

GENERAL NOTICES • ALGEMENE KENNISGEWINGS

DEPARTMENT OF TRANSPORT

NOTICE 355 OF 2018

NATIONAL PORTS ACT, 2005(ACT NO.12 OF 2005)

PUBLICATION FOR COMMENTS: DRAFT NATIONAL PORTS AMENDMENT BILL, 2018

The draft National Ports Amendment Bill, 2018 is hereby published for public comments.

Any interested persons are requested to submit written comments in connection with the draft National Ports Amendment Bill, 2018, within 30 days from the date of publication of this notice in the Government Gazette.

All comments should be posted or emailed to the Director-General Department of Transport for attention of Mr Dumisani Ntuli at:

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REPUBLIC OF SOUTH AFRICA

NATIONAL PORTS AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 75), explanatory summary of Bill
published in Government Gazette No. 41731 of 22 June 2018) (The English text is the official text of the
Bill)*

(MINISTER OF TRANSPORT)

[B - 2018]

GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the National Ports Act, 2005, so as to substitute and insert certain definitions; to repeal certain provisions; to amend the functions of the Authority; to amend the establishment of the Regulator; to expand the functions of the Regulator; to provide for the reappointment of members of Regulator; to amend the disclosure of interests; to amend meetings of the Regulator; to amend the provision of Funding of the Regulator; to provide for appointment of non-member Chairman of the Audit committee of the Regulator; to empower the Regulator to make additional orders; and to provide for matters connected therewith.

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

Amendment of section 1 of Act 12 of 2005

1. Section 1 of the National Ports Act, 2005 (hereinafter referred to as the principal by Act), is hereby amended—

(a) by the substitution for the definition of "Companies Act" of the following definition:

" **'_Companies Act'** means the Companies Act [1973(Act No.61 of 1973)] 2008,(Act No.71 of 2008);";

(b) by the insertion after the definition of "Port Consultative Committee" of the following definition:

" **'_port facility'** means any operation which has a geographically determined place within a port of operation for the provision of port services, and is not a port terminal;";

(c) by the insertion after the definition of "Port terminal" of the following definition:

" **'_port user'** means any current or future user or provider of a port facility, port services, port terminals, port infrastructure, port repair facilities, off-shore cargo handling facilities or terminal operations

Repeal of section 4 of Act 12 of 2005

2. Section 4 of the Principal Act is hereby repealed.

Amendment of section 11 of Act 12 of 2005

3. Section 11 of the principal Act is hereby amended by-

(a) the substitution in subsection (1) for words preceding paragraph (a) of the following word:

"The main function of the Authority is to own, manage, develop, control and administer ports to ensure their efficient and economic functioning, and in doing so the Authority must"

- (b) the substitution in subsection (1)(g) for subparagraph (iv) of the following subparagraph:

" (iv) the development of ports facility ".

Amendment of section 29 of Act 12 of 2005

4. Section 29 of the principal Act is hereby amended by the substitution for section 29 of the following section:

" 29 There is hereby established an independent ports regulatory body, vested with legal personality, to be known as the Regulator of South Africa ".

Amendment of section 30 of Act 12 of 2005

5. Section 30 of the principal Act is hereby amended—

- (a) by the addition after paragraph (c) in subsection (1) of the following paragraphs:

"(d) enforce compliance with the provisions of this Act together with Regulations and Directives; and;

(e) initiate an investigation into any matter related to in subsection (1);"

- (b) by the addition in subsection (3) for words preceding paragraph (a) of the following word:
"but not limited to"

- (c) by the substitution in subsection (3) for paragraph(h) of the following paragraph:

"(h) the filing of **[prices charged by the provider of any port service other than the Authority]** any information by a port user with the Regulator. "

(d) by the addition in subsection (3) of the following paragraph:

"(i) to issue a Regulatory Manual governing all regulated entities dealing with amongst others, accounting standards and compliance monitoring ".

(e) by the substitution for subsection (6) of the following subsection:

"(6) The Regulator must as soon as practicable after 31 March of each year but not later than **[30 June of each year]** 10 business days after receipt of the Auditor-General's audit of the Financial Statements, submit to the Minister a report giving particulars regarding the activities of the Regulator during the year which ended on the first mentioned dated ".

