

**Mr T Motlashuping  
THE ACTING MUNICIPAL MANAGER  
MANGAUNG METROPOLITAN MUNICIPALITY  
BLOEMFONTEIN**

**Ms S Lockman-Naidoo  
THE SPEAKER  
MANGAUNG METROPOLITAN MUNICIPALITY  
BLOEMFONTEIN**

**BY HAND and E-MAIL**

**MOTION: MOTION FOR THE DISSOLUTION OF THE BOARD OF CENTLEC (RF) SOC LTD**

**MOTION**

**By**

**Clr. LE RASOEU**

**Democratic Alliance (DA) PR Councillor**

**MOTION FOR THE DISSOLUTION**

**OF THE BOARD OF CENTLEC (RF) SOC LTD**

**FOR**

**CONTRAVENING PROVISIONS OF THE MEMORANDUM OF INCORPORATION OF CENTLEC (RF) SOC LTD AS ANCHORED IN \*THE COMPANIES ACT NO. 71 OF 2008**

**\*LOCAL GOVERNMENT: MUNICIPAL SYSTEMS ACT 32 OF 2000**

**\*LOCAL GOVERNMENT: MUNICIPAL FINANCE MANAGEMENT ACT 56 OF 2003**

**ON PROPER COMPOSITION OF THE BOARD OF CENTLEC (RF) SOC LTD**

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## Background

CENTLEC (RF) SOC LTD, hereafter [CENTLEC], is a state-owned entity incorporated in terms of the laws of the Republic of South Africa. Of particular importance to its existence or establishment is, inter alia, the Company's Act 71 of 2008 ["Company's Act"], the Local Government: Municipal Systems Act 32 of 2000 ["Systems Act"] and the Local Government: Municipal Finance Management Act 56 of 2003 [Municipal Finance Management Act].

These superordinate legislation notwithstanding, the primary enabling and regulatory instrument which outlines the managerial and administrative architecture and mechanics for the exercise of power through the Board of Directors at CENTLEC is the entity's Memorandum of Incorporation, hereafter [MOI].

The MOI, under section 5, defines the status of CENTLEC, inter alia:

- 5.1 The Company is a "ring-fenced" company as defined in the Companies Act and a State-Owned Company as contemplated in section 8(2)(a) of the Companies Act.
- 5.2 The Company is an entity member of the Mangaung Metropolitan Municipality Group.
- 5.3 This MOI replaces and supersedes the Memorandum of Incorporation of the Company applicable prior to the filing hereof.
- 5.4 The provisions of section 13(1) (a) (i) of the Companies Act shall not apply to the Company.
- 5.5 The Company is incorporated in accordance with and governed by:
  - 5.5.1 the alterable provisions of the Companies Act that are applicable to State Owned Companies, subject to the limitations, extensions, variations or substitutions set out in this MOI;
  - 5.5.2 the unalterable provisions of the Companies Act that are applicable to State Owned Companies, save to the extent that this MOI does not impose on the Company a higher standard, greater restriction, a longer period of time or similarly more onerous requirement; and
  - 5.5.3 the provisions of this MOI.

Of importance are the "ring-fencing" provisions referenced under section 5.1 cited above and which are substantively outlined under section 9 of the MOI under "General Ring-Fencing Provisions". Within these "ring-fencing" provisions, of particular importance to this motion are sections 9.2 and 9.4 which state inter alia:

- 9.2 The Company shall not, and no Director, other officers, body or organ of the Company shall be authorised on behalf of the Company to, enter into any transaction:
  - 9.2.1 that contravenes or conflicts with this MOI;
  - 9.2.2 that contravenes or conflicts with the obligations of the Company under any agreement, document, deed or instrument to which it is or may become a party in accordance with this MOI;
  - 9.2.3 to the extent to which the capacity or powers of the Company have been qualified; or
  - 9.2.4 unless all applicable restrictive conditions which are imposed under this MOI are complied with in full.
- 9.4 The Company shall:

