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BROAD-BASED BLACK ECONOMIC EMPOWERMENT: 2014/2015 FEEDBACK

Purpose:

The Ports Regulator of South Africa (“PRSA”) would like to update industry with regards to the National Ports Authority’s B-BBEE report and the progress thereof.

Background:

The PRSA was established under the provisions of the National Ports Act, 12 of 2005 (“the Act”).

The PRSAs main functions in terms of the Act¹ are to:

1. Exercise economic regulation of the ports system in line with governments strategic objectives;
2. Promote equity of access to ports and to facilities and services provided in ports; and
3. Monitor the activities of the National Ports Authority (“the NPA”) to ensure that it performs its functions in accordance with the Act.

The core functions of the Authority, as set out in Section 11 of the Act, include the promotion of the achievement of equality by measures designated to advance persons or categories of persons historically disadvantaged by unfair discrimination in the operation of facilities in the ports environment²; the promotion of greater representivity, in particular to increase the participation in terminal port operations of historically disadvantaged persons³; and to promote research and development in the spheres of port services and facilities⁴.

The Regulations to the Act⁵ further specify the requirements and obligations imposed on the NPA by the Act in terms of B-BBEE.

Regulation 2 emphasises that the NPA MUST take into account and apply as far as is reasonably possible any relevant Code of Good Practice or issued in terms of section 9 of the BEE Act or Sector Code if any, in –

1. Determining qualification criteria for entering into any agreement in terms of section 56 of the Act;
2. Determining qualification criteria for entering into any licence in terms of section 57 of the Act;
3. Granting any other concession or authorisation in terms of the Act;
4. Developing and implementing a preferential procurement policy;
5. Determining qualification criteria for the sale or lease of any property owned by the NPA within a port; and
6. Developing criteria for entering into partnerships with the private sector.

¹ Section 30(1) of the National Ports Act 12 of 2005

² Section 11(1) (l) of the Act

³ Section 11(1) (r) of the Act

⁴ Section 11(1) (v) of the Act

⁵ Section 80(1) of the Act

Regulation 3(1) further provides that in the second, third and fourth years following the commencement of the Regulations at least 25% per year of all:

- a.) Agreements entered into in terms of section 56 of the Act by the NPA;
- b.) Licenses issued in terms of section 57 of the Act by the Authority;
- c.) Other concessions or authorisations granted in terms of the Act by the Authority;
- d.) Sales or leases of any property owned by the NPA within a port; and
- e.) Any partnership with the private sector and the NPA,

shall be entered into, issued or granted to persons or entities who have attained the B-BBEE Status at least a Level Four Contributor measured in terms of the Codes of Good Practice issued in terms of Section 9 of the BEE Act or any equivalent rating in terms of the Sector Code if any.

Furthermore, **Regulation 3(2)** states that from the fifth year following the commencement of the Regulations at least 75% per year of all:

- a.) Agreements entered into in terms of section 56 of the Act by the NPA;
- b.) Licenses issued in terms of section 57 of the Act by the NPA;
- c.) Other concessions or authorisations granted in terms of the Act by the NPA;
- d.) Sales or leases of any property owned by the NPA within a port; and
- e.) Any partnerships with the private sector and the Authority,

shall be entered into, issued or granted to persons or entities who have attained the B-BBEE Status at least a Level Four Contributor measured in terms of the Codes of Good Practice issued in terms of Section 9 of the BEE Act or any equivalent rating in terms of the Sector Code if any.

In terms of monitoring, Regulation 4 applies. The NPA is required in terms thereof to submit a report to the PRSA, on or before each anniversary of the commencement of the Act, in which it sets out in detail the measures taken pursuant to Regulations 2 and 3 and the manner in which the measures taken have enhanced access to and participation in ports services and port facilities by black people.

Moreover, the PRSA may take such other steps as it may deem necessary from time to time to monitor and enforce compliance by the NPA with the requirements of Regulations 2 and 3, including conduct a hearing regarding the performance of the NPA in fulfilling the requirements set out in Regulations 2 and 3.

