



For attention: Ms Mandy Balie

Email: [nsebill@parliament.gov.za](mailto:nsebill@parliament.gov.za)

14 February 2025

Dear Ms Balie

The Helen Suzman Foundation attaches our written submission in response to the invitation for comments on the National State Enterprises Bill [B1-2024].

We would like to confirm our interest in making oral representations at a convenient date.

Should you have any queries, it would be appreciated if you could contact me at the following email address: [naseema@hsf.org.za](mailto:naseema@hsf.org.za)

Yours sincerely

A handwritten signature in black ink, appearing to be 'Naseema Fakir', written over a light blue horizontal line.

Naseema Fakir

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## 1. Introduction

- 1.1. Perhaps nowhere else is State Capture's devastating effect on South Africa's social and economic life more evident than in the dire condition of our State-Owned Enterprises ("**SOEs**").
- 1.2. Ostensibly to prevent this dark chapter in our history from repeating, the National State Enterprises Bill ("**Bill**") establishes the State Asset Management SOC Limited ("**SAMSOC**") as a holding company for thirteen of our SOEs as its wholly owned subsidiaries;<sup>1</sup> with the State as its sole shareholder, represented by the President.<sup>2</sup>
- 1.3. If the Bill becomes law, SAMSOC will carry the mantle of ensuring that the SOEs under its control are "politically insulated, professionalised and transparent."<sup>3</sup> However, HSF submits here that the Bill falls far short of these intentions by:
  - 1.3.1. providing that the President, as the sole representative of the State as SAMSOC's shareholder, has ultimate power, over the long-term,<sup>4</sup> to appoint and remove members of SAMSOC's board;
  - 1.3.2. allowing, in turn, SAMSOC's board to exercise the full rights of a shareholder over its subsidiary SOEs, which would include appointing and removing members of those subsidiary boards;
  - 1.3.3. ignoring the State Capture Report's recommendation for a permanent structure to facilitate independent appointments to SOE boards;
  - 1.3.4. risking Presidential interference in a subsidiary SOE's operations by (i) requiring SAMSOC to monitor significant aspects of day-to-day work at its subsidiaries; and (ii) requiring SAMSOC to develop a procurement framework

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<sup>1</sup> Schedule A to the Bill lists thirteen SOEs (Air Traffic and Navigation Services Company; Airports Company; Broadband Infraco; CEF; Denel; Eskom Holdings; Sentech; South African Airways; South African Forestry Company; South African National Roads Agency; South African Nuclear Energy Corporation; South African Post Office; and Transnet) which "are capable of being transferred" to SAMSOC as wholly owned subsidiaries.

<sup>2</sup> The Bill does allow, however, for the President to delegate the implementation of the Bill, if it becomes law, to a Minister in Cabinet. See section 6(3) of the Bill.

<sup>3</sup> Paragraph 1.9 of the Bill's explanatory memorandum.

<sup>4</sup> While the Bill provides that SAMSOC's first board be appointed by an independent panel, this is not the case for subsequent SAMSOC boards. We deal with this below in section 2 of this submission.

for its subsidiary SOE's, as well as a system for evaluating their capital investments; and

1.3.5. delaying meaningful reform of SAMSOC's subsidiary SOEs until the Presidency devises a National Strategy.

1.4. As such, the Bill does little to reform our SOE sector to prevent State Capture; and may instead formalise a centralised structure that enables it. However, if the Bill is to remain government policy, to mitigate its risks HSF suggests that:

1.4.1. a permanent, independent, structure work with the Presidency to appoint and remove SAMSOC's board, and the boards of its subsidiaries;

1.4.2. the appointment process for SAMSOC's board, and the boards of its subsidiaries, be transparent and open to the public;

1.4.3. the Bill's centralised model be softened by ensuring that subsidiary SOEs take the lead in formulating their procurement frameworks and systems for evaluating capital expenditure;

1.4.4. any procurement framework that the Bill envisages be subject to transparent processes in its formulation;

1.4.5. clear criteria guide how and when SOEs fall under SAMSOC's control; and

1.4.6. a parliamentary committee is tasked with overseeing SAMSOC's activity, if not the Presidency as a whole.

