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OFFICE OF THE PRESIDENT

No. 1635.

11 December 1998

It is hereby notified that the President has assented to the following Act which is hereby published for general information:—

No. 105 of 1998: National Empowerment Fund Act, 1998.

*(English text signed by the President.)
(Assented to 19 November 1998.)*

ACT

To establish a trust for the promotion and facilitation of ownership of income generating assets by historically disadvantaged persons; to set out the objects of the trust; to provide for the powers, appointment and mode of operation of the trustees; to provide for the establishment of other investment entities for the attainment of the objects; to provide for the powers of the Minister to give implementation directives; to provide for the sale of shares in State Owned Commercial Enterprises at a discount to the trust or by the trust to the beneficiaries; to provide for the control of the financial affairs of the trust; to provide for the establishment of an investment holding company by the trust; to provide for the promulgation of regulations; to provide for the dissolution of the trust; and to provide for other incidental matters.

PREAMBLE

WHEREAS section 9 of the Constitution of the Republic of South Africa, 1996 authorises measures to be taken designed to promote the achievement of equality by protecting or advancing persons, or categories of persons, disadvantaged by unfair discrimination;

AND WHEREAS the Government of National Unity and Labour have agreed in terms of the "National Framework Agreement on the Restructuring of State Assets" that the restructuring "must distribute wealth, boost the small and medium enterprise sector, have sustainable affirmative action implication and facilitate genuine black economic empowerment";

NOW THEREFORE, in order to establish structures and mechanisms to redress the inequalities brought about by apartheid by facilitating the broader economic ownership by historically disadvantaged persons,

IT IS THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:—

Definitions

1. In this Act, unless the context indicates otherwise—

- (a) "Assets" or "fund" or "trust assets" or "trust fund" mean and include— 5
- (i) shares in State Owned Commercial Enterprises or private business enterprises acquired by the trustees;
 - (ii) monies, securities, investments, properties or any other assets which may be acquired by the trustees or which any person may vest or cause to be vested in the trustees as part and for purposes, of the Trust; 10
 - (iii) income of the Trust;
- (b) "beneficiaries" mean the State and such historically disadvantaged persons who avail themselves of the benefits under the Trust in terms of this Act, and such other categories of persons who in the discretion of the trustees, in consultation with the Minister, may appropriately benefit from the Trust 15 having regard to the objects;
- (c) "Board" means the board of trustees as constituted from time to time;

- (d) "Chief Executive Officer" means the Chief Executive Officer of the Trust appointed in terms of section 17, and has the same meaning ascribed to it in terms of the Reporting by Public Entities Act, 1992 (Act No. 93 of 1992);
- (e) "family member" or "member of the family", in relation to any person, means his or her parent, siblings, child, including adopted child, or spouse, including a person living with that person as if they were married to each other; 5
- (f) "historically disadvantaged persons" mean those persons or categories of persons, who prior to the new democratic dispensation marked by the adoption and coming into force of the Constitution of the Republic of South Africa Act, 1996 (Act No. 108 of 1996), were disadvantaged by unfair discrimination on the basis of their race and includes juristic persons or associations owned and controlled by such persons; 10
- (g) "Minister" means the Minister of Trade and Industry;
- (h) "Ministers in charge" means the Minister, the Minister of Finance, the Minister of Public Enterprises and, if any or different from the aforesaid Ministers, the Minister in charge of the State Owned Commercial Enterprise in question; 15
- (i) "objects" means the objects of the Trust set out in section 3 of this Act;
- (j) "regulation" means any regulation made under this Act; 20
- (k) "State Owned Commercial Enterprises" mean commercial enterprises partly or wholly owned or controlled by the State;
- (l) "this Act" includes the regulations;
- (m) "the Trust" means the National Empowerment Fund established in terms of section 2 of this Act and also refers to the trustees constituted in terms of section 4(2); 25
- (n) "trustees" mean the trustees of the Trust constituted in terms of section 8 and also refers to the individual members of the Board in their capacities as trustees.

