

REPUBLIC OF SOUTH AFRICA

PRE-DRAFT SOUTH AFRICAN SHIPPING COMPANY BILL, 2022

*(As introduced in the National Assembly (proposed section 75); explanatory
summary of Bill and prior notice of its introduction published in Government Gazette
No. of 2022)
(The English text is the official text of the Bill)*

(MINISTER OF TRANSPORT)

[B -2022]

BILL

To provide for the establishment of the South African Shipping Company; to develop and promote an efficient international and domestic, shipping services provided by the South African Shipping Company; and to provide for matters connected therewith.

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

CHAPTER 1

INTERPRETATION

Definitions

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

“**board**” means the board appointed in terms of Section 13;

“**Chief Executive Officer**” means the person appointed in terms of section 19;

“commercial shipping business” means the ownership or operation of vessels and any activities within the ship-owning and shipping industries and all businesses which are complementary, related or ancillary to any such activities;

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

“fleet” means a fleet of vessels under the ownership of the South African Shipping Company;

“Minister” means the member of the Cabinet responsible for transport;

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

“shareholder” means the member of the Cabinet appointed in terms of section 2(2) , and “shareholding Minister” has a corresponding meaning;

“South African Shipping Company” means the Company, established in terms of section 2;

“State” means the Government of the Republic of South Africa;

“strategic fleet” means the following vessels owned by the South African Shipping Company:

- (a) Bunker barge(s);
- (b) container vessel;
- (c) multipurpose bulk cargo vessel;
- (d) coastal shipping vessel;
- (e) oil tanker vessel; and
- (f) chemical tanker vessel;

“this Act” includes the regulations; and

“vessel” means any kind of ship used in navigation by water, however propelled or moved, and includes—

- (a) a barge, lighter or other floating ship, including a floating dock;
 - (b) a structure that is able to float or be floated and is able to move or be moved as an entity from one place to another; and
 - (c) a dynamically supported craft;
- and includes all gear, equipment, stores, cargo and fuel aboard the ship, and any article belonging to or to be used in connection with, or necessary for the operation and safety of the ship.

CHAPTER 2

ESTABLISHMENT OF SOUTH AFRICAN SHIPPING COMPANY

Establishment

2. (1) The South African Shipping Company (SASCO) is hereby established as a juristic person.

(2) The President of the Republic of South Africa must appoint a member of the Cabinet to exercise the rights attached to shares in the South African Shipping Company as shareholder on behalf of the State.

(3) The Shareholding Minister must take the necessary steps and incorporate the South African Shipping Company as a company envisaged in section 11(3)(c)(iv) of the Companies Act and ensure that—

- (a) the Memorandum and Articles of Association is registered with the Registrar of Companies and that the South African Shipping Company is incorporated under the name referred to in subsection (1), with the State as the sole shareholder; and

(b) the Registrar of Companies issues the necessary documents to enable the South African Shipping Company to conduct business as a corporate entity.

(4) The State has the power to acquire in whole or in part, a shipping going concern or a company or companies during the incorporation of the South African Shipping Company.

(5) Any acquisitions undertaken in terms of this section, must be done in accordance with principles of fairness, equitability, transparency, competitiveness and cost-effectiveness.

(6) Any acquisition undertaken, must be preceded by an independent business and financial analysis and due diligence and be approved by the Cabinet.

(7) The Public Finance Management Act is applicable to the South African Shipping Company. (8) No fees are payable in terms of the Companies Act in respect of the checking of documents, the reservation of name, the registration of the said memorandum and articles and the issue of a certificate to commence business, and

(9) Sections 32, 54(2), 66,92, 190 and 344(d) of the Companies Act do not apply to the company.

Objects of South African Shipping Company

3. The objects of the South African Shipping Company are to—

(a) participate in the carriage of exports and imports as the preferred national shipping carrier;

- (b) own and manage a strategic fleet of vessels acquired or built and registered in terms of the South African Ship Register;
- (c) promote shipping research, innovation, training and education;
- (d) own and operate goods clearance, stevedoring, warehousing and other logistics infrastructure and services;
- (e) engage in tanker services;
- (f) engage in bunkering services;
- (g) engage in container services;
- (h) engage in bulk cargo services; and
- (i) engage in coastal shipping services.

