

NOTICE 568 OF 2007

NOTICE INVITING COMMENTS

The Minister of Public Enterprises intends to introduce the South African Express Enabling Bill 2007.

Interested persons are hereby invited to submit written comments *or* written representation on the draft Bill, within 30 days of the date of publication of this notice at any of the following addresses:

For attention: Ursula Nobulali Fikelepi/ Denzel Matjila
Legal, Governance and Secretariat

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Please note that comments received after the closing date may be disregarded
Ursula / Denzel can be reached at (012) 431 11311194 for enquiries.

REPUBLIC OF SOUTH AFRICA

SOUTH AFRICAN EXPRESS ENABLING BILL

*(As introduced in the National Assembly (proposed as section 75): explanatory summary of Bill published in Government Gazette No. 0000 of **[insert date]**)*

(The English text is the official text of the Bill)

(MINISTER OF *PUBLIC* ENTERPRISES)

[B - 20071

BILL

To provide for the transfer of shares, loan accounts, liabilities and guarantees from Transnet Limited in South African Express (Proprietary) Limited to the State, to provide for the conversion of South African Express (Proprietary) Limited into a public company having a share capital incorporated in terms of the Companies Act, 1961; and to provide for matters connected therewith.

Preamble

Since retaining South African Express as a strategic asset would enable the State to preserve its ability to provide frequency of services on lower density routes:

And since the State desires to contribute to the expansion of regional air service capability within South Africa, the African continent and surrounding islands,

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

1. Definitions

In this Act, unless the context otherwise indicates-

- {1} "Companies Act" means the Companies Act, 1973 (Act No. 61 of 1973);
- {2} "conversion date" means the date determined by the Minister in terms of the provisions of section 4(1);
- 131 "Legal Succession Act" means the Legal Succession to the South African Transport Services Act, 1989 (Act No.9 of 1989):
- 141 "Minister" means the Minister of Public Enterprises;
- {5} "Prescribed" means prescribed by Regulation in terms of section 8;

- (6) "PFMA" means the Public Finance Management Act, 1999 (Act No.1 of 1999);
- (7) "SAX" means South African Express (Proprietary) Limited, and with effect from the conversion date, South African Express Limited;
- (8) "SAX claims" means all amounts owing by SAX to Transnet as at midnight on the day immediately preceding the Transfer Date;
- (9) "SAX interests" means such of the SAX claims and any other assets, liabilities, rights or obligations of Transnet as are determined pursuant to section 3(1)a) or, if applicable, determined under section 3(2);
- (10) "SAX shares" means all the shares in the capital of SAX of which Transnet is, on the day preceding the transfer date, the registered and beneficial owner;
- (11) "South African Express Limited" means South African Express Limited, a public company duly incorporated in terms of the Companies Act;
- (12) "South African Express (Proprietary) Ltd" means South African Express, a private company duly incorporated in terms of the Companies Act;
- (13) "State" means the Government of the Republic of South Africa acting through the Minister;
- (14) "this Act" includes any Regulation in terms of section 8;
- (15) "transfer date" means the date on which the transfer of the shares and claims is finalised under the agreement between Transnet and the State.
- (16) "Transnet" means Transnet Limited, a company duly incorporated in terms of section 2 of the Legal Succession Act;

2. Objects of Act

The objects of this Act are to provide for—

- (a) the transfer of the SAX Shares, the SAX Interests and the SAX claims from Transnet to the State; and

- (b) the conversion of South African Express (Proprietary) Limited into a public company with share capital.

3. Transfer of SAX shares and SAX interests

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

4. Objects and powers of SAX

- (1) The main object of SAX is to engage in passenger airline and cargo transport services, mail, air charter and other related aviation services in South Africa, the African continent and surrounding islands.
- (2) For the purposes of section 33(1) of the Companies Act, none of the objects ancillary to the main objects of SAX are excluded.
- (3) The powers of SAX are as set out in schedule 2 to the Companies Act and none of such powers are excluded or qualified,

5. Borrowing powers of **SAX**

Subject to the PFMA, SAX may borrow money or issue a guarantee, indemnity or security, or enter into any transaction necessary to achieve its objects referred to in section 4.

6. Conversion **of** South African Express (Proprietary) Limited into a public company

{1} After the transfer date, the Minister may on behalf of the State request the Registrar of Companies in writing to convert South African Express (Proprietary) Limited into a public company having a share capital in accordance with the Companies Act.

{2} The request must be accompanied by the memorandum of association and articles of association of the intended company that must be –

(a) framed in accordance with the Companies Act, subject to this Act: and

(b) signed by the Minister on behalf of the State

{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 Express (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

{4} The name of the public company referred to in subsection (3) (a) shall be South African Express 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).

{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 Express Limited for so long as

the State holds 75 per cent or more of the total issued ordinary shares in the Company.

7. Effect of conversion

- (1) The conversion contemplated in section 6(1) does not affect—
- a) the continued corporate existence of SAX under the Companies Act;
 - b) any of the rights, liabilities or obligations acquired or incurred by SAX before the conversion date; or
 - c) the terms and conditions of service of SAX employees.

8. Regulations

The Minister may, by notice in the *Government 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.

9. Short title and commencement

This Act is called the South African Express Act, 2006 and comes into operation on a date determined by the President of the Republic of South Africa by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE SOUTH AFRICAN EXPRESS BILL

1. BACKGROUND

- 1.1 In 2004 the Minister approved the disposal of non-freight assets from Transnet Limited ("Transnet") as part of Transnet's new four-point turn around strategy. The Minister of Public Enterprises has agreed with Transnet to transfer Transnet's entire shareholding, including claims in and to SAX in terms of a share sale agreement. This agreement will be subject to the fulfilment of certain suspensive conditions, which will include the passing of any legislative mandate required to implement the transfer. The SAX Bill is part of such legislative mandate.
- 1.2 The Bill provides flexibility for funding and private sector involvement as well as the possibility that SAX may be converted into a public company. Public companies are generally recognised as the optimal corporate form to access capital markets and enable future private sector investment, where necessary.

2. OBJECTS

The objects sought to be achieved through the enactment of the Bill are to provide for—

- 2.1 the transfer of the SAX shares, interests and claims from Transnet to Government; and
- 2.2 the conversion of SAX into a public company with share capital.

3. Bodies consulted

The Department of Public Enterprises has consulted -

- National Treasury;
- Department of Transport; and
- Transnet and SAX.

4. Financial implications for State

The financial implications for the State of the proposed statute will be through providing guarantees to various third party lenders and entities such as the International Licensing 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 ("the Constitution") since it contains no provision to which the procedure set out in section 74¹ or 76² 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 1(1)(a) of the Traditional Leadership and Government Framework Act, 2003, (Act. No.41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

This section governs Bills providing for amendments to the Constitution

² This section governs bills affecting provinces and requires that they be referred to the National Council of Provinces

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