

REPUBLIC OF SOUTH AFRICA

SOUTH AFRICAN AIRWAYS BILL

(As amended by the Portfolio Committee on Public Enterprises (National Assembly))
(The English text is the official text of the Bill)

(MINISTER FOR PUBLIC ENTERPRISES)

[B 35B—2006]

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GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To provide for the transfer of the shares of Transnet Limited in South African Airways (Proprietary) Limited to the State; to provide for the conversion of South African Airways (Proprietary) Limited into a public company having a share capital incorporated in terms of the Companies Act, 1973; and to provide for matters connected therewith.

PREAMBLE

Since the Republic's rapidly developing economy requires reliable and extensive air transport capacity;

And since the State desires to promote air links with the Republic's main business, trading and tourism markets within the African continent and internationally;

And since the State has a developmental orientation and regards South African Airways as a national carrier and strategic asset that would enable the State to preserve its ability to contribute to key domestic, intra-regional and international air linkages, the State intends to retain it as a national carrier,

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

Definitions

1. In this Act, unless the context indicates otherwise—
 - “**Companies Act**” means the Companies Act, 1973 (Act No. 61 of 1973); 5
 - “**conversion date**” means the date on which the conversion of South African Airways (Pty.) Ltd. into a public company is registered in terms of section 4(3);
 - “**Legal Succession Act**” means the Legal Succession to the South African Transport Services Act, 1989 (Act No. 9 of 1989);
 - “**Minister**” means the Minister responsible for Public Enterprises; 10
 - “**PFMA**” means the Public Finance Management Act, 1999 (Act No. 1 of 1999);
 - “**SAA**” means South African Airways (Pty.) Ltd. and, with effect from the conversion date, South African Airways Ltd.;
 - “**SAA claims**” means all amounts owing by SAA to Transnet as at midnight on the day immediately preceding the transfer date; 15

“SAA interests” means those SAA claims and assets, liabilities, rights or obligations determined in terms of section 3(1)(a) or section 3(2), as the case may be, to constitute SAA interests;
“SAA shares” means all the shares in the capital of SAA of which Transnet is, immediately before the transfer date, the registered and beneficial owner; 5
“South African Airways Ltd.” means South African Airways Limited, a public company duly incorporated in terms of the Companies Act;
“South African Airways (Pty.) Ltd.” means South African Airways (Proprietary) Limited, a private company duly incorporated in terms of the Companies Act;
“State” means the Government of the Republic of South Africa acting through the Minister; 10
“this Act” includes any regulation made in terms of section 8;
“transfer date” means the date on which the transfer of the shares and claims is finalised under the agreement between Transnet and the State;
“Transnet” means Transnet Limited, a company duly incorporated in terms of section 2 of the Legal Succession Act. 15

Objects of Act

2. The objects of this Act are to provide for—
- (a) the transfer of SAA shares and SAA interests from Transnet to the State;
 - (b) the conversion of South African Airways (Pty.) Ltd. into a public company with share capital; and 20
 - (c) the listing of SAA as a major public entity in Schedule 2 to the PFMA.

Transfer of SAA shares and SAA interests

3. (1) The Minister and Transnet, with the concurrence of the Minister of Finance, must determine by agreement— 25
- (a) which SAA claims and which assets, liabilities, rights or obligations of Transnet in connection with SAA constitute SAA interests; and
 - (b) the consideration payable for the transfer of SAA shares and SAA interests to the State.
- (2) In the absence of an agreement between the Minister and Transnet on any matter referred to in subsection (1) that matter must be finally determined by the Minister, with the concurrence of the Minister of Finance. 30
- (3) With effect from the transfer date—
- (a) the State becomes the shareholder and member of SAA; and
 - (b) the Minister exercises all the rights attaching to SAA shares and SAA interests on behalf of the State, including the rights as shareholder and member of SAA. 35

Conversion of South African Airways (Pty.) Ltd. into public company

4. (1) After the transfer date, the Minister may on behalf of the State request the Registrar of Companies in writing to convert South African Airways (Pty.) Ltd. into a public company having a share capital in accordance with the Companies Act. 40
- (2) The request must be accompanied by the memorandum of association and articles of association of the intended public company that must be—
- (a) framed in accordance with the Companies Act, but subject to this Act; and
 - (b) signed by the Minister on behalf of the State. 45
- (3) On receipt of the request and the memorandum and articles so signed the Registrar of Companies must—
- (a) register the conversion of South African Airways (Pty.) Ltd. into a public company having a share capital, as well as the memorandum and articles; and
 - (b) issue an amended certificate of incorporation. 50
- (4) The name of the public company referred to in subsection (3)(a) is South African Airways Limited.
- (5) No additional fee referred to in section 63(2) of the Companies Act is payable in respect of the registration of the memorandum and articles referred to in subsection (3)(a). 55