Memorandum of Incorporation

4. (1) The member of the Cabinet contemplated in section 2 must ensure that a Memorandum of Incorporation of the South African Shipping Company is drawn up in accordance with the Companies Act.

(2) In the event of any conflict between a provision of this Act and a provision of the Memorandum of Incorporation as envisaged in subsection (1), the provisions of this Act prevail.

Funds of South African Shipping Company

5. (1) The South African Shipping Company must be financed by—
- Industrial Development Fund; and
 - (c) money appropriated by Parliament.

(2) Notwithstanding the provisions of subsection (1), the funds allocated by the Industrial Development Fund, may only be used to finance the acquisition of strategic fleet.

Judicial management and liquidation

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

Co-operative governance

7. To give effect to the principles of co-operative governance and intergovernmental relations as envisaged in Chapter 3 of the Constitution of the Republic of South Africa, 1996, the South African Shipping Company—

- (a) may conclude a Memorandum of Understanding with relevant organs of state; and
- (b) must publish by notice in the *Gazette*, any Memorandum of Understanding concluded in terms of paragraph (a).

Modified application with respect to state-owned companies

8. (1) The Shareholding Minister may approach the member of Cabinet responsible for state-owned companies to apply, as envisaged in section 9(2)(a) of

the Companies Act, for a total, partial or conditional exemption of the South African Shipping Company, from one or more provisions of the Companies Act.

(2) Subject to subsection (1), the Companies Act applies to the South African Shipping Company, except to the extent that the Minister of Trade, Industry and Competition has granted an exemption in terms of section 9(3) of the Companies Act.

Shares of South African Shipping Company

9. (1) The State is the sole shareholder of the shares in the South African Shipping Company.

(2) The rights attached to the shares in the South African Shipping Company of which the State is the holder, are exercised by the Shareholding Minister on behalf of the Government.

(3) Despite any provision of the law to the contrary, the Shareholding Minister may, in terms of one or more transactions, transfer shares in the South African Shipping Company of which the State is the holder, to such transferees in such manner and on such terms and conditions as the Cabinet, on the recommendation of the Shareholding Minister, approves.

(4) The proceeds of any transfer of shares in terms of subsection (3), must be used in the furtherance of the objectives of the South African Shipping Company.

Powers and functions of South African Shipping Company

10. (1) The main function of the South African Shipping Company is to engage in commercial shipping business in furtherance of the objectives envisaged in section 3.

(2) The South African Shipping Company must—

- (a) be globally competitive;
- (b) implement the highest standard of efficient shipping services;
- (c) maintain a professional and skilled workforce;
- (d) maximise the company's economic use of ships and consider selling out its ships space to potential shippers;
- (e) comply with maritime safety requirements at all times;
- (f) provide ship management services to government fleet;
- (g) ensure, within its employ, the availability of qualified personnel;
- (h) keep a fleet of vessels that are running efficiently, on time, within budget; and
- (i) monitor fleet activities.

CHAPTER 3

GOVERNANCE MATTERS

Composition of Board of South African Shipping Company

11. (1) The Board of the South African Shipping Company has the authority to exercise all of the powers and perform any of the functions of South African

Shipping Company on behalf of the Shareholding Minister, except if limited by the Companies Act, or Memorandum of Incorporation.

(2) The Board of the South African Shipping Company consists of a minimum of seven and a maximum of 13 members, appointed by the Shareholding Minister.

(3) Members of the Board must be appointed on the basis of their specialised knowledge and experience in the field of—

- (a) shipping trade;
- (b) corporate management;
- (c) business studies;
- (d) maritime transport;
- (e) transport and logistics;
- (f) ship agency, clearing and forwarding; and
- (g) commerce, banking, finance, economic or legal matters.

(4) The Shareholding Minister must appoint one member of the Board as the chairperson and another as deputy chairperson.

(5) Members of the Board must exercise their functions with due diligence, skill and care, in a transparent and impartial manner, in good faith and must, at all times, promote the business interests of the South African Shipping Company, for the benefit of the economy.

Role and functions of Board

(1) The Board must govern and provide strategic direction to the Institute.

(2) The Board is the accounting authority of the entity in terms of PFMA.

(3) The Board has the authority to exercise all the powers and functions of the entity except to the extent this Act provides otherwise.

(4) The Board represents the South African Shipping Company and all actions performed by the Board in terms of this Act, are deemed to be the actions of the South African Shipping Company.