NPA's B-BBEE Report 2014 - Compliance Feedback:

The PRSA, on 31st July 2014, provided the NPA with a revised B-BBEE Template as the PRSA was not satisfied with the quality and detail of the previous B-BBEE reports received from the NPA.

On 24th November 2014, the NPA submitted to the PRSA its 2014 B-BBEE annual report, in line with the revised template, for the period 1st October 2013 to 30th September 2014. The Regulations to the Act are currently in their seventh year of existence (since commencement on 23rd November 2007). Therefore, Regulation 3(2) applies in terms of the percentage that is required to meet compliance with the Act, that being 75% as set out above. The target moving forward was therefore for the NPA to obtain at least 75% compliance (all ports taken together), as well as provide the Regulator with strategic information on how it aims to enhance transformative measures as well as increase compliance levels within individual ports and the sector as a whole.

On review of the NPAs annual B-BBEE report, there is *prima facie* **compliance** with both the Act and its Regulations with regards to B-BBEE. The NPAs report states that 85,62% of all Section 56s, Section

57/65s, Port licenses and Registrations (collectively) have been entered into, issued or granted to persons or entities who have attained the B-BBEE Status of at least a Level Four Contributor (see NPA Table attached hereto as "Annexure A"). The Department of Trade and Industry ("DTI") scorecard in accordance with the DTI Codes of Good Practice, according to the report, is the measure used by NPA.

The report received from NPA was not of sufficient detail for PRSA to formulate comprehensive findings, with regard to the level of NPA's B-BBEE compliance in the port sector, at this point. Further engagement will be had with NPA to obtain additional details and to improve the level of reporting. Furthermore, the PRSA has, in its 2015/ 2016 Tariff Record of Decision ("ROD"), requested extensive documentation from the NPA in order to achieve more thorough findings and regulation by the PRSA and, as a result, increased compliance by the NPA.

New maritime sector scorecard and the amended B-BBEE Act, 46 of 2013 - Update:

With the amendment of the B-BBEE Act and the intensified focus on black economic empowerment by government, the Act and its Regulations have become outdated with regards to B-BBEE. As a result, amendments to the Regulations are required in order to comply with the amended B-BBEE Act and Maritime Sector codes.

With regards to B-BBEE, the PRSA has drafted a Report with recommended amendments to the Regulations. The recommended amendments have been duly submitted to the Department of Transport in order for the legislative amendments to follow due process.

Status of B-BBEE access to and participation in Ports					
The Authority's consolidated collective B-BBEE Status as at 30 September 2014					
This report accounts for the period from 01 October 2013 to 30 September 2014.					
Transaction type	Total concluded	Total concluded: Level 5 to 8	Total concluded: Level 1 to 4	Total Percentage: Level 5 to 8	Total Percentage: Level 1 to 4
(a) Section 56 agreements and/or any other concession (entered into during the period 01 October 2013 until 30 September 2014)	None	n/a	n/a	n/a	n/a
(b) Section 57 Licences (i.e stevedoring & waste disposal licences issued and/or renewed during the period 01 October 2013 until 30 September 2014)	10	0	10	0%	100%
i. Port Rule Licences (i.e bunkering & diving licences issued and/or renewed during the period 01 October 2013 until 30 September 2014)	6	2	4	33,33%	66,66%
ii. Registrations/ Permits (i.e vessel agents registrations issued and/or renewed during the period 01 October 2013 until 30 September 2014)	244	32	212	13,12%	86,88%
(c) Authorisations and/or Section 79's Ministerial directives (received during the period 01 October 2013 until 30 September 2014)	None	n/a	n/a	n/a	n/a
(d) Sales of property. (during the period 01 October 2013 until 30 September 2014)	None	n/a	n/a	n/a	n/a

(e) Leases of property (entered into during the period 01 October 2013 until 30 September 2014)	46	10	36	21,74%	78,26%
(f) Partnerships with the private sector (entered into during the period 01 October 2013 until 30 September 2014)	None	n/a	n/a	n/a	n/a
Totals	360	44	262	14,38%	85,62%