(6) The Registrar of Companies must issue such directives and authorise such deviations from the regulations in force in terms of the Companies Act and the documents prescribed in terms thereof as he or she may consider necessary in order to give effect to this section.

(7) Sections 32, 44(1), 54(2), 66, 190 and 344(d) of the Companies Act do not apply to South African Airways Ltd. for so long as the State holds 75 per cent or more of the total issued ordinary shares in the Company. 5

Effect of conversion

5. The conversion contemplated in section 4(1) does not affect— 10
- (a) the continued corporate existence of SAA under the Companies Act;
 - (b) any rights, liabilities or obligations acquired or incurred by SAA before the conversion date; or
 - (c) the terms and conditions of service of any employee of SAA.

Objects and powers of SAA

6. (1) The main object of SAA is to engage in passenger airline and cargo transport services, air charter services and other related services. 15

(2) For the purposes of section 33(1) of the Companies Act, none of the objects ancillary to the main object of SAA is excluded.

(3) The powers of SAA are as set out in Schedule 2 to the Companies Act.

Borrowing powers of SAA 20

7. Subject to the PFMA, SAA may borrow money or issue a guarantee, indemnity or security, or enter into any transaction necessary to achieve its object referred to in section 6.

Regulations

8. The Minister may, by notice in the *Gazette*, make regulations regarding any ancillary or incidental administrative or procedural matter that it is necessary to prescribe for the proper implementation or administration of this Act. 25

Amendment of law

9. With effect from—
- (a) the transfer date, the PFMA is hereby amended by the insertion in Schedule 2 after item 16 of the following item: 30
 “16A. South African Airways (Proprietary) Limited”; and
 - (b) the conversion date, the PFMA is hereby amended by the substitution in Schedule 2 for item 16A of the following item:
 “16A. South African Airways Limited”. 35

Short title and commencement

10. This Act is called the South African Airways Act, 2007, and comes into operation on a date determined by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE SOUTH AFRICAN AIRWAYS BILL, 2006

1. BACKGROUND

On 26 July 2006 Cabinet endorsed the separation of South African Airways (Pty.) Ltd. (“SAA”) from Transnet Limited (“Transnet”). In terms of this strategy, Transnet will focus on the core businesses of rail, ports and pipelines. Due to the volatility of the airline industry and the need to assist SAA in strengthening its balance sheet, it was decided that SAA should be a stand-alone State-owned enterprise reporting directly to the Minister for Public Enterprises. In June 2006 the Minister for Public Enterprises agreed with Transnet to transfer Transnet’s entire shareholding, including claims in and to SAA, in terms of a share sale agreement. This agreement is subject to the fulfilment of certain suspensive conditions, which include the passing of any legislative mandate required to implement the transfer. The Bill is part of such legislative mandate.

In order to align SAA with State-owned enterprises that are major public entities and to create flexibility for funding and private sector involvement, it is proposed that SAA be converted into a public company. Public companies are generally recognised as the optimal corporate form to access capital markets and to enable future private sector investment, where necessary.

2. OBJECTS

The objects of the Bill are to provide for—

- (a) the transfer of SAA shares and, interests from Transnet to the State;
- (b) the conversion of SAA into a public company with share capital; and
- (c) the listing of SAA as a major public entity in Schedule 2 to the PFMA.

3. BODIES CONSULTED

The Department of Public Enterprises has consulted—

- National Treasury;
- the boards of directors of Transnet and SAA.

4. FINANCIAL IMPLICATIONS FOR STATE

The financial implications for the State will be in respect of providing guarantees to various third party lenders and entities such as the International Air Services Council and replacing Transnet as the present guarantor.

5. PARLIAMENTARY PROCEDURE

5.1 The State Law Advisers and the Department of Public Enterprises are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution of the Republic of South Africa, 1996, since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.

5.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it contains no provision pertaining to customary law or customs of traditional communities.

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