

COMPLIANCE
MONITORING
FEEDBACK:
Ports of
Durban &
Richard's Bay



2013/2014

The National Ports Act, 12 of 2005

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REGULATORY AND COMPLIANCE FRAMEWORK: THE NATIONAL PORTS ACT, 12 OF 2005

EXECUTIVE SUMMARY:

A preliminary compliance review of the ports of Durban and Richards Bay by the Ports Regulator of South Africa was conducted for the 2013/2014 financial year. This Review was conducted to assess compliance with the National Ports Act, 12 of 2005 by the National Ports Authority of South Africa in carrying out its functions and powers within the Ports.

The following compliance Framework assesses the Ports Authority's compliance with the National Ports Act, 12 of 2005 ("the Act") broken down into various sections reviewed.

THE NATIONAL PORTS AUTHORITY OF SOUTH AFRICA IN ITS CURRENT CORPORATE FORMAT

The Minister of Transport, within the South African White Paper on Commercial Ports¹, stated that South Africa had adopted a new Ports Policy in terms of which landlord functions had been separated from ports operations, allowing the private sector to have greater participation in order to cope with the needs of the economy and the increasing business in our ports. The landlord functions are to be performed by the National Ports Authority of South Africa ("NPA"). The Act, flowing from the policy, encompasses steps that are required to be taken in order to transform the ports sector to the new Ports Policy. The processes creating the National Ports Authority as a separate, independent landlord entity will be assessed by the Ports Regulator in order to assess its compliance in terms of the Act.

¹ Government Gazette Vol. 446, No. 23715, 8 August 2002: *South African White Paper on Commercial Ports*

THE FOLLOWING DOCUMENTS WERE ASSESSED AS PART OF THE COMPLIANCE REVIEW FOR DURBAN & RICHARDS BAY.

A.)SECTION 56 AGREEMENTS

B.)SECTION 57 LICENCES

C.)LEASE AGREEMENTS

INTRODUCTION:

Sea transport is an essential vehicle of international trade². Efficient ports are known to be catalysts for increased trade by providing a comparative advantage for international trade. Trade, distribution, transport and logistics are some of the most crucial activities which are vital facets of the South African economy. Commercial ports, as key nodal points, therefore, play a crucial role in South Africa's transport system and its economic development. The National Ports Act, 12 of 2005 was established with the purpose of ensuring affordable, internationally competitive, efficient and safe port services with the basis of a transparent and cost-effective system³ that is economically and environmentally sustainable. Further, a world-wide trend towards private sector participation, particularly in operations, has intensified, creating a larger opportunity for investment, a trend which has been reflected in the Act.

The National Ports Authority of South Africa ("the Authority"/ "NPA")⁴ controlled and managed by Transnet SOC Limited ("Transnet") was established upon the promulgation of the Act on the 26th of November 2006. In terms of the Act, Transnet is deemed to be the Authority until a date upon which the National Ports Authority becomes corporatised. The Authority is charged with the main function of owning, managing, controlling and administering South Africa's commercial maritime ports on the 2954km coastline (Richards Bay, Durban, East London, Nqura, Port Elizabeth, Mossel Bay, Cape Town, and Saldanha Bay) ("the Ports") to ensure their efficient and economic functioning.

The Act has further given birth to an independent port regulatory body vested with legal personality, the Ports Regulator ("the Regulator"/ "PRSA")⁵. The Ports Regulator's primary function is economic regulation of the ports system in South Africa, while at the same time monitoring the industry's compliance with the regulatory framework. The Department of Public Enterprise and the Department of Transport, through the legislative and regulatory sphere of the National Ports Act (i.e.

