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DEPARTMENT OF PUBLIC ENTERPRISES

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**MINISTRY
PUBLIC ENTERPRISES
REPUBLIC OF SOUTH AFRICA**

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NATIONAL STATE ENTERPRISES BILL, 2023

PUBLICATION FOR COMMENTS OF THE DRAFT NATIONAL STATE ENTERPRISES BILL, 2023

The Draft National State Enterprises Bill, 2023 is hereby published for public comments.

Interested persons are invited to submit written comments on the draft National State Enterprises Bill, 2023, within 30 days from the date of publication of this notice in the Government Gazette.

All comments should be emailed or hand delivered to the Deputy Director-General Department of Public Enterprises for attention of:

Advocate Melanchton Makobe
Department of Public Enterprises
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Email: Nationalstateenterprisesbill@dpe.gov.za

Any enquiries should be directed to Adv. Melanchton Makobe at 012 431 1094.

A handwritten signature in black ink, appearing to read 'Pravin Gordhan'.

Pravin Gordhan, MP

Minister of Public Enterprises

Date: 14-09-2023

REPUBLIC OF SOUTH AFRICA

NATIONAL STATE ENTERPRISES BILL

(As introduced in the National Assembly (proposed section 75); (explanatory
summary of Bill and prior notice of its introduction published in Government Gazette
No. 49312 of 15 September 2023)
(The English text is the official text of the Bill)

(MINISTER OF PUBLIC ENTERPRISES)

[B—2023]

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BILL

To establish the State Asset Management SOC Ltd; to provide for the State as the sole shareholder of a holding company; to consolidate the State's shareholdings in state enterprises; to provide for the powers of the shareholder on behalf of the State; to provide for the phased succession of state enterprises to the holding company; to provide for the holding company's powers as shareholder of subsidiaries; to provide for the restructuring and management of subsidiaries for developmental purposes; to provide for appropriate and effective performance monitoring mechanisms over subsidiaries; to provide for the corporatisation of those state enterprises that are not registered as companies; and to provide for matters connected therewith.

PREAMBLE

WHEREAS, the State recognises the value of its shareholding in national state enterprises and wishes to optimise that shareholding to achieve long-term strategic interventions for developmental purposes;

AND WHEREAS, the State wishes to enhance its capacity as owner of national state enterprises through a strategy for those enterprises and for the operational implementation of that strategy by a holding company on the State's behalf;

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

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CHAPTER 1

DEFINITIONS AND OBJECTS OF ACT

Definitions

1. (1) In this Act, unless the context indicates otherwise—

“**Board**” means the duly elected board of directors of the holding company;

“**Companies Act**” means the Companies Act, 2008 (Act No. 71 of 2008);

“**corporatisation**” means the process contemplated in terms of section 16 whereby the assets and liabilities of a juristic entity are transferred into a subsidiary of the holding company.

“**holding company**” means the State Asset Management SOC Ltd referred to in section 3(2) and incorporated in terms of the Companies Act;

“**President**” means the President of the Republic of South Africa;

“**prescribed**” means prescribed by regulation in terms of section 17;

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

“**shareholder**” means the Republic of South Africa as represented by the President or a proclaimed member of Cabinet;

“**state enterprise**” means a company or entity which is listed in Schedule A;

“**this Act**” includes any regulations made in terms of section 17.

(2) Unless the context indicates otherwise, a word or phrase defined in the Public Finance Management Act or the Companies Act has that meaning in this Act.

Objects of Act

2. The objects of this Act are to—

- (a) establish the State Asset Management SOC Ltd as a holding company incorporated in terms of the Companies Act and subject to the Public Finance Management Act;
- (b) authorise the transfer of the shareholding of state enterprises listed in Schedule A to the holding company to ensure the operation of state enterprises are supervised by the holding company in accordance with the Public Finance Management Act, the Companies Act and the provisions of this Act;
- (c) ensure the uniform governance of the holding company and its subsidiaries;
and
- (d) promote the long-term commercial sustainability of the holding company and its subsidiaries.

CHAPTER 2

HOLDING COMPANY

Establishment of holding company

3. (1) Upon the coming into effect of this section, the President must ensure that the necessary steps are taken for the incorporation of the holding company as a company contemplated in subsection (2).

(2) The Companies and Intellectual Property Commission must—

(a) register the Memorandum of Incorporation and incorporate the holding company under the name “State Asset Management SOC Limited” with the State as the sole shareholder; and

(b) issue to that entity the necessary documents to enable it to conduct business as a holding company.

(3) The President is the sole representative of the holding company but may transfer the administration of this Act or any power or function referred to in this Act to another member of Cabinet in accordance with section 97 of the Constitution.

(4) The holding company acts through its Board.

(5) The Public Finance Management Act and the Companies Act apply to the operations of the holding company.

