IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO:

In the matter between:

SA AIRLINK (PTY) LTD	Applicant
and	
SOUTH AFRICAN AIRWAYS SOC LTD	First Respondent
LESLIE MATUSON N.O.	Second Respondent
SIVIWE DONGWANA N.O.	Third Respondent
COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	Fourth Respondent
THE MINISTER OF PUBLIC ENTERPRISES	Fifth Respondent

ANSWERING AFFIDAVIT

I, the undersigned,

FRANS KGATHATSO NEPO TLHAKUDI

do hereby make oath and say that:

1. I am the Acting Director General of the Department of Public Enterprises.

2. I am duly authorised to depose to this affidavit and to launch this application on behalf of the intervening party.

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3. The facts contained in this affidavit, save where the context indicates otherwise, are of my own knowledge and are true and correct.

4. Where I make submissions of a legal nature, I do so on the advice of the intervening party's legal advisors.

5. The preamble of the South African Airways Act 5 of 2007 ("**SAA Act**") describes the first respondent ("**SAA**") as a national carrier and strategic asset that would enable the State to preserve its ability to contribute to key domestic, intra-regional and international linkages.

6. SAA is a major public entity in terms of schedule 2 of the Public Finance Management Act 1 of 1999 ("**PFMA**").

7. The Government of the Republic of South Africa ("**the Government**") is the sole shareholder in SAA.

8. The **MINSTER OF PUBLIC ENTERPRISES** ("**the Minister**") is the executive head of the **DEPARTMENT OF PUBLIC ENTERPRISES** ("**the Department**"). The Department:

8.1. is the shareholder representative for the Government and is mandated to perform the shareholder oversight in respect of SAA; and

8.2. has its principal place of business situated at 80 Hamilton Street, Pretoria.

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9. SAA is currently in Business Rescue as provided for in Chapter 6 of the Companies Act, 2008. The first and second respondents ("**the BRPs**") are the appointed Business Rescue Practitioners.

10. The Minister is entitled (and to the extent necessary seeks leave) to intervene as the fifth respondent in this application, on the basis, *inter alia*, that it is an "*affected person*" as provided for in section 128(1)(a)(i) of the Companies Act, 2008 ("**the Companies Act**") and it has a direct and substantial outcome in the relief sought by the applicant ("**SA Airlink**"). SA Airlink has also informed the "affected persons" that "*they have a right to participate in the hearing of this application and invites any party that wishes to participate to do so.*"[1]

11. Despite its interest, the far-reaching consequences of the relief sought, the allegations made in the founding affidavit regarding the Minister and the Department and the national importance of SAA to the State, SA Airlink did not cite the Minster or the Government (collectively "**the Minister**", unless the context requires otherwise) as a party to these proceedings. This, together with the application being launched at the last minute with extremely unreasonable time periods for service of answering papers and for the hearing itself, deprives the Minister of a fair opportunity to prepare a full answering affidavit addressing all issues, and to oppose the application to the full extent. It is only possible to address a limited number of aspects at a superficial level in the limited time

[1] Founding Affidavit, paragraph 124, pg. 60

available. Obviously, any allegation not dealt with must not be taken to be admitted.

12. The Minister opposes the relief sought in Part A of the application on the grounds and bases set out below. If required, this affidavit will need to be supplemented to deal with Part B of the application.

13. SA Airlink's urgent request that SAA be liquidated must be seen in the context that SA Airlink is SAA's competitor, and its incentive is not simply to get payment of a creditor's claim. SA Airlink's competitive position would be substantially improved without SAA, and potentially without its subsidiary, Mango. SA Airlink has not shown that it (or any other creditor) would be better off financially if SAA were liquidated, as opposed to the position it would be in under the BRPs' Proposed Plan.

INTRODUCTION

14. Section 7(k) of the Companies Act says that the Act has as one of its purposes to "*provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders.*"

15. Whilst cloaking a company "*with a temporary moratorium on the rights of claimants against the company or in respect of the property in its possession*", section 128(1)(b) of the Companies Act, 2008 provides that "*business rescue*"

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means "*proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for*" and has and has as one of its primary purposes "*the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company.*"

16. I am advised that the courts have recognised that, "*it is axiomatic that business rescue proceedings, by their very nature, must be conducted with the maximum possible expedition. In most cases a failure to expeditiously implement rescue measures when a company is in financial distress will lessen or entirely negate the prospect of effective rescue. Legislative recognition of this axiom is reflected in the tight timelines given in terms of the Act for the implementation of business rescue procedures if an order placing a company under supervision for that purpose is granted. There is also the consideration that the mere institution of business rescue proceedings however dubious might be their prospects of success in a given case materially affects the rights of third parties to enforce their rights against the subject company.*"

17. In Part A of the application SA Airlink seeks an order:

17.1. pending "*the latest of the final determination*" of Part B of the application, the delivery of a notice in terms of section 151(2) of the Companies Act and the delivery of "*the notice contemplated notice in of section 145(5) of the Companies Act*":

17.1.1. Interdicting the BRPs from convening or holding **any** meeting to consider the business rescue plan in relation to SAA proposed by the BRPs under section 151 of the Companies Act ("**the Proposed Plan**");

17.1.2. Interdicting the BRPs from introducing the Proposed Plan and calling for or conducting a vote for the preliminary approval of the Proposed Plan under section 152 of the Companies Act; and/or

17.1.3. Interdicting the BRPs from inviting discussion and entertaining or conducting a vote on any motion relating to or concerning the Proposed Plan including **any** motion as provided for under section 152(1)(d) of the Companies Act.

17.2. Directing SAA and/or SAA and the BRPs within 2 calendar days to provide the applicant with copies of all minutes from meetings of the board of directors or any committee of the board of directors of SAA in which the following issues were debated, considered, discussed or voted upon:

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17.2.1. Placing SAA under business rescue; and/or

17.2.2. The prospects of rescuing SAA.

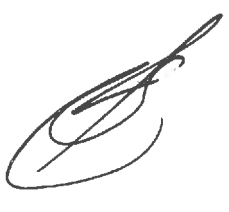
17.3. Directing SAA and/or SAA and the BRPS to provide SA Airlink within 2 calendar days with copies of all correspondence and/or documents pertaining to instructions or communications from the Government or the Minister to the board of directors of SAA, regarding placing SAA under business rescue or the prospects of rescuing the first respondent.

18. In the event that the Part A relief is granted, it will no doubt have the effect that business rescue will fail. This will have catastrophic consequences for all concerned.

19. I say this because it is sought to interdict **any** meeting to "consider", "introduce", "vote on" and "invite discussion and entertain or conduct a vote on any motion relating to or concerning" the BRP's Proposed Plan.

20. Moreover, the application is sought pending "*the latest of the final determination of*" Part B of the application or the delivery of the section 151(2) and 145(5) notices. The final determination of Part B of the application (including any appeals) could take many months and if not years to complete.

21. This is illustrated by the unsuccessful litigation that SA Airlink brought to avoid



being classified as a concurrent creditor.[2] The urgent application was launched on 16 January 2020 and was heard on 11 February 2020. This court *per* Kathree-Setiloane J gave judgement on 2 March 2020 and a copy is attached as **DPE1**.

