

16 Nov. 22

TO: CLLR LOCKMAN-NAIDOO
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TO: CLLR MXOLISI SIYONZANA
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TO: MR MOTLASHUPING
THE ACTING CITY MANAGER
MANGAUNG METROPOLITAN MUNICIPALITY
BRAM FISCHER BUILDING
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BY EMAIL & HAND.

RE: MOTION TO ESTABLISH A FRAMEWORK/CRITERIA FOR THE ELIGIBILITY TO SERVE AS A BOARD MEMBER OF CENTLEC (SOC) Ltd.

In terms of rule 29 of the Standing Rules and Orders, myself, Cllr Eddie Rasoeu and seconded by Cllr Dirk Kotze on behalf of the Democratic Alliance hereby submits a Motion to establish a framework for the eligibility framework for the eligibility to serve as Board Member of Centlec (SOC) Ltd.

Given the provisions of the Municipal Systems Act 32 of 2000, specifically section 93E, as well as the Company Act of 2008 all board members shall be appointed by the Shareholder through its Council. A core consideration is that a Board Must have the requisite expertise to manage and guide the activities of the municipal entity. Centlec is bound by this provision and thus it must reflect this requirement.

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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, longer period of time or similarly more onerous requirement; and*
 - 5.5.3 *the provisions of this MOI.*

CENTLEC Board Dysfunctionalities and Technical Dissolution of the 1 November 2020 Board of Directors

The Shareholder, in fulfilling the mandate bestowed by section 12.1.2 of the MOI, that stipulates, *inter alia*:

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

Appointed a Board of Directors on 1 November 2020. The Board 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.

By June 1 2022, four (4) Non-Executive Directors has 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 that form, the Board did 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 requires a quorum of five (5) in a Board that originally consisted of eight (members) and neither did 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 percent) 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.

Constituted as such, there was a dilemma and thus a dysfunctionality in the Board. 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. With two (2) Non-Executive Directors, which number is inclusive of the Non-Executive Chairperson – this regulatory and oversight role was compromised.

The dysfunctionalities extended further. 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 was 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 after the resignations of the four (4) members and thus its dysfunctionality is that it didn'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 of Four’ that oversaw the operations of CENTLEC for the longest time since the resignations of the four (4) Board members was a disservice to the good people of Mangaung Metropolitan Municipality (MMM) – the Shareholder, because it could not operationalise the 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 of Four’ effectively operationalised the above listed committees.

By extension, the ‘Board of Four’ was not only a nullity, but it was an animal strange in law; with no power nay authority to convene meetings; nor take binding effectual resolutions on behalf of the Company.

In retrospect, possibly in recognition of the unlawful nature of their tenure as Board members, the Chairperson and the Deputy Chairperson of the 1 November 2020 Board resigned on 28 October 2022. With those resignations and effective the day of the said resignations, the 1 November 2020 Board of CENTLEC stood technically dissolved.

It is therefore incumbent on the Shareholder to constitute another Board so as to ensure compliance and optimal operations of the Company.

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

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- (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 Directors 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 Directors 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 Directors 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 –

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“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 percent) 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, a core consideration in relation to the current motion is that a Board MUST have ‘the requisite expertise to manage and guide the activities of the municipal entity’. CENTLEC is bound by this provision and therefore its Board MUST reflect this requirement.

The ‘Ideal’ CENTLEC Board

The ‘ideal’ CENTLEC Board is envisioned under section 12.1 and 12.4 of the MOI that stipulate, inter alia –

12.1 Composition and Appointment of the Board of Directors

- 12.1.2 *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 section 93E of the MSA.*
- 12.1.3 *All Board members shall be appointed by the Shareholder through its Council.*
- 12.1.4 *The Board shall comprise of the following:*
 - 12.1.4.1 *a Chairperson, who shall be a non-executive Director;*
 - 12.1.4.2 *the Chief Executive Officer and Chief Financial Officer of the Company; and*
 - 12.1.4.3 *up to 6 (six) other non-executive directors of which one of them should be designated as deputy chairperson.*
- 12.1.5 *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.*
- 12.1.6 *The Board must have the requisite range of expertise to effectively manage and guide the Business.*
- 12.1.7 *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.*

12.4.1 Authority and Duties of the Board of Directors

- 12.4.1 *The authority of the Board to manage and direct the business and affairs of the Company, as set out in section 66(1) of the Companies Act is governed by this MOI.*
- 12.4.2 *Subject to accountability and effective oversight by the Shareholder, the Board has power to direct and control the business of the Company.*
- 12.4.3 *The Board has authority to make decisions to determine the future of the Company and protect its assets and reputation.*
- 12.4.4 *The Board must provide leadership and retain full and effective control over the direction and performance of the Company.*