Objectives of holding company

- 4.** (1) The objectives of the holding company are to -
- (a) advise on the phased succession for the transfer of state enterprises to the holding company;
 - (b) conduct due diligence of state enterprises listed in Schedule A as provided for in section 14;
 - (c) on instruction by the shareholder, cooperate with the relevant state enterprise's Board to prepare for the implementation of the transfers contemplated in sections 15 or 16; and
 - (d) exercise the rights and observe the restrictions as the sole or majority shareholder of any subsidiary of the holding company on behalf of the State.

Shareholder powers and duties

- 5.** (1) The shareholder must exercise all the rights and duties of a shareholder under the Companies Act in relation to the holding company to promote and support the functions of the holding company and to report annually on the commercial sustainability, developmental impact and material risks of its investment in the holding company in terms of the Companies Act and the Public Finance Management Act.

- (2) Notwithstanding the Companies Act, the shareholder may only—
- (a) appoint the directors to the Board of the holding company in terms of section 68 of the Companies Act;
 - (b) must remove directors of the Board of the holding company in accordance with section 69 and 71 of the Companies Act and this Act—
 - (c) determine the remuneration of directors in accordance with the best market practice and as prescribed;
 - (d) provide guidance to ensure the uniform governance of subsidiaries as prescribed;
 - (e) promote the long-term commercial sustainability of subsidiaries in accordance with applicable guidelines or as prescribed; and
 - (f) must conduct an independent assessment of the Board's performance every three years and publish the outcomes of this report as prescribed.

Material or persistent failure to meet objectives and targets

6. (1) If the holding company materially or persistently fails to meet the objectives and targets as contained in its corporate planning instruments and as specified by the shareholder in terms of binding shareholder instructions as contained in shareholder compacts, the shareholder may call a special general meeting of the holding company to consider the corrective action to be taken.

(2) In the circumstances contemplated in subsection (1), the shareholder may—

- (a) request any additional information required from the Board or any other personnel of the holding company;

- (b) commission an independent investigation of the holding company in relation to its operations and finances;
- (c) require, in consultation with the Board, that the holding company be restructured with a view to meet the objects of this Act;
- (d) review Board membership and provide additional capacity to the Board;
- (e) issue instructions to the Board to remedy the failure; or
- (f) appoint an administrator, on such terms as the shareholder may determine, to take control of the management of the holding company.

(3) If the shareholder exercises any of the powers listed in subsection (2), the powers of the Board and the performance of its functions to manage the business and affairs of the holding company are restricted accordingly, notwithstanding anything to the contrary contained in section 66 of the Companies Act.

(4) If the shareholder commissions an independent investigation in terms of subsection (2)(b)—

- (a) the Board must allow the person carrying out the investigation access to all relevant information of the holding company; and
- (b) the person carrying out the investigation must—
 - (i) ensure that the confidentiality of information is maintained in accordance with applicable laws and that confidential information is not communicated to any person other than the shareholder, the Board or any law enforcement agency entitled to such information; and
 - (ii) submit a written report of the findings arising from the investigation to the shareholder and the Board.

(c) the shareholder and the Board must disclose any appointment and main findings of an independent investigator in their respective annual reports.

(5) If an administrator is appointed in terms of subsection (2)(f), the administrator assumes all the duties and functions and is deemed to have all the powers of the Board.

Powers, functions and duties of the Board

7. (1) In the exercise of its powers and the performance of its functions and duties to manage the business and affairs of the holding company, the Board must, subject to section 6 —

- (a) advise the shareholder on the phased succession for the transfer of state enterprises to the holding company;
- (b) on instruction by the shareholder conduct due diligence of state enterprises listed in Schedule A;
- (c) on instruction by the shareholder, and after the completion of the due diligence, cooperate with the relevant state enterprise's Board to prepare for the implementation of the transfers contemplated in sections 15 or 16; and
- (d) exercise the rights and observe the restrictions as the sole or majority shareholder of any subsidiary of the holding company on behalf of the State.

(2) The Board must ensure that its business and affairs, and those of its subsidiaries are conducted in a manner consistent with this Act, the Public Finance Management Act, the Companies Act and any legislation applicable to its subsidiaries, and in particular, it must—

- (a) conclude the annual corporate plan in respect of itself and its subsidiaries;

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- (b) prepare and approve an annual budget to give effect to that corporate plan and, in the case of a financially dependent subsidiary that requires funding—
 - (i) from the State, submit a borrowing plan for approval by the shareholder and the Minister responsible for Finance; or
 - (ii) from a third party that requires a guarantee from the State, submit that requirement for approval from the shareholder and the Minister responsible for Finance;
- (c) without delay notify the shareholder of any adverse events that may affect the ability of a subsidiary to meet its performance and comply with this Act and the reasons therefore;
- (d) implement an appropriate procurement and provisioning system which is in accordance with section 217 of the Constitution of the Republic of South Africa; and
- (e) develop a system for properly evaluating all major capital investment projects.