22. SA Airlink was granted leave to appeal the judgment. Despite having requested a preferential date from the President of the Supreme Court of Appeal in April, the earliest that a date for the appeal could be obtained is 4 September 2020. This means that it is likely that finality of an urgent application will only be reached in little under a year from the date that the application was launched (leaving aside a possible further appeal to the Constitutional Court).

23. Part B of this application has been launched in the ordinary course. It is likely only to be determined in this Court many months from now with an appeal further into the future. Very serious allegations, including fraud and sham transactions, are made in the founding affidavit. If the wide ranging interdict is granted, it means that the continued business rescue will be at the mercy of the progression and "final determination" of Part B, which includes deciding highly contentious allegations. Finality could be years from now.

24. By seeking the relief that it does in Part A of the application, SA Airlink, under the guise of last minute urgent interim relief, effectively asks this Court to put an abrupt and final end to the business rescue of SAA. For so long as a vote on the

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[2] Founding Affidavit, para 40 – 41, pg. 24

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Proposed Plan is interdicted, the business rescue of SAA is stopped in its tracks. SAA will effectively be hamstrung while its operational costs continue to mount, including those of the thousands of employees who wish for a positive outcome to the business rescue process. These mounting costs will have a devastating effect on SAA and all "affected persons."

25. SA Airlink plainly considered the Draft Proposed Plan[3] from as early as 1 June 2020, and has no doubt been engaged in preparing this application for at least a few weeks. Yet it considers it appropriate to bring this application at the last minute without giving the Minister sufficient time to provide a full response.

26. In addition, I am advised that it will be argued that the balance of convenience is powerfully against SA Airlink. SA Airlink's interest as a concurrent creditor is by no means the only interest in issue in these proceedings. Leaving aside that SA Airlink's interest as a competitor is best served by liquidating SAA, the reality outlined in the BRP's Proposed Plan is that a liquidation will protect no jobs, provide no payment of retrenchment benefits, and will yield no payment for SA Airlink and the other concurrent creditors.

27. The Proposed Plan has the funding support of the Minister and the government. If voted upon by creditors, in essence it plans to provide a sustainable restructured SAA, save 1000 jobs, pay retrenchment benefits of R2.2 billion,

[3] Annexure FA23, pg. 412

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provide an initial working capital injection of R2.8 billion, pay concurrent creditors R600 million, pay "unflown" ticket liability of R3 billion, and pay aircraft lessors R1.7 billion.

28. These benefits affect a great number of people and would be lost if the business rescue proceedings are terminated and if SAA is liquidated instead.

29. The business rescue process anticipates a vote by creditors on a proposed plan. Instead of attending that meeting and exercising its right to vote, SA Airlink wishes to avoid a meeting altogether and to destroy the rights of all other creditors and other parties to even discuss the Proposed Plan, and for those entitled to do so - to vote on it.

30. In refusing relief to SA Airlink, the judgment[4] of Justice Kathree-Setiloane says the following about SA Airlink's claim (with emphasis added):

> [54] In the circumstances, I am of the view that Airlink's application is misconceived. Airlink is a concurrent creditor in the business rescue proceedings of SAA and should, as all other creditors, await the business rescue plan and the section 151 meeting, to consider its rights as against SAA. It does not have a superior claim to the revenue from SAA's sale of its tickets.
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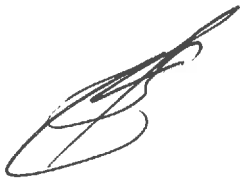
> ...
>
> [62] Moreover, what is starkly absent is even a single allegation that conforms to the requirements articulated by this Court in Arendse. No case is made out in its founding affidavit which distinguishes Airlink's claim from other creditors who are subject to the moratorium, and why Airlink should be given preferential treatment to them. Furthermore, Airlink makes out no case which discloses the impact of the grant of leave to commence legal

[4] Annexure **DPE1**



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proceedings against SAA in business rescue, on the one hand, and the refusal of the grant, on the other, on Airlink, SAA and every other concurrent creditor of SAA.

[63] Lastly, Airlink fails to make out a case on the impact that the proposed legal proceedings would have on the wellbeing of SAA and its ability to regain its financial health; and whether the grant of leave would be inimical to the object and purpose of business rescue proceedings as set out in sections 7 and 128 of the Act. In light of this omission, there was no onus on the [sic] Practitioners to adduce evidence that would establish hardship on SAA or other stakeholders if leave to commence proceedings is granted or that the grant of leave would be inimical to the objects of the business rescue proceedings.

[64] For these reasons, I consider Airlink to have failed to make out a case to lift the moratorium on legal proceedings against SAA in business rescue. I accordingly exercise my discretion against granting Airlink leave to commence legal proceedings against SAA in business rescue.

IN LIMINE

(a) The urgency is self-created and the time periods unreasonable

31. Part A of the application has been brought as one of extreme urgency with an unreasonable curtailment of the respondents procedural rights and in circumstances where SA Airlink seeks relief with far reaching consequences.

32. SA Airlink primarily basis its case for urgency on the following statement: "*The vote in relation to the Proposed Plan is, however, imminent and is set for 25 June 2020. Part A of this application thus must be heard before the Proposed Plan is voted on. If the Proposed Plan is adopted subsequent the vote, this application will be moot. Accordingly, for the relief sought to have any effect, it must be granted before 25 June 2020. This application has thus been set down on an*

urgent basis for 24 June 2020."[5]

33. The application of 782 pages (including annexures) was received electronically from the attorneys of record of the first, second and third respondents' attorneys of record at 10h44am on Sunday, 21 June 2020 and is set down for hearing 3 days (including a weekend) later at 10:00am on Wednesday, 24 June 2020. I have not been able to find any reference to the application having been served directly on the fifth respondent.

34. I set out briefly the chronology as it is relevant to the issue of urgency:

34.1. The draft proposed plan was circulated on 29 May 2020.[6] SA Airlink has engaged extensively with this draft plan. It has dedicated pages in its founding affidavit to its detailed analysis of the draft proposed plan, referenced submissions, reports and drawn conclusions.

34.2. The Proposed Plan[7] was published and sent to the Creditor's Committee and presumably affected persons on 16 June 2020;

34.3. On 16 June 2020, the Department issued a media statement, in which, *inter alia*, Government expressed its support for the Proposed Plan and that it "*remains committed to support a competitive, viable and sustainable*

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5 Founding Affidavit, para 344, pg. 123
6 Annexure FA23, pg. 299
7 Annexure FA26, pg. 412

national airline. This is to resolve the untenable situation of the current South African Airways (SAA), specifically for its employees and its creditors, as well as to support important economic objectives",[8]

34.4. Section 151 of the Companies Act, provides that the BRPs "*must*" convene meeting for purpose of "*considering the plan.*" This means that SA Airlink was aware from 16 June 2020 that the Companies Act peremptorily requires the BRPs to hold a meeting to "*consider the plan*"; and

34.5. On 17 June 2020, a notice in terms of section 151(2) of the Companies Act was delivered to all affected persons that a meeting for purposes of section 151(1) will be held at 11:00 on 25 June 2020 for purposes of items on the agenda set out in the notice, a copy of which is annexed marked **DPE2.**

35. SA Airlink admits that "*Some of the facts set out above (under the various grounds for setting aside the resolution and placing SAA under liquidation) became known to Airlink from 5 December 2019 as the business rescue proceedings progressed*"[9] but other facts (such as the financial commitment of Government) only became known to it when proposed plan was published on 16 June 2020.

