agency.

(3) The Board of the Agency consists of—

(a) two executive members appointed in terms of section 24;

(b) not less than nine and not more than eleven non-executive members, which must include— 25

(i) a member designated by the Minister who is a senior officer of the Department;

(ii) a member designated by the Minister of Finance who is suitably qualified and experienced; and 30

(iii) the members appointed in terms of section 11.

(4) The Chief Executive Officer and the Chief Financial Officer are executive members of the Board by virtue of their appointment and may not be the chairperson or the deputy chairperson of the Board or of any committee constituted under section 17.

Role of Board 35

9. The Board must—

(a) retain adequate and effective control over the Agency;

(b) produce the strategic plan;

(c) give consideration to policy and systems of the Agency in order to achieve the objects of the Agency; 40

(c) monitor and evaluate the implementation of strategy, policy and corporate plans;

(d) implement and monitor performance management systems for employees of the Agency;

(e) ensure a transparent and effective communication and stakeholder engagement policy; 45

(f) develop a code of conduct for the Board for approval by the Minister;

(g) provide effective and transparent corporate governance;

(h) ensure compliance with all applicable laws, regulations, agreements and codes of best business practice; and 50

(i) report to the Minister.

Principles to guide Board

10. The Board, as accounting authority of the Agency, is guided by ethical and good governance practices articulated in the legislative prescripts, including the Companies Act and the PFMA, as well as the principles in the corporate governance codes of best practice, including the King Reports. 5

Appointment of non-executive Board members

- 11.** (1) The Minister must, by notice in at least two newspapers that have general circulation throughout the Republic of South Africa and by notice in the *Gazette*, invite nominations for non-executive members of the Board contemplated in section 8(3)(iii). 10
- (2) (a) The Minister must establish a nominations committee consisting of the number of persons that the Minister may determine, one of which must be the chairperson of the nominations committee. 10
- (b) The nominations committee must make recommendations to the Minister for the appointment of the non-executive members of the Board from the nominations received pursuant to the invitation in terms of subsection (1). 15
- (3) In establishing a nominations committee, the Minister must—
- (a) ensure that the nominations committee is constituted with members that are fit and proper, suitably qualified and experienced to serve on the nominations committee; and
- (b) ensure that the nominations committee is broadly representative of race, gender, disability and the geographical spread of the Republic of South Africa. 20
- (4) The nominations committee, in making recommendations to the Minister, must consider—
- (a) the proven skills, knowledge, experience and professional registrations of an applicant in areas of— 25
- (i) governance, audit, legal and risk management;
 - (ii) project finance, treasury management and financial management;
 - (iii) water resources infrastructure development, operations and management;
 - (iv) social development and poverty eradication; 30
 - (v) economic management and development;
 - (vi) corporate governance compliance;
 - (vii) operation and maintenance of national water resources infrastructure;
 - (viii) human resource management; and
 - (ix) environmental management and compliance, necessary for the efficient and effective exercising of the Board's powers and performing its duties; 35
- and
- (b) the need for representation of previously disadvantaged persons due to past racial, gender and any other form of discrimination.
- (5) The nominations committee, in making its recommendations, must include members with at least 10 years' experience, where each member should be at least one of the following— 40
- (a) a chief financial officer of a listed company;
 - (b) a senior engineer in a management position in the water sector;
 - (c) an attorney or advocate of the High Court of South Africa with experience in commercial law and the law governing public entities; 45
 - (d) a senior representative of organised business with substantial experience of major water-dependent sectors of the economy; and
 - (e) an experienced civil society leader with knowledge and skills in the built environment field with experience in water, sanitation and civil engineering. 50
- (6) The nominations committee, in making recommendations to the Minister, must recommend no less than 50 percent more than the prospective number of non-executive board members required.
- (7) The Minister must appoint—
- (a) the two non-executive members of the Board, which consists of— 55
- (i) one member designated by the Minister;
 - (ii) one suitably qualified and experienced member designated by the Minister of Finance; and

- (b) the other non-executive members of the Board from suitable persons recommended by the nominations committee as contemplated in subsection (2)(b).

(8) The Minister is not obliged to appoint the non-executive members to the Board after considering the recommendations made by the nominations committee, and may call for further nominations in the manner set out in subsection (1) if insufficient suitable persons are recommended in terms of subsection (6). 5

(9) The Minister must, by notice in the *Gazette* and within 30 days after the appointment of the members of the Board, publish the names of members and the date of commencement of their terms of office. 10

Chairperson and deputy chairperson

12. (1) The Minister must appoint, from the non-executive members of the Board, a chairperson and a deputy chairperson of the Board.

(2) (a) If the chairperson of the Board is absent or unable to perform any function of the chairperson, the deputy chairperson acts in the chairperson's place. 15

(b) If both the chairperson and deputy chairperson of the Board are absent or unable to perform any function of the chairperson, the Board may designate any other non-executive member of the Board to act as chairperson during such absence or incapacity.

Terms of office and conditions of appointment of non-executive Board members 20

13. (1) A non-executive member of the Board—

- (a) holds office for a term not exceeding five years on a part-time basis;
- (b) may be recommended for re-appointment for a further term not exceeding five years to ensure continuity, but may not serve for more than two consecutive terms; and 25
- (c) is appointed on such terms and conditions as the Minister may determine.

(2) A non-executive member of the Board or a member of any committee of the Board who is not in the full-time employment of the State must be paid such remuneration and allowances out of the funds of the Agency as may be determined by the Minister in consultation with the Minister of Finance. 30

(3) Notwithstanding subsection (1)(a), a member of the Board may, with the authority of the Minister, remain in office after completion of his or her term of office until his or her successor takes office.

(4) The extended term of office contemplated in subsection (3) may not exceed six months. 35

Disqualification and removal of Board member

14. (1) A person is disqualified from being appointed to the Board or from remaining a member if such person is disqualified from serving as a member of a Board in terms of the Companies Act, including if such person—

- (a) is convicted of an offence involving dishonesty; 40
- (b) is declared to be of unsound mind by a competent court;
- (c) is declared insolvent or is an unrehabilitated insolvent;
- (d) is absent from two or more meetings in one calendar year;
- (e) has acted inappropriately and such conduct brings the Agency into disrepute;
- (f) has been removed from an office or position of trust, on the grounds of misconduct involving dishonesty; or 45
- (g) has failed to disclose personal financial interest in terms of section 19.

(2) A non-executive member of the Board must give 30 days' notice of resignation, in writing, to the Minister and the non-executive member contemplated in section 11(7)(a)(ii) must, in addition, notify the Minister of Finance. 50

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

- (a) if there is an irretrievable breakdown of trust or working relationship between the member and the Minister as representative shareholder;
- (b) if the member refuses to execute a lawful directive included in the shareholder's compact; 55
- (c) if the member becomes disqualified in terms of subsection (1); or
- (d) if the member acts contrary to this Act.

(4) Before removing a member from the Board in terms of subsection (3), the Minister must give the member written notice of such intention and an opportunity to make representations within 14 days from the receipt of such notice.

