



TO: Chairperson, Standing Committee on Finance [Mr Y Carrim, MP]

FROM: Constitutional and Legal Services Office

DATE: 16 October 2017

SUBJECT: Advice on the use of section 16 of the PFMA to capitalise SAA

Purpose

1. To advise the Standing Committee on Finance (SCoF) on the legality of using section 16 of the Public Finance Management Act 1 of 1999 (PFMA) to capitalise South African Airways (SAA).

Background

2. A letter dated 28 September 2017 from the Minister of Finance (the Minister) to the Speaker to the National Assembly (NA) advised that the Minister authorised the use of funds from the National Revenue Fund (NRF) in terms of section 16 of the PFMA. The notice indicated that the funds were to defray expenditure in respect of SAA's debt obligation of R1,761 billion to Citybank and to provide for immediate working capital requirements of R1.2 billion.
3. Attached to the letter is a report to Parliament that deals in detail with the requirements provided for in **section 16**.
4. On 12 October 2017 the Minister submitted the Report to Parliament authorising the settling of SAA debt obligation to Citibank Bank and to provide for immediate working capital requirements of R1,2 billion, tabled in terms of **section 16(5)** of the PFMA.

5. On 13 October 2017 the Report was referred to the Standing Committee on Appropriations for consideration. In other words, the Standing Committee on Appropriations is not required to report to the NA on it.
6. A similar report from the Minister was tabled in Parliament on 20 July 2017 and referred to the Standing Committee on Appropriations on 27 July. I am not aware of any findings that that Committee made in respect of the compliance with section 16.

Section 16

7. Section 16 of the PFMA provides as follows:

16. Use of funds in emergency situations.—(1) The Minister may authorise the use of funds from the National Revenue Fund to defray expenditure of an exceptional nature which is currently not provided for and which cannot, without serious prejudice to the public interest, be postponed to a future parliamentary appropriation of funds.

(2) The combined amount of any authorisations in terms of subsection (1), may not exceed two per cent of the total amount appropriated in the annual national budget for the current financial year.

(3) An amount authorised in terms of subsection (1) is a direct charge against the National Revenue Fund.

(4) An amount authorised in terms of subsection (1) must—

- (a) be reported to Parliament and the Auditor-General within 14 days, or if the funds are authorised for the deployment of the security services, within a period determined by the President; and*
- (b) be attributed to a vote.*

(5) A report to Parliament in terms of subsection (4) (a) must be submitted to the National Assembly for tabling in the Assembly and made public.

(6) Expenditure in terms of subsection (1) must be included either in the next adjustments budget for the financial year in which the expenditure is authorised or in other appropriation legislation tabled in the National Assembly within 120 days of the Minister authorising the expenditure, whichever is the sooner.

8. The legality of the use of funds in terms of section 16 should be evaluated against this provision.

Analysis

9. In light of the requirements of subsection (1), the Report indicates that the funds are meant to defray expenditure of an exceptional nature which is currently not provided for and which cannot, without serious prejudice to the public interest, be postponed to a future parliamentary appropriation of funds. I return to this issue below.
10. Compliance with subsection (2) requires that the total combined amount of authorisations in the financial year may not exceed two per cent of the total amount appropriated in the annual national budget for this financial year. This is an issue that should be determined at the end of the financial year. Only then will the combined amount of authorisations in terms of section 16 be certain.
11. From the notice the amount appears as a direct charge against the NRF, in compliance with subsection (3).
12. It is further clear, with reference to subsection (4) that the Minister submitted the Report within 14 days and the Report indicates that the funds will be allocated to Vote 7: National Treasury.
13. The Report was submitted to the NA and should be made public, in terms of subsection (5).
14. The intention, according to the Report, and the requirement, in terms of section 16, is to include this allocation in the adjustments appropriation Bill to be tabled in October 2017. This will be sooner than the 120 days allowed in terms of subsection (6).

Nature of the allocation

15. Subsection (1) of section 16 requires a three stage analysis:
 - (a) The funds allocated by the Minister must not be provided for in the current budget.
 - (b) The allocation cannot, without serious prejudice to the public interest, be postponed to a future parliamentary appropriation of funds.

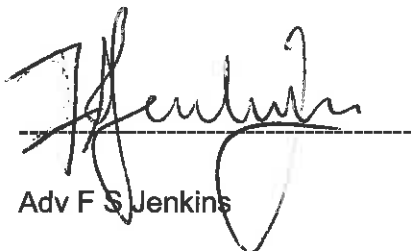
(c) The funds are “to defray expenditure of an exceptional nature”.

16. Logically, the allocated funds are not presently budgeted for.
17. The crisp issue is therefore whether the funds allocated to SAA cannot, without serious prejudice to the public interest, be postponed to a future parliamentary appropriation of funds; and whether the funds are to defray expenditure of an exceptional nature.
18. In my view, the Report provides a strong argument that the allocation could not wait for a future appropriation. Central to this was the partial success in renegotiating the debt obligations of SAA to a future maturity date. The risks of defaulting on those maturity dates that could not be rolled over is set out in the Report [at para 4.7].
19. The remaining question is whether the settlement of debt and provision for immediate working capital requirements constitute “expenditure of an exceptional nature”?
20. The ordinary meaning of “exceptional” is “unusual” or “not typical” (Concise Oxford Dictionary). However, the words must be read in context and having regard to the purpose of the provision [*Natal Joint Municipal Pension Fund v Endumeni Municipality* (920/2010) [2012] ZASCA 13].
21. The object of the PFMA is set out in section 2. It is to secure accountability, and sound management of the revenue, expenditure, assets and liabilities of the institutions to which the PFMA applies, which includes SAA and National Treasury.
22. The financial situation of SAA is highlighted in the Report [at para 4.2]. The shortfall was anticipated and the solution was projected to be the adjustments budget process. It appears that the strategy has been to manage the capitalisation of SAA in a manner suited to enable fruitful negotiations with creditors. Intervening events such as economic growth forecasts and credit rating changes necessitated an urgent response, according to the Report [at para 4.5]. However, these events speak to the fact that the allocation could not wait for a future appropriation by Parliament. The question remains whether this allocation was exceptional in nature – i.e. unusual or not typical in the context of budgeting for the entity’s debt obligations and working capital requirements?
23. The exceptional nature of the debt obligation could possibly come from the fact that a minority of creditors refused to roll over the maturity date of the debt. In respect of the

working capital / liquidity, there is no evidence in the Report to ascertain whether the expenditure is exceptional.

Conclusion

24. Reading section 16 with the object of the PFMA, it appears that section 16 is intended for use where good financial planning and management could not avert the need for unusual expenditure.
25. In my respectful view it appears that the expenditure was foreseeable and as such, not unusual or atypical. It would not have been the first time such expenditure had to be effected.
26. Notice must be taken of the requirement that the amount authorised in terms of section 16 must also be referred to the Auditor-General (AGSA) within 14 days (subsection(4)(a) of section 16). It would be for the AGSA to make a finding of whether the allocation is in compliance with section 16 of the PFMA.

A handwritten signature in black ink, appearing to read 'F S Jenkins', is written over a horizontal dashed line. The signature is fluid and cursive.

Adv F S Jenkins

Senior Parliamentary Legal Adviser