Establishment of National Empowerment Fund 30

2. A trust called the "National Empowerment Fund" (NEF) is established.

Objects of Trust

3. The object of the Trust is to facilitate the redressing of economic inequality which resulted from the past unfair discrimination against historically disadvantaged persons by— 35
- (a) providing historically disadvantaged persons with the opportunity of, directly or indirectly, acquiring shares or interest in State Owned Commercial Enterprises that are being restructured or in private business enterprises;
- (b) encouraging and promoting savings, investments and meaningful economic participation by historically disadvantaged persons; 40
- (c) promoting and supporting business ventures pioneered and run by historically disadvantaged persons;
- (d) promoting the universal understanding of equity ownership among historically disadvantaged persons;
- (e) encouraging the development of a competitive and effective equities market inclusive of all persons in the Republic; 45
- (f) contributing to the creation of employment opportunities; and
- (g) generally employing such schemes, businesses and enterprises as may be necessary to achieve the objects of this Act.

The Trust 50

4. (1) The Trust is constituted as a body corporate with perpetual succession, and subject to the provisions of this Act, will be capable in law, in its own name, of suing and being sued, of acquiring, holding and alienating movable and immovable property, and of performing such acts as a body corporate may by law perform.

- (2) The Trust shall consist of not less than 7 but not more than 11 trustees appointed in terms of section 8. 55

Duty of care by trustees

5. A trustee must in the performance and execution of his or her duties and the exercise of his or her powers act with such care, diligence and skill as may reasonably be expected of a person who manages the affairs of another person.

Personal requirements in respect of trustees

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6. (1) The trustees must be persons who—

(a) are committed to—

(i) fairness, transparency and accountability on the part of those entrusted with public office;

(ii) the objects and principles of this Act;

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(b) when viewed collectively—

(i) predominantly represent a broad cross-section of the historically disadvantaged persons of the Republic;

(ii) possess expertise and experience in the fields of, amongst others, law, economics, business practice, development practice, capital markets and finance;

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(iii) are reasonably reflective of the gender composition of the historically disadvantaged persons; and

(iv) are fairly representative of the various provinces of the Republic.

Disqualification of trustees

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7. (1) A person may not be appointed or continue as a trustee if such person—

(a) is not a citizen of the Republic;

(b) is not permanently resident in the Republic;

(c) is an unrehabilitated insolvent;

(d) is of unsound mind, or is subject to an order of a competent court declaring such person to be mentally ill or mentally disordered;

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(e) has at any time been convicted, whether in the Republic or elsewhere, of theft, fraud, forgery and uttering, perjury, an offence in terms of the Corruption Act, 1992 (Act No. 94 of 1992), or any other offence involving dishonesty; or

(f) has at any time been removed from an office of trust on account of misconduct.

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(2) A person who is subject to a disqualification contemplated in subsection (1)(b) or (c) may be nominated for appointment and may be appointed as a trustee if at the time of such appointment he or she is no longer subject to that disqualification.

Appointment of trustees

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8. (1) The President must on the advice of the Minister appoint not more than seven but not less than five trustees.

(2) For purposes of the appointment of the trustees referred to in subsection (1), the Minister must through the media and by notice in the *Gazette* invite nominations of persons as candidates for such appointment, not less than 10 days after publication.

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(3) (a) The Minister must after the expiry of the period referred to in subsection (2) for nomination, and having due regard to the provisions of section 6, recommend candidates to the President for appointment as trustees.

(b) The number of candidates so recommended, must not exceed the number of trustees referred to in subsection (1) by more than three.

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(c) If the President determines that circumstances exist which render any or some of such candidates unacceptable, he or she must inform the Minister of those circumstances.

(d) After receiving information referred to in paragraph (c), the Minister may—

(i) invite further nominations in accordance with subsection (2);

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(ii) recommend other candidates in accordance with subparagraph (i); or

(iii) advise the President that the recommendation of other candidates is not necessary.

(e) The President must thereafter make appointments from the candidates recommended by the Minister, and appoint one of the candidates as the chairperson of the Board.

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(f) The administrative work necessary for compliance with section 2 must be performed by officers within the Department of the Minister.

(4) (a) The additional trustees must be appointed by the Minister on the recommendation of the trustees.

(b) The procedure for the appointment of additional trustees must be as follows: 5

(i) The trustees appointed in terms of subsection (1) must as soon as practicable after taking office recommend to the Minister, from the management team, for appointment as additional trustees such other persons as they may nominate having regard to the provisions of section 6.

