

REPUBLIC OF SOUTH AFRICA

REPEAL OF SOUTH AFRICAN AIRWAYS BILL

*(As introduced in the National Assembly (proposed section 75); explanatory summary of
Bill and prior notice of its introduction published in Government Gazette No. 49978
of 9 January 2024)*
(The English text is the official text of the Bill)

(MINISTER OF PUBLIC ENTERPRISES)

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BILL

To repeal the South African Airways Act, 2007; and to provide for matters connected therewith.

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

Definitions

1. In this Act, unless the context indicates otherwise—
“**company**” means South African Airways Limited, a public company duly incorporated in terms of the Companies Act, or its successor in title; and
“**Shareholder Representative**” means the Cabinet Member designated in terms of section 3(2). 5

Repeal of Act 5 of 2007

2. The South African Airways Act, 2007 (Act No. 5 of 2007), is hereby repealed. 10

Effect of repeal

3. (1) The repeal of the South African Airways Act, 2007, in terms of section 2 does not affect the continued corporate existence of the company under the Companies Act.
(2) The State shall hold shares in the company.
(3) As long as the State holds shares in the company, the President must designate a Cabinet Member as Shareholder Representative. 15
(4) The rights attached to the shares in the company, of which the State is the holder, are exercised by the Shareholder Representative on behalf of the State.
(5) Notwithstanding any provision of the law to the contrary, the Shareholder Representative may in terms of one or more transactions transfer shares in the company, of which the State is the holder, to such transferee or transferees in such manner and on such terms and conditions as the Cabinet, on the recommendation of the Shareholder Representative, approves. 20

Short title and Commencement

4. This Act is called the Repeal of South African Airways Act, 2024, and comes into operation on a date determined by the President by proclamation in the *Gazette*. 25

MEMORANDUM ON THE OBJECTS OF THE REPEAL OF THE SOUTH AFRICAN AIRWAYS BILL

1. BACKGROUND

The purpose of the Repeal of the South African Airways Bill, 2003 (“the Bill”), is to repeal the South African Airways Act, 2007 (Act No. 5 of 2007) (“the Act”). The Act was enacted to provide for the transfer of shares in Transnet Limited to the South African Airways (Proprietary) Limited (“SAA”) 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.

The repeal of the Act is intended to facilitate the repositioning and restructuring of SAA by Government through the introduction of a strategic equity partner. In this regard, Cabinet has approved the acquisition of 51% shareholding in SAA by Takatso Proprietary Limited (“Takatso”). This acquisition would mean the Government will become the minority shareholder, holding the remaining 49% in SAA.

In terms of the Sale and Purchase Agreement entered between the Department of Public Enterprises (“the Department”) and Takatso the repeal of the Act is one of the condition precedents for the conclusion of the transaction in light of the fact that the Minister will no longer have full shareholder rights contained in section 3(3) of the Act.

In light of the fact that the shareholder Minister will no longer hold the majority of voting powers in SAA, and that the shareholder Minister will not be able to fulfil the objects of the Act, it is imperative to repeal the Act.

2. CLAUSE-BY-CLAUSE ANALYSIS

2.1 **Clause 1** makes provision for the Definitions used in the Bill.

2.2 **Clause 2** deals with the repeal of the Act.

2.3. **Clause 3** deals with the effect of repeal. The clause provides that the repeal of the Act does not affect the continued corporate existence of the company under the Companies Act. It provides that as long as the State holds shares in the company, the President must designate a Shareholder Representative. It provides for the Shareholder Representative to exercise the rights attached to the shares in the company on behalf of the State.

2.4 **Clause 4** deals with the short title and commencement of the Act.

3. FINANCIAL IMPLICATIONS

None.

4. PARTIES CONSULTED

4.1. Stakeholders consulted outside the Department are the Presidency on Socio-Economic Impact Assessment System (“SEIAS”).

5. PARLIAMENTARY PROCEDURE

5.1 In *Tongoane and Others v Minister of Agriculture and Land Affairs and Others*, (“Tongoane”) the CC confirmed the test formulated in order to determine the classification of a Bill (“tagging test”). According to the CC, what matters for the purposes of tagging, is not the substance or purpose of the Bill, but rather whether the provisions of the Bill in “substantial measure” fall within a functional area listed in Schedule 4.

- 5.2 In commenting on the “substantial measure test”, the CC made the following remarks:

“[60] The test for tagging must be informed by its purpose. Tagging is not concerned with determining the sphere of government that has the competence to legislate on a matter. Nor is the process concerned with preventing interference in the legislative competence of another sphere of government. The process is concerned with the question of how the Bill should be considered by the provinces and in the NCOP, and how a Bill must be considered by the provincial legislatures depends on whether it affects the provinces. The more it affects the interests, concerns and capacities of the provinces, the more say the provinces should have on its content. . . .

[71] On the other hand, the “substantial measure” test permits a consideration of the provisions of the Bill and their impact on matters that substantially affect the provinces. This test ensures that legislation that affects the provinces will be enacted in accordance with a procedure that allows the provinces to fully and effectively play their role in the law-making process. This test must therefore be endorsed.

[72] To summarise: any Bill whose provisions substantially affect the interests of the provinces must be enacted in accordance with the procedure stipulated in section 76. Whether a Bill is a section 76 Bill is determined in two ways. First, by the explicit list of legislative matters in section 76(3)(a)-(f), and second by whether the provisions of a Bill in substantial measure fall within a concurrent provincial legislative competence.”.

[Our emphasis]

- 5.3. As stated above, a Bill, the provisions of which in substantial measure fall within a functional area listed in Schedule 4 to the Constitution of the Republic of South Africa, 1996 (“Constitution”), must be classified as a section 76 Bill. To test whether the provisions of a Bill fall within a functional area listed in Schedule 4, the cumulative effect of all the provisions of the Bill must be taken into account in order to determine its impact on the provinces.
- 5.4. The Bill seeks to repeal the SAA so as to fulfil one of the conditions of the Sale and Purchase Agreement entered into between the Department and Takatso. The Department and State Law Advisers are of the view that the subject matter of the Bill does not fall within any of the functional areas listed in Schedule 4 to the Constitution. In view of the above discussion, the Department and the Office of the Chief State Law Advisor are of the opinion that this Bill must be dealt with in accordance with the procedure established in terms of section 75.
- 5.5. We are also of the view that it is not necessary to refer this Bill to the National House of Traditional and Khoi-San Leadership in terms of section 39(1)(a)(i) of the Traditional and Khoi-San Leadership Act, 2019 (Act No. 3 of 2019), since it does not directly affect traditional or Khoi-San communities or pertain to customary law or customs of traditional or Khoi-San communities.