## **2. SAMSOC's Board is not Insulated from Undue Political Influence and Neither are its Subsidiaries' Boards.**

2.1. Section 8(2), read with section 10(2), of the Bill provides that the President appoints SAMSOC's directors on the advice of its board. However, if the President rejects a recommendation, SAMSOC's board must find someone new.

2.2. Since this mechanism centralises appointment power in the President, it was severely criticised in previous iterations of the Bill. The current Bill offers the following solution:

- 2.2.1. Schedule B provides that an independent panel will appoint the first SAMSOC Board.<sup>5</sup> Thereafter, however, appointments to SAMSOC's board revert to the process set out in sections 8(2) and 10(2) of the Bill.
- 2.2.2. This means that over the long term, SAMSOC's board will effectively be subject to Presidential power as no board will be able to nominate new members absent Presidential agreement.
- 2.2.3. While the SAMSOC board's advisory role provides somewhat of a check on the Presidential appointment power, it is likely that over time, the power of the Presidency will win out over SAMSOC's board.
- 2.3. Moreover, section 9(1)(d) of the Bill provides that SAMSOC's board will "*exercise the rights and observe the restrictions as a sole or majority shareholder of any subsidiaries of the holding company on behalf of the State.*"
- 2.4. This significantly magnifies the risk of centralising long-term power to appoint SAMSOC's board in the President because it leaves SAMSOC's board with the power to appoint and remove members of its subsidiary boards.

### **3. The Companies Act's Mechanism for Removing Underperforming Directors is a Bad Fit for SAMSOC.**

- 3.1. Similarly, section 8(3) of the Bill concentrates the power to remove directors from SAMSOC's board in the Presidency by expressly incorporating section 71 of the Companies Act No 71 of 2008 ("**Companies Act**"), which gives ultimate removal authority to shareholders.<sup>6</sup>
- 3.2. SAMSOC, however, is unlike an ordinary company in that it has a single shareholder (the State) represented by the President. This means that the President, as with appointments, wields ultimate power to remove directors from SAMSOC's board.

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<sup>5</sup> Paragraph 2.10 of the Bill's explanatory memorandum.

<sup>6</sup> Section 8(3) of the Bill.

#### 4. There Should be a Permanent Structure that Facilitates Appointments to, and Removals from, SAMSOC's Board and its Subsidiaries' Boards.

- 4.1. By concentrating board appointment and removal power in the Presidency, the Bill stands in sharp contrast to the State Capture Report's recommendation that a permanent independent structure provide a check on political powers of appointment to SOE boards.
- 4.2. In this regard, the State Capture Report suggested a new structure, a so-called 'Standing Appointment and Oversight Committee' ("**Standing Committee**"), to ensure that key appointments to SOE boards meet appropriate professional and ethical standards.<sup>7</sup>
- 4.3. While HSF is not opposed to such a recommendation, a brand-new structure would take time and resources to establish; and so, should only be considered if there is not already state capacity that can play the role that the State Capture Commission envisaged for the Standing Committee.
- 4.4. In this regard, Parliament should consider enlisting the Public Service Commission ("**PSC**") to provide the permanent check on appointment and removal power that the Bill gives to the President and SAMSOC's board, if it is constitutional to do so.<sup>8</sup>
- 4.5. The PSC is a robustly independent<sup>9</sup> organ of state established by section 196 of the Constitution expressly to maintain an effective and efficient public service. Therefore, it would be a natural partner to SAMSOC as it oversees its subsidiary SOEs.<sup>10</sup>

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<sup>7</sup> The State Capture Report Part 6, Volume 3, Page 976.