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8 Annexure FA30, pg. 567

9 Founding Affidavit, para 345, pg. 123

36. The urgency relied on for Part A is self-created and the curtailment of the time periods and respondent's procedural rights are unreasonable.

37. I am advised that SA Airlink has disregarded the requirements of Uniform Rule 6(12) and the respondents' (and all the "affected persons" of SAA) rights as litigants.

38. I am advised that the application should be struck from the roll for lack of urgency with costs, including the costs of two counsel.

(b) SA Airlink's remedy lies in the Companies Act and misjoinder

39. In terms of section 151 of the Companies Act:

> (1) Within 10 business days after publishing a business rescue plan in terms of section 150, the practitioner must convene and preside over a meeting of creditors and any other holders of a voting interest, called for the purpose of considering the plan.
>
> (2) At least five business days before the meeting contemplated in subsection (1), the practitioner must deliver notice of the meeting to all affected persons, setting out –
>
> (a) the date, time and place of the meeting;
>
> (b) the agenda of the meeting; and
>
> (c) a summary of the rights of affected persons to participate in and vote at the meeting.

40. The BRPs have called the meeting of creditors to be held on 25 June 2020.

41. Section 152 of the Companies Act prescribes, *inter alia*, what is required to happen at such a meeting (and for the sake of completeness, thereafter) (with

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emphasis added):

(1) At a meeting convened in terms of section 151, the practitioner must

(a) introduce the proposed business plan for consideration by the creditors and, if applicable, by the shareholders;

(b) inform the meeting whether the practitioner continues to believe that there is a reasonable prospect of the company being rescued;

(c) provide an opportunity for the employees' representatives to address the meeting;

(d) invite discussion, and entertain and conduct a vote, on any motions to -

(i) amend the proposed plan, in any manner moved and seconded by holders of creditors' voting interests, and satisfactory to the practitioner; or

(ii) direct the practitioner to adjourn the meeting in order to revise the plan for further consideration; and

(e) call for a vote for preliminary approval of the proposed plan, as amended if applicable, unless the meeting has first been adjourned in accordance with paragraph (d) (ii).

(2) In a vote called in terms of subsection (1) (e), the proposed business rescue plan will be approved on a preliminary basis if –

(a) it was supported by the holders of more than 75% of the creditors' voting interests that were voted; and

(b) the votes in support of the proposed plan included at least 50% of the independent creditors' voting interests, if any, that were voted.

(3) If a proposed business rescue plan –

(a) is not approved on a preliminary basis, as contemplated in subsection (2), the plan is rejected, and may be considered further only in terms of section 153;

(b) does not alter the rights of the holders of any class of the company's securities, approval of that plan on a preliminary basis in terms of subsection (2) constitutes also the final adoption of that plan, subject to satisfaction of any conditions on which that plan is contingent; or

(c) does alter the rights of any class of holders of the company's securities

(i) the practitioner must immediately hold a meeting of holders of the class, or classes of securities whose

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rights would be altered by the plan, and call for a vote by them to approve the adoption of the proposed business rescue plan; and

(ii) if, in a vote contemplated in subparagraph (i), a majority of the voting rights that were exercised

(aa) support adoption of the plan, it will have been finally adopted, subject only to satisfaction of any conditions on which it is contingent; or

(bb) oppose adoption of the plan, the plan is rejected, and may be considered further only in terms of section 153.

(4) A business rescue plan that has been adopted is binding on the company, and on each of the creditors of the company and every holder of the company's securities, whether or not such a person –

(a) was present at the meeting;

(b) voted in favour of adoption of the plan; or

(c) in the case of creditors, had proven their claims against the company.

(5) The company, under the direction of the practitioner, must take all necessary steps to –

(a) attempt to satisfy any conditions on which the business rescue plan is contingent; and

(b) implement the plan as adopted.

(6) To the extent necessary to implement an adopted business rescue plan –

(a) the practitioner may, in accordance with that plan, determine the consideration for, and issue, any authorised securities of the company, despite section 38 or 40 to the contrary; and

(b) if the business rescue plan was approved by the shareholders of the company, as contemplated in subsection (3) (c), the practitioner may amend the company's Memorandum of Incorporation to authorise, and determine the preferences, rights, limitations and other terms of, any securities that are not otherwise authorised, but are contemplated to be issued in terms of the business rescue plan, despite any provision of section 16, 36 or 37 to the contrary.

(7) Except to the extent that an approved business rescue plan provides otherwise, a pre-emptive right of any shareholder of the company, as contemplated in section 39, does not apply with respect to an issue of shares by the company in terms of the business rescue plan.

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(8) When the business rescue plan has been substantially implemented, the practitioner must file a notice of the substantial implementation of the business rescue plan.

42. In Part A of the application, SA Airlink asks this court to interdict the meeting. But I am advised that this is entirely unnecessary as SA Airlink has its remedies in the Companies Act:

42.1. SA Airlink can attend the meeting and motion an amendment of the Proposed Plan and/or an adjournment of the meeting [section 151(1)(d)]; and

42.2. SA Airlink can apply to court after the adoption of the Proposed Plan to set aside the adoption of the Propose Plan.

43. Whilst SA Airlink says that it has (or will have) notified all "affected parties" of this application, it is submitted that they ought to have been joined.

44. This because when the BRPs notified the meeting, the other "affected persons" gained statutory rights, *inter alia*, for:

44.1. the section 151 meeting to be held;

44.2. to be present at the section 151 meeting; and

44.3. to exercise their statutory rights at the meeting.

45. These "affected persons" include the representatives of the many thousands of employees (who have a statutory right to address the meeting) and the secured and unsecured creditors (whose number and value far exceed that of Airlink).

46. Once these statutory rights were gained, I am advised that the "affected persons" are interested parties and ought to have been joined.

(c) The relief relating to provision of documents has no basis in law

47. Airlink says that it seeks *"the documents described under Part A of the notice of motion because it is apparent that the purpose of the Proposed Plan is to advance an agenda other than the rescue of SAA. These documents are relevant to the true motivation behind the business rescue proceedings, and to ascertaining whether the Board held the genuine belief that the company could be rescued, at the time that the resolution placing the company into business rescue was passed."*[10]

48. I am advised that SA Airlink is not entitled to demand from the Court an order for discovery of documents in motion proceedings without setting out a recognised basis for doing so. SA Airlink is certainly not entitled to the documents in this application as of right.

