



HELENSUZMAN
FOUNDATION

For attention: Honourable Minister Godongwana, MP

Email: OAGqueries@treasury.gov.za

21 April 2023

Submission on Section 92 Exemption applied to Eskom Holdings SOC Ltd in terms of the Public Finance Management Act No. 1 of 1999

We attach our written submission in response to the invitation for comments on the proposed Section 92 Exemption to be applied to Eskom Holdings SOC Ltd in terms of the Public Finance Management Act No. 1 of 1999.

We would like to confirm our interest in making oral representations at a later convenient date.

Should you have any queries, it would be appreciated if you could contact me at the following email address: nicole@hsf.org.za.

Yours sincerely

Nicole Fritz

Director



1. Introduction

1.1. The Helen Suzman Foundation (“HSF”) opposes the Exemption (“Exemption”) applied to Eskom Holdings SOC Ltd (“Eskom”) proposed by the Minister of Finance (“Minister”) on 6 April 2023 in terms of section 92 of the Public Finance Management Act No. 1 of 1999 (“PFMA”).

1.2. The Exemption seeks to relieve Eskom of its obligation under section 55(2)(b)(i) of the PFMA, read with Treasury Regulation 28.2.1 (“Regulation”), to include in its financial statements particulars of irregular, fruitless and wasteful expenditure.

1.3. HSF submits, in summary, that the Exemption:

1.3.1. would undermine the very purpose of the PFMA, and therefore cannot be a lawful exercise of the Minister’s powers of exemption under section 92 of the PFMA; and

1.3.2. by allowing Eskom to sanitise its financial statements, the Exemption would exacerbate corruption at Eskom and cripple the Auditor-General’s constitutional oversight role.

2. The Purpose of Section 55(2)(b)(i) of the PFMA and Treasury Regulation 28.2.1

2.1. These provisions make mandatory Eskom’s disclosure of irregular, fruitless and wasteful expenditure.

2.2. They do so in the context of the PFMA as a whole. Its sole purpose is to:



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“secure transparency, accountability, and sound management of the revenue, expenditure, assets and liabilities of the institutions to which this Act applies.”¹

- 2.3. As such, section 55(2)(b)(i) and Treasury Regulation 28 serve as indispensable constituent parts of the PFMA’s overall design. If removed for Eskom, the PFMA could not achieve its purposes in respect of a public entity whose current state of disrepair requires close oversight – perhaps more than ever.
- 2.4. While the Minister is indeed granted powers of exemption under section 92 of the PFMA, in this instance, the exercise of this power is unlawful, because it fundamentally undermines the sole purpose of the PFMA and breaches the separation of powers doctrine.
- 2.5. In any event, it would be unthinkable to countenance an interpretation of the PFMA which assumes that Parliament intended to award the Minister powers to subvert its express purpose.

3. The Exemption’s Negative Effect on Reducing the Scope of Corruption

- 3.1. The Exemption’s application to Eskom’s financial statements, as opposed to its annual report, is particularly insidious because an institution’s financial statements form the source material of an audit.
- 3.2. In terms of section 8 of the PFMA, the Auditor-General has a duty to audit the financial statements of all applicable institutions under the PFMA and to return an audit report to National Treasury. In terms of section 20 of the Public Audit Act No. 25 of 2004 the Auditor-General is only able to report on that which is presented to them.

¹ Section 2 of the PFMA. The Treasury Regulations for departments, trading entities, constitutional institutions and public entities are issued in terms of the PFMA and therefore should be read with its purposes in mind.



3.3. Therefore, the Exemption would impede the Auditor-General, as a constitutionally entrenched Chapter 9 Institution, in detecting irregular, fruitless and wasteful expenditure at Eskom and exercising its remedial powers accordingly.

3.4. In doing so, the proposed Exemption would not only undermine the PFMA's express purpose but also a key constitutional mechanism for government accountability.

4. Conclusion

4.1. HSF opposes the Exemption because it would undermine PFMA's express purpose, as well as prevent the Auditor-General from playing its constitutionally enshrined role of holding government to account.

4.2. As such, the Exemption, far from reducing the scope for corruption at Eskom, will exacerbate it.