<sup>8</sup> The [Public Service Amendment Bill](#) is currently before Parliament, and it has proved [controversial](#) whether its proposal to extend the PSC's mandate to cover SOEs is constitutional. However, given that the PSC is an already existing structure with expertise in administering organs of state, enlisting it to guide SAMSOC's board should be seriously considered.

<sup>9</sup> The PSC's members are appointed in terms of section 196(8)(a) of the Constitution.

<sup>10</sup> HSF has long advocated for a more robust role for the PSC in appointments of high-level state officials. See our submissions in respect of the Public Service Commission Bill (available [here](#)); and the Public Service Amendment Bill (available [here](#)).

4.6. Moreover, any process to appoint SAMSOC's board or the boards of its subsidiaries should be open to public scrutiny in a similar manner to how the Judicial Service Commission conducts interviews for judicial appointments.

4.7. Any additional state capacity required for such a process is more than justified by the fact that South Africa's SOEs ultimately serve to create an inclusive economy.

## **5. Parliament Must be Given a Role in Supervising The Presidency and/or SAMSOC.**

5.1. Housing SAMSOC in the Presidency, compounds a longstanding concern in South African civil society that there is no Parliamentary Committee designated to oversee the President.

5.2. Concentrating power over SOEs in the Presidency can only amplify the call for such a Parliamentary Committee – or at least one that supervises SAMSOC itself.

5.3. Currently, the Portfolio Committee on Planning, Monitoring and Evaluation oversees our SOEs. If the Bill is enacted, it should continue doing so by being intentionally mandated to oversee SAMSOC in carrying out all its duties.

## **6. The Bill Risks Presidential Interference in Subsidiary SOE Operations, Procurement and Capex Decisions.**

6.1. Section 9(2) of the Bill provides that SAMSOC's Board:

*must ensure that its business and affairs and those of its subsidiaries are conducted in a manner consistent with this Act, the Companies Act, the memorandum of incorporation, any applicable legislation and the National Strategy and in particular, it must—*

*(a)...*

*(b)...*

*(c) conclude a corporate plan with each of its subsidiaries;*

*(d)...*

*(e) without delay, notify the shareholder of any adverse events that may affect the ability of a subsidiary to meet its performance targets or to comply with this Act and the reasons, therefore.*

6.2. These provisions plainly entail a significant role for SAMSOC's board in the strategic and operational affairs of subsidiary SOEs. A corporate plan, for example, would detail a subsidiary SOEs long-term strategy and how it is operationalised.

6.3. Given the Presidency's powerful role in shaping SAMSOC's board, this risks Presidential interference in the operational activity of subsidiary SOEs.

6.4. Moreover, the Bill risks SAMSOC influencing its subsidiaries' procurement and capital expenditure agenda. In this regard, sections 9(2)(f) and (g) of the Bill provide that SAMSOC's board must:

*(f) implement an appropriate procurement and provisioning system for itself and a procurement and provisioning framework for its subsidiaries that is in accordance with section 217 of the Constitution; and*

*(g) develop a system for properly evaluating all major capital investment projects of its subsidiaries.*

6.5. The Bill provides that the Public Finance Management Act No 1 of 1999 ("**PFMA**") will not apply to SAMSOC and its subsidiaries.<sup>11</sup> While it is arguably sensible to free subsidiary SOEs from the PFMA's procurement framework, the Bill falls short of providing a workable replacement because:

6.5.1. sections 9(2)(f) and (g) of the Bill do not provide that SAMSOC's procurement framework for its subsidiaries will be subject to public scrutiny in its formulation;

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<sup>11</sup> Section 22(3) of the Bill.