(ii) The Minister must appoint the additional trustees from the names so 10 submitted.

(iii) The trustees so appointed will be the executive members of the Trust.

(5) Where a vacancy in the office of the Trust occurs the procedure referred to in subsections (3) and (4) must, with the necessary changes, apply.

Term of office of trustees 15

9. (1) The chairperson must hold office for three years.

(2) (a) Subject to paragraphs (c) and (d), the trustees, appointed in terms of section 8(1) must hold office for three years.

(b) Four of the trustees appointed in terms of section 8(1), must vacate office every 20 two years.

(c) The remaining trustees appointed in terms of section 8(1) must vacate office two years later.

(d) The term of office of additional trustees will run concurrently with their term of employment, which term of office will be prescribed by regulations.

(3) A trustee may at any time, resign from office after giving at least three months' 25 written notice to the Chairperson of the Board, or in his or her absence, to an acting Chairperson.

(4) Despite subsection (1) and (2)(a), the trustees may remain in office after expiry of their term of office until the commencement of the term of office of their successors but such increased term of office must not exceed 45 days. 30

(5) The Chairperson or a trustee may at the expiry of his or her term of office be eligible for reappointment for not more than one additional term of office.

(6) The trustees appointed in terms of section 8(1) are engaged on a non-executive basis and the trustees appointed in terms of section 8(4) are engaged on an executive 35 basis for the daily management of the office of the Trust.

Remuneration and allowances of trustees

10. (1) (a) The Minister may at the end of each calendar year determine the remuneration and allowances of the trustees taking into account the time spent by them in the service of the Trust.

(b) A determination made by the Minister is subject to the approval and concurrence 40 of the Minister of Finance.

(2) The salaries and allowances so approved by the Minister in terms of subsection 10(1) may be paid to the trustees from the trust funds.

Removal from office

11. A trustee may be removed from office by the Minister on account of— 45

(a) misconduct;

(b) inability to perform the duties of his or her office effectively;

(c) absence from three consecutive meetings of the Board without the prior permission of the chairperson, except on good cause shown;

(d) failure to disclose an interest in terms of section 14(2) or attendance at, or 50 participation in, proceedings of the Board while having an interest as contemplated in section 14(1); or

(e) any other ground which in terms of the laws and principles governing trusts constitutes the basis for his or her removal as a trustee.

Vacancies on Board

12. (1) There will be a vacancy on the Board if a trustee—
- (a) becomes subject to a disqualification referred to in section 7;
 - (b) tenders his or her resignation as contemplated in section 9(3);
 - (c) is removed from office in terms of section 11; or
 - (d) dies or becomes incapacitated.

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(2) A vacancy on the Board must be filled by the appointment of another trustee by the President or the Minister, as the case may be, in terms of section 8 as soon as may be reasonably practicable after the occurrence of such vacancy, and any trustee so appointed must hold office for the unexpired period of his or her predecessor's term of office.

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Meetings of Board

13. (1) Meetings of the Board must be held at such times and places as may be determined by the Board but the first meeting must be held at such time and place as the chairperson may determine.

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(2) In the absence of the chairperson at a meeting the remaining trustees must from their number elect an acting chairperson.

(3) (a) The chairperson may, at any time within reasonable notice, convene a special meeting of the Board, which must be held at such time and place as the chairperson may determine.

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(b) Two trustees may in writing request the Chairperson to convene a special meeting.

(c) The trustees must convene a special meeting if the chairperson fails to convene a special meeting within seven days after receiving a request.

(4) (a) The quorum for any meeting of the Board, at any time must either be a minimum of five trustees or 50 per cent of the trustees in office at that time, whichever number is the greater;

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(b) If 50 per cent of the trustees is a fraction, the number required shall be the nearest higher whole number.

(5) (a) A decision of the Board must be taken by resolution agreed to by the majority of trustees present at a meeting of the Board subject to subsection (4).

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(b) The Chairperson must have a deliberative vote, and in the event of an equality of votes, a casting vote.

(6) The seat of the Trust must be determined by the trustees in consultation with the Minister.