(5) The Board may delegate any of its powers and assign any of its duties conferred by this Act and the Memorandum of Incorporation, to any member of the Board, the Chief Executive Officer, or any employee of the Company.

(6) The Board is accountable to the Shareholding Minister and must—

- (a) approve disposal and acquisition of vessels;
- (b) determine the remuneration structure of the employees of the South African Shipping Company, for approval by the Shareholding Minister;
- (c) adopt an investment policy, to be approved, in writing, by the Shareholding Minister, with guidelines to regulate the investment of funds of the South African Shipping Company;
- (d) adopt a borrowing policy that is governed by the Public Finance Management Act, to be approved, in writing, by the Shareholding Minister, with the concurrence of the Minister of Finance;
- (e) approve chartering services contracts and any other contracts to be entered into, in furtherance of the objects of this Act;
- (f) recommend the appointment of the Chief Executive Officer;

- (g) institute the necessary control measures to ensure that the South African Shipping Company is managed and operated in accordance with acceptable business principles;
- (h) ensure the appointment of a Company Secretary in terms of section 86 of the Companies Act;
- (i) ensure the appointment of an Audit Committee in terms of section 94 of the Companies Act, to perform the functions provided therein;
- (j) approve the strategic and business plan of the South African Shipping Company, including budgets and pricing mechanism policy; and
- (k) perform any function necessary for the effective achievement of the objects of this Act.

Nomination and appointment of members of Board

13. (1) Before appointing members of the Board, the Shareholding Minister must call for nominations by publishing a notice in the national print media, which notice must specify—

- (a) the procedure to be adopted regarding such nominations; and
- (b) the period within which nominations must be submitted.

(2) Subject to sections 11(3) and 14, the Shareholding Minister must appoint a member of the Board from among the persons nominated as envisaged in subsection (1).

(3) Whenever a position on the Board becomes vacant, the Shareholding Minister may appoint a person with specialised knowledge, experience

and skill as contemplated in section 11(3), to serve for the unexpired period of the term of office of the previous member, irrespective of when the vacancy occurs.

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

Disqualification from membership of Board

- 14.** A person may not be appointed as a Board member if that person—
- (a) is not a citizen or a permanent resident of the Republic;
 - (b) is an unrehabilitated insolvent;
 - (c) has been declared mentally ill by a competent court;
 - (d) has been convicted—
 - (i) before or after the commencement of this Act, whether in the Republic or elsewhere, of any offence for which such person is or was sentenced to imprisonment, without the option of a fine;
 - (ii) of theft, fraud, forgery, perjury or an offence involving dishonesty or corruption in the Republic; or
 - (e) has, according to a determination by an Equality Court, contravened Section 7 of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000); or
 - (f) is disqualified to act as a director of a company incorporated in terms of the Companies Act.

Terms and conditions of office of members of Board

15. (1) A member of the Board holds office for a period of three years and may be eligible for reappointment.

(2) Except as provided for in subsection (1), no member of the Board may serve for more than two consecutive terms.

(3) The Shareholding Minister may extend the term of office of members of the Board for such period as may be necessary to finalise the appointment of a new Board: Provided that the term of office may not extend for a period longer than three months.

(4) The Shareholding Minister must remove a member of the Board from office prior to the expiry of that Board member's term of office—

- (a) if the member repeatedly fails to perform his or her functions efficiently;
- (b) if, due to any physical or mental illness or disability, the member becomes incapable of performing his or her functions or performs them inefficiently;
- (c) for misconduct;
- (d) on any of the grounds as envisaged in section 14; or
- (e) for failure to comply with section 18.

Meetings of Board

16. (1) The first meeting of the Board may be held at the time and place determined by the Shareholding Minister and thereafter Board meetings must be held at such times and places as the Board may determine.

(2) The Board must meet at least once every three months.

(3) The chairperson must preside at a meeting of the Board.

(4) If the chairperson is not present at a Board meeting, the deputy chairperson must act as the chairperson, subject to such directions as may be determined by the chairperson.

(5) If the chairperson and the deputy chairperson are not present at a Board meeting, the members present at the meeting may elect an acting chairperson from among them, to preside at that meeting.

(6) The quorum for a meeting of the Board is the majority of all members of the Board.

(7) All decisions of the majority of the members of the Board present at the meeting, are binding on the Board and the South African Shipping Company.