- 6.5.2. as a centralised authority overseeing various complex subsidiary SOEs, SAMSOC is unlikely to have the expertise to design a procurement framework that serves the interests of individual subsidiary SOEs; and
- 6.5.3. fails to appreciate that section 8(1) of the recently enacted Public Procurement Act No 28 of 2024 contemplates procuring institutions themselves taking the lead in formulating their procurement policies.
- 6.6. As such, if Parliament wishes to free SOEs from the PFMA's procurement framework, a better solution would be to ensure that the formulation of any replacement framework is led by subsidiary SOEs and that it be subject to transparent processes in its formulation.
- 6.7. The risk of Presidential interference in the operations of subsidiary SOEs is amplified by section 9(2)(d) of the Bill, which gives the President, and the Minister of Finance final say over the borrowing plans of "financially dependent" subsidiaries. Given how often our SOEs have fallen into financial distress, this provision creates significant scope for Presidential interference in the operations of subsidiary SOEs.
- 6.8. Furthermore, nothing in SAMSOC's role in overseeing its subsidiaries should prevent them from putting in place their own independent mechanisms for reporting corruption – either within their own organisations or in their interaction with SAMSOC.

## **7. Stalling Meaningful Reform**

- 7.1. The Bill provides that a National Strategy, formulated by the President,<sup>12</sup> will guide the future functioning of our SOEs in respect of their (i) strategies; (ii) performance targets; (iii) developmental obligations; and (iv) potential private investment.
- 7.2. However, the Bill provides no timeline according to which the National Strategy must be completed, leaving subsidiary SOEs in a strategic purgatory until then.

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<sup>12</sup> For completeness, the Presidency will be assisted in developing the National Strategy by an advisory committee which it appoints. See section 20 of the Bill.



## **8. There is no Clear Plan for Including SOEs Under SAMSOC's Control.**

- 8.1. Schedule A to the Bill provides that thirteen critical SOEs are “capable of being transferred” to SAMSOC as wholly owned subsidiaries. However, individual SOEs listed in Schedule A will only be transferred to SAMSOC after the President has instructed its board to conduct a due diligence on that SOE.<sup>13</sup>
- 8.2. Upon receiving a recommendation from SAMSOC's board regarding the suitability of a listed SOE's inclusion under SAMSOC, the President has the discretion to make a final decision, after consulting with Cabinet.<sup>14</sup>
- 8.3. However, the Bill is silent about what criteria guide SAMSOC's board's due diligence process; and the President's discretion in bringing listed SOEs under SAMSOC's control, how long it should take to do so and whether Schedule A represents a closed list of SOEs – and indeed what criteria guide inclusion on that list of it is not closed.<sup>15</sup>
- 8.4. As such, the Bill creates a framework for a disorderly and drawn-out process for restructuring our SOE sector that is likely to adversely affect all stakeholders therein.

## **9. Conclusion**

- 9.1. The Bill has laudable intentions of ensuring that the SOEs under SAMSOC's control are “politically insulated, professionalised and transparent.”
- 9.2. However, it falls far short by proposing that we manage critical SOEs through a structure that creates a vicious circle of Presidential power over SOEs by giving the President the power to:
  - 9.2.1. appoint and remove SAMSOC's board, which in turn is empowered to appoint and remove members of subsidiary boards;

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<sup>13</sup> Section 9(1)(b) read with 16(4)(b) of the Bill

<sup>14</sup> Ibid.

<sup>15</sup> See the [submission](#) of the Public Affairs Research Institute and Corruption Watch on this issue at paragraph 13.

- 9.2.2. leading the formation of the National Strategy;
  - 9.2.3. plan SOE financial recovery programs;
  - 9.2.4. influence SOEs procurement policy and capital expenditure decisions; and
  - 9.2.5. determine which SOEs are transferred to SAMSOC and in terms of what timeframe.
- 9.3. As such, the Bill does little to reduce the risk of State Capture in the future and may even formalise a structure which enables it.
- 9.4. However, if the Bill remains government policy, we have submitted that it be amended so that it provides a permanent check on the political power to appoint SAMSOC's board and the boards of its subsidiaries; and to soften SAMSOC's centralised role by allowing its subsidiaries to lead the formulation of their procurement frameworks and systems for evaluating capital expenditure decisions.
- 9.5. All this in service of the critical role that our SOEs play in creating an inclusive South African economy.