Vacancies

- 15.** (1) A vacancy on the Board occurs— 5
- (a) when a member's term of office expires;
 - (b) when a member is disqualified from being appointed to the Board or from remaining a member of the Board as set out in section 14(1);
 - (c) when a member dies;
 - (d) when a member's resignation submitted in terms of section 14(2) takes effect; 10
or
 - (e) when a member is removed by the Minister in terms of section 14(3).
- (2) If a vacancy occurs on the Board, such vacancy must be filled within six months by the Minister, who must comply with section 11.
- (3) A member appointed to fill a vacancy holds office for the unexpired portion of the term of the member who is replaced. 15

Shareholder's compact

- 16.** (1) The Minister and the Board must conclude the first shareholder's compact within six months of the appointment of the Board and must conclude subsequent shareholder's compacts at least 60 working days before the beginning of any financial year of the Agency. 20
- (2) The shareholder's compact must—
- (a) include the operation and performance indicators against which the performance of the Agency must be measured;
 - (b) give direction with regard to the utilisation of any surplus revenue; 25
 - (c) set procedures for reporting to the Minister;
 - (d) contain such other detail, including directives, as the Minister may require, including matters to be referred to Minister for approval; and
 - (e) provide for the relationship between the Minister and the Agency.
- (3) The Minister must table in Parliament the shareholders compact of the Agency and its subsidiaries— 30
- (a) within 14 days after agreeing to the shareholder's compact, if Parliament is in session; or
 - (b) if Parliament is not in session, within 14 days after the commencement of the next Parliamentary session. 35

Establishment of committees

- 17.** (1) The Board must establish at least the following committees to support the effective functioning of the Board:
- (a) Social and Ethics; and
 - (b) Audit and Risk. 40
- (2) The Board must—
- (a) assign members of the Board to serve on a committee, based on their knowledge and skills; and
 - (b) determine the— 45
 - (i) terms of reference of a committee;
 - (ii) composition of members of a committee;
 - (iii) tenure of members of a committee;
 - (iv) reporting mechanisms for a committee to the Board; and
 - (v) process for the removal of any member appointed to a committee.
- (3) Non-executive members of the Board must be in the majority on any committee. 50
- (4) The composition of members on no two committees may overlap completely.
- (5) The Board may procure specialists or advisors for technical support to a committee.
- (6) Unless specially delegated by the Board, a committee has no decision-making powers and may only make recommendations for consideration by the Board. If decision-making powers are delegated to a committee, decisions will be made with a special majority. 55

(7) A committee must meet as often as is necessary to perform its functions and in accordance with such procedure as the committee may decide.

(8) A non-executive member of the Board must be appointed as the chairperson of a committee.

(9) For committee members who are not Board members, including specialists and advisors, remuneration and allowances as set out in section 13(2) apply. 5

Fiduciary duties of Board members

18. A Board member must in compliance with the provisions of the Companies Act any other applicable legislation and at all times exercise the utmost duty of care and diligence in performing his or her functions. 10

Disclosure of interests of Board members

19. (1) A Board member must disclose the member's personal financial and other conflicts of interest in terms of the procedure set out in section 75 of the Companies Act.

(2) Any disclosure made under this section must be noted in the minutes of the relevant meeting of the Board. 15

Recovery of improper profits

20. If a Board member contravenes section 19, the Agency or the Minister may, in addition to laying criminal charges, recover from the Board member, through a competent court or by agreement or consent of persons concerned, an amount, paid to that Board member or any other person, which is equivalent to— 20

(a) an amount equal to that benefit if a Board member or any other person received a benefit either directly or indirectly as a result of the Board member's actions; or

(b) an amount equal to that loss or damage if the Agency has suffered loss or damage as a result of the contravention of section 19. 25

Validity of decisions

21. (1) An act or decision of the Board, taken by a majority of the members present and constituting a quorum, is not invalid merely because—

(a) of a defect or irregularity in, or in connection with, the appointment of a Board member; 30

(b) of a vacancy in the membership of the Board, including a vacancy resulting from the failure to appoint an original Board member; or

(c) a person not entitled to sit as a member sat as such at the time when the decision was taken.

(2) Anything done by or in relation to a person purporting to act as chairperson or as a Board member is not invalid merely because— 35

(a) an occasion for the person to act had not arisen or had ceased;

(b) there was a defect or irregularity in relation to the appointment; or

(c) the appointment had ceased to have effect.

Delegation of powers and assignment of functions by Board 40

22. (1) Subject to subsections (2) and (3), the Board may, by special resolution, delegate any power or assign any function entrusted to it under this Act to—

(a) the Chief Executive Officer;

(b) a Board member; or

(c) a committee established under section 17. 45

(2) Any power delegated, or function assigned must be exercised or performed subject to such conditions as the Board considers necessary.

(3) The Board may not delegate—

(a) any power conferred in terms of section 66(3) of the Public Finance Management Act to borrow money, or issue a guarantee, indemnity or security, or enter into any other transaction that binds or may bind the Agency to any future financial commitment without the authority of the Minister of Finance; 50

- (b) the power to appoint specialists or advisors to advise the committees of the Board;
 - (c) the power to recommend the Chief Executive Officer;
 - (d) the power to approve the appointment of the Chief Financial Officer;
 - (e) the conclusion of the shareholder's compact; and 5
 - (f) the adoption of the Agency's corporate plan.
- (4) A delegation by the Board—
- (a) must be in writing; and
 - (b) does not prohibit the Board from exercising the power or performing the duty that is delegated. 10

Meetings of Board

23. (1) The Board may determine its own operational proceedings for meetings but must hold at least four meetings in any financial year.

(2) A quorum for Board meetings is two-thirds of the members of the Board.

CHAPTER 4 15

CHIEF EXECUTIVE OFFICER AND CHIEF FINANCIAL OFFICER

Appointment and functions of Chief Executive Officer and Chief Financial Officer

- 24.** (1) (a) The Board must recommend no less than two persons for the appointment of Chief Executive Officer.
- (b) The Minister must, after considering the recommendations of the Board, appoint a Chief Executive Officer within six months of— 20
- (i) the initial appointment of the Board following the commencement of this section; or
 - (ii) a vacancy occurring in the office of the Chief Executive Officer, to ensure that the Agency meets its objects. 25
- (c) The Minister may call for further recommendations from the Board—
- (i) if the recruitment process did not meet the requirements set out in subsection (2); or
 - (ii) if, in the opinion of the Minister, the persons recommended by the Board are not suitable for appointment. 30
- (2) The Chief Executive Officer must—
- (a) be appointed after an open and transparent recruitment process;
 - (b) be a fit and proper person with appropriate qualifications and experience which are relevant to ensure the efficient and effective execution of the functions of the Agency; and 35
 - (c) not be disqualified on the grounds contemplated in section 14(1).
- (3) The Chief Executive Officer must—
- (a) manage the affairs and day-to-day business of the Agency;
 - (b) implement the policies and strategies and carry out the decisions of the Board;
 - (c) recruit and manage the employees of the Agency;
 - (d) develop an efficient and cost-effective administration; and
 - (e) act subject to the instructions and directives that the Board may issue. 40
- (4) The Chief Executive Officer must, with the approval of the Board, appoint a Chief Financial Officer after an open and transparent recruitment process by inviting applications for the post of Chief Financial Officer. 45
- (5) The Chief Financial Officer must—
- (a) ensure that risk management policies and procedures of the Agency are in place;
 - (b) assist the Board to comply with its responsibilities in terms of the Public Finance Management Act; 50
 - (c) ensure that all money payable to the Agency is properly collected;
 - (d) ensure that all money spent by the Agency is properly spent and authorised;
 - (e) ensure that there is adequate control over all assets acquired for the purposes of the Agency;
 - (f) ensure that all liabilities incurred on behalf of the Agency are properly authorised; 55
 - (g) ensure the efficiency and economy of operations and avoidance of fruitless and wasteful expenditure;

- (h) ensure that the financial system is in line with generally accepted accounting practices and procedures; and
- (i) ensure that an adequate budgeting and financial system is in place.

