

REPUBLIC OF SOUTH AFRICA

**DEVELOPMENT BANK OF
SOUTHERN AFRICA BILL**

(As introduced)

(MINISTER OF FINANCE)

[B 2—97]

REPUBLIEK VAN SUID-AFRIKA

**WETSONTWERP OP DIE
ONTWIKKELINGSBANK VAN
SUIDER-AFRIKA**

(Soos ingedien)

(MINISTER VAN FINANSIES)

[W 2—97]

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To provide for the reconstitution, and incorporation in terms of the Companies Act, 1973, of the Development Bank of Southern Africa as a development finance institution with the primary purpose to promote economic development and growth, human resource development and institutional capacity building by mobilising financial and other resources from the national or international private and public sectors for sustainable development projects and programmes; and to provide for matters connected therewith.

PREAMBLE

The Development Bank of Southern Africa was established in 1983 to perform an economic development function within the constitutional dispensation which then obtained. The transformation of the constitutional and economic dispensation of South Africa by virtue of the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993), and otherwise, necessitated the transformation of the role and function of the Development Bank of Southern Africa in order to promote economic development and growth in the Southern African region within an integrated financial development system which has as its aim the efficient deployment of scarce resources. On account of the aforesaid reasons it has now become desirable to reconstitute the Development Bank of Southern Africa in order to promote, facilitate and by funding to mobilise the socio-economic development in Southern Africa, while efficiency, fairness, transparency and responsibility are promoted at the same time.

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

Interpretation

1. In this Act, unless the context otherwise indicates—
 - (i) “Bank” means the Development Bank of Southern Africa Limited, reconstituted and incorporated as provided for by section 2; (ii) 5
 - (ii) “board” means the board of directors of the Bank mentioned in section 7; (viii)
 - (iii) “DBSA (1983)” means the Development Bank of Southern Africa, which was established in 1983 by treaty; (vii) 10
 - (iv) “effective date” means the date on which this Act comes into operation; (iii)
 - (v) “institutional shareholders” means the holders of shares in the Bank, excluding the Government of the Republic and any individual, but including national, international or multilateral institutions; (v)
 - (vi) “Minister” means the Minister of Finance or the Minister who for the time being acts in his or her stead; (vi) 15
 - (vii) “region” means the national territory of the Republic of South Africa and the national territories of the countries determined by regulation; (x)
 - (viii) “regulation” means any regulation made in terms of section 17; (ix)
 - (ix) “shares” means the shares referred to in section 13; (i) 20
 - (x) “this Act” includes the regulations. (iv)

Reconstitution and incorporation of Development Bank of Southern Africa, Limited

2. (1) The institution which immediately before the effective date existed as DBSA (1983) shall continue to exist as a juristic person but shall with effect from that date be deemed to have been incorporated in terms of the Companies Act, 1973 (Act No. 61 of 1973), by the name the “Development Bank of Southern Africa Limited”, and shall have the powers, functions and duties provided for in this Act, which shall be exercised, performed and carried out by the Bank subject to the provisions of this Act. 5

(2) The Registrar of Companies shall register the Bank as a company in terms of the Companies Act, 1973, and shall issue in respect of the Bank a certificate of incorporation in terms of section 64 of that Act. 10

Objects of Bank

3. (1) The main objects of the Bank shall be the promotion of economic development and growth, human resources development, institutional capacity building, and the support of development projects and programmes in the region by— 15

- (a) mobilising financial and other resources from the private and public sectors, national or international;
- (b) appraising, planning and monitoring the implementation of development projects and programmes;
- (c) facilitating the participation of the private sector and community organisations in development projects and programmes; 20
- (d) providing technical assistance, particularly in respect of human resource development and training with regard to the identification, preparation, evaluation, financing, implementation and management of development projects and programmes; 25
- (e) funding or mobilising funding for initiatives to minimise or mitigate the environmental impact of development projects or programmes.