² CMF – Le Cluster Maritime François: *The Importance of the Sea*. The Maritime Voice (<http://www.cluster-maritime.fr/article.php?lang=Uk&id=2>, accessed on 15/02/2013)

³ Government Gazette Vol. 446, No. 23715, 8 August 2002: *South African White Paper on Commercial Ports*

⁴ Section 3(1)(a)(i) and (ii) of the National Ports Act 12 of 2005

⁵ Section 29 of the National Ports Act 12 of 2005

the Ports Regulator), has an imperative responsibility in carrying out their executive obligations in this demanding operational environment, especially due to the natural monopoly held by the NPA/Transnet in the port sector. The compliance function of the Regulator is intended to enhance the most common themes throughout the White Paper and the Act, that being fairness, transparency, competitiveness, equity of access, non-discrimination, efficiency and cost-effectiveness in the South African ports as defined by the Act.

JURISDICTION:

Most importantly, with regards to this compliance review, the Ports Regulator is authorized by the Act, through Chapter 5, to conduct compliance reviews to ensure compliance with the Act by the Authority in the exercise of its functions and powers with respect to the ports. Section 30 of the Act provides the Ports Regulator with the main function of monitoring the activities of the Authority to ensure that it performs its functions in accordance with the National Ports Act.

PURPOSE AND OBJECTIVES:

. The PRSA has the following stated objectives: -

- To achieve an effective and productive South African ports industry that is capable of contributing to the economic growth and development of our country while regulating and monitoring the ports system within the context of the application of prescribed law, government policy, rules and regulations.
- To encourage a culture of compliance while ensuring all the regulated entity's processes are fair, equitable, transparent, competitive, and cost-effective.
- To build positive professional relationships with industry participants and the regulated entity, encouraging optimal compliance with the law.

The primary purpose of the compliance monitoring is to determine the extent to which the Authority has met the requirements embodied in Chapters 4 and 6 of the Act, along with the Regulations, and the Directives in terms of Section 30(3) of the Act. The PRSA shall, on an ongoing basis, examine all agreements and licenses of port terminals, port services, and port facilities within the Authority's domain as port landlord, ensuring the Act has been adhered to.

The PRSA aims to reduce impact of the compliance monitoring on the ports industry operations and development as a burden, and position it as a process of compliance achievement.

GENERAL COMPLIANCE FEEDBACK

Persistent effects of the delayed implementation of elements of the National Ports Act, 12 of 2005 have created areas of governance failures that have application to the compliance assessment conducted by the PRSA. While the stated object of the Compliance Review was to identify areas of non-compliance so as to work together with the National Ports Authority (NPA) to develop a framework that will ensure that non-compliance is corrected and the port system is aligned with the stated intentions of the legislature, as articulated in the National Ports Act, it is recognised that there are elements of the compliance that are rendered incapable of correction by the joint efforts of the Ports Regulator of South Africa (PRSA) and the NPA, and extend to the respective Shareholding Ministers.

The requirement for a legislatively compliant governance regime is obligated by the express provisions of the National Ports Act and the implied provisions of the Constitution of the Republic of South Africa. Numerous other legislative instruments give effect to implied provisions of clause 33 of the Constitution of the Republic of South Africa that gives content to the formal and substantive compliance requirements imposed expressly by the National Ports Act.

Further, see Compliance Review Tables and comments below.

Section	The National Ports Act, 12 of 2005: SECTION 56 AGREEMENTS/ CONCESSIONS	Responsibility
S56(1)	Allows NPA to enter into an agreement with any person in terms of which that person is authorized to – Design, construct, rehabilitate, develop, finance, maintain or operate a port terminal OR port facility, OR provide services relating thereto; provide any other service within a port designated by the NPA for this purpose; perform any function necessary or ancillary to the matters referred to above; or perform any combination of the functions referred to above.	NPA
S56(5)	Such an agreement can only be entered into by the NPA in accordance with a procedure that is fair, equitable, transparent, competitive and cost-effective.	NPA

Comment:

Prima facie, the existing Section 56 agreements in the port of Richards Bay reviewed were compliant with the section in the Act. There seemed to be no such agreements entered into for the Port of Durban. Further certain information gaps were identified, in terms of which requests have been made for same do comply with the Act.