Amendment of section 31 of Act 12 of 2005

6. Section 31 of the principal Act is hereby amended by:-

(a) the substitution in subsection (1) for paragraph (b) of the following paragraph:

"(b) The members of the Regulator may be re-appointed for one additional term of three years".

(b) the substitution for subsection (8) of the following subsection:

"(8) The Minister may extend the terms of office of members of the Regulator upon the expiry of their terms of office for such period as may be necessary, not exceeding three months, to finalise the appointment of **[a new board]** new members".

Amendment of section 32 of Act 12 of 2005

7. Section 32 of the principal Act is hereby amended by the substitution in subsection (2) for paragraph (b) of the following paragraph:

"(b) participate in any investigation, hearing or decision of the Regulator concerning a matter in respect of which that person or a family member or a business partner or associate of that member has a direct financial interest or any other personal interest or any other personal interest; or."

Amendment of section 37 of Act 12 of 2005

8. Section 37 of the principal Act is hereby amended—

(a) by the substitution in subsection (1) for paragraph (a) of the following paragraph:

"(a) on such conditions as the Regulator **[with the approval of the Minister]**, may determine, appoint such employees as may be required to perform the work connected with the functions of the Regulator; and";

(b) by the substitution in subsection (1) for paragraph (b) of the following paragraph:

"(b) pay its employees such remuneration, allowances, subsidies and other benefits as the Regulator may determine in accordance with a remuneration **[structure]** policy approved by the Minister with the concurrence of the Minister of Finance;"

Amendment of section 39 of Act 12 of 2005

9. Section 39 of the principal Act is hereby amended by the addition of the following proviso at the end of the section:

" (7) The meetings of the Regulator are open to public^[.], unless matters of a confidential nature are being dealt with by the Regulator."

Amendment of section 42 of Act 12 of 2002

10. Section 42 of the principal Act is hereby amended—

(a) by the substitution of subsection (1) for the following subsection:

"(1) For the purpose of regulation of the National Ports Authority, the funds of the Regulator consists of-

(a) money appropriated by Parliament;

(b) interest on investments;

(c) Regulatory charges imposed as a percentage of the approved total revenue allowed to the Authority by the Regulator and approved by the Minister;

(d) Fees charged for the filing of complaints and appeals with the Regulator and other regulatory services rendered in terms of the Act; and

(e) Money received from any other source, with the approval of the Minister of Finance and the Minister of Transport. ;".

Amendment of section 43 of Act 12 of 2005

11. Section 43 of the principal Act is hereby amended by the addition after subsection (5) of the following subsection:

"(6) The Regulator shall appoint a non-member Chairman of the Audit Committee of the Ports Regulator."

Amendment of section 53 of Act 12 of 2005

12. Section 53 of the principal Act is hereby amended by insertion of the words "or appeal" after the word complain:

The Regulator may, if so requested by a person who lodged a complaint or appeal with the Regulator, make such interim order as it may deem necessary in the circumstances.

Amendment of section 54 of Act 12 of 2005

13. Section 54 of the principal Act is hereby amended-

(a) by the addition in subsection (1) (a) of the following subparagraphs:

"(iii) ordering the Authority or port sector companies, to grant access to ports and port facilities on a fair and transparent basis;

(iv) impose any penalties as it may deem necessary in the circumstances, in accordance with this Act, which may include imposing an administrative fine, with or without the addition of any other order in terms of this section ."

(b) by the addition in subsection (1) after paragraph (b) of the following paragraph:

"(c) make an appropriate order in relation to any appeal or complaint related to any non-compliance with this Act by any party in the matter."

(c) by the addition in subsection (2) after paragraph (b) of the following paragraphs:

"(c) The Regulator that heard any complaint or appeal shall be regarded as the Taxing Master with regard to any costs order handed down."