Disclosure of conflicting interests 35

14. (1) A trustee must not participate in the proceedings at any meeting of the Board if he or she or his or her family member or business partner is a director, trustee or business partner of, or has an interest in the business in question, or in relation to any matter before the Board which may preclude him or her from performing his or her other functions as a trustee in a fair, unbiased and proper manner.

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(2) If at any stage during the proceedings of the Board there is reason to believe that a trustee has an interest, that trustee must—

(a) disclose fully the nature of his or her interest; and

(b) leave the meeting or hearing in question.

(3) The remaining trustees must discuss the matter and determine whether that trustee is to be precluded from participating in such proceedings.

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(4) The disclosure and the decision taken by the trustees regarding such determination must be recorded in the minutes of such proceedings.

Proceedings of Board not invalid in certain circumstances

15. A decision taken by the Board or an act performed under the authority of such a decision must not be invalid by reason of—

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(a) an irregularity in the appointment of a trustee;

- (b) a vacancy on the Board;
- (c) the fact that a trustee is guilty of an act or omission justifying his or her removal from office; or
- (d) the fact that any person who is disqualified from being a trustee or who was removed from that office sat as such on the Board at the time when such decision was taken, 5

if such decision was taken by a majority of the trustees lawfully entitled to vote and the said trustees at the time constituted a quorum.

Powers of Trustees

16. (1) The trustees must acquire, administer and control the assets of the Trust in accordance with its objects subject to the provisions of this Act. 10

(2) The trustees must have all such powers as may be necessary to enable them to administer the trust and may—

- (a) (i) procure the incorporation of a company or companies registered in terms of the Companies Act for the purpose of holding all or any of the trust assets; and 15
- (ii) require such company or companies to dispose of all or any of the shares in any such company to such persons and on such terms and conditions as the trustees may from time to time determine;
- (b) (i) invest in such manner as they may think fit, subject to the provisions of this Act, the capital amount and such income from the trust which may not be immediately required; and 20
- (ii) realise, vary and transpose any securities, assets, investments and property as they may determine;
- (c) (i) purchase, sell, exchange, lease, hire or otherwise acquire or dispose of movable or immovable property or any right therein; and 25
- (ii) improve and develop any property or assets of the trust;
- (d) expend trust funds pertaining to any immovable property on maintenance, construction, improvement, alteration, payment of rates, taxes, insurance premiums and other charges; 30
- (e) advance and lend money to any person, company, corporation, association or institution, either with or without security and upon such terms and conditions regarding repayment or otherwise as the trustees may decide subject to the prior approval of the Minister with the concurrence of the Minister of Finance;
- (f) borrow money and in order to provide security for such borrowing, mortgage or pledge trust assets and arrange the manner of repayment of such loans subject to the prior approval of the Minister with the concurrence of the Minister of Finance; 35
- (g) pay all expenses incurred in connection with the administration of the trust;
- (h) employ any person to manage or assist in the management of the assets of the trust and to remunerate including travelling and other expenses which may necessarily be incurred by such employee from funds or income of the trust; 40
- (i) appoint agents for any specific purpose, including the power to appoint accountants, attorneys, advocates and other professional persons for any specific purpose; 45
- (j) take action in a court of law for the recovery of any amounts due to the trust or compel the fulfillment of obligations in its favour and defend any proceedings that may be instituted against the trust;
- (k) enter into an agreement or arrangement regarding the terms and conditions of payment of money due to the Trust and the abandonment of any claims by the Trust, subject to the approval of the Minister with the concurrence of the Minister of Finance; 50
- (l) accept grants and transfers from the State or donations from other persons in favour of the Trust, subject to the terms and conditions as may be imposed by the State or other persons, but such terms and conditions must not be inconsistent with the terms of the Trust; 55
- (m) purchase or otherwise acquire any equipment that may be necessary for the purpose of meeting the administrative requirements of the Trust;
- (n) open and control any bank account or building society account and draw, accept or give promissory notes, bills of exchange and other negotiable instruments; and 60

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- (o) finance, undertake and promote the education of the historically disadvantaged persons in economic and investment issues and their participation in economic and investment activities.