(2) Ancillary objects of the Bank shall be—

- (a) to assist other international, national, regional and provincial initiatives in order to achieve an integrated finance system for development; and 30
- (b) to assist other institutions in the national or international public and private sectors with the management of specific funds,

in order that the developmental requirements of the region may be met.

Powers of Bank

4. For the purpose of attaining its objects, the Bank shall have the power— 35

- (a) to appraise, approve or mobilise funding for, and to monitor the implementation of, development projects and programmes;
- (b) to lend or advance money to any person or private or public body engaged in or proposing to engage in development projects and programmes in the region; to acquire an interest in it or to provide capital for it, or by underwriting or otherwise, to assist in the acquisition of capital for it; 40
- (c) to hold, manage, develop, let, hire, buy, subscribe to, or otherwise acquire, or to sell or otherwise dispose of, hypothecate or otherwise deal in immovable or movable property, including stocks, shares, bonds, debentures and securities of, or any other interest in, any company, and if necessary to act as trustee for debenture holders; 45
- (d) to make, draw, accept or endorse negotiable instruments;
- (e) to guarantee any undertaking given in relation to the financing of any person, private or public body, or the performance of any contract by any person, private or public body, or to indemnify any person, public or private body in 50

respect of the costs attaching to legal proceedings or in respect of any loss or damage, arising from—

- (i) the financing of such person or private or public body; or
- (ii) the entering into of any contract by such person, private or public body;
- (f) to receive grants and donations, issue debentures or debenture stock or otherwise to raise loans or borrow money, provided the amount owing at any time in respect of loans raised or moneys borrowed shall not, without the approval of the shareholders of the Bank, previously given at a meeting of those shareholders, at any time exceed the limitations set by regulation; 5
- (g) to act as an agent or trustee, manager or secretary of any person, national or international private or public body, and to appoint any person to act on behalf of the Bank as a director or in any other capacity in relation to such person, private or public body, irrespective of whether or not such person carries on business within the region or elsewhere; 10
- (h) to establish, within the region or elsewhere, any juristic person capable of exercising, performing or carrying out such powers, functions and duties as may or shall be exercised, performed or carried out by the Bank in terms of this Act, and to open offices within the region and elsewhere; 15
- (i) to provide technical and other assistance and to give advice, information and guidance, 20

and, generally, to enter into any contract or perform any act, whether within the Republic, region or elsewhere, which may promote the attainment of any of the objects of the Bank, or which is designed to directly or indirectly enhance the value of the services which the Bank can render in relation to the development of the region.

Management of affairs of Bank 25

5. (1) Subject to the provisions of this Act—

- (a) the shareholders shall exercise the overall authority but may delegate to the board all their powers, except the power to—
 - (i) issue or transfer shares;
 - (ii) appoint directors, as provided in section 7; and 30
 - (iii) authorise the payment of dividends;
- (b) the board shall control the business of the Bank and shall direct the operations of the Bank and may exercise all such powers of the Bank as are not in terms of this Act required to be exercised by the shareholders of the Bank at a meeting of shareholders; and 35
- (c) the chief executive officer shall be the executive officer and legal representative of the Bank and shall be responsible for the management of the operations of the Bank.

(2) The powers of the board may be delegated to the chief executive officer who in turn may delegate such powers to the staff, committees or other structures of the Bank. 40

Shareholder meetings

6. (1) A shareholder shall have the right to attend a meeting of the shareholders, or to appoint a representative to attend such a meeting in the place of that shareholder.

(2) A shareholder shall have such number of votes with regard to any matter as may be determined in the regulations. 45

(3) While the Government of the Republic is the sole shareholder of shares in the Bank any resolution signed by the representative of the Government shall be deemed to be a resolution taken at a duly constituted meeting of shareholders.