(8) In the case of an equality of votes at any meeting of the Board, the chairperson has a casting vote, in addition to a deliberative vote.

(9) In casting a deliberative vote in terms of subsection (8), the chairperson must consider the best interest of the South African Shipping Company.

Vacating of office

17. (1) A Board member may resign from the Board by giving one month's prior written notice to the Shareholding Minister.

(2) The chairperson may resign as chairperson of the Board, by giving one month's prior written notice to the Shareholding Minister, but may remain as a Board member.

(3) A Board member must vacate his or her office if he or she has been absent for more than two consecutive meetings of the Board, without leave of the chairperson, for each such absence.

Disclosure of interest by members of Board

18. (1) A member of the Board must, upon appointment, submit to the Shareholding Minister and the Board, a written statement in accordance with section 75(5) of the Companies Act in which it is declared whether or not that member has any direct or indirect financial interest, which could reasonably be expected to compromise the Board in performance of its functions.

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

(3) If any member of the Board acquires an interest that could reasonably be expected to be an interest as envisaged in this section, he or she must immediately declare, in writing, such interest to the Shareholding Minister and the Board.

(4) A Board member or employee of the South African Shipping Company must declare at a meeting of the Board, any business enterprise or company of which that member or employee, as the case may be, is an owner, director, shareholder or employee.

CHAPTER 4

CHIEF EXECUTIVE OFFICER AND STAFF

Appointment of Chief Executive Officer

19. (1) The Chief Executive Officer is appointed by the Shareholding Minister upon recommendation by the Board, within three months of the incorporation date of the South African Shipping Company.

(2) The Board must invite applications for the post of Chief Executive Officer, by publishing an advertisement in the national print media.

(3) A person appointed as Chief Executive Officer must—

- (a) have qualifications and international shipping experience, relevant to the powers and functions of the South African Shipping Company;
- (b) have extensive knowledge and traceable track record of running a profitable commercial shipping business; and
- (c) not be disqualified on any of the grounds as envisaged in section 14.

(4) The Board must arrange for the chief executive officer to be paid remuneration, allowances, subsidies and other service benefits in accordance with a remuneration structure as determined by the Board, on an annual basis, subject to the approval of the Shareholding Minister and after consultation with the Minister of Finance and subject to the applicable labour legislation.

Role and functions of Chief Executive Officer

20. (1) The chief executive officer is the head of the entity's administration.

(2) Subject to directives from the Board, the functions of the chief executive officer are to—

(a) implement the strategies, policies and decisions of the Board;

(b) establish structure (subject to board approval), recruit and manage employees/human resources of the entity;

(c) develop and maintain efficient, transparent and cost-effective administrative systems;

(d) keep full and proper records of the financial affairs of the company; and

(e) perform any such powers or functions as may be delegated by the Board from time to time.

(3) The Chief Executive Officer is responsible for—

(a) the execution of the directives of the Board;

(b) the implementation of the objects and functions of the South African Shipping Company;

(c) the organisation, control and management of the day-to-day business of the South African Shipping Company; and

(d) ensuring that the South African Shipping Company achieves the objects envisaged in section 3.

(e) prepare financial statements for each financial year in accordance with generally accepted accounting practice, unless the Accounting Standards

Board approves the application of generally recognised accounting practice for the Company.

(4) The Chief Executive Officer may, in writing, delegate any of his or her powers or assign any of his or her duties to a senior employee of the South African Shipping Company.

(5) The Chief Executive Office must advise the Board of any delegation or assignment contemplated in subsection (4).

Vacating of and removal from office of Chief Executive Officer

21. (1) The Board must, subject to applicable labour law legislation, remove the Chief Executive Officer from the office—

- (a) for misconduct;
- (b) for failing to diligently perform the duties connected with that office; or
- (c) if the Chief Executive Officer becomes disqualified in terms of section 14.

(2) The Chief Executive Officer may resign by giving two months' written notice, in advance, to the Board.

(3) If the Board is not sitting at the time of resignation as envisaged in subsection (2), the notice may be handed to the chairperson of the Board and must be regarded as having been received by the Board, on the date on which it is handed to the chairperson.

Acting Chief Executive Officer

22. (1) The Board may, in writing, appoint any senior employee of the South African Shipping Company to act as Chief Executive Officer, when the holder of that office—

- (a) is temporarily unable to perform the duties connected with that office; or
- (b) has vacated or been removed from that office, and a new Chief Executive Officer has not yet been appointed.