Terms of office and conditions of appointment of Chief Executive Officer and Chief Financial Officer

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25. (1) The Chief Executive Officer and the Chief Financial Officer are appointed on a full-time basis for a term not exceeding five years.

(2) The Chief Executive Officer may be re-appointed for one additional term not exceeding five years, by the Minister, after consultation with the Board.

(3) The Chief Financial Officer may be re-appointed for one additional term not exceeding five years, by the Chief Executive Officer, after consultation with the Board.

(4) (a) The Chief Executive Officer holds office on the terms and conditions, including those relating to remuneration and allowances, as the Minister may determine in writing, in consultation with the Minister of Finance and after considering the recommendations of the Board.

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(b) The Chief Financial Officer holds office on the terms and conditions, including those relating to remuneration and allowances, as the Minister may determine in writing, in consultation with the Minister of Finance and after considering the recommendations of the Board.

(5) The Board must enter into an annual performance agreement with the Chief Executive Officer and the Chief Financial Officer stipulating measurable objectives relating to the performance of that officer's functions under this Act, that are aligned with the key performance indicators included in the shareholder's compact.

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(6) The Chief Executive Officer and the Chief Financial Officer are accountable to the Board.

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(7) Subject to the Labour Relations Act, 1995 (Act No. 66 of 1995), the Minister may on recommendation of the Board terminate the services of the Chief Executive Officer—

(a) for any sound and compelling reasons such as—

(i) an irretrievable breakdown of trust or working relationship between the Chief Executive Officer and the Board or the Minister as sole shareholder; and

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(ii) refusal to execute lawful instructions issued by the Board or the Minister; and

(b) in terms of his or her contract of employment.

(8) Subject to the Labour Relations Act, 1995 (Act No. 66 of 1995), the Chief Executive Officer may on recommendation of the Board, terminate the services of the Chief Financial Officer—

35

(a) for any sound and compelling reasons such as—

(i) an irretrievable breakdown of trust or working relationship between the Chief Financial Officer and the Board or the Minister as sole shareholder; and

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(ii) refusal to execute lawful instructions issued by the Board or the Minister; and

(b) in terms of his or her contract of employment.

Appointment of person to act as Chief Executive Officer or Chief Financial Officer

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26. (1) If the Chief Executive Officer is absent or is unable to carry out her or his duties, or if a vacancy in the office of the Chief Executive Officer exists for a period of more than two months, the Board may, with the approval of the Minister, appoint a person, who is a fit and proper person with appropriate qualifications and experience to carry out the functions of Chief Executive Officer and who is preferably an employee of the Agency, to act as Chief Executive Officer until the Chief Executive Officer is able to resume those functions or until the vacant position of Chief Executive Officer is filled.

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(2) If the Chief Executive Officer is absent or is unable to carry out his or her duties or if there is a vacancy in the Office of the Chief Executive Officer, for a period of less than two months, the Board may, without the approval of the Minister, appoint a person, who is a fit and proper person with appropriate qualifications and experience to carry out the functions of Chief Executive Officer and who is preferably an employee of the Agency, to act as Chief Executive Officer.

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(3) If the Chief Financial Officer is absent for a period of more than two months or is unable to carry out her or his duties or if there is a vacancy in the Office of the Chief Financial Officer, the Chief Executive Officer may, with the approval of the Board, appoint a person, who is a fit and proper person with appropriate qualifications and experience to carry out the functions of Chief Financial Officer and who is preferably an employee of the Agency, to act as Chief Financial Officer until the Chief Financial Officer is able to resume the duties. 5

(4) An acting Chief Executive Officer or Chief Financial Officer may exercise all the powers and must perform all the duties of the Chief Executive Officer or Chief Financial Officer, as the case may be. 10

Interim Chief Executive Officer

27. The Minister may appoint an interim Chief Executive Officer for a period of up to two months, within three days of the short-term vacancy of the office of the Chief Executive arising until such appointment as contemplated in section 24(1) and section 26(1) and (2) is executed. 15

Suspension from Office of Chief Executive Officer and Chief Financial Officer

28. Subject to the Labour Relations Act, 1995 (Act No. 66 of 1995), the Minister may, on the recommendation of the Board, suspend the Chief Executive Officer or the Chief Financial Officer from office during any investigation into misconduct against the Chief Executive Officer or the Chief Financial Officer. 20

Delegation by Chief Executive Officer

29. (1) The Chief Executive Officer may delegate to an employee of the Agency any function entrusted to the Chief Executive Officer under this Act.

(2) A delegation contemplated in subsection (1)—

- (a) must be in writing; 25
- (b) does not prohibit the Chief Executive Officer that made the delegation from performing that function; and
- (c) may at any time be withdrawn or amended, in writing.

Appointment of employees

30. (1) Subject to the general or special directions of the Board, the Chief Executive Officer may appoint staff for the Agency to perform the work necessary for or arising from the performance of the Agency's functions in terms of this Act. 30

(2) An employee is employed subject to the terms and conditions determined by the Chief Executive Officer in accordance with labour legislation and any directions set out in subsection (1). 35

CHAPTER 5

FINANCIAL MATTERS, REPORTING AND ACCOUNTABILITY

Funds of Agency

31. (1) The funds of the Agency consist of—

- (a) any funds transferred to the agency at the dates referred to in section 37(2) and 37(5); 40
- (b) monies appropriated by Parliament;
- (c) revenue from water use charges due to the Agency, as contemplated in Chapter 5 of the National Water Act, and the Pricing Strategy established by the Minister in terms of section 56 of the National Water Act; 45
- (d) loans raised;
- (e) income derived by it on investments in terms of subsection (3);
- (f) income derived by it in the performance of its functions;
- (g) income generated through developing, leasing out or otherwise managing its assets within the scope of this Act; 50

- (h) income earned from the Agency's participation in joint ventures with water services institutions as contemplated by section 19 of the Water Services Act;
 - (i) proceeds derived from the sale of the Agency's assets;
 - (j) fines payable by persons as a penalty on their conviction of offences created by this Act; 5
 - (k) recovery of improper profits from Board members or persons concerned as contemplated in section 20; and
 - (l) grants or donations received by the Agency.
- (2) The Agency must utilise—
- (a) its funds to cover costs in connection with the performance of its functions in terms of this Act, as well as any additional functions that may be assigned or delegated to it by the Minister from time to time; 10
 - (b) any donation or contribution in accordance with any conditions that may be imposed, provided it is not inconsistent with the purpose of this Act; and
 - (c) any money appropriated by Parliament for the purpose for which it was granted. 15
- (3) The Agency may invest any of its funds not immediately required by the Agency, with such directions as the Minister and the Minister of Finance may determine.
- (4) The Agency must distribute to other water management institutions such revenues that it may collect on their behalf in terms of any billing and collection agreements, either with the Minister or with other water management institutions, less any fees or commissions that the Agency may charge for these services in terms of these agreements. 20

Government support to Agency and loans by Agency and subsidiaries

- 32.** (1) Parliament may fund the normal expenditure of the Agency out of money appropriated for the purpose. 25
- (2) A request for financial support must be prepared by the Agency by a date determined by the Minister in order for it to be subjected to the evaluation process for inclusion in the annual compilation and exposition of the government's expenditure proposal for appropriation purposes. 30
- (3) (a) The Agency and its subsidiaries may not borrow money without the prior written approval of the Minister, granted after consultation with the Minister of Finance. 30
- (b) Any decision to borrow money taken without the approval contemplated in paragraph (a) is of no force and effect.