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[10] Founding Affidavit, para 222, pg. 92 – 93

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THE PROPOSED PLAN AND FUNDING

49. Upon publication of the plan, Government issued a statement[11] of its support for the business rescue of SAA by means of the Proposed Plan which reads, *inter alia*, as follows:

> Government, as the sole shareholder of SAA, supports the business rescue plan where it results in a viable, sustainable, competitive airline that provides integrated domestic, regional and international flight services.
>
> Government remains committed to support a competitive, viable and sustainable national airline. This is to resolve the untenable situation of the current South African Airways (SAA), specifically for its employees and its creditors, as well as to support important economic objectives.
>
> The aviation industry in South Africa requires the capabilities of a SAA that is reconstituted, restructured and reinvigorated, without the legacy burdens, including corruption, poor leadership and unsustainable costs, which have beset SAA's past.
>
> ...
>
> As the shareholder of SAA, government, taking into account the broader national interests, has made it clear that the desired outcome should be to establish a viable, sustainable national carrier that must emerge from the business rescue process. Particularly so as government if expected to marshal the resources necessary for this process from diverse sources.
>
> Through government guarantees, the BRP's have had significant additional financial resources at their disposal to enable them to restructure SAA by stemming the tide of wastage, an excessive cost-structure and cash burn. We will assess the plan which, we are concerned, might have not been adequately accomplished.
>
> In addition, government has enabled consultations with employee representatives in the Labour Consultative Forum. This process must be embraced by the BRPs and taken to a state of completion.
>
> As a shareholder government wishes to engage constructively towards the national interest objective of creating a viable, competitive, sustainable airline in a constrained fiscal environment, taking into account the impact of COVID-19 pandemic on this situation.
>
> We repeat: Government as the sole shareholder supports the business rescue plan where it results in a viable, sustainable airline that provides integrated domestic, regional and international flight services.

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[11] Annexure FA30, pg. 567

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50. On 23 June 2020, the Government issued a further statement of its support for a "*New and Restructured SAA*" through the business rescue of SAA by means of the Proposed Plan which reads as follows:

> The South African government, during this period of business rescue for South African Airways (SAA), has received unsolicited proposals from private sector funders, private equity investors and potential airline partners for a new national airline that must emerge from the SAA business rescue process.
>
> Government is intent on pursuing credible proposals for investment and strategic partnerships with the private sector, as well as equity participation for employees. Such partners will also introduce technical, financial, and operational expertise.
>
> As the Shareholder on behalf of government, the Department of Public Enterprises (DPE), will engage interested parties constructively in pursuit of government's national developmental and strategic agenda to rebuild our economy in a post-COVID-19 era.
>
> Government has expressed its intent and commitment to fundamentally restructure and transform SAA into a viable, sustainable and competitive national carrier. The broader aviation industry and the passenger air transport sector specifically, is essential for servicing and growing economic sectors, including tourism, business connectivity and cargo carriage.
>
> The DPE is cognisant that airlines across the world have been facing severe drop in flights due to COVID 19, leading to financial and other pressures. Therefore, there are possibilities for airline partnerships to improve scale and scope and ensure continuity of value creation to the South African economy and long-term sustainability of the aviation industry.
>
> Government is committed to support the formation of such a new airline with no legacy financial and operational issues which will be managed by competent, competitive and skilled personnel who have strategic and technical capabilities which are critical to the success of the new carrier.
>
> Government would like to see the following characteristics of the new airline as envisaged in the new Business Rescue Plan:
>
> - An efficient and modem aircraft fleet with hybrid density options acquired at competitive rates resulting in cost efficiency;
> - An offering with the right routes, at the right times and at competitive prices;
> - A motivated workforce, ensuring productivity and efficiency and determined to increase market share;

- A customer-centric airline designed to be lean, technology savvy, digitally native [sic] and agile to service all market segments;
- Appointment of an effective, competent, and empowered Board of Directors with appropriate aviation experience.

51. A copy of the statement is annexed marked **DPE3**.

52. Under the heading "*Funding*", paragraph 9[12] of the Proposed Plan provides as follows:

> 9.1. Government, as the sole shareholder of the Company and acting through the DPE, supports the Business Rescue Plan which results in a viable and sustainable national carrier that provides international, regional and domestic services.
>
> 9.2. Consequently, and subject to the adoption of the Business Rescue Plan, it is proposed that Government fund or raise funding for:
>
> 9.2.1. The Proposed Restructure starting with the working capital injection that is required to restart business operations;
>
> 9.2.2. The retrenchment costs of Employees including any support for the social plan;
>
> 9.2.3. The repayment of the amounts owing to the Lenders as set out in paragraph 30.3; and
>
> 9.2.4. The continuation of the Business as a going concern which would include honouring of tickets bought by customers or any subsequent vouchers that they may receive in accordance with SAA's policy.
>
> 9.3 This funding is broken down into immediate, medium and long term underpins the Proposed Restructure and is a condition of the implementation of the Business Rescue Plan.

53. Under the heading "*Government Appropriation and Funding*", paragraph 28[13] of the Proposed Plan provides as follows:

> 28.1. Government, as the sole shareholder of the Company and acting through DPE, supports a Business Rescue which results in a viable

[12] Annexure FA29, pg. 431
[13] Annexure FA29, pg. 498

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and sustainable national flag carrier that provides international, regional and domestic services.

28.2. The Proposed Restructure seeks to achieve, inter alia, the aforesaid result.

28.3. Consequently, and subject to the adoption of this Business Rescue Plan, it is proposed that Government fund or raise funding for:

28.3.1. the Proposed Restructure starting with a working capital injection that is needed to restart the airline post the COVID-19 related travel bans and the ramp up of operations as the activity increases due to further relaxation of all the other travel bans including opening the borders. We estimate that the initial working capital injection needed would not be less than R2.8 billion (two billion and eight hundred million Rand). This amount would cover the following costs:

28.3.1.1. Post commencement creditors of approximately R800 million (eight hundred million Rand); and

28.3.1.2. Restarting costs of approximately R2 billion (two billion.

28.3.2. The Employees have been consulting in the Leadership Consultative forum that has been convened by the DPE. It is anticipated that a voluntary severance agreement will be concluded as a result of these consultations, it is anticipated that 1000 jobs will be retained, these Employees will be retained under new terms and conditions of employment. The above process will either be achieved by mutual agreement or through a S189 process. Based on the anticipated number of employees to be retrenched it is estimated that cost of the severance package will be in the amount of R2.2 billion (two billion and two hundred million Rand). This amount would be payable a month after the conclusion of such agreements or the conclusion of the S189 process;

28.3.3. R16.4 billion (sixteen billon and four hundred million Rand) towards payment of the Lenders, more fully dealt with in paragraph 30.3;

28.3.4. the unflown ticket liability in the amount of approximately R3 billion (three billion Rand);

28.3.5. General Concurrent Creditors Dividend in the amount of approximately R600 million (six hundred million Rand);

28.3.6. The Lessors in the amount of approximately R1.7 billion (one billion and seven hundred million Rand) (this amount is the equivalent of 6 months rental payments less any letters of credit and/or cash deposits held by the Lessors); and

28.3.7. to support the business during the post ramp up period until it is profitable and self-sustaining, this quantum is set out in Annexure C of the Business Rescue Plan.

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54. Under the heading "*Conditions For The Business Rescue Plan To Come Into Operation And Be Fully Implemented*", paragraph 42[14] of the Proposed Plan provides, *inter alia*, as follows:

> 42.1. As required in terms of section 150 (2)(c)(i)(aa) of the Companies Act, the Business Rescue Plan will come into operation upon the conditions listed below having been fulfilled:
>
> ...
>
> 42.1.5. Confirmation of Government's support and commitment to providing the requisite funding for the various commitments stipulated in paragraph 28 [of] the Business Rescue Plan. This is to be evidenced by way of a letter of support from the Department of Public Enterprises with the concurrence of the Department of National Treasury. Such letter is to be received on or before 15 July 2020;
>
> 4.2. Should the conditions set out in paragraph 42.1 not be fulfilled by 15 July 2020, the Business Rescue Plan will be deemed unimplementable and a meeting of Creditors will be convened on 17 July 2020 for Creditors to consider amending the Business Rescue Plan, failing which for the BRPs to discharge the Business Rescue. Such meeting will be convened in terms of section 151 of the Companies Act.