(2) The Chief Executive Officer may, in writing, appoint any senior employee of the South African Shipping Company to act as Chief Executive Officer for any period that the Chief Executive Officer is absent from the Republic.

(3) An acting Chief Executive Officer may exercise all the powers and must perform all the duties of the Chief Executive Officer.

Appointment of staff

23. The Chief Executive Officer must—

- (a) employ staff in terms of the structure approved by the Shareholding Minister to perform such services as may be necessary to conduct the business of the South African Shipping Company, on such conditions as the Board determines; and
- (b) arrange for staff to be paid remuneration, allowances, subsidies and other service benefits in accordance with a remuneration structure as determined by the Board, on an annual basis, subject to the approval of the Shareholding

Minister and after consultation with the Minister of Finance and subject to the applicable labour legislation.

CHAPTER 5

ANNUAL REPORTS, JOINT VENTURES AND ASSETS

Annual Reports

24. (1) The South African Shipping Company must submit to the Shareholding Minister, an annual report including its audited and approved financial statements, in respect of all its business within two months of the end of each financial year.

(2) The South African Shipping Company's financial year runs from 1 April in any year to 31 March in the following year, both days included.

(3) The Shareholding Minister must table the annual report before Parliament within 30 days after the receipt thereof, if Parliament is in session, or, if Parliament is not in session, within 30 days after the commencement of the next ensuing session.

Joint ventures

25. The South African Shipping Company may, subject to the Public Finance Management Act and National Treasury Regulations and with the approval of the Board, enter into a joint venture with any person, for purposes of furthering the objects of this Act.

State guarantees

26. (1) Subject to section 66 of the Public Finance Management Act, the South African Shipping Company may borrow money, issue guarantees, indemnities or securities or enter into any transaction necessary, to achieve the objects as provided in section 3.

(2) The South African Shipping Company may raise additional funds, including by way of borrowing from such persons and on such terms as the Board may determine from time to time, in terms of the borrowing policy envisaged in section 12(3)(d).

Transfer of assets

27. The State may, on such terms and conditions as the State may determine, transfer assets to the South African Shipping Company, in order to further the objects of the Company.

Movable and immovable property

28. (1) The South African Shipping Company may acquire, hold or dispose of movable and immovable property in the course of its business.

(2) The Board must determine the policy and procedure to be prescribed for the South African Shipping Company, with regard to the acquisition and disposal of movable and immovable property and assets.

Acquisition

29. (1) Subject to the provisions of this section and after consultation with the Minister of Finance, and the Minister whose department is the owner of ships, the Shareholding Minister may, by agreement—

- (a) transfer to the South African Shipping Company, all State-owned vessels except naval vessels, as well as the responsibility for the maintenance, management, control and operation of the vessels concerned;
- (b) transfer to the South African Shipping Company such assets owned by, or liabilities, rights or obligations of the State, as may be necessary for the effective maintenance, management, control and operation of the said vessels; and
- (c) subject to applicable labour laws, transfer any person for the purposes of employment to the South African Shipping Company or make available the services of any person for the purposes of providing maintenance to ships.

(2) The agreement envisaged in subsection (1), must include provisions concerning—

- (a) the relationship between members of the Board, who act on behalf of the South African Shipping Company and the State, as the sole shareholder of the South African Shipping Company;
- (b) the extent of the vessels, liabilities, rights and obligations to be transferred; and
- (c) any other matter which the Minister deems expedient, for the functioning of the South African Shipping Company.

Winding up

30. The South African Shipping Company may not be wound up, except in terms of an Act of Parliament.

Regulations

31. The Minister may make regulations regarding—

- (a) acquisition procedure and the financing thereof; and
- (b) any other matter ancillary or any administrative matter which it is necessary, for the furtherance of the objectives of this Act.

Short title

32. This Act is called the South African Shipping Company Bill, 2022, and takes effect on a date fixed by the President by proclamation in the *Gazette*.

MEMORANDUM ON OBJECTS OF THE SOUTH AFRICAN NATIONAL SHIPPING COMPANY BILL, 2022

1. BACKGROUND

1.1 Since Maersk acquired the South African shipping line Safmarine many years ago, South Africa has been without a national carrier. Despite the country being a cargo-owning nation that generates approximately more than 80 percent of export cargo, the carriage of cargo is predominantly undertaken by foreign-owned ships.