- 9.4.1 conduct the Business under the name of Margaung Metropolitan Municipality and in its own name;
- 9.4.2 always holds itself out as an entity which is separate from any other entity or group of entities and shall without delay correct any misunderstanding known to the Company regarding its separate identity;
- 9.4.3 maintain books and records separate from those of any other Person, maintain bank accounts separate from those of any other Person and shall not commingle its assets with the assets of any other Person;
- 9.4.4 comply with all Regulatory Provisions; and
- 9.4.5 not at any time act or omit to act in any manner which results or would be reasonably likely to result in the Company failing to comply timeously and in full with all its obligations under the Service Delivery Agreement.

From these “ring-fencing” provisions of the MOI:

- (a) Any action and/or process that contravenes or conflicts with the MOI is either illegality or nullity – or both;
- (b) Since the proper constitution of the Board of CENTLEC falls under “restrictive conditions which are imposed under [this] MOI”, and which are supposed to be “complied with in full”, the existence and/or actions of a Board not so constituted are otherwise ultra vires and as such and to such an extent either illegality and/or nullity;
- (c) A Board of CENTLEC that is not properly constituted fails the benchmark of complying with “all Regulatory Provisions”; and
- (d) Decisions of an improperly constituted Board since in law and applicable regulations they are non-binding if not illegal, such decisions are most likely to expose CENTLEC to “acts of commission or acts of omission which results would most reasonably result in the company failing to comply timeously and in full with all its obligations” under the applicable Service Delivery Agreement – whether these/such decisions are subject to administrative and legal challenges or not.

## **The Board of CENTLEC**

The Board of CENTLEC is constituted under section 12 of the MOI, which inter alia outlines:

- (a) Composition and Appointment of the Board of Directors
- (b) Terms of Office of the Directors
- (c) Removal of Directors
- (d) Authority and Duties of the Board of Directors
- (e) Annual General Meeting
- (f) Directors and Board Committee Meetings

- (g) Proceedings at Board Meetings
- (h) Shareholder Meetings
- (i) Indemnification of Directors
- (j) Accountability and Reporting
- (k) Prescribed Officers
- (l) Chief Executive Officer
- (m) Executive Mayor
- (n) Liabilities of the Directors and Prescribed Officers

Broad Overview of the Functions and Power of the Board of CENTLEC

Section 93H (1) (a) and (b) of the Systems Act, respectively provides that:

**The Board of Directors of a municipal entity must –**

- (a) Provide effective, transparent, accountable and coherent corporate governance and conduct effective oversight of the affairs of the municipal entity.
- (b) Ensure that it and the municipal entity comply with all applicable legislation.

When these prescripts are applied to the Board of CENTLEC, they obligate its Board to ensure the development of strategic policies aimed at ensuring that the company meets its objectives and performs at its most superlative in the pursuit of the vision of the company as well as achievement of its strategic objectives for the betterment of the citizens of its 'Area'. These broad prescripts are echoed in the Board Charter and it must be submitted that compliance with these prescripts is peremptory.

**Instruments Providing the Architecture and Operationalisation of the Board of CENTLEC**

Apart from the aspects of the MOI already adduced in this motion, the instruments providing the architecture and operationalisation of the Board of CENTLEC are to be found in:

- (a) The Company's Act
- (b) The Systems Act

With regard to The Company's Act:

Section 66(1) of the Act provides that –

“The business and affairs of a company must be managed by or under the direction of its Board, which has the authority to exercise all of the powers and perform any of the functions of a company, except to the extent that this Act or the company’s Memorandum of Incorporation provides otherwise”

Whereas section 66(2) (b) of the Act provides that –

The Board of a company must comprise –

(b) “In case of a public company, or non-profit company, at least three (3) directors”.

Section 66(2) (b) of the Company’s Act is echoed in the MOI that stipulates, under section 12.8.4 that “The quorum for a Board Meeting to begin or for a matter to be considered is at least 50% + 1% (fifty plus one per cent) of the Directors”.