(3) The Minister must from time to time, determine by notice in the *Gazette* the value of movable and immovable assets or shares or interest in the State Owned Commercial Enterprises or private business enterprises which the trustees may not dispose of, encumber or alienate without his or her prior consent with the concurrence of the Minister of Finance. 5

(4) The Trustees may in consultation with the Minister make an application for the listing of shares in any company or companies referred to in section 16(2)(a) on a stock exchange in the Republic of South Africa. 10

Chief Executive Officer

17. (1) The Board must with the approval of the Minister, appoint a Chief Executive Officer of the Trust, subject to the terms and conditions and employment contract which he or she may conclude with Trust. 15

(2) The personal requirements and the disqualifications applicable to the trustees as referred to in sections 6 and 7, respectively, must, with the necessary changes, apply to the Chief Executive Officer.

(3) The Chief Executive Officer is by virtue of his or her office a member of the Board with full powers accorded to any other trustee of the Trust. 20

(4) The Chief Executive Officer is the executive officer of the Trust and shall be responsible for the management of the activities of the Trust.

(5) (a) The Board may delegate to the Chief Executive Officer such powers as may be necessary in managing the activities of the Trust.

(b) The Chief Executive Officer may delegate such powers to the staff, committees, other trustees or other structures of the Trust. 25

(6) The Board may, if the Chief Executive Officer is unable to perform his or her duties for a period longer than six weeks, appoint, in consultation with the Minister, an acting Chief Executive Officer for the duration of his or her inability.

Financing of Trust

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18. (1) The operating and capital expenses of the Trust will be financed by grants, loans, income generated by the Trust or money appropriated by Parliament for that purpose.

(2) The Trust must utilise any money referred to in subsection (1) in accordance with the statement of estimated expenditure referred to in subsection (3). 35

(3) The Trust—

(a) must in each financial year, at a time determined by the Minister, submit to him or her for his or her approval granted with the concurrence of the Minister of Finance, a statement of estimated income and expenditure, for the next financial year; 40

(b) may in any financial year submit adjusted statements of estimated income and expenditure to the Minister for his or her approval, granted with the concurrence of the Minister of Finance; and

(c) must comply with the provisions of the Reporting by Public Entities Act, 1992 (Act No. 93 of 1992). 45

Banking account

19. The Trust must open and maintain an account in the name of the Trust, with a bank registered as a bank in terms of the Banks Act, 1990 (Act No. 94 of 1990).

Reports

20. (1) The Trust must— 50

(a) furnish the Minister with information and particulars as he or she may in writing require in connection with the activities of the Trust; and

(b) annually, within six months from the end of each financial year, furnish the Minister with a consolidated report with regard to the functions, affairs, activities and financial position of the Trust during that financial year and provide a statement of the progress achieved towards realization of the purposes of this Act in that financial year. 55

(2) The annual report referred to in subsection (1) may include such other information as the Minister may determine.

(3) The Minister must, within 14 days after he or she has received a copy of the annual report, table it in Parliament if Parliament is then in ordinary session or, if Parliament is not then in ordinary session, within 14 days after the commencement of its next ordinary session. 5

Promotion and establishment of investment entities

21. The trustees may, having regard to—

- (a) the implementation directives issued by the Minister in terms of section 22;
- (b) the policies adopted by the government, from time to time, regarding the economic empowerment of historically disadvantaged persons; and 10
- (c) the objects of the Trust as defined in section 3,

establish, promote or facilitate the establishment of companies, trusts, unit trusts, management companies, or other suitable business entities for purposes of engaging in activities or schemes designed to economically empower historically disadvantaged persons. 15

Implementation directives by Minister

22. (1) The Minister may with the consent of other Ministers in charge, issue to the trustees implementation directives in regard to—

- (a) economic empowerment policies; 20
- (b) the investment entities to be established or promoted and the terms on which the State may provide assistance for their promotion or establishment;
- (c) the value and terms on which the shares in State Owned Commercial Enterprises or private business enterprises held by the Trust may be sold to the historically disadvantaged persons referred to in section 21. 25

(2) The trustees must have due regard to, and be guided by, the policies of the government applicable to the empowerment of the historically disadvantaged persons, in particular, but not limited to the—

- (a) White Paper on the Reconstruction and Development Programme;
- (b) Growth Employment and Redistribution Strategy; 30
- (c) National Framework Agreement on the Restructuring of State Assets.