55. Government has assessed the numbers in Annexure C to the Proposed Plan to support the business of SAA during the post ramp up period (the peak funding requirement) and has agreed to provide support for approximately R 6.3 billion.[15]

56. Government intends to deliver its letters of support and commitment to provide the requisite funding, as contemplated by paragraph 42.4.2 of the Proposed Plan

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[14] Annexure FA29, pg. 498

[15] Annexure C to Annexure FA29, pg. 558: The sum of line item EBT (Earnings Before Tax) until the business becomes profitable being: R3 199 473 531 + R2 251 933 902 + R916 442 188 = R6 367 849 621

by 15 July 2020.

57. It is wholly incorrect and irresponsible to suggest that Government's support for the Proposed Plan gives rise to a sham and a fraud on the creditors. There is no sham in Government being prepared, for the reasons stated in annexure **FA30** to support the Proposed Plan. The benefits to many people are real. It is correct that under the Proposed Plan concurrent creditors stand to receive 7.5 cents in the rand on their claims, which is no doubt less than what SA Airlink would like to receive. But the BRPs say, that in a liquidation, concurrent creditors will receive nothing at all. SA Airlink puts up no evidence to suggest that the BRPs are wrong and does not establish its allegation that "liquidation without delay" would provide a better yield for creditors.

58. The provision of guarantees to lenders who made loans to SAA is a lawful policy decision by Government and has been found to be so in other litigation. Those lenders are simply creditors of SAA who have the benefit of Government guarantees. They are entitled to exercise their rights to vote at the meeting of 25 June 2020. The fact that they hold guarantees from Government does not mean that they have lesser or greater rights than other creditors of SAA. They entered into their own commercial arrangements with SAA and are certainly not parties to any sham or fraud on creditors.

59. It is correct that the Proposed Plan provides that lenders will receive R16.4 billion (in respect of pre and post Business Rescue obligations). This recognises

that Government provided guarantees to the lenders. SA Airlink complains that the lenders should not be paid, but a liquidation scenario does not improve on this situation for SA Airlink and for other concurrent creditors. In a liquidation it is clear that SAA would be unable to pay the lenders and they would call upon Government for payment under the guarantees.

60. Funding has been provided by Government and by private lenders over many years. In regard to the present lenders, they advanced the capital and Government provided a guarantee in the event of a default by SAA (given its precarious financial position) Government was capable of publishing an appropriation budget which is approved by Parliament and then directly lending cash, which had been done in the past. SAA elected to approach private lenders. The description of the lenders as "secured" is a misnomer. In fact, they do not enjoy security against SAA. They have an independent guarantee as creditors in these situations often do.

THE SUBSIDIARIES AND THE PROPOSED PLAN

61. The Proposed Plan recognises the necessity of SAA's subsidiaries for a restructured SAA. By way of example, SAA Technical provides essential statutory Air Maintenance Organisation services, both for SAA and Mango and for other airlines. These are vital for SAA's safe and airworthy operation and for the retention of its operating certificate and licenses. As part of the restructuring, leases with aircraft lessors were cancelled, thereby significantly reducing the size

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of the SAA aircraft fleet in the short term. Mango is an operating budget airline, and its fleet contributes to having more aircraft in the sky in the short term. Air Chefs remains required for the provision of food services. Being forced to sell off assets (i.e. subsidiaries or assets of subsidiaries) results in a loss of optionality for SAA in regard to potential future restructuring of subsidiaries. Retention of the benefits of the subsidiaries and retaining the optionality for future restructuring requires funding, but is important for future prospects.

THE LEADERSHIP COMPACT FORUM

62. This process was initiated by Government to reach settlement with the various employee interests. Government's role was not limited to that of shareholder but also as a funder and a facilitator. Otherwise, SAA would have had to embark on a fresh section 189 process with employees. Government's facilitating role enhances the possibility of a business rescue of SAA. The rescue is conditional on agreement with employees being reached. Government believes that significant progress has been made to address fundamental problems of the airline – including bloated employment numbers and remuneration at substantially above going market rates. The Proposed Plan does reduce employment numbers, but Government is also funding the retrenchment packages of those who are made redundant. This will provide employees a markedly better outcome than on a liquidation. Business Rescue is aimed at protecting interests of all affected persons, including employees, and is not only aimed at creditors. Under the Business Rescue 1000 jobs are retained with

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further employment anticipated, and retrenchment benefits are paid that would not be forthcoming in a liquidation.

INDEPENDENCE OF THE BRPS

63. SA Airlink contends that "*the business rescue procedure, and the Proposed Plan itself, is unlawful, because of the undue influence that the Shareholder has exerted over the process.*"[16] It states this as a conclusion of fact, as if it is able at present to establish this contention. The allegation is denied.

64. However, this is belied by the relief sought, which shows that SA Airlink cannot establish this case, instead wants to embark on a fishing expedition to find documents to do so. In prayer 4 of the notice of motion an order is sought, "*Directing SAA and/or SAA and the BRPS to provide SA Airlink within 2 calendar days with copies of all correspondence and/or documents pertaining to instructions or communications from the Government or the Minister to the board of directors of SAA, regarding placing SAA under business rescue or the prospects of rescuing the first respondent*". The basis upon which it says it seeks this relief is "*it is apparent that the purpose of the Proposed Plan is to advance an agenda other than the rescue of SAA. These documents are relevant to the true motivation behind the business rescue proceedings, and to ascertaining whether the Board held the genuine belief that the company could be rescued, at the time that the resolution placing the company into business rescue was*

[16] Founding Affidavit, para 223, pg. 93

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passed."

65. It is difficult to understand how SA Airlink can say on the one hand that there has been "undue influence" as a matter of fact yet on the other hand, it says it essentially requires discovery of documents so that it can establish this bald assertion. The assertion is made without any factual is based on conjecture.

66. Section 145(3) of the Companies Act provides that, "*The creditors of a company are entitled to form a creditors' committee, and through that committee are entitled to be consulted by the practitioner during the development of the business rescue plan.*"

67. Section 150(1) of the Companies Act provides that "*The practitioner, after consulting the creditors, other affected persons, and the management of the company, must prepare a business rescue plan for consideration and possible adoption at a meeting held in terms of section 151.*"

68. In the circumstances, the BRPS are statutorily obliged to "consult" with Government is its capacity as an "affected person", a funder and the sole shareholder in SAA.

69. I am advised that it is settled law that "consult" means that there must be sufficient information available for the affected party (e.g. the shareholders) and that they must actually be consulted. At a substantive level, consultation entails

a genuine invitation to give advice and a genuine receipt of that advice. This is precisely what occurred.

70. Government is not only the sole shareholder, but it is the funder (historically and for purposes of Post Commencement Financing). In the circumstances, it makes sense that the process of consultation and the interaction would be significantly different to that of a creditor. Without funding there would be no Business Rescue, and the reality of the matter is that funding of SAA requires the support of Government.

71. SA Airlink accuses the BRPs of doing the Government's bidding. This is denied, particularly if it is suggested that there exists some form of collusion with the Government, or a relationship that lacks independence. However, since 9 December 2019 (the date of the adoption of the resolution placing the company under business rescue) the relationship between the BRPs, on the one hand and the Department and the Minster on the other hand, has been fraught.