- 12.4.5 The Board must provide effective, transparent, accountable and coherent corporate governance and conduct effective oversight of the affairs of the municipal entity.*
- 12.4.6 The Board must communicate openly and promptly with the Shareholder and ensure that the Company complies with all applicable legislation and agreements.*
- 12.4.7 The Board is accountable to the Shareholder and therefore it owes the Shareholder a duty of good faith.*
- 12.4.8 Subject to the approval of the Shareholder, the Board has the power to appoint Company Secretary.*
- 12.4.9 A Director must disclose to the Board and to the Shareholder, any direct or indirect personal or business interest that the Director or his or her spouse or partner may have in any matter before the Board in accordance with section 75 of the Companies Act.*
- 12.4.10 A Director must at all times act in accordance with the Code of Conduct for directors referred to in section 93L of the MSA.*
- 12.4.11 The Board may from time to time by resolution delegate any power that the Board has to the executive Directors, CEO, or any Prescribed Officer, provided that such powers so delegated may be similarly withdrawn.*
- 12.4.12 As set out in the Service Delivery Agreement, the Board in consultation shall ensure that in each Financial Year, a budget of the Company is prepared in accordance with the provisions of section 87 of the MFMA and submitted to the Shareholder.*
- 12.4.13 In addition to the budget referred in clause 12.4.12 above, a mid-year budget and performance assessment must also be performed by the Company in terms of section 88 of MFMA.*

Brief Literature Overview on Board of Directors Efficiencies

There is an extensive corpus of research and policy literature on efficiencies of Boards of Directors. It is not feasible to include all of it here because of constraints of time and space. It will be remiss however, within the South African context not to mention the King Report on Corporate Governance, which constitutes of four (4) reports – King I (1994); King II (2002); King III (2009) and King IV (2016). These reports that were authored by a Committee constituted by the Institute of Directors in South Africa and chaired by retired Supreme Court of South Africa judge Mervyn E. King with committee members Richard Wilkinson; Phillip Armstrong and Nigel Payne remain the most effective summary of the best international practices in corporate governance. The golden rubric through the King Reports, and their substratum of the King Code is the insistence of the

primacy of 'corporate governance' which they define as 'the exercise of the ethical and effective leadership by the governing body'. In the instance of the current motion, the 'governing body' is the Board which this motion seeks to establish the contours of a framework for its establishment.

Further afield and writing for the Harvard Business Review way back in 1979 long before Justice King and his committee had been commissioned by the Institute of Directors in South Africa, William W. Wommack documented that "the board of directors' most important function is to approve or send back for amendment management's recommendations about the future direction of the corporation". Over time, this has come to be known as the 'strategic function' of the board of directors. It is the brain trust of a corporation or a company. It helps the company set out objectives and develop a strategic philosophy.

Framework for Eligibility to Serve as a Member of the CENTLEC Board of Directors

A core consideration for eligibility to serve as a member of the CENTLEC Board of Directors as derived from the constitutive legislative instruments as well as the MOI is the notion of having 'the requisite expertise to manage and guide the activities of the municipal entity'.

Deriving from this core consideration is an invitation to specify, in some detail, what 'requisite expertise' that is referenced in the constitutive instruments would entail. A point of departure in formulating a framework for eligibility to serve as a member of the CENTLEC Board of Directors can be found in the MOI. 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.

Ideally, each of these Board Committees must be chaired by a member with 'requisite expertise' in the core orientation of the said Committee.

Given the foregoing framework of Board Committees and given the unique environment under which CENTLEC operates, it is submitted that an ideal CENTLEC Board must have persons drawn from nay having the following professional orientations.

1. Engineering (Electrical and Electronics/Civil and Structural/ICT Engineering)
2. Law
3. Human Resource/Governance/Political Science
4. Social Work/Scientist
5. Auditor/Risk Manager
6. Economist/Accountant

Recommendations for Council Approval

- It is therefore recommended for Council adoption that members of the Board of Directors of CENTLEC be persons, apart from moral fortitude and demonstrable professional skills and aptitudes, be drawn from the following professions:
 1. Engineering (Electrical and Electronics/Civil and Structural/ICT Engineering/Industrial electro-mechanical)
 2. Law
 3. Human Resource/Governance/Political Science
 4. Social Work/Scientist
 5. Auditor/Risk Manager
 6. Economist/Accountant
- At least a third of non-executive directors **MUST** be certified directors
- At least half should originally be from the Free State Province
- With at least NQF level 6/7 in the profession specified above
- Qualifications above the listed above and coupled with demonstrable track record in management through unqualified audits or enterprises/entities one has managed will be an added advantage
- Should have served for at least five years at the level of director or above in a public entity/equivalent GSE listed companies.

Cllr. LE RASOEU
 Democratic Alliance (DA) PR Councillor
 Signature.....

Seconder Cllr Dirk Kotze
 Democratic Alliance (DA) PR Councillor
 Signature..... *D Kotze*

Cllr. LE RASOEU
Democratic Alliance (DA) PR Councillor

BA Communication Science	UFS
BA Honours Political Science	UFS
MA Public Administration	UFS
LLB (<i>Ongoing</i>)	UFS

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