Annual budget, long-term financial plan and corporate plan 35

- 33.** (1) The annual budget, long-term financial plan and corporate plan of the Agency must be submitted to the Minister, as the shareholder representative and executive authority, for approval.
- (2) The financial year of the Agency is for the period 1 April to 31 March in the following year, except that the first financial year of the Agency begins on the incorporation date and ends on 31 March. 40
- (3) The corporate plan must, in addition to the matters specified in the Public Finance Management Act, contain—
- (a) financial and performance indicators and targets considered by the Board to be appropriate, based on indicators and targets contained in the shareholder's compact; 45
 - (b) any other information that the Board considers necessary; and
 - (c) such information as may be directed by the Minister.
- (4) In preparing or revising a financial and performance indicators and targets referred to in subsection (3), the Board must have regard to— 50
- (a) the shareholder's compact entered into with the Minister;
 - (b) the need to maintain the Agency's financial viability;
 - (c) the need to maintain reserves, at a level determined by the Minister from time to time, especially to provide for— 55
 - (i) the development of national water resources infrastructure as instructed by the Minister;
 - (ii) any estimated future demand for the services of the Agency; and
 - (iii) any need to improve the accessibility of, and performance standards for, the services provided by the Agency;

- (d) the need to meet the developmental objectives of government and in accordance with sections 27(1)(b) and 27(2) of the Constitution; and
- (e) any other matter determined by the Minister.

Submission of quarterly reports and corporate plans

- 34.** (1) The Board must submit quarterly reports to the Minister— 5
- (a) at the end of each quarter; and
 - (b) which must illustrate how the national water policy and plans are complied with.
- (2) The Board must revise its corporate plan annually, and must— 10
- (a) take national water policy into consideration; and
 - (b) at least 30 working days before the beginning of each financial year, make a copy of the corporate plan available to the Minister.
- (3) The Minister may— 15
- (a) within 60 working days after receiving a copy of a prepared corporate plan; or
 - (b) within 30 working days after receiving a copy of a revised corporate plan, make comments on the plan to the Board.
- (4) The Board must consult in good faith with the Minister, following communication to it of the Minister’s comments, and must make any changes to the corporate plan that are agreed upon by the Minister and the Board.
- (5) The Minister may, from time to time, direct the Board to include in, or omit from, a corporate plan, any matter, including a financial matter. 20
- (6) Before giving a directive under this section, the Minister must consult with the Board as to any matter to be included or omitted in the directive.
- (7) The Board must comply with a directive given under this section, unless adequate financial arrangements cannot be made to fund the implementation of the directive. 25

Financial statements and annual report

- 35.** (1) The Board must prepare and submit financial statements to the Minister in accordance with established accounting practice, principles and procedures, comprising—
- (a) a statement reflecting, with suitable and sufficient particulars, the income and expenditure of the Agency during the preceding financial year; and 30
 - (b) a balance sheet showing the state of its assets, liabilities and financial position as at the end of that financial year.
- (2) Within five months after the end of each financial year of the Agency, the Board must prepare and submit to the Minister an annual report and financial statements in the prescribed form. 35
- (3) Where required, the financial records must indicate separate activities or projects of the Agency.
- (4) The Agency must publish its annual report and financial statements and make copies available at the offices of the Agency for inspection. 40

Board to notify Minister of significant events

- 36.** If any matter arises that might prevent or materially affect the achievement of the objects of the Agency in terms of the corporate plan or financial and performance indicators and targets contained in the corporate plan, the Board must immediately notify the Minister of the existence of such matter. 45

CHAPTER 6

TRANSFER OF NATIONAL WATER RESOURCES INFRASTRUCTURE AND DISESTABLISHMENT OF TCTA

Transfer of national water resources infrastructure

- 37.** (1) (a) Section 115 of the National Water Act applies, in respect of the transfer of a national water resources infrastructure, to the Agency. 50
- (b) The Minister may declare, by notice in the *Gazette*, which government waterworks are deemed to be national water resources infrastructure and are to be vested

in the Agency, and may determine, from time to time, which infrastructure is no longer national water resources infrastructure and to which water management institution it should be transferred.

(2) Subject to subsection (1), the Minister must, within a period of 12 months after the date of incorporation of the Agency and in consultation with the Agency, determine by notice in the *Gazette* a date on which the Minister will transfer to the Agency the national water resources infrastructure, which immediately before that date vested in the Department. 5

(3) The transfer contemplated in subsections (2) includes—

- (a) all assets and associated liabilities; 10
- (b) all water user agreements, contractual and non-contractual rights and obligations, functions, directives and duties associated with the national water resources infrastructure;
- (c) all operation and maintenance responsibilities of the national water resources infrastructure; 15
- (d) all financial advisory services, including systems for the billing and collection of revenue payable for water use from the national water resources infrastructure; and
- (e) the transfer of employees and officials of the Department associated with the national water resources infrastructure in terms of section 197 of the Labour Relations Act, 1995 (Act No. 66 of 1995). 20

(4) The Minister must, either by way of a written directive or in the shareholder's compact, give direction in respect of the utilisation of any surplus revenue, if any, towards capital improvements or social projects of the national water resources infrastructure being transferred. 25

(5) The Minister must, by notice in the *Gazette* determine a date within 12 months after the incorporation of the Agency or such extended period determined by the Minister by notice in the *Gazette*, after the incorporation date and subject to subsection (10), on which date the Minister shall transfer to the Agency—

- (a) the whole of the commercial enterprise of the TCTA, including all assets, liabilities, rights and obligations of whatsoever nature and howsoever arising, who acquires such enterprise as a going concern; 30
- (b) the TCTA's treaty functions; and
- (c) the TCTA's non-Treaty functions.

(6) On the date contemplated in subsection (5), the Agency becomes the owner of all moveable and immovable property, which immediately prior to the date determined by the Minister in subsection (5)—

- (a) was registered in the asset registers of the TCTA; 35
- (b) fell under the control or custody of the TCTA;
- (c) was possessed, occupied or used by the TCTA as if it was the owner thereof; 40
- and
- (d) was registered with any Registrar of Deeds in the name of the TCTA.

(7) On the date contemplated in subsection (5), in all pending litigation, including arbitration, the Agency must be substituted as a litigating party for the TCTA, as if the Agency was a litigant from the commencement thereof. 45

(8) On the date contemplated in subsection (5), in all contracts to which the TCTA is a party, the Agency must substitute the TCTA as a contracting party, as if the Agency had been a contracting party from the negotiation and conclusion thereof.

(9) On the date contemplated in subsection (5), in all guarantees issued in respect of the financial obligations of the TCTA, including any guarantees issued under sections 66 or 70 of the Public Finance Management Act, the Agency must substitute, and hereby substitutes, the TCTA as a contracting party, as if the Agency had been the entity guaranteed from the beginning. 50

(10) On the date contemplated in subsection (5), all existing financial instruments of the TCTA must be regarded as having been issued by the Agency. 55

(11) Despite any law to the contrary, any reference to the TCTA or a representative of the TCTA in any law, contract, register or record created in terms of a statute, contract or other legal document, must, with effect from the date contemplated in subsection (5), be regarded as being a reference to the Agency or a representative thereof.