72. This is borne out by, for example, the SCOPA meeting (attached as annexure **DPE43**) and the draft plan where Government pulled back on supporting certain aspects.[17]

[17] FA23 page 350 paragraph 8.2.13

INTERIM RELIEF

(a) There is no right, *prima facie* or otherwise

73. SA Airlink has failed to demonstrate that it has a right to the relief that it seeks in Part of the application. It does not have a right to be treated differently to all to other "affected persons", does not have a basis to deny other creditors their rights to consider the Proposed Plan and to vote on it, and does not have a right to effectively cause the end to the business rescue proceedings.

74. To say that its rights to claim relief under Part B will be compromised if the relief is not granted is to pre-determine the outcome of the section 151 meeting.

(b) There is no injury actually committed or that can be reasonably apprehended

75. There can be no apprehension (reasonable or otherwise) of harm in the event that the Part A relief is not granted. This is because SA Airlink will be entitled to attend the meeting and assert its statutory right to propose a motion for an amendment of the Proposed Plan or an adjournment.

76. By seeking to interdict the section 151 meeting, SA Airlink also seeks to pre-determine the outcome of the meeting and in doing so deprives all the other "affected persons" of their statutory rights.

77. To say that it will be deprived of its claim to set aside the resolution placing the company in business rescue in terms of section 130(1)(a) is wrong. If the

Proposed Plan is adopted and SA Airlink feels aggrieved, it is entitled to approach the Court to have the plan set aside.

78. The statutory consequences of adopting a plan in terms of section as provided for in section 154 of the Companies Act are the same for all "affected persons." There is nothing special or different about the position of SA Airlink.

(c) The balance of convenience favours the refusal of the relief

79. I have already said that if the relief in Part A is granted this will likely mean that the business rescue of SAA will come to an abrupt end. The delay caused by Part B of the application and the consequent hamstringing of the business rescue will be catastrophic and liquidation is likely to follow with negative consequences for many people.

80. The likely consequences of liquidation include, *inter alia*:

80.1. The loss of employment of all of the employees;

80.2. Retrenched employees would not be paid the same retrenchment packages and would be limited to amounts stipulated in the Insolvency Act (the maximum amount per employee is R32 000). In addition, this payment could be delayed by many months until confirmation of an L&D account;

80.3. There would be a significant loss of value in the assets of SAA including

the brand;

80.4. All of the lessor claims (to the extent leases are not cancelled) would be due and payable (a figure of approximately R31bn);

80.5. The strategic benefit of having a going concern will be lost in its entirety. In liquidation, the airline will lose its licenses. It cannot be re-packaged later. It would have to start a new business from scratch complying with all regulatory requirements;

80.6. It would take substantially longer to finalise the process of distributing the assets under a liquidation scenario; and

80.7. A liquidation will probably result in the liquidation of the subsidiaries.

81. Whereas, if the Proposed Plan is adopted and implemented:

81.1. Approximately 1000 employees will retain their jobs with further potential employment down the line;

81.2. The employees that are retrenched will receive significantly more than in liquidation scenario (around 20 times more in certain instances);

81.3. The legacy liabilities will be taken care of, SAA can trade going forward, all the various creditors with different interests are taken into account and

the balance sheet will be cleaned-up;

81.4. The past mismanagement will have been tackled, there will no longer be a bloated employment structure which will stop the drag on cash-flow;

81.5. A new Board and new management will be imposed;

81.6. Government has expressed interest pursuing a strategic partner; and

81.7. It is essential for the region to have a functional airline system and would assist tourism which is a major employment sector.

82. I submit that there can be no doubt that the balance of convenience favours the dismissal of the relief sought in Part A of the application.

83. SA Airlinks glib offer to "expedite" Part B is no comfort at all. This is because the litigants will be at the mercy of the system. SA Airlink's own attempts to expedite its other application and the appeal bear testimony to this.

(d) There is similar protection by another remedy

84. SA Airlink has a perfectly suitable alternate remedy. It can attend the meeting and propose a motion for an amendment to the Proposed Plan and it can ask for an adjournment. This right is expressly afforded to it in the Companies Act.

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85. If the plan is adopted and it is dissatisfied then it can approach the Court and seek that the plan be set aside. If the plan is set aside it can then seek that relief that is does in Part B of the application.

CONCLUSION

86. The Minister and the Government accordingly ask that the application be dismissed with costs.

DEPONENT

Thus done to and sworn before me on this 23 day of **JUNE 2020**, the deponent having acknowledged that he knows and understands the contents of this affidavit, that he has no objection to taking the prescribed oath and that he considers the prescribed oath to be binding on his conscience.

COMMISSIONER OF OATHS

Full name: JOHANNES STEPHANUS GREEFF

Capacity: Commissioner of Oaths / Kommissaris van Ede
Practicing Attorney / Praktiserende Prokureur R.S.A

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"DPE1"

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2020/01078

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

2 March 2020

In the matter between:

SA AIRLINK (PTY) LIMITED	Applicant
and	
SOUTH AFRICAN AIRWAYS (SOC) LIMITED	First Respondent
(IN BUSINESS RESCUE)	
LESLIE MATUSON NO	Second Respondent
SIVIWE DONGWANA NO	Third Respondent

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JUDGMENT

KATHREE-SETILOANE J,

[1] On 5 December 2019 the directors of the first respondent, South African Airways (SOC) Limited (in business rescue) ("SAA") passed a resolution in terms of section 129 of the Companies Act, 71 of 2008 ("the Act") to commence business rescue proceedings and place SAA under supervision of the second and third respondents as business rescue practitioners ("the Practitioners").

[2] On 17 January 2020 SA Airlink (Pty) Limited ("Airlink") made application on an urgent basis seeking the following relief:

2.1 leave to sue SAA in terms of section 133(1)(b) of the Companies Act;

2.2 a declaratory order that monies payable to it by SAA are not "debts owed" as contemplated in section 154(2) of the Act or are not debts owed by SAA immediately before the beginning of the business rescue process, and are not debts subject to the provisions of section 154(2) of the Act; and

2.3 payment by SAA (in business rescue) and the Practitioners of the sum in excess of R510 Million. +

[3] The amounts which Airlink contends must be paid over to it by SAA in terms of its contractual obligations include the following:

3.1 The November 2019 flown revenue and related charges in the amount of R430,000, 838.80;

3.2 The 1 to 5 December 2019 flown revenue and related charges in the amount of R83, 609, 493.21 ("flown revenue");

3.3 Unflown revenue between January 2020 and June 2021 ("unflown revenue).

Background

[4] The Alliance between Airlink and SAA is governed by the following agreements which were concluded between them:

4.1 The Alliance Agreement entered into on 30 August 2000 (effective 1 September 1999), read with the First Addendum thereto dated 15 March 2018 ("the Alliance Agreement");

4.2 The Licence Agreement entered into on 30 August 2000 (effective 1 September 1999), read with the First Addendum thereto dated 15 March 2018 ("the Licence Agreement");

4.3 The Licence Agreement Africa entered into on 30 August 2000 (effective 1 September 1999), read with the First Addendum thereto dated 15 March 2018 ("the Licence Agreement Africa");

4.4 The Commercial Agreement entered into on 30 August 2000 (effective 1 September 1999), read with the First Addendum thereto dated 15 March 2018 ("the Commercial Agreement"),

(collectively, "the Alliance Agreements").