(3) The Board may exercise all its powers under the Companies Act in accordance with the Public Finance Management Act, including the power to borrow money, issue a guarantee, indemnity or security from a third party for the purpose of performing its functions and achieving its objectives.

(4) The Board must, in accordance with its corporate plan, and after consultation with each of its subsidiaries, issue annual instructions to each subsidiary.

(5) The Board must establish a governance and reporting framework for its subsidiaries.

(6) The Board must establish a financial and operational performance monitoring framework for its subsidiaries.

(7) The Board is responsible for the appointment of the Chief Executive Officer of the holding company after consultation with the shareholder.

Composition of Board

8. (1) Subject to section 5, the shareholder must elect all the non-executive directors of the Board on grounds of their skill, knowledge and experience, which, when considered collectively, will enable them to fulfil the objectives of the holding company.

(2) The Board must comprise a minimum of five and a maximum of eleven directors.

(3) Non-executive directors serve a term of three years and may not be reappointed for more than two additional terms.

(4) The Chief Executive Officer and Chief Financial Officer of the holding company are Executive members of the Board.

Standards of director conduct

9. In addition to the standards of director conduct contemplated in section 76 of the Companies Act and governed by the common law, a director of the holding company must act in the best interests of the company taking into account its long-term business sustainability, public interest and developmental objectives.

Board committees

10. In addition to any other Board committees permitted in terms of section 72 of the Companies Act, the Board must appoint—

- (a) an audit and risk committee;
- (b) a nominations and governance committee
- (c) a remuneration committee; and
- (d) a social and ethics committee.

Reporting

11. (1) The Board must submit to the shareholder an integrated annual report within five months of the end of each financial year in respect of the holding company and the annual reports of each of its subsidiaries to include—

- (a) the audited financial statements including, but not limited to, profit and loss statements, statement of financial position and statement of cash flows;
- (b) the audit reports and any necessary commentaries on those financial statements;
- (c) detailed performance against targets;
- (d) material risks;
- (e) significant and material transactions concluded and their respective values;
- (f) capital investments undertaken by the group;
- (g) capitalisation and any other shareholder support from the State and the deployment of the capitalisation;
- (h) information required under the Companies Act for public companies;
- (i) a report on corporate governance; and
- (j) a business sustainability report.

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(2) The Board must submit to the shareholder the holding company's unaudited financial statements by no later than 31 May of every year.

(3) The shareholder must table a copy of the integrated annual report contemplated in subsection (1) with the National Assembly in accordance with the provisions of the Public Finance Management Act.

(4) The shareholder may request such other reporting information as may be prescribed.

Audit of holding company

12. Despite section 90(1) of the Companies Act, the Auditor-General must, in accordance with the Public Audit Act, 2004 (Act No. 25 of 2004), ensure that the financial statements of the holding company and its subsidiaries are audited each year.

CHAPTER 3

LEGAL SUCCESSION AND CORPORATISATION

HOLDING COMPANY MAY ESTABLISH SUBSIDIARIES

13. (1) The holding company may establish one or more subsidiary companies in terms of the Companies Act.

(2) The Companies and Intellectual Property Commission must—

- (a) register the Memorandum of Incorporation and incorporate the subsidiary company; and
- (b) issue to that subsidiary the necessary documents to enable it to conduct business as a corporate entity.

(3) A subsidiary company must perform such functions as the holding company may assign to it, subject to any conditions the holding company may impose.

(4) The Public Finance Management Act and the Companies Act apply to the subsidiary company.

DUE DILIGENCE

14. (1) The shareholder may instruct the holding company to conduct a due diligence into a state enterprise referred to in Schedule A.

(2) When the holding company is conducting a due diligence, the accounting authority and all other personnel of that state enterprise must cooperate and provide it with access to all requested information.

(3) The holding company must make findings and recommendations to the shareholder.

(4) The holding company may recommend that the state enterprise must be transferred to the holding company or that any action be taken by the Executive Authority responsible for the state enterprise.

(5) The shareholder, upon receipt of the findings and recommendations of the holding company—

- (a) may, after consultation with the Cabinet, advise that the state enterprise must be transferred to the holding company, where the holding company has recommended that the state enterprise must be transferred to the holding company;
- (b) must share the findings and recommendations of the holding company with the Cabinet for consideration, where the holding company has recommended that certain action be taken by the Executive Authority responsible for the state enterprise.

Legal succession to holding company

15. (1) This section applies only to a state enterprise referred to in Schedule A that is incorporated under the Companies Act.