(12) The Minister may not determine the date contemplated in subsection (5) until such time as— 60

- (a) the Government of Lesotho has been consulted on the transfer of the Treaty functions and non-Treaty functions of the TCTA to the Agency;

- (b) an arrangement has been made with the TCTA's primary creditors, to the satisfaction and approval of the Minister of Finance, in compliance with the Public Finance Management Act; and
- (c) an arrangement has been made for the transfer of personnel employed by the TCTA to the Agency in terms of section 197 of the Labour Relations Act, 1995 (Act No. 66 of 1995). 5

Disestablishment of TCTA

38. (1) Subject to section 37, the Minister must disestablish the TCTA as a statutory body after the date determined by the Minister in terms of section 37(5) and may take steps to wind up the TCTA. 10

(2) Disestablishment of the TCTA must be by notice in the *Gazette*, after consultation with the Minister of Finance, the Board of the TCTA and the Board of the Agency.

(3) Clause 30 of Government Notice No. 277, published in *Gazette* No. 21017 of 24 March 2000, is hereby repealed.

(4) The Minister may direct the transfer of any function or service of the TCTA prior to its disestablishment to the Agency by a written directive. 15

(5) Any guarantee or indemnity expressed or implied by the State in favour of any contractual obligation or associated liability by the TCTA remains valid, binding and enforceable.

Registering of real rights 20

39. The relevant Registrar of Deeds must make the necessary entries, in the register in terms of the Deeds Registration Act, 1937 (Act No. 47 of 1937), of the vesting of any real right of the State in the Agency in terms of this Act.

Transfer of personal servitude

40. (1) Despite any law to the contrary, a personal servitude, whether registered or not, held by the Minister or a water management institution, may be transferred from— 25

- (a) the Minister to the Agency; or
- (b) a water management institution to the Agency.

(2) The relevant Registrar of Deeds must register a notarially executed deed of cession to transfer a registered personal servitude in terms of subsection (1). 30

Disposal and transfer of national water resources infrastructure

41. National water resources infrastructure may not be transferred or disposed of by the Agency without the approval of the Minister if its value exceeds an amount determined from time to time by the Minister by notice in the *Gazette* with the approval of the Minister of Finance. 35

Acquiring State land

42. Upon request by the Agency, in consultation with the Minister and the Ministers responsible for Public Works or Land Affairs, as the case may be, land may be made available by the State for transfer or registration of a servitude over any State land for the performance of any function by the Agency under this Act. 40

CHAPTER 7

POWERS OF MINISTER

Delegation by Minister

43. (1) The Minister may, in writing and subject to such conditions as the Minister may consider necessary, delegate a function entrusted to the Minister in terms of this Act to the Director-General of the Department. 45

(2) The Minister may not delegate the power—

- (a) to make regulations;
- (b) to appoint a member of the Board;

- (c) to determine performance objectives and the strategic direction for the Agency; and
- (d) to approve annual reports and financial statements.
- (3) A delegation—
 - (a) does not prohibit or relieve the Minister from performing the function so delegated in terms of subsection (1); and
 - (b) may at any time be withdrawn or amended, in writing, by the Minister.
- (4) The Minister may give a directive to the Director-General in relation to a delegation contemplated in subsection (1).
- (5) The Director-General must give effect to a directive contemplated in subsection (4).

Additional functions

- 44.** (1) (a) The Minister may request the Agency, in writing, to plan, design and construct national water resources infrastructure or to maintain or rehabilitate any particular national water resources infrastructure, despite the fact that such a project is not included in the Agency's corporate plan. 15
- (b) The Minister must identify the source of the funding of a project referred to in paragraph (a).
- (2) The Agency may perform additional functions if—
- (a) it does not limit its capacity to perform its functions; 20
 - (b) it is not to the financial prejudice of the Agency; or
 - (c) it is not likely to detrimentally affect or cause financial prejudice to the Agency's customers or stakeholders or another water management institution.
- (3) The Minister may, in consultation with the Minister of Finance and after consultation with the Ministers for Public Enterprises and of Trade and Industry, request or authorise the Agency to perform its functions outside of the Republic of South Africa. 25

Expropriation by Minister

- 45.** (1) Subject to section 25 of the Constitution, the Minister may authorise the Agency to expropriate property, in terms of section 64 of the National Water Act for a public purpose or in the public interest and such property may include— 30
- (a) land that it reasonably requires for national water resources infrastructure or other purposes connected with a national water resources infrastructure;
 - (b) the right to land that it requires temporarily for any of the purposes which the Minister of Public Works is competent to expropriate land; or
 - (c) gravel, stone, sand, clay, water or any other material or substance on or in the land required for the construction of national water resources infrastructure or for any waterwork or any other purposes. 35
- (2) Where the Minister expropriates any land for the Agency in terms of paragraph (a), the Agency becomes the owner thereof on the date of such expropriation.
- (3) The Expropriation Act, 1975 (Act No. 63 of 1975) applies to any expropriation required in terms of this Act. 40

Investigation of Agency

- 46.** (1) The Minister may appoint a person to investigate the affairs or financial position of the Agency and compliance by the Agency with this Act, and may recover from the Agency the fees and disbursements paid by the Minister to that person during the investigation. 45
- (2) The Agency or an employee of the Agency must provide the Minister and the person appointed in subsection (1) with such data, information, books, accounts, documents and access to assets of the Agency as the Minister or the person appointed in subsection (1) may require. 50

Intervention by Minister

- 47.** (1) Subject to subsection (2), the Minister may direct the Agency to take any action specified by the Minister, if the Agency—
- (a) has failed to comply with any law or any policy envisaged in this Act;
 - (b) is in financial difficulty or is being mismanaged; 55

- (c) has failed to perform its functions effectively;
 - (d) has failed to comply with any directive given by the Minister under this Act or in the shareholder's compact; or
 - (e) has obstructed the Minister, or a person authorised by the Minister, in performing a function in terms of this Act. 5
- (2) A directive contemplated in subsection (1) must—
- (a) be in writing;
 - (b) state the nature of the deficiency;
 - (c) state the steps that must be taken to remedy the situation; and
 - (d) specify a reasonable period within which those steps must be taken. 10
- (3) If the Agency fails to remedy the situation within the period specified in the directive contemplated in subsection (2), the Minister, with the approval of the Minister of Finance, may appoint an administrator—
- (a) after having given the Agency a reasonable opportunity to be heard; and
 - (b) after having afforded the Agency a hearing on any submissions received. 15
- (4) If the Minister appoints an administrator—
- (a) the administrator may do anything that the Agency is authorised or required to do in terms of this Act, to the exclusion of the Agency;
 - (b) the Board may not, while the administrator performs any function, perform that function; 20
 - (c) an employee or a contractor of the Agency must comply with a directive given by the Minister or the administrator; and
 - (e) the Minister or the administrator may recover from the Agency all reasonable costs incurred that are related to the appointment of and performance of functions by the administrator. 25
- (5) The Minister must—
- (a) Regularly review the progress of the administrator in remedying the situation that gave rise to the appointment of the administrator; and
 - (b) within six months of appointing the administrator, table a report on his or her findings in the National Assembly. 30
- (6) Once the Minister is satisfied that the Agency is able to perform its functions effectively, the Minister, with the approval of the Minister of Finance, must terminate the appointment of the administrator.
- (7) (a) Despite anything contained in this Act, but subject to paragraph (b), the Minister may dissolve the Board if the Minister, on good cause shown, loses confidence 35 in the ability of the Board to perform its functions effectively and efficiently.
- (b) The Minister may dissolve the Board only—
- (i) after having given the Board a reasonable opportunity to be heard; and
 - (ii) after having afforded the Board a hearing on any submissions received from the Board. 40
- (c) If the Minister dissolves the Board, the Minister—
- (i) may appoint an administrator to take over the functions of the Board and to do anything which the Board might otherwise be empowered or required to do by or under this Act, subject to such conditions as the Minister may determine; and
 - (ii) must, as soon as it is feasible but not later than three months after the dissolution 45 of the Board, replace the members of the Board in the same way as the way in which they were appointed.
- (8) (a) The costs associated with the appointment of an administrator must be for the account of the Agency.
- (b) The appointment of the administrator terminates when the Board members have 50 assumed office.
- (9) Despite this section, the Minister retains the right at any time to approach a competent court for relief in any matter that he or she considers appropriate in furtherance of the objects of this Act.