[5] The Alliance Agreements provide for an association between SAA and Airlink in terms of which Airlink-operated flights are booked through the SAA-administered computer reservation system ("CRS") with the flight designator SA8 ("the SA8 system"). Airlink contends that in terms of this arrangement, it is entirely dependent on SAA in relation to bookings made through the SA8 system and for the payment of revenue received from Airlink customers in relation to Airlink flights administered on the SA8 system.

[6] Airlink and SAA both provide air transportation services and have sought under the Alliance Agreements to attain the highest standards of quality, service and value for the benefit of their respective customers. The Alliance was to increase the opportunities of both parties to offer competitive and cost effective air transportation services within each company's area of operation. The Alliance was also to provide customers with a wider choice of transportation options for the mutual benefit of Airlink and SAA.

[7] The Alliance Agreements provide for the overarching structure of the Alliance and provide, *inter alia*, that the purpose of the Alliance relationship includes to enable Airlink and SAA jointly to offer customers a wider choice of flight options, and that the founding objectives of the Alliance are to form an integrated operation between SAA and Airlink to provide customers with convenient and seamless travel options.

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[8] The Alliance Agreements set out the basic underlying principles and framework for the implementation and operation of the Alliance. The implementing agreements are the two Licence Agreements and the Commercial Agreement. They set out the details of the rights and duties of the parties. The two companies, however, operate their flights as separate companies, with their own call signs and utilising their own technical, scheduling and financial teams.

[9] The Licence Agreement and the Licence Agreement Africa provide for the use by Airlink of SAA intellectual property in relation to bookings and flights. SAA is the proprietor of the SA8 designator. Airlink was granted a licence to use the SA8 designator and related intellectual property for its flights in return for an initial total consideration of R34,500,000 on 31 August 2000, and a continuing royalty equal to 1% of Airlink's flown revenue.

[10] The Commercial Agreement provides for, *inter alia*, the operating and financial obligations of the parties. The details of the various obligations are set out in the eleven appendices to the Commercial Agreement. Appendix 3 and 11 are of specific relevance to the issues for determination in this application. Appendix 3 deals with distribution channels, the computer reservation systems and the ticketing and revenue accounting systems that are used by Airlink. Appendix 11 in turn deals with the schedule of rates that are payable by the parties for the various services they provide to each other and the responsibility for various charges incurred.

[11] The Commercial Agreement provides that in order to achieve the objectives set out in the Alliance Agreement, and further facilitate the optimal deployment of their respective resources within the operating area, SAA and Airlink shall for the duration of the Agreement provide the support set out in Appendices 1-10 to each other on the basis and on the terms and conditions set out in the Agreement. The relationship between SAA and Airlink is multi-faceted and there are diverse support service obligations owed by both parties covering a variety of areas. The use of the SA8 designator and the ticketing and revenue accounting systems, as well as the payment obligations in relation to Airlink flown revenue, are of specific relevance to this application. These obligations are for the most part set out in Appendix 3 and Appendix 11 to the Commercial Agreement.

[12] In terms of Appendix 3 to the Commercial Agreement, the operating practice in relation to the ticketing and revenue accounting systems is as follows:

12.1 Tickets for Airlink flights are booked through the CRS operated by SAA.

12.2 Airlink flights are booked under the SA8 designator that is owned by SAA which Airlink is entitled to use.

12.3 Airlink tickets, identifiable by the SA8 designator, are issued to Airlink customers by SAA, but reflect that the flight is operated by Airlink.

12.4 Airlink's conditions of carriage are applicable to the flight and are made available to the Airlink customers by SAA at the time of booking. Airlink is the supplier to the customer in terms of the conditions to the carriage.

12.5 Airlink is also the operator of the flights.

12.6 Airlink does not provide flight services to SAA, but to Airlink's customers.

12.7 SAA collects revenue for Airlink flights through the SAA revenue collection infrastructure, which includes the International Air Transport Association ("IATA") Billing Settlement Plan ("BSP") system and internet sales facilities on behalf of Airlink and pays this over to Airlink, net of all related charges and royalties payable by Airlink in favour of SAA for such services rendered by SAA.

12.8 A substantial part of the funds which SAA collects on Airlink's behalf is in respect of charges and taxes for which Airlink is responsible to the regulators. These are passenger service charges, amounts payable to the South African Civil Aviation Authority and indirect taxes. Airlink pays the regulator all these charges.

[13] Clause 8 of Appendix 3 to the Commercial Agreement provides for SAA's revenue accounting obligations. Clause 8 provides in relevant part:

'8.1 SAA will provide Revenue Accounting and Ticket Audit functions for Airlink's sale transactions. In order to allow Airlink to to reconcile its revenues, SAA will provide monthly electronic transfers to Airlink of all Airlink's revenue Accounting and Ticket data, including , but not limited to ticket data, sales data, prorates data, BSP data, etc.

...

8.4 SAA will claim revenues earned from other airlines within its normal interline billings on behalf of Airlink. All IATA standards, rules and procedures will be maintained.

8.5 SAA will provide Airlink with all revenue data accounting data relative to its operation.

...

8.13 Payments by SAA to Airlink with respect to all Airlink tickets lifted and processed by SAA shall be made on the basis that a prepayment shall be established and made by SAA to Airlink based on the following principles:

8.13.1 SAA will provide Airlink with a loan equal to advance sales as per the formula laid out in Appendix 11. It is agreed that the amount advanced to Airlink will be revised at monthly intervals, with the first period starting on 01 September 1999.

8.13.2 Payment in respect of Airlink tickets flown will be paid on the 7th working day of the relevant month.

8.13.3 Payment in respect of the balance between the above and the revenue that has been processed for the given month of operation will

be paid over on the 15th (fifteenth) working day of the following month by direct bank deposit.

8.13.4 Earned revenues shall include Airlink's lifted coupons, MCO's and excess baggage. SAA has the right to offset from amounts paid to Airlink any amounts due to SAA.'

[14] In addition to the sub-clauses referred to above, Airlink relies on the following sub-clauses of Appendix 3, clauses which it contends points to an agency relationship between it and SAA:

Clause 6.1 which provides:

"SAA will provide to customers that wish to travel on Airlink scheduled flights, ticket services at all airport and off-airport SAA worldwide ticketing locations."

Clause 6.1.4 which provides:

"...SAA will be entitled to any sales commission for the sales made on AIRLINK scheduled services at any airport stations or office handled by SAA, similar to a travel agent."

Clause 6.2 which provides:

"SAA reservations and ticketing personnel will handle on behalf of Airlink; all requests for prepaid ticket advice and ticket by mail requests. Should Airlink make these request, Airlink will pay a tariff for this facility as laid out in Appendix 11."

Clause 7.2 which provides:

> "SAA will ticket on the services of Airlink through its entire agency network of BSPZA, which includes the Republic of South Africa, Swaziland, Lesotho, Namibia, Botswana, Zimbabwe and Mauritius. It will also include any other country that may join BSPZA in the future. This constitutes all agents who have been issued with carrier identification plates of SAA."

