



MINDE SCHAPIRO & SMITH

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Our Ref: DEM16/0732/E Jonker/ks | Your Ref: | Date: 16 July 2020

THE MINISTER OF FINANCE
MR TITO MBOWENI
PER EMAIL: Mary.Marumo@treasury.gov.za

URGENT

Dear Minister Mboweni,

APPROPRIATION OF FUNDS TO SAA IN TERMS OF SECTION 16 OF THE PUBLIC FINANCE MANAGEMENT ACT

1. We act on behalf of the Democratic Alliance.
2. Our client has been made aware that the government plans to issue a letter of commitment to South African Airways' business rescue practitioners, and/or to the Department of Public Enterprises, committing to the provision of public monies to fund SAA in line with its business rescue plan; and that this commitment may be based on the planned use of section 16 of the Public Finance Management Act 1 of 1999 ("the PFMA") to disburse these funds.
3. Using section 16 of the PFMA for this purpose is unlawful, and any letter of commitment based on this section would also be unlawful. Section 16 is a mechanism for "emergency situations". It allows the Minister of Finance to 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."
4. None of section 16's requirements apply to the government's commitment to fund SAA.
 - 4.1. There is no emergency. SAA's financial decline has taken place over several years. It was placed in business rescue late last year. Nothing about SAA's decade-long decline or its current status in business rescue justifies this extraordinary short-circuiting of the usual appropriations process.

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Directors: Heinrich Crous BA LLB | Elzanne Jonker BA LLB | *Jonathan Rubin B Comm LLB LLM | Venesen Reddy LLB

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- 4.2. There is nothing exceptional about the proposed expenditure. SAA is a state-owned entity like any other. It is subject to the same constitutional and statutory obligations as any other state-owned, PFMA-listed entity. Nor is there anything exceptional in a state-owned entity being in financial distress or even in business rescue. SAA's funding needs could have been catered for during the ordinary appropriations process, where it would have been subject to the usual parliamentary scrutiny and oversight.
- 4.3. Postponing the funding of SAA will not seriously prejudice the public interest. The public interest favours accountability and transparency. Using emergency measures like section 16 of the PFMA is anathema to those constitutional values, which should be the guiding lights for the management of public funds. Even if there is some benefit to having a national airline (which our client does not accept), there is no pressing need to return SAA to business, especially not during the Covid-19 lockdown and associated travel restrictions. There is also no reason why funds cannot be appropriate through the usual budgetary process (including the adjustment budgetary process). In this regard, our client points out that SAA's business rescue plan was published on 16 June 2020. A supplementary budget was delivered on 24 June 2020. Funds could have been appropriated for SAA during that process.
5. For these reasons, and for the further reasons outlined in the opinion of Senior Parliamentary Legal Advisor Adv F S Jenkins dated 16 October 2017, the use of section 16 of the PFMA to fund SAA's business rescue would be unlawful.
6. If you intend to proceed to authorise funding under section 16 of the PFMA, our client will have no choice but to approach the High Court for urgent interdictory relief pending a review of your decision.
7. To that end, we accordingly request:
 - 7.1. confirmation, by no later than **17:00 on Thursday, 16 July 2020**, whether you have authorised the use of funds from the National Revenue Fund for any purpose relating to SAA's business rescue plan in terms of section 16 of the PFMA and, if so, we request that you provide us with full details of your decision and all documents that served before you when you made your decision;

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- 7.2. confirmation, by no later than **17:00 on Thursday, 16 July 2020**, whether any authorised funds have been disbursed to SAA or any other person for the aforesaid purpose and, if so, that you provide full details of such disbursements and any other planned disbursements;
 - 7.3. if you have not yet authorised the use of funds for the aforesaid purpose, that you provide our client with a written undertaking by no later than **17:00 on Thursday, 16 July 2020** that you will not do so pending an urgent application to be launched by our client in due course; and
 - 7.4. if you have already authorised the use of funds for the aforesaid purpose, that you provide our client with a written undertaking by no later than **17:00 on Thursday, 16 July 2020** that such funds will not be made available and disbursed to SAA or any other party pending an urgent application to be launched by our client in due course.
8. Please also indicate whether, in light of the urgency of the contemplated litigation, your office will accept service of court processes by email (and indicate an email address for that purpose).
 9. Finally, we note that our client addresses this letter to you, and will approach a court for necessary relief, in its own interest as the official opposition in Parliament, on behalf of its members, and in the public interest.

Yours faithfully

MINDE SCHAPIRO & SMITH INC.

Per

(Electronically sent, therefore unsigned)

CC: THE MINISTER OF PUBLIC ENTERPRISES
PER EMAIL: busi.sokhulu@dpe.gov.za

CC: THE BUSINESS RESCUE PRACTITIONERS OF SAA
PER EMAIL: lmatuson@matusonassociates.co.za

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