Board of directors

7. (1) The Board of Directors of the Bank shall consist of not fewer than ten and not more than fifteen directors: Provided that if at any time the number of directors holding office at any time falls below ten, the remaining directors shall manage the affairs of the Bank, until the vacancy or vacancies can be filled by the appointments by the Minister or the relevant shareholders, as the case may be. 5

(2) The directors of the Bank shall be appointed, in the manner determined in the regulations, by the Minister and the shareholders, as follows:

(a) The Minister shall be entitled to appoint the same proportion of the total number of directors as the number of shares held by the Government bears to the total number of shares issued; and 10

(b) the institutional or other shareholders shall be entitled to appoint the remaining number of directors, each in proportion to its holding in shares.

(3) Directors shall be appointed on the grounds of their ability and experience in relation to socio-economic development, development finance, business, finance, banking and administration. 15

(4) The chief executive officer, any executive manager or member of the staff of the Bank may be appointed as a director.

(5) The board shall, with the consent of the shareholders, elect one of its number as the chairperson of the board. The person so elected shall act as chairperson for as long as the board determines. 20

(6) No decision or act of the board, or act performed under the authority of the board, shall be invalid by reason only of the fact that a person who participated in the proceedings at the meetings in question was elected as a director by the institutional shareholders without the provisions of the regulations having been observed. 25

Disqualification of directors

8. No person shall be a director of the board if he or she—

(a) is disqualified to act as a director of a board of a company incorporated in terms of the Companies Act, 1973 (Act No. 61 of 1973);

(b) is a member of any legislature or of an executive council in the Republic, or of a similar governmental institution in the region. 30

Tenure and conditions of office of directors

9. (1) A director shall hold office for a period of three years, but shall be eligible for reappointment.

(2) A director shall receive such service benefits, including the reimbursement of expenses in connection with travelling and subsistence, as may be prescribed by regulation. 35

Committees of board

10. (1) The board may establish such committees, consisting of directors, as it deems advisable. 40

(2) The board shall determine the functions of the committees and the procedure to be followed when the chairpersons of such committees are elected.

(3) Any person with expert knowledge of a function of a committee may be co-opted by such committee.

Meetings

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11. (1) (a) The Minister, in the case of a shareholders' meeting, and, in the case of a board meeting, the chairperson, shall preside at the meeting in question.

(b) In the case of a board meeting, and provided a quorum is present, the members present may elect an acting chairperson to preside at that meeting, if the chairperson is not present. The acting chairperson shall at such meeting have all the powers and carry out all the duties of the chairperson. 50

(2) The Minister and the chairperson shall in the event of an equality of votes have a casting vote.

- (3) The quorum for a meeting of shareholders shall be a majority of the shareholders, and the quorum for a meeting of the board shall be five directors.
- (4) Subject to the provisions of subsection (2), the decision of—
- (a) a majority of the shareholders shall be the decision of the shareholders; and
 - (b) the majority of the directors present at a meeting of the board shall be the decision of the board. 5
- (5) The meetings referred to in this section shall be held and the business thereat shall be disposed of in accordance with the provisions of the regulations.

Chief executive officer

- 12.** (1) The appointment of the chief executive officer shall be made by the shareholders, unless the authority to appoint the chief executive officer has been delegated to the board. 10
- (2) If for any reason the chief executive officer is unable to act as chief executive officer for a period longer than two months, the board may appoint an acting chief executive officer to act during such inability, and the person so appointed shall, while so acting, have all the powers and shall carry out all the duties of the chief executive officer. 15
- (3) If the chief executive officer has resigned, died or has been permanently disabled and is unable to act as such, the board shall appoint an acting chief executive officer to act as chief executive officer until the successor assumes office, and the person who has been so appointed shall, while so acting, have all the powers and shall carry out all the duties of the chief executive officer. 20