1.2 More reliance on foreign governments and companies for the shipping of our essential imports and exports may not be able to shield South Africa from supply chain disruption, especially during times of natural disaster or international conflict.

1.3 Before the Comprehensive Maritime Transport Policy (“CMTP”) for South Africa was developed, the National Department of Transport conducted research which identified South Africa as the only country which does not have its own ships in the economic group, known as BRICS.

1.4 The CMTP as published in Government *Gazette* No.40904 of 12 June 2017, calls for a transformed and growing maritime transport sector. Policy statement 3 of the CMTP provides that the Department must, in consultation with relevant departments and relevant organs of state, take steps to establish a national shipping carrier as a strategic pillar in the revival of the maritime transport industry. This confirms the need for the government to establishment a national shipping company

as a means of building South African strategic national shipping capacity and capability.

1.5 The South African Shipping Company Bill, 2022 (the “Bill”) gives effect to the CMTP.

2. OBJECTIVES OF THE BILL

The objectives of the Bill are to—

- (a) participate in the carriage of exports and imports as preferred national shipping carrier;
- (b) own and manage a strategic fleet of vessels acquired or built and registered in terms of the South African Ship Register;
- (c) promote shipping research, innovation, training and education;
- (d) own and operate goods clearance, stevedoring, warehousing and other logistics infrastructure and services;
- (e) engage in tanker services;
- (f) engage in bunkering services;
- (g) engage in container services;
- (h) engage in bulk cargo services; and
- (i) engage in coastal shipping services.

3. CLAUSE- BY-CLAUSE ANALYSIS

3.1 **Clause 1** of the Bill provides for the definitions in the Bill.

3.2 **Clause 2** makes provision for the establishment of the South African Shipping Company as a juristic person, with the Minister of Transport as the shareholder.

3.3 **Clause 3** makes provision for the objects of the South African Shipping Company which includes, amongst others, the promotion of shipping research, innovation, training and education, as well as participating in the carriage of exports and imports as the preferred national carrier.

3.4 **Clauses 4** makes provision for the Memorandum of Incorporation of the South African Shipping Company.

3.5 **Clause 5** provides for the funding of the South African Shipping Company with the view to providing clarity on the nature of the source of finances of the South African Shipping Company.

3.6 **Clause 6** provides for the judicial management and liquidation of the South African Shipping Company.

3.7 **Clause 7** provides for cooperation with other institutions by the South African Shipping Company.

3.8 **Clause 8** deals with the application of the Companies Act, 2008 (Act No. 71 of 2008) to the Bill.

3.9 **Clause 9** deals with the shares of the South African Shipping Company and their ownership.

3.10 **Clause 10** provides for the powers and functions of the South African Shipping Company.

3.11 **Clause 11** makes provision for the composition of the Board of the South African Shipping Company. Clause 11 further outlines the specialised knowledge and experience that is required of Board members and also makes provision for the election of a chairperson by the Shareholding Minister, as well as the election of deputy chairperson by the Board.

3.12 **Clause 12** of the Bill provides for the functions of the Board.

3.13 **Clause 13** of the Bill provides for the nomination and appointment of the members of the Board.

3.14 **Clause 14** deals with the disqualification of members of the Board. In order to ensure that the South African Shipping Company is managed by law-abiding citizens, Clause 14 outlines the criteria in terms of which a member of the Board may be disqualified as a member.

3.15 **Clause 15** provides for the terms and conditions of office of members of the Board.

3.16 **Clause 16** deals with the meetings of the Board.

3.17 **Clause 17** provides for vacation of office by a Board member and ensures that, in the event that such Board member resigns, such resignation must be preceded by giving one month's prior written notice to the Minister in order to ensure that the Minister has sufficient time to fill such vacancies.

3.18 **Clause 18** of the Bill compels members of the Board to disclose their financial interests to the South African Shipping Company upon appointment. The purpose of this provision is to avoid a situation where members unduly benefit themselves at the expense of the South African Shipping Company.

3.19 **Clauses 19** makes provision for the appointment of the Chief Executive Officer and the qualifications and experience that is required of the Chief Executive Officer.

3.20 **Clauses 20 and 21** deals with the functions of the Chief Executive Officer and the vacating and removal from office of the Chief Executive Officer.