(2) The President may by Proclamation in the *Gazette* transfer the shareholding in a state enterprise listed in Schedule A to the holding company.

- (3) Upon publication of the Proclamation contemplated in subsection (2)—
- (a) the holding company and the relevant state enterprise must, without delay, implement the applicable procedures contemplated in the Companies Act and the Public Finance Management Act;
 - (b) the Executive Authority responsible for the relevant state enterprise must, without delay, initiate and introduce in Parliament the laws required to be

enacted to give effect to the transfer of the state enterprise to the holding company;

- (c) the state enterprise and holding company must, without delay, cooperate in preparing for the transfer.

Corporatisation of state enterprises

16. (1) This section applies only to state enterprise referred to Schedule A that is not incorporated under the Companies Act.

(2) The President may by Proclamation in the *Gazette* publish an intention to transfer a state enterprise listed in Schedule A to the holding company.

(3) Upon publication of the Proclamation contemplated in subsection (2)—

- (a) the holding company and the relevant state enterprise must, without delay, implement the applicable procedures contemplated in the Companies Act and the Public Finance Management Act;
- (b) the Executive Authority responsible for the relevant state enterprise must, without delay, initiate and introduce in Parliament the laws required to be enacted to give effect to the transfer of the state enterprise to the holding company;
- (c) the state enterprise and holding company must, without delay, cooperate in preparing for the transfer.

(4) For the purpose of corporatising a state enterprise, the holding company must take the necessary steps to form and incorporate a public company under the Companies Act with share capital with the holding company responsible for exercising shareholder functions.

(5) After the state enterprise is incorporated as contemplated in subsection 4, the President must by notice in the *Gazette* determine a date upon which—

- (a) the company incorporated in terms of subsection 4 becomes the successor to the state enterprise;
- (b) the accounting authority of the enterprise becomes the board of the company; and
- (c) the whole of the enterprise's assets, liabilities, rights and obligations of whatever nature are transferred to that company which acquires the entity as a going concern;

(6) Arising from the transfer contemplated in subsection 5—

- (a) the company becomes the owner of all movable and immovable property—
 - (i) registered in the asset registers of the state enterprise;
 - (ii) under the control of the enterprise; and
 - (iii) owned by the State and possessed, occupied or used by the enterprise;
- (b) all employees of the enterprise become employees of the company as if they had been in the employ of the company from the beginning of their contracts;
- (c) the company is substituted as the litigating party for the enterprise in all pending litigation, including arbitrations, as if the company had been the litigant from the beginning;
- (d) the company is substituted as the contracting party for the enterprise in all of its contracts as if the company had been the contracting party from the beginning;
- (e) the company is substituted as party to any collective agreement or bargaining council agreement binding on the enterprise;

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- (f) the company is substituted as the employer party to any medical aid scheme or pension or provident fund to which the entity was party; and
- (g) all existing financial instruments of the enterprise are deemed to be issued to the company.

(7) The President may include any other matter not addressed in subsection 6 that must govern the transfer contemplated in this section and include such matter in the *Gazette* as required by subsection 6.

(8) Section 197 of the Labour Relations Act, 1995 (Act No. 66 of 1995) does not apply to a transfer under this section.

CHAPTER 4

GENERAL

Regulations

17. The Shareholder responsible for the administration of this Act, may, by notice in the *Gazette*, make regulations regarding-

- (a) the form and manner to determine the remuneration of directors in accordance with the best market practice;
- (b) the form and manner to provide guidance to ensure the uniform governance of subsidiaries;
- (c) the manner in which to promote the long-term commercial sustainability of subsidiaries;
- (d) the frequency, form and manner of reporting;
- (e) any matter which is required or permitted to be prescribed under this Act; and

- (f) generally, any other ancillary or incidental administrative or procedural matter that it is necessary to prescribe for the proper implementation or administration of this Act.

Transfer of property and duties of Registrar of Deeds

18. (1) A subsidiary may enter into an agreement with another subsidiary to transfer specified property to that subsidiary.

(2) In order to record the transfer of immovable property or real rights in terms of section 16 or this section, the Registrar of Deeds exercising jurisdiction over the area in which the immovable property is situated must—

- (a) record and effect the transfer of the immovable property to the subsidiary; and
- (b) register any bond in favour of the subsidiary in place of the entity on the same terms as concluded with the entity; and

(3) In any transfer contemplated in this section, no levy, tax, transfer duty or any other charge or fee imposed by statute may be charged.

Short title and commencement

19. (1) This Act is called the National State Enterprises Act, 2023 and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

(2) Different dates may be fixed in respect of the coming into effect of different provisions of this Act.

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SCHEDULE A

**STATE ENTERPRISES CAPABLE OF BEING TRANSFERRED TO HOLDING
COMPANY**