Section	The National Ports Act, 12 of 2005: SECTION 56 AGREEMENTS/ CONCESSIONS	Responsibility
S56(2) & S11(1)(j) & S12(c) & (f)	A Section 56 agreement MUST provide for the NPA to monitor and annually review performance with regard to the operation of the terminal or facility and the provision of the relevant services in terms of a performance standard specified in the agreement.	NPA

Comment:

The PRSA requires assurance from the NPA that ALL terminal operator (Section 56) agreements, together with all terminal operator (Section 57) licenses comply with the Act by having accompanying Performance Standard Agreements.

Section	The National Ports Act, 12 of 2005: SECTION 56 AGREEMENTS/ CONCESSIONS	Responsibility
S57(1)	Unless an agreement in terms of Section 56 has been concluded, no person other than the Authority may provide a port service or operate a port facility otherwise than in terms of a license issued in terms of Section 57.	NPA

Comment:

The NPA has issued licenses in terms of Section 57 of the Act. The NPA provided Waste Disposal licenses, Stevedoring licenses, along with Terminal Operator licenses.

Prima facie, the existing Section 57 licences in the ports of Richards Bay and Durban do comply with the Act. They have gone through an invitation process and have been issued accordingly.

Section	<p align="center">The National Ports Act, 12 of 2005: SECTION 57 LICENCES</p>	Responsibility
S57 & S65	<p>Any person who provided a port service or operated a port facility immediately prior to the date on which the Act came into force (26 November 2006), is deemed to hold a license for the provision of such port service or the operation of such port facility, but such person must apply for a license in terms of Section 57 within 6 months of the date determined by the Shareholding Minister by notice in the Gazette (2011).</p>	NPA

Comment:

A Ministerial notice was published on 25th November 2011, five years after the commencement of the Act. The NPA thereafter published an invitation to all persons who provided a port service or operated a port facility to apply for a license in terms of Section 57 by 31st May 2012.

The PRSA can only assume that the persons who were providing a port service or operated a port facility immediately prior to the Act, are the persons who were later awarded S57 licences in terms of S65 of the Act. The PRSA requires further documentation to supplement the licences in order to make any form of conclusive finding in regard to their compliance.

Section	The National Ports Act, 12 of 2005: SECTION 57 LICENCES	Responsibility
S62(2) & S11(1)(j) & S12(c) & (f)	Every licensed operator MUST within three months after the end of each financial year, submit to the NPA a report of its licensed operations during that financial year	NPA

Comment:

The NPA has issued a State of Compliance Report. To accurately assess compliance the PRSA requires the actual annual reports of Licensees.

Section	The National Ports Act, 12 of 2005: LEASES	Responsibility
S56/S57	Terminal Operator / Licence Holder Leases	NPA

Comment:

Various anomalies were identified as regards the Leases reviewed for both Ports, including duration of agreements and whether the Leases corresponded with the Licences received, and whether or not some of these Leases should not have been S56 Agreements. However due to differing interpretations of the Act, the NPA still has an opportunity to respond to the PRSA in writing as to its processes followed and the justification thereof.

CONCLUSION:

Prima facie, the NPA's documentation is compliant with the Act (concessions/ licences/ leases). There is what the PRSA refers to as the "domino effect" of the situation as described in the General Compliance Feedback, affecting many of the NPA's processes and procedures. Moreover, given the

lack of information in certain instances the PRSA is unable to comprehensively determine the extent of compliance or the lack thereof on a conclusive basis. This report will therefore remain a work in progress. It must be stated that like with any monitoring or audit process the Authority has an opportunity to respond in writing and rectify the feedback provided by the PRSA as regards the elements contained herein. The best interest of the port industry and South Africa's economy remain of utmost importance with the aim of improving regulation.

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