[15] The payment process envisaged in clause 8.13 of Appendix 3 to the Commercial Agreement is explained by Airlink, in its founding affidavit as follows: payments by SAA to Airlink, with respect to all Airlink tickets processed in relation to Airlink flights under the SA8 designator, are made on the basis that a cash neutrality payment for a particular month is made by SAA to Airlink, in advance of that month, in terms of Appendix 11 to the Commercial Agreement. This is to ensure that some of Airlink's cash flow constraints that are occasioned by SAA temporarily holding onto Airlink's flown revenue are mitigated. The passengers fly the Airlink flights in month X. Five working days after the end of month X, SAA discloses to Airlink information pertaining to the flown revenue and generates an invoice from Airlink to SAA, in the form of a statement of revenue accounting. Payment in respect of Airlink's flown revenue (being Airlink's revenue held by SAA in respect of Airlink tickets flown in month X, minus SAA commission and fees, and excluding taxes and charges due to regulators and ancillary revenue collected for Airlink) is then required to be made by SAA on the 7th

working day of the month following month X. Payment in respect of the balance of the amounts held by SAA for Airlink (being the fuel levies, charges and taxes, and additional revenue amounts, collected by SAA) are also calculated on the basis of SAA's disclosures of flown revenue, and SAA generates a statement of revenue accounting from Airlink to SAA in this regard by typically the 12th working day of the month following month X, and the amounts are required to be paid over to Airlink on the 15th working day of that month.

[16] The tickets in respect of aircraft flights operated by Airlink (SA8 tickets) are sold on SAA's online CRS. Airlink contends that that in terms of this arrangement, SAA effectively receives all revenue collected from the sale of SA8 tickets via the IATA BSP, but (subject to deducting its fees, royalties and the amounts which Airlink is obliged to bear) is then required to transfer such revenue to Airlink.

[17] SAA specifically denies Airlink's allegation that SAA is required to "transfer" to Airlink the revenue collected from the sale of the tickets as it suggests that the revenue belongs to Airlnk. SAA also denies that the monies paid by passengers into the bank accounts of SAA are somehow "earmarked", "belong to" or held on behalf of Airlink in trust.

[18] As concerns the monies received into SAA's bank accounts, SAA contends that the situation is simply that passengrs of SAA, Airlink and SA Express book through the same system, namely SAA's CRS. All the debit and credit card payments by these passengers in respect of tickets purchased on the 083 designated code are made into SAA's

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bank accounts (the bank accounts would depend on which country the passenger is purchasing the ticket from). SAA makes payment of the agreed expenses on behalf of Airlink (and SA Express). SAA accounts to Airlink (and to SA Express) and makes payment of the net amount, as calculated in accordance with the Alliance Agreement.

[19] SAA states that up until the date of commencement of SAA's business rescue proceedings, these payments to Airlink were made out of SAA's corporate account held with The Standard Bank of South Africa Limited. It contends that there is a debtor-creditor relationship by virtue of money lent (i.e. the prepayment in terms of clause 8.13.1 of Appendix 3) and that, depending on the accounting, Airlink becomes a creditor of SAA in respect of the flown revenue, and it is then obliged to make payment of amounts to Airlink in terms of the Alliance Agreement. Consequently, so it asserts, the amounts which Airlink claims to be payable to it, are debts for the purposes of SAA's business rescue and fall to be dealt with in accordance with its business rescue proceedings.

The flown revenue

[20] The Practitioners were appointed on 5 December 2019 and 18 December 2019, respectively. Airlink explains that on 6 December 2019 and 18 December 209, SAA generated statements which identify the "flown revenue received by SAA on behalf of Airlink during November 2019 and up to 5 December 2019, being the date that SAA was placed under business rescue. Airlink makes the point, common cause, that SAA has not paid the amounts owing to it in respect to flown

revenue. However, it is common cause that in terms of an Ad Hoc Arrangement (discussed more fully below), SAA has been paying over to Airlink flown revenue amounts for tickets sold from 6 December 2019 on a daily basis.

[21] Airlink alleges that the Practioners have refused to pay over to Airlink the amounts set forth in the 6 December 2019 statement, the 18 December 2019 statement and the December 2019 revenue and charges ("the relevant amounts") on the basis that these amounts constitute pre-commencement debts. Notwithstanding that the relevant amounts were generated up to 5 December 2019, and these debts were incurred before the date of business rescue, Airlink contends that the relevant amounts were not a "debt owed" as contemplated in section 154(2)[1] and are not precommenement debts. Airlink's contention, in this regard, is that because the relevant amounts owing by SAA to Airlink was only due for payment after the date of business

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[1] Section154 of the Act provides:

Discharge of debts and claims

(1) A business rescue plan may provide that, if it is implemented in accordance with its terms and conditions, a creditor who has acceded to the discharge of the whole or part of a debt owing to that creditor will lose the right to enforce the relevant debt or part of it.

(2) If a business rescue plan has been approved and implemented in accordance with this Chapter, a creditor is not entitled to enforce any debt owed by the company immediately before the beginning of the business rescue process, except to the extent provided for in the business rescue plan.

rescue, it is a post-commencement rather than a pre-commencement debt.

[22] SAA disputes the amounts claimed by Airlink in respect of the flown revenue. Airlink seemingly concedes that there is a dispute in relation to the December 2019 revenue and charges.

Unflown revenue

[23] In relation to the unflown revenue Airlink contends that because these amounts are held by SAA on behalf of Airlink, they are not debts at all but rather funds owned by Airlink. And to the extent that they are considered by this Court to constitute debts, it argues that they were not owing immediately prior to the commencement of business rescue, but only in the period between January 2020 and June 2021.

[24] SAA denies that the funds in respect of the of the unflown revenue are "not debts" and that these funds are "owned by" and "held on behalf of" Airlink in trust. SAA also disputes the amount claimed in terms of the unflown revenue and denies that any amounts which may be owed in terms of the unflown revenue do not amount to pre-business rescue debts.

Breach of the Alliance Agreements

[25] On 10 December 2019, after SAA was placed in business rescue, Airlink wrote to SAA and Mr Matuson terminating the Alliance Agreements in terms of clause 15.2.1 of the Alliance Agreement and

providing 6 months' written notice to that effect. The Alliance Agreements would thus terminate on 10 June 2020. Airlink reserved its right to terminate the Alliance Agreements for cause at any date prior to the expiry of the 6 month period.

[26] When SAA then failed to make payment of the November 2019 flown revenue by 10 December 2019, Airlink sent a further letter to SAA and Mr Matuson on 11 December 2019 notifying SAA that Airlink had the right under clause 15.1.4 of the Alliance Agreement to terminate the Alliance Agreements with immediate effect as it constituted a Material Default. Airlink gave SAA seven days' notice to remedy the default and make payment of the amounts to Airlink, failing which the Alliance Agreements were to be considered immediately terminated, without further notice.

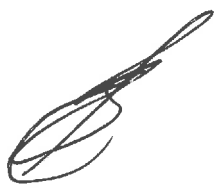
[27] On 12 December 2019, SAA and Airlink entered into the Ad Hoc Arrangement (referred to above) in terms of which it was agreed that SAA would make payment of the flown revenue and other amounts owed under the Alliance Agreements for the period 6 to 11 December 2019 on 12 December 2019, and that from 12 December 2019 onwards, on a daily basis, Airlink would provide invoices in relation to flown revenue and other amounts due for the previous day's flown revenue. Airlink agreed to suspend the termination of the Alliance Agreements until