3.21 **Clauses 22 and 23** deals with the appointment of an acting Chief Executive Officer by the Board and the appointment of the staff of the South African Shipping Company.

3.22 **Clause 24** makes provision for the annual reports of the South African Shipping Company which must be tabled in Parliament by the Shareholding Minister.

3.23 **Clause 25** provides for joint ventures by the South African Shipping Company for the purposes of furthering the objects of the Act.

3.24 **Clause 26** makes provision for state guarantees.

3.25 **Clause 27** provides for the transfer of assets by the State to the South African Shipping Company.

3.26 **Clause 28** empowers the South African Shipping Company to acquire, hold or dispose of movable or immovable property in the course of its business.

3.27 **Clause 29** provides for the acquisition of State-owned vessels by the South African Shipping Company.

3.28 **Clause 30** provides for the winding up of the South African Shipping Company in terms of an Act of Parliament.

3.29 **Clause 31** makes provision for the making of regulations by the Minister.

3.30 **Clause 32** of the Bill provides for the short title and commencement of the Act.

4. Parties consulted

5. FINANCIAL IMPLICATIONS FOR THE STATE

To be compiled

6. IMPLICATIONS FOR PROVINCES

None.

7. PARLIAMENTARY PROCEDURE

7.1 In *Tongoane and Others v Minister of Agriculture and Land Affairs and Others*¹, ("Tongoane") the Constitutional Court ("CC") confirmed the test formulated in order to determine the classification of a Bill ("tagging test"). According to the CC, what matters for the purposes of tagging, is not the substance or purpose of the Bill, but rather whether the provisions of the Bill in "substantial measure" fall within a functional area listed in Schedule 4.

7.2 In commenting on the "substantial measure test", the CC made the following remarks:

"[60] The test for tagging must be informed by its purpose. Tagging is not concerned with determining the sphere of government that has the competence to legislate on a matter. Nor is the process concerned with preventing interference in the legislative competence of another sphere of government. The process is concerned with the question of how the Bill should be considered by the provinces and in the NCOP, and how a Bill must be considered by the provincial legislatures depends on whether it affects the provinces. The more it affects the interests, concerns and capacities of the provinces, the more say the provinces should have on its content. ..."

"[71] On the other hand, the "substantial measure" test permits a consideration of the provisions of the Bill and their impact on matters that substantially affect the provinces. This test ensures that legislation that affects the provinces will

¹ 2010 (6) SA 214 (CC).

be enacted in accordance with a procedure that allows the provinces to fully and effectively play their role in the law-making process. This test must therefore be endorsed.

[72] To summarise: any Bill whose provisions substantially affect the interests of the provinces must be enacted in accordance with the procedure stipulated in section 76. Whether a Bill is a section 76 Bill is determined in two ways. First, by the explicit list of legislative matters in section 76(3)(a)-(f), and second by whether the provisions of a Bill in substantial measure fall within a concurrent provincial legislative competence." [Our emphasis]

7.3 As stated above, a Bill, the provisions of which in substantial measure fall within a functional area listed in Schedule 4 to the Constitution, must be classified as a section 76 Bill. In order to test whether the provisions of a Bill fall within a functional area listed in Schedule 4, the cumulative effect of all the provisions of the Bill must be taken into account in order to determine its impact on the provinces.

7.4 The state law advisers are of the view that the Bill deals with the establishment of the South African Shipping Company and the governance matters related to the establishment of the said Company, which includes the establishment of a Board, the appointment of a chief executive officer, acting chief executive officer and staff. It therefore follows that the subject matter of the Bill, does not, in the opinion of the state law advisers, fall within the ambit of any of the listed items in Schedule 4 to the Constitution. It therefore follows that the Bill must be tagged as a section 75 Bill.

7.5 In view of the above discussion, the State Law Advisers and the Department of Transport are of the opinion that the Bill must be dealt with in terms of section 75 of the Constitution of the Republic of South Africa, 1996 ("Constitution") since it

contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.

7.6 The State Law Advisers are of the opinion that it is not necessary to refer the Bill to the National House of Traditional Leaders in terms of section 39(1)(a)(i) of the Traditional and Khoi-San Leadership Act, 2019 (Act No. 3 of 2019), since the Bill does not contain any provisions which directly affects customary law or the customs of traditional or Khoi-San communities.