Transfer of State Assets

23. (1) (a) The Trust may purchase or acquire shares in State Owned Commercial Enterprises, as such shares may be offered to the Trust by the State, on such terms and conditions as may be determined by the Minister in consultation with the Ministers in charge, having regard to the recommendations of the trustees. 35

(b) The Minister is authorised to determine or agree to a price for the shares which price may be less than the market related price of the shares.

(2) The terms and conditions of sale of shares to the Trust referred to in subsection 1, may include— 40

- (a) deferred payment of the purchase price payable by the Trust;
- (b) the minimum or maximum price at which the Trust may sell the shares to the historically disadvantaged persons, or business entities referred to in section 21;
- (c) such other terms and conditions as the Minister may determine with the concurrence of the Minister of Finance and the trustees. 45

(3) The Trust is entitled to, either partly or wholly, sell, transfer, or in any way deal with the said assets or shares for the purpose of meeting the objects of the Trust, subject to the provisions of any agreement applicable to the shares in question.

Establishment of Investment Holding Company 50

24. (1) The Trust is authorised to establish an investment holding company known as the National Empowerment Fund Corporation.

(2) The object of the Corporation is to hold investments of the Trust in a commercially sound manner and carry out such investment activities as its directors may determine.

(3) The Trust may transfer into the Corporation any of its assets in exchange for the shares issued to the trust.

(4) The Trust may, in consultation with the Minister, invite any strategic equity partner to acquire shares in the Corporation, but the Trust will not hold less than 70 per cent of the shares in the Corporation. 5

(5) The Corporation must be registered in terms of, and be governed by, the provisions of the Companies Act, 1973 (Act No. 61 of 1973).

Funds of Trust 10

25. (1) The Chief Executive Officer of the Trust is charged with the responsibility of accounting for all assets, shares or money received by the Trust, and payments, discharges or loans made by the Trust.

(2) The trust assets or funds must not form part of the assets of the trustees.

(3) The funds of the Trust consist of— 15

- (a) money appropriated by Parliament;
- (b) interest or income derived from investments of the Trust; and
- (c) grants, donations and bequests made to the Trust;
- (d) money lawfully obtained by the Trust from any other source.

(4) The financial year of the Trust is the period extending from 1 April in any year to 31 March in the succeeding year. 20

(5) The Board must—

- (a) keep proper records of all the financial transactions, assets and liabilities of the Trust;
- (b) prepare financial statements, as soon as possible but not later than six months after the end of the financial year or such other period as the Minister may by notice in the *Gazette* determine. 25

(6) (a) The financial statements of the Trust must be audited by an auditor or firm of auditors registered in terms of section 20 of the Public Accountants and Auditors Act, 1991 (Act No. 80 of 1991), appointed by the Board. The audit must be completed within six months from the end of the financial year of the Trust. 30

(7) The chairperson of the Board must furnish the Minister with such information as the Minister may require relating to the activities of the Trust.

Certain Exemptions regarding the National Revenue Fund

26. (1) The Minister may for the purposes of the Trust exempt any money from the provisions of section 213 of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996). 35

(2) The above exemption shall apply only in so far as it is necessary to meet the objects.

Regulations 40

27. (1) The Minister, after consultation with the trustees, may make regulations regarding—

- (a) any matter which in terms of this Act is required or permitted to be prescribed; and
- (b) generally, any other matter which may be necessary or expedient to prescribe in order to achieve the objects of this Act. 45

(2) The Minister, after consultation with the trustees, may make a code of ethics for trustees.

Dissolution of Trust and Distribution

28. (1) The Trust may be dissolved on a date determined by an Act of Parliament. 50

(2) The assets or the proceeds of those assets must, after the payment of all the liabilities of the Trust or the assumption thereof by the State pursuant to an Act of Parliament, upon dissolution of the Trust, be ceded and transferred to the State or any beneficiary as may be appointed by the Act of Parliament referred to in subsection (1).

Application of Trust laws and principles

29. The Trust is governed by all laws applicable to trusts.

Short title and commencement

30. This Act is called the National Empowerment Fund Act, 1998, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.