(d) by the addition of the following subsections:

54 (3) (a) An administrative fine imposed in terms of section 54(1)(a) iv) may not exceed 5% of the authority's annual turnover in the Republic during the preceding financial year

(b) When determining an appropriate fine, the Regulator must consider the following factors:

- (i) the nature, duration, gravity and extent of the contravention;
- (ii) any loss or damage suffered as a result of the contravention;
- (iii) the behaviour of the respondent or the party against whom the Ports Regulator rules;
- (iv) the market circumstances in which the contravention took place;
- (v) the level of profit derived from the contravention;
- (vi) the degree to which the respondent has co-operated with the Regulator; and
- (vii) whether the respondent has previously been found in contravention of this Act.

(c) A fine payable in terms of this section must be paid into a separate trust account to be held by the Ports Regulator who will in turn pay the money over to National Revenue Fund.

54(4) Any failure to comply with the provisions of this Act, or any order imposed in terms hereof may be liable for one or more penalties as the Regulator may determine.

54(5) In addition the Regulator may publish details of such non-compliance in a manner prescribed in its directives.

54(6) Penalties imposed in terms hereof may differ according to criteria which the Regulator deems reasonable.

54(7) The Regulator may recover penalties imposed in terms hereof by civil action where necessary. "

Short title

15. This Act is called the National Ports Amendment Bill, 2018 and is published for comments.

MEMORANDUM ON THE OBJECTS OF THE NATIONAL PORTS AMENDMENT BILL

1. BACKGROUND

- 1.1. The national Ports Amendment Bill, 2018 ("the Bill") seeks to amend the National Ports Act, 2005 (Act No. 12 of 2005) (the "principal Act") to ensure a degree of autonomy of the activities and responsibilities of the Ports Regulator of South Africa ("the PRSA"), to ensure, the ability of the Regulator to effectively execute its mandate.
- 1.2. The main objects of the Bill are as follows:
- 1.2.1 To introduce provision that enhances the powers of the Ports Regulator in relation to implementation, enforcement and redress with regard to decisions made by it in terms of penalty imposition and the powers of the Ports Regulator to institute decisions made by it.
- 1.2.2 To enhance the investigative powers of the Ports Regulator;
- 1.2.3 To correct technical deficiencies in the National Ports Act;
- 1.2.4 To correct technical deficiencies in the National Ports Act 12 of 2005 and delete or replace certain obsolete provisions and expressions; and
- 1.2.5 To make other consequential changes.

- 1.3. The proposed amendment to the funding model of the Ports Regulator captured in Section 42 of the National Ports Act (12 of 2005) is a response to the Minister of Transport and the Deputy Minister of Transport's request to the Ports Regulator of South Africa for a sustainable funding model for the Ports Regulator.
- 1.4. The independence and security of funding is important in order to ensure a degree of autonomy of the activities and responsibilities of the Ports Regulator of South Africa ("the PRSA"). Without secure funding, the ability of the Regulator to effectively execute its mandate may be constrained from year to year.

2. PURPOSE OF BILL

The purpose of the Bill is to amend the sections of the National Ports Act 12 of 2005 to enable the implementation of the funding model for the Ports Regulator of South Africa.

3 Clause by clause discussion

The Bill introduces the amendments as follows:

- 3.1 **Clause 1** of the Bill amends section 1 of the Act by substituting and inserting certain definitions.
- 3.2 **Clause 2** of the Bill repeals section 4 of the Act, providing for conversion of the Authority, to align with the repeal of the Companies Act of 1973.
- 3.3. **Clause 3** of the Bill amends 11 of the principal Act to provide clarity to the effect that the National Ports Authority does not only have own, manage, control and administer ports but it also have to develop them.

The functions of the Ports Authority will not only be limited to the development of ports but will be extended to the development of ports facilities as well.

- 3.4. **Clause 4** of the Bill amends section 29 of the principal Act dealing with the establishment of the Regulator by adding the words "of South Africa" at the end.