With regard to The Systems Act:

Section 93E (1) of the Act states that –

“The Board of Directors of a municipal entity –

- (a) must have the requisite range of expertise to effectively manage and guide the activities of the municipal entity;
- (b) must consist of at least a third non-executive directors; and
- (c) must have a non-executive chairperson.

Given the foregoing provisions of The Company’s Act and The Systems Act on the composition of the Board of a municipal entity, fundamental aspects of the composition of such a Board are:

- i. The Board must be constituted by a minimum of three (3) Directors;
- ii. A third of those directors must be Non-Executive members; plus
- iii. A Non-Executive Chairperson.

Advertently, these provisions cast the spotlight on the issue of a quorum at a state-owned municipal entity of which CENTLEC is one.

### **The Quorum for Directors’ Meetings at CENTLEC**

A quorum requirement for a Directors’ meeting to begin, voting rights and approvals of resolutions in meetings of the Board, are regulated under section 73(5) of the Company’s Act and in particular subsection (b) which provides that –

“a majority of the directors must be present at a meeting before a vote may be called at a meeting of the directors”.

The MOI is aligned to these provisions under section 12.8.4 which states that “The quorum for a Board Meeting to begin or for a matter to be considered is at least 50% + 1 (fifty plus one per cent) of the Directors”.

The ‘Ideal’ CENTLEC Board

The 'ideal' CENTLEC Board is envisioned under section 12.1 of the MOI that stipulates, inter alia –

#### 12.1 Composition and Appointment of the Board of Directors

12.1.1 The Board shall comprise of a minimum number of 4 (four) and not more than 7 (seven) non-executive directors excluding the Chief Executive Officer and Chief Financial Officer who shall be executive, non-voting Board members. Directors shall be appointed in accordance to section 93E of the MSA.

12.1.2 All Board members shall be appointed by the Shareholder through its Council.

12.1.3 The Board shall comprise of the following:

12.1.3.1 a Chairperson, who shall be a non-executive Director;

12.1.3.2 the Chief Executive Officer and Chief Financial Officer of the Company; and

12.1.3.3 up to 6 (six) other non-executive directors of which one of them should be designated as deputy chairperson.

12.1.4 The Shareholder shall appoint a person as an executive Director (s) of the Company as a consequence of that person holding some other office, title, designation or similar status in the Company.

12.1.5 The Board must have the requisite range of expertise to effectively manage and guide the Business.

12.1.6 The authority of the Board to fill any vacancy on the Board on a temporary basis, as set out in section 68 (3) of the Companies Act is limited or restricted by this MOI. Only the Council has the authority to fill a vacancy on the Board either on a temporary or permanent basis.

In fulfilling this mandate, the Shareholder, on 1 November 2020, appointed a Board that was to serve for three (3) years until 30th October 2023. It comprised of five (5) Non-Executive Directors, a Chairperson who is also a Non-Executive Director, and two (2) Executive Directors. Constituted as such, the Board satisfied all the precepts of the constitutive instruments of CENTLEC including relevant legislation and MOI.

#### **CENTLEC Board Dysfunctionalities**

By June 1, 2022, four (4) Non-Executive Directors have resigned from the Board, thereby leaving only two (2) Non-Executive Directors and two (2) Executive Directors.

A Board that originally has eight (8) members, was reduced to four (4) members.

In its current form, the Board does not meet the quorum requirement of a majority of Directors as stipulated in the Company's Act under section 73(5) of the Company's Act and in particular, subsection (b), which would require a quorum of five (5) in a Board that was originally constituted of eight (members) and neither does it meet the precepts of the MOI under section 12.8.4 that states that "The quorum for a Board Meeting to begin or for a matter to be considered is at least 50% + 1% (fifty plus one per cent) of the Directors"; which again would require a quorum of five (5) because 50% of Board members would be four (4) members and a fifth member satisfying the +1% requirement – in percentage terms or otherwise.