Regulations 55

48. (1) The Minister may make regulations regarding ancillary or incidental administrative or procedural matter in relation to functions of the Agency set out under section 7, that are necessary to prescribe for the proper implementation or administration of this Act.

(2) Any regulation that has financial implications may only be made in consultation 60 with the Minister of Finance.

CHAPTER 8

MISCELLANEOUS PROVISIONS

Subsidiary company

- 49.** The Agency may only establish a subsidiary company in terms of the Companies Act— 5
- (a) by a special resolution of the Board; and
 - (b) in consultation with the Minister and the Minister of Finance.

Liquidation

- 50.** Despite any other law, the Agency or any subsidiary company, as the case may be, may not be placed under judicial management or in liquidation, except on the authority of an Act of Parliament adopted specifically for that purpose. 10

Documents relating to litigation against Agency

- 51.** The Agency must provide the Minister with copies of all summonses and applications in its possession relating to any legal proceedings brought against the Agency. 15

Transitional provisions and savings

- 52.** Anything done under the National Water Act and which is still valid at the commencement of this Act, remains in force— 20
- (a) to the extent that it is consistent with this Act; and
 - (b) until anything done under this Act overrides it.

Offences and penalties

- 53.** Any person who—
- (a) fails to provide access to any book, account, document or asset when required to do so under this Act;
 - (b) fails to comply with a directive issued under this Act; 25
 - (c) fails or refuses to give data or information, or gives false or misleading data or information, when required to give information under this Act;
 - (d) refuses to perform a duty, or obstructs any person in the performance of any of that person's functions, in terms of this Act;
 - (e) makes personal gains or accepts any unauthorised fee or reward, either directly or indirectly, as a result of his or her position with the Agency; 30
 - (f) fraudulently uses the Agency's name, logo or design without authority to do so; and
 - (g) unlawfully and intentionally or negligently tamper or interferes with any waterwork or any seal or measuring device attached to a waterwork, 35
- is guilty of an offence and is liable, upon conviction, to a fine or to imprisonment or to both a fine and such imprisonment for a period not exceeding five years.

Short title and commencement

- 54.** This Act is called the South African National Water Resources Infrastructure Agency SOC Limited Act, 2023, and comes into effect on a date determined by the President by Proclamation in the *Gazette*. 40

**MEMORANDUM ON THE OBJECTS OF THE SOUTH AFRICAN
NATIONAL WATER RESOURCES INFRASTRUCTURE AGENCY
SOC LIMITED BILL, 2023**

1. BACKGROUND

- 1.1 The South African National Water Resources Infrastructure Agency SOC Limited Bill, 2023 (the “Bill”) emanates from a project of the Department of Water and Sanitation to restructure the South African national water resources infrastructure. Over the past few years, there has been an emerging recognition of the need for a stronger public sector in the key area of infrastructure development, effective maintenance, operation and management of existing infrastructure to support social and economic development.
- 1.2 The importance of water for social and economic development has been a high priority of Government since 1994. In order to meet the obligations in terms of section 27(1)(b) and 27(2) of the Constitution of the Republic of South Africa, 1996 (the “Constitution”), and to achieve the strategic objectives of Government to eradicate poverty and to ensure sustainable and equitable development, including promoting the State’s socio- economic and transformation objectives, the National Water Resources Infrastructure Agency SOC Limited (the “Agency”) must be established. The importance of national water resources infrastructure as an element of South African economic infrastructure has also been increasingly recognised.
- 1.3 While the social and economic dimensions of water resources management is fundamentally linked, the financing and development of large-scale water resources infrastructure is driven by the requirements for economic use, which can be used to leverage supply for social purposes development and assessing viability of the investment.
- 1.4 In addition to the development, operation and maintenance of national water resources infrastructure, there is a need to ensure that the value of this national asset is effectively maintained and sustained in order to minimise the risk to end-users.
- 1.5 Currently, the Department of Water and Sanitation cannot raise capital directly on the financial markets, and is reliant on special-purpose vehicles, mainly the Trans-Caledon Tunnel Authority (“TCTA”), to finance and implement viable economic projects.
- 1.6 The establishment of the Agency, therefore, fulfils the requirement of the management of water resources infrastructure to achieve the economic, social and water resources management objectives of Government and obligations in terms of section 27(1)(b) and 27(2) of the Constitution.
- 1.7 The establishment of the Agency has the advantage of an institution that separates the policy development and regulatory responsibilities of the Department, as the custodian of the national water resources infrastructure, from the development and implementation responsibilities for infrastructure management.
- 1.8 The Bill seeks to incorporate and establish the Agency as a juristic person under the sole ownership of the State. The Agency is to be registered as a State Owned Company in terms of the Companies Act, 2008 (Act No. 71 of 2008) (“Companies Act”), and will be known as the South African National Water Resources Infrastructure Agency SOC Limited. The rights of the State will be exercised by the Minister of Water and Sanitation. The governance of the Agency will vest in the Board of the Agency.

2. OBJECTS OF BILL

The objects of the Bill can be summarised as follows:

- (a) To establish a juristic person under the ownership and control of the State in order to administer, fund, finance, develop, operate, maintain, manage and provide advisory services in respect of national water resources infrastructure in an efficient and cost-effective manner to meet the social and economic developmental needs of current and future water users within the framework of national government policy and in accordance with section 27(1)(b) and 27(2) of the Constitution;
- (b) to ensure the sustainable, equitable and reliable supply of water to meet nationally and regionally defined social and economic objectives of government;
- (c) to transfer national government waterworks to the Agency;
- (d) to alleviate the burden on the State's resources in water resources development; and
- (e) to provide for the disestablishment of the TCTA and the transfer of all its assets, liabilities, rights, obligations, powers, Treaty and non-Treaty functions as a going concern into the Agency.

3. CLAUSE BY CLAUSE EXPLANATION

- 3.1 Clause 1 contains the definitions in respect of the provisions of the Bill.
- 3.2 Clause 2 provides for the purpose of the Act, with special reference to the fact that the Agency as a juristic person, owned and controlled by the State, will take over all aspects dealing with the operation and maintenance of national water resources infrastructure and serve and achieve the development and transformation objectives of Government relating to service delivery, social and economic development.
- 3.3 Clause 3 provides for the establishment of the Agency.
- 3.4 Clause 4 requires that the Agency's Memorandum of Incorporation must be consistent with the Act.
- 3.5 Clause 5 provides for the application of the Companies Act, to the Agency.
- 3.6 Clause 6 provides for the objects of the Agency which detail that the Agency must develop and manage national water resources infrastructure to ensure the sustainable, equitable and reliable supply of water from national water resources infrastructure.
- 3.7 Clause 7 provides for the functions of the Agency. Extensive powers are conferred upon the Agency in order to enable it to realise the objects of the Bill. The Agency may also carry out functions by giving support to other water management institutions and water services providers. This support will not include financial support but will be technical and advisory in its nature. Further, with the required approval, the Agency may perform its functions outside the Republic of South Africa. This Clause also sets out that the Treaty and non-Treaty functions of the TCTA will be taken over by the Agency.
- 3.8 Clause 8 provides for the governance and composition of the Board. This Clause sets out that the Agency is governed by and acts through its Board which is its accounting authority and is subject to the Public Finance Management Act, 1999 (Act No. 1 of 1999) (the "Public Finance Management Act"). The Board will consist of between nine and eleven non-executive members. The Chief Executive Officer and Chief Financial Officers being the executive members of the Board.

- 3.9 Clause 9 describes the role of the Board. This includes, among others, that the Board must retain effective control over the Agency and give consideration to the strategy, policy and systems of the Agency to achieve the objectives of the Agency.
- 3.10 Clause 10 explains that the Board is guided by the ethical and good governance practices articulated in legislative prescripts, which include the Companies Act, the Public Finance Management Act and the principles in the corporate governance codes of best practice including the King Reports.
- 3.11 Clause 11 provides for the appointment procedure of non-executive members to the Board. The non-executive members will be appointed by the Minister on the recommendation of a nominations committee. In addition one non-executive member will be designated by the Minister who is a senior officer of the Department and one non-executive member will be designated by the Minister of Finance. Due consideration must be given to the need for representation by previously disadvantaged persons due to past racial, gender and other discrimination.
- 3.12 Clause 12 provides for the appointment of the chairperson and deputy chairperson from the non-executive members of the Board. The Minister will make these appointments.
- 3.13 Clause 13 provides for the terms of office and conditions of appointment of non-executive Board members. Terms are for five years, with the right of re-appointment and with the remuneration approved by the Minister, in consultation with the Minister of Finance.
- 3.14 Clause 14 provides for the disqualification and removal of Board members.
- 3.15 Clause 15 of the Bill sets out the procedure that must be followed for the filling of vacancies on the Board.
- 3.16 Clause 16 provides for the entering into of the shareholder's compact. The first shareholder's compact must be concluded within six months from the date on which the Board is appointed.
- 3.17 Clause 17 requires that the Board must establish certain mandatory committees to support the effective functioning of the Board.
- 3.18 Clause 18 requires that a Board member must in compliance with the provisions of the Companies Act exercise the utmost duty of care and diligence in performing his or hers functions and in the furtherance of the Board members duty.
- 3.19 Clause 19 provides for the disclosure of interests of board members in terms of the procedure set out in section 75 of the Companies Act. Disclosures which are made in terms of clause 19 must be recorded in the minutes of the relevant Board meeting.
- 3.20 Clause 20 provides for the recovery of improper profits if a Board member contravenes clause 19. The clause further provides that the Agency or the Minister may, in addition to laying criminal charges, recover from the Board member, through a competent court or by agreement or consent of persons concerned, an amount, paid to that Board member or any other person.
- 3.21 Clause 21 of the Bill provides that any acts or decision of the Board are not invalid merely because of a defect or irregularity in, or in connection with, the appointment of a Board member; or a vacancy in the membership of the Board.

- 3.22 Clause 22 provides that the Board may delegate certain of its functions to the Chief Executive Officer, a Board member or a committee. Certain powers may not be delegated.
- 3.23 Clause 23 provides that the Board will regulate its own procedures for its meetings but must hold at least four meetings in a year. The quorum of the Board is two thirds of the members of the Board.
- 3.24 Clause 24 provides for the appointment of the Chief Executive Officer and the Chief Financial Officer. The Chief Executive Officer is appointed by the Minister upon the recommendation of the Board. The Chief Financial Officer is appointed by the Chief Executive Officer with the approval of the Board. The functions of these officers are also set out in this clause.
- 3.25 Clause 25 provides for the term of office and conditions of appointment of the Chief Executive Officer and the Chief Financial Officer who are appointed for a term of five years with an option for reappointment for one additional term not exceeding five years.
- 3.26 Clause 26 makes provision for the appointment of a person to act as Chief Executive Officer or Chief Financial Officer.
- 3.27 Clause 27 provides for the appointment of an interim Chief Executive Officer.
- 3.28 Clause 28 provides for the suspension from office of the Chief Executive Officer and the Chief Financial Officer.
- 3.29 Clause 29 makes provision for the delegation by the Chief Executive Officer to an employee of the Agency any function entrusted to the Chief Executive Officer.
- 3.30 Clause 30 provides that the Chief Executive Officer may appoint the staff necessary for the Agency to perform the work arising from the provisions of this Act, subject to the directions of the Board.
- 3.31 Clause 31 provides that the funds of the Agency are, amongst others, money appropriated by Parliament, revenue from water charges in terms of the National Water Act, 1998 (Act No. 36 of 1998), income received from additional services performed and loans raised in terms of the Public Finance Management Act.
- 3.32 Clause 32 provides that the Agency may request financial support by a date determined by the Minister. The Agency and its subsidiaries may not borrow money without the prior written approval of the Minister granted after consultation with the Minister of Finance.
- 3.33 Clause 33 requires that the annual budget, long-term financial plan and corporate plan must be submitted to the Minister as the shareholder representative for approval.
- 3.34 Clause 34 requires the submission of quarterly reports to the Minister. The Board must revise its corporate plan annually. All revised corporate plans must also be given to the Minister and the Board must consult in good faith with the Minister and must make any changes to the corporate plan that are agreed upon by the Minister and the Board.
- 3.35 Clause 35 requires that the financial statements must be submitted to the Minister in accordance with established accounting practice, principles and procedures. The Board must also prepare and submit to the Minister an annual report and financial statements in the prescribed form within five months after the end of each financial year of the Agency. Where required the financial records must indicate separate activities or projects of the Agency.

- 3.36 Clause 36 requires that the Board must notify the Minister of significant events.
- 3.37 Clause 37 provides for the transfer of national water resources infrastructure with section 115 of the National Water Act finding application. The Minister may declare by notice in the *Gazette* any government waterwork as a national water resources infrastructure. Furthermore, the Minister must within a period of 12 months, in consultation with the Agency and at a date determined by the Minister after its incorporation date, transfer the national water resources infrastructure to the Agency. The Minister must also transfer, at a date determined by the Minister after its incorporation date, all assets and associated liabilities, water supply agreements, contractual and non-contractual rights and obligations. This clause provides also for the transfer to the Agency the whole commercial enterprise of the TCTA.
- 3.38 Clause 38 provides for the disestablishment of the TCTA. The Minister must disestablish the TCTA as a statutory body at a date determined by the Minister after the date of incorporation of the Agency as a company (the “Incorporation date”). Functions and services of the TCTA may be transferred to the Agency prior to its disestablishment by written directive. Clause 30 of Government Notice No. 277, published in *Gazette* No. 21017 of 24 March 2000, is repealed.
- 3.39 Clause 39 provides for the registration of real rights. Real rights will be registered in the name of the Agency.
- 3.40 Clause 40 provides for the transfer of personal servitudes. Personal servitudes, whether registered or not, will also be transferred to the Agency.
- 3.41 Clause 41 provides that the national water resources infrastructure may not be transferred or disposed of by the Agency without the approval of the Minister, if its value exceeds an amount determined from time to time by the Minister, with the approval of the Minister of Finance, by notice in the *Gazette*.
- 3.42 Clause 42 provides for the acquisition of State land.
- 3.43 Clause 43 makes provision for delegations by the Minister. Subject to certain functions that may not be delegated, the Minister may delegate functions to the Director-General of the Department.
- 3.44 Clause 44 provides that the Minister may, in consultation with the Agency, authorise the Agency to perform additional functions, including functions outside of the Republic. Funding arrangements must be made in these circumstances.
- 3.45 Clause 45 provides for expropriation of property by the Minister subject to section 25 of the Constitution.
- 3.46 Clause 46 provides for the investigation of the Agency by a person appointed by the Minister.
- 3.47 Clause 47 provides for intervention by the Minister. In terms of the clause, the Minister may under certain circumstances direct the Agency to take action specified by the Minister. Failure to do so could result in the Minister, with the approval of the Minister of Finance, appointing an administrator.
- 3.48 Clause 48 authorises the making of regulations by the Minister.
- 3.49 Clause 49 provides that with the required approval, the Agency may establish a subsidiary company.