- 3.5. **Clause 5** of the Bill amends section 30 of the principal Act This amendment is aimed at ensuring that functions of the Ports Regulator are not only limited to ports sector activities performed by the Ports Authority but also that which are performed by other maritime industries etc.
- 3.5.1. Section 30(1)(d) the replacement of merely saying subordinate legislation with what that subordinate legislation actually is by delineating the Regulations and the Directives lends certainty to the section and avoids multiple interpretations of the clause later on, thus indicating definitively that these are part of the primary legislation.
- 3.5.2 Section 30(1)(e): the insertion would allow the Ports Regulator to initiate investigations of its own accord.
- 3.5.3 Section 30(3): the insertion of the words “but not limited to”, serves to allow the Ports Regulator to amend its Directives without limiting those areas identified in section 30(3)
- 3.5.4 Section 30(3)(h): is to allow the filing of any information including prices charged by the provider of any port service by a port user with the Ports Regulator.
- 3.5.5 Section 30(3) (i): to issue a Regulatory Manual governing the Authority dealing with amongst others, the accounting standards required for economic regulation.
- 3.6. **Clause 6** of the Bill amends section 31 of the principal Act by removal of the ceiling is to allow for additional members to increase the efficiency of the Regulator, specifically with the regard to the hearing of Tribunal matters and to allow members to be appointed for an additional term of three years.
- 3.7. **Clause 7** of the Bill amends section 32 of the principal Act which deals with the Disclosure of interests and certain prohibitions by the addition of the phrase “or any other personal interests” at the end of paragraph (b) of subsection (2).
- 3.8. **Clause 8** of the Bill amends section 37 by, granting the Ports Regulator full powers without approval by the Minister, to appoint employees as may be required to perform the work connected with the functions of the Ports Regulator.

3.9. **Clause 9** of the Bill amends section 39 of the principal Act by adding the proviso clause which will allow matters of a sensitive and confidential nature not to be discussed or dealt with in front of the public.

3.10. **Clause 10** of the Bill substitutes Section 42(1) of the principal Act providing for Funding of the Regulator by: -

The introduction of a hybrid funding model that retains the current budgetary approval processes with oversight by the Department of Transport as well as the National Treasury but removes the direct financial burden of regulation from the national budget. This will retain the credibility of national budgetary processes and lend transparency to the price setting process, as the impact on users of the ports system will ultimately pay for regulation.

Based on average volumes for the South African port system from 2015 to date, the average percentage regulatory charge to be added to the tariff book in order to raise the PRSA's current budget is in the region of 0.5 - 0.7%. In terms of which application would be made to the Minister annually, in order to fund and grow the organisation and the work that it does.

Collection will be facilitated through the normal invoicing process by the NPA and transferred monthly to the PRSA on the 15th of every month. The amount will be determined as 12 equal instalments prior to the start of the financial year and in line with the approved budget.

3.11 **Clause 11** of the Bill amends section 43 of the principal Act providing for Accounting and accountability by the addition of subsection (6) empowering the Regulator to appoint a non-member Chairman of the Audit Committee of the Ports Regulator.

3.12 **Clause 12** of the Bill substitute section 53 which is providing for interim Relief which gives the Regulator the power to make interim order as it may deem necessary in the circumstances.

3.13 **Clause 13** of the Bill amends section 54 of the principal Act which provides for Orders of the Regulator and the addition of subsection 3 to 7 regarding offences, means that the penalties clause is expanded upon to allow the Ports Regulator to issue a penalty like an

administrative fine for non-compliance with the Act or any decision or order of the Ports Regulator. This in turn enhances its power to penalise non-compliant conduct.

- 3.13.1 Section 54(2)(b): Costs orders are given by the Regulator in Tribunal matters, and these costs would need to be taxed in front of a taxing master.
- 3.13.2 Section 54(2)(c): this is a practical issue by virtue of the Regulator being able to hand down adverse cost orders as part of Tribunal decisions and hearings, as they may be interim orders made as well.
- 3.13.3 . Section 54(3): allows the Ports Regulator by virtue of section 30(1)(c) in performing its compliance monitoring function, the teeth to enforce its findings where these are not addressed by the Authority, by issuing a compliance notice and an opportunity to correct the issues.
- 3.13.4 Section 54(4): The section gives effect to the enforcement of compliance notices and in the event that these are not complied with, allows the Ports Regulator to administer a fine.

CONSULTATION

The Department has consulted the Ports Regulator and industry stakeholders on the proposed amendments.