There is another dilemma, and thus a dysfunctionality, that the Board as currently constituted poses. The law generally and the MOI specifically, in their wisdom and genius, envisioned a Board whereby the non-Executive members will constitute a majority – specifically because of the regulatory and oversight roles that these Board members should and must execute over the executive decisions carried out by the Executive Directors. As currently constituted – with two (2) Non-Executive Directors, which number is inclusive of the Non-Executive Chairperson – this regulatory and oversight role has been compromised.

There is also the peremptory issue of the Board being required to have at least a third Non-Executive Directors, excluding the Chairperson. In an original cohort of five (5) Non-Executive Directors, excluding the Chairperson, the legal threshold of this requirement would be at least two (2) other Non-Executive Directors – with one of them designated and serving as the Deputy Chairperson and the other one serving as an ordinary member of the Board. The oddity of the Board as currently constituted and thus its dysfunctionality is that it doesn't have an 'ordinary member'. No functional Board can only have a Chairperson and Deputy Chairperson and two (2) other non-voting members in the persons of the Executive Directors – The Chief Executive Officer (CEO) and the Chief Finance Officer (CFO).

The Board as currently constituted is equally hamstrung when it comes to the operationalisation of Board Committees. Under section 13.5 of the MOI, the Board is required to appoint the following Board Committees:

1. remuneration committee;
2. human resource committee;
3. audit and risk committee;
4. social and ethics committee;
5. governance committee; and
6. information and technology committee.

It is difficult nay impossible to contemplate how the Board as currently constituted can effectively operationalise the above-listed committees.

Thus, This Motion for Dissolution of CENTLEC Board

From the foregoing, in fact, in law and managerial practice, the Board does not exist. As such, whatever structure/formation within CENTLEC that currently purports to be a 'Board' is an animal strange to law; doesn't have the power or the authority to convene meetings and cannot take binding effectual resolutions on behalf of the Company.

Should the structure/formation within CENTLEC that purports to be the 'Board' continue to convene meetings and take decisions, such actions and decisions shall be unlawful and/or nullities in law.

It is noteworthy that this state of affairs exposes the Company, its Shareholder, Directors and Officers to liabilities and risks because all public power must be exercised in a manner that is in tandem with the Constitution and all applicable subordinate legislation generally and specifically by the doctrine of legality that binds all arms of government as well as all legal persons (an individual, company, or other entity which has legal rights and is subject to obligations) to constraints in exercising power and performing functions only to the extent conferred to them by law.



The Board can only exercise its powers if properly constituted.

Having carefully demonstrated that the current Board is NOT properly constituted, this motion, therefore, submits that the current Board MUST be dissolved.

### **Recommendations**

- 1) That the Board of CENTLEC is dissolved with immediate effect.
- 2) That Council appoints an interim Board Administrator whilst the process of recruitment for new board members is undertaken.
- 3) That the recruitment and appointment of the CENTLEC board members be completed within three months.
- 4) That the administrator appoints an independent chartered accountant or service provider to conduct a financial forensic audit.
- 5) The appointed service provider must focus on the allegations tabled between the Executive and Chairperson of the Board and findings by the Auditor General.
- 6) The administrator requests that the South African Revenue Services conduct lifestyle audits on all members appointed to serve on the CENTLEC Board since 2016 and the Executive Mayor as he is named the shareholder in the letter from CENTLEC.
- 7) That the interim Board Administrator report monthly on progress to Council.

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**by Cllr LE RASOEU**  
**Democratic Alliance (DA) PR Councillor**  
**BA Communication Science UFS**  
**BA Hons Political Science UFS**  
**MA Public Administration UFS**  
**LLB-Ongoing UFS**

**and**

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**Seconded by Cllr .....**  
**Democratic Alliance (DA) PR Councillor**

**O.B.O**  
**DEMOCRATIC ALLIANCE MANGAUNG METRO**