3.50 Clause 50 provides that the Agency or any subsidiary company may not be placed under judicial management or in liquidation without an Act of Parliament adopted specifically for this purpose.

3.51 Clause 51 requires that the Agency must provide the Minister with copies of all summonses and applications in its possession relating to any legal proceedings brought against the Agency.

3.52 Clause 52 provides for the transitional provisions and savings.

3.53 Clause 53 provides for the offences and penalties.

3.54 Clause 54 contains the short title and commencement.

4. FINANCIAL IMPLICATIONS FOR STATE

Based on assumptions set out in the Business Case and the associated financial model, the Agency should be financially viable. However, the Agency would still require the current augmentation received from the fiscus to continue to finance the social portion of infrastructure projects as well as two thirds of the Acid Mine Drainage costs as agreed with the water users. This would not be more than the funds currently provided for in the MTEF for water resources infrastructure development. Thereafter the fiscus would only contribute to specific social projects which the Agency may be directed to implement or manage. Funding shall primarily be from the sale of water, State subsidies and borrowings. Borrowing is subject to approval by the Minister of Water Affairs and Forestry and the Minister of Finance, and in terms of the Public Finance Management Act.

5. CONSULTATION

5.1 The following stakeholders and statutory bodies have been consulted:

- The Economic Sectors, Investment, Employment and Infrastructure Development Cluster.
- The Social Protection, Community and Human Development Cluster.
- The Departments: National Treasury, Public Services and Administration, Public Enterprise, Agriculture, Land Reform and Rural Development, Cooperative Governance and Traditional Affairs, Public Works, Forestry, Fisheries and Environment, Small Business Development, Minerals and Energy, Employment and Labour, Trade and Industry, The Presidency and Human Settlements.
- Organisations: South African Local Government Association, Municipal Infrastructure Support Agent, Eskom, Sasol (through Chemical and Allied Industries Association), Business Unity South Africa, National Economic Development and Labour Council, the Trans-Caledon Tunnel Authority, Chamber of Mines, AGRI-South Africa, National African Farmers Union, South African Non-Governmental Organisation Coalition, South African Water Utilities, Rand Water, Umgeni Water, Bloem Water, Magalies Water, Overberg, Lepelle Northern Water, Mhlatuze Water, Sedibeng Water, Amatola Water, Water Research Commission, Breede–Gouritz Catchment Management Agency, Inkomati–Usuthu Catchment Management Agency.

5.2 The National Treasury has been consulted in line with the Public Finance Management Act.

5.3 The Bill was also published for public comment and comments received have been taken into consideration.

6. IMPLICATIONS FOR PROVINCES

None.

7. ORGANISATIONAL AND PERSONNEL IMPLICATIONS

The Department has established an Infrastructure Branch within the Water Trading Entity under a Deputy Director-General with administration and support staff. The Branch, together with all employees of TCTA, will be transferred to the Agency as a going concern at a date specified by the Minister. The necessary arrangements will have to be made for the proposed Agency to be accommodated and equipped in order to perform its functions properly.

8. COMMUNICATION IMPLICATIONS

Appropriate communication measures may be implemented by the Government Communication and Information System. A communication strategy will be implemented to inform role players in the financial markets about the Agency and to ensure the integrity of TCTA's existing loans.

9. CONSTITUTIONAL IMPLICATIONS

None.

10. PARLIAMENTARY PROCEDURE

10.1 The Department of Water and Sanitation and the Office of the Chief State Law Advisers are of the opinion that the Bill must be dealt with in accordance with the Parliamentary procedure established by section 75 of the Constitution, since it contains no provisions to which the procedure set out in section 74 or 76 of the Constitution applies.

10.2 Chapter 4 of the Constitution specifies the manner in which legislation must be enacted by Parliament. It prescribes different procedures for Bills, including ordinary Bills not affecting provinces (section 75 procedure), and ordinary Bills affecting provinces (section 76 procedure). The determination of the procedure to be followed in processing the Bill is referred to as tagging.

10.3 In terms of section 76(3) of the Constitution, a Bill must be dealt with in accordance with section 76 if it falls within a functional area listed in Schedule 4. Schedule 4 to the Constitution lists functional areas of concurrent national and provincial legislative competence. In the Constitutional Court judgment of *Ex-Parte President of the Republic of South Africa In Re: Constitutionality of the Liquor Bill** (“*Liquor Bill* judgment”), Cameron AJ held the following:

“[27] It must be borne in mind that section 76 is headed ‘ordinary Bills affecting provinces’. This is my view, a strong textual indication that section 76(3) must be understood as requiring that any Bill whose provisions in substantial measure fall within a functional area listed in Schedule 4 be dealt with under section 76.

[29] Once a Bill falls within a functional area listed in Schedule 4, it must be dealt with not in terms of section 75, but by either the section 76 (1) or the section 76(2) procedure. . .”.

10.4 Following the *Liquor Bill* judgment, the Constitutional Court, in the judgment of *Tongoane and Others vs Minister for Agriculture and Land Affairs and Others*† (“*Tongoane* judgment”), confirmed the following:

“[59] . . .the tagging test focuses on all the provisions of the Bill in order to determine the extent to which they substantially affect functional areas listed in Schedule 4, and not on whether any of its provisions are incidental to its substance.”.

* (CCT/12/99) [1999] ZACC 15.

† 2010 (8) BCLR 741 (CC).

10.5 Furthermore, the Constitutional Court held that—

“[66] . . . procedural safeguards are designed to give more weight to the voice of the provinces in legislation substantially affecting them . . . they are fundamental to the role of the NCOP in ensuring that provincial interests are taken into account in the national sphere of government. . .”.

10.6 As the Court held in the *Tongoane* judgment, a Bill must be tagged as a section 76 Bill if its provisions, in substantial measure, deal with a Schedule 4 functional area. We are therefore of the view that the Bill should be classified as a section 75 Bill, which is an ordinary Bill affecting provinces, as its provisions do not fall within a functional area listed in Schedule 4 to the Constitution.

10.7 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional and Khoi-San Leaders, in terms of section 39 of the Traditional and Khoi San Leadership Act, 2019 (Act No. 3 of 2019), since it does not contain provisions that affect traditional or Khoi-San communities or pertain to customary law or customs of traditional or Khoi-San communities.

Printed by Creda Communications

ISBN 978-1-4850-0888-8