Share capital

- 13.** (1) Subject to the provisions of subsection (5), the authorised share capital of the Bank shall be the amount of five thousand million rand which shall be divided into five hundred thousand ordinary shares having a par value of ten thousand rand each. 25
- (2) Share certificates in respect of two hundred thousand of the shares referred to in subsection (1) shall be issued to the Government of the Republic of South Africa as consideration for paid-up share capital to an amount of R200,000,000 in DBSA (1983) and the certificates so issued shall replace any certificate previously issued in respect of the shares in DBSA (1983). 30
- (3) The shareholders shall subscribe to the balance of the authorised share capital when requested to do so by the board as provided in the regulations.
- (4) The issued shares may be transferred by the Government of the Republic to any institutional shareholder.
- (5) The board may from time to time, with the approval of the shareholders previously given at a meeting of shareholders, increase the share capital of the Bank to such extent as it may deem expedient, by the creation and issue of ordinary or preference shares, or shares of such other class as it may determine, which shares may be issued upon such terms and conditions as the board may determine, including conditions as to the voting rights which may be exercised by the holders thereof, in the case of preferent shares, or that the holders thereof shall not be entitled to vote. 35 40
- (6) An institutional shareholder shall not pledge or encumber any of the Bank's shares held by it if the aggregate of the shares so pledged or encumbered exceeds five per cent of the Bank's issued share capital.
- (7) An institutional shareholder shall not transfer or assign any of its shares in the Bank to any other person if the aggregate of the shares which are transferred to such other person exceeds five per cent of the Bank's issued share capital. 45

Expenditure

- 14.** Expenditure incurred by or on behalf of the board, including any amount owing in respect of the remuneration of the directors and personnel of the Bank, shall be defrayed from the funds of the Bank. 50

Dividends

15. The declaration of dividends shall be authorised by the board and shall be approved by the shareholders.

Accounts and audit

16. (1) The board shall cause proper books of account to be kept, and shall also cause to be kept all necessary books and records in relation thereto. 5

(2) An annual report on the financial status and the achievement of the objects of the Bank shall be published by the board.

(3) The books of account of the Bank shall be audited by a person registered in terms of section 15 of the Public Accountants' and Auditors' Act, 1991 (Act No. 80 of 1991).

Regulations 10

17. The Minister may at the request of the shareholders or the board make regulations as to—

- (a) the election of directors;
- (b) the conditions of appointment of directors and the circumstances in which a director shall vacate the office of director; 15
- (c) meetings of the board and the procedure thereat, including the minutes to be kept of such meetings;
- (d) the taking of decisions by shareholders and directors without holding a meeting; 20
- (e) the meetings of shareholders, the matters to be dealt with and the procedures to be followed thereat, including the minutes to be kept thereof;
- (f) the annual submission of a balance sheet and accounts to a meeting of shareholders;
- (g) the appointment of officers of the Bank; 25
- (h) the determination of the national territories which constitute the region; and
- (i) such other matters as are necessary or useful to be prescribed for the achievement of the objectives of this Act.

Transitional arrangements

18. Notwithstanding anything to the contrary contained in section 7— 30

- (a) the shareholders of the Bank shall not later than six months after the effective date hold a meeting for the purpose of appointing a new board of directors of the Bank; 30
- (b) unless a director is reappointed at the meeting referred to in paragraph (a), every director of the Bank shall cease to hold his or her office six months after the effective date or upon the appointment of a successor at that meeting, whichever occurs earlier, 35

and the provisions of section 11 shall apply *mutatis mutandis* to the convening and conduct of that meeting of shareholders and the appointment of directors at that meeting.

Winding up of Bank

19. The Bank shall not be wound up except in terms of an Act of Parliament. 40

Use of name of Bank

20. No person, association, corporation or other statutory body or company shall carry on business or be registered under an Act of Parliament, with a name identical to that of the Bank, or so nearly resembling the name of the Bank as to deceive. 45

Application to Bank of Companies Act, 1973, and Banks Act, 1990

21. (1) (a) The Bank shall, subject to the provisions of paragraph (b), be exempt from the provisions of the Banks Act, 1990 (Act No. 94 of 1990), the Companies Act, 1973 (Act No. 61 of 1973), and any other law which applies to banks.

(b) The Minister may by notice in the *Gazette* apply any provision of the Companies Act, 1973, the Banks Act, 1990, or such other law to the Bank, in so far as such provision is not inconsistent with the provisions of this Act, with such modifications as the Minister may deem fit and may specify in that notice, and may withdraw or amend any such notice.

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Short title

22. This Act shall be called the Development Bank of Southern Africa Act, 1997.

**MEMORANDUM ON THE OBJECTS OF THE DEVELOPMENT
BANK OF SOUTHERN AFRICA BILL, 1997**

The most important reason for the restructuring, and incorporation in terms of the Companies Act, 1973, of the Development Bank of Southern Africa (the Bank), has already been mentioned in the Preamble to the Bill. The legal entity which came into being in 1983 by virtue of a treaty between the Republic of South Africa and a number of other entities, which existed at that time as separate countries, will continue to exist but the legal foundation of that entity will henceforth be the Companies Act, 1973 (Act No. 61 of 1973), and the proposed Act. The duties, functions and powers of the Bank will be circumscribed anew in order to enable the Bank to properly fulfil the role which it is to play in the altered constitutional dispensation, and in the "region", as it is to be determined from time to time to be in terms of the proposed Act.

Clause 2 of the Bill makes provision for the said incorporation, while clause 3 determines the main objects of the Bank. In clause 4 powers are conferred upon the Bank which are intended to assist it to achieve the said objects. As a legal persona the Bank would have the power to take part in the commercial intercourse, and the limits of its objects would be the only limitation of this power. A complete enumeration of those powers would be barely possible, and no attempt to do so is made in the Bill. Clause 4 mentions the most important of those. The overall authority over the Bank is in the first place entrusted to the shareholders. The Board of Directors (the Board), to whom the control of the business of the Bank is entrusted (clause 5(1)(b)), will be assisted by a chief executive officer and staff who will be charged with the responsibility for the performance of the activities which are necessitated by the affairs of the Bank. The Bill provides for a number of directors not exceeding fifteen and not fewer than ten, and provides what number of directors may be appointed by the respective shareholders. The existence of certain circumstances in relation to a particular person will constitute a disqualification of that person for membership of the Board. The Bill further provides for the establishment of committees of the Board, consisting of directors to assist the Board in the performance of its functions. Clause 13 determines the authorised share capital of the Bank and makes provision for the issuing to the Government of the Republic of share certificates in respect of two hundred thousand shares in respect of paid-up share capital of the Bank. Provision is made for an increase of the share capital by the issuing of ordinary or preferent shares. The declaration of dividends shall be authorised by the Board, subject to the approval of the shareholders (clause 15). The Bill further makes provision for the keeping of books of account, the auditing of the accounts of the Bank and for annual and interim reports on the financial status of the Bank and the measure in which the objects of the Bank have been achieved. The Minister will be authorised to make regulations on a variety of subjects relating to the affairs of the Bank. The appointment of directors, meetings of the Board, the taking of decisions by the shareholders, the appointment of officials and the submission of a balance sheet to a meeting of the shareholders are some of the said subjects.

Transitional arrangements, which are limited in the Bill to the election of a new board of directors within six months after the commencement of the contemplated Act, have to a large extent been made unnecessary by the fact that the Bank as institution continues to exist and by the fact that the Government of the Republic is still the largest, and will, initially, be the only shareholder. Shares in the Bank held by former entities have by reason of an amalgamation of interests devolved upon the Government, hence the provisions of clause 13(2) which make provision for the issuing of share certificates in respect of the paid-up share capital of an amount of two hundred million rand. Clause 19 contains the usual provision concerning institutions of the nature in question, namely, that the Bank may be liquidated only in terms of an Act of Parliament. The Bank is to be incorporated in terms of the Companies Act, 1973, but the provisions of the said Act, as well as those of the Banks Act, 1990, will apply in respect of the Bank only to the extent to which the Minister of Finance determines.

In the opinion of the Department and the State Law Advisers this Bill must be dealt with in terms of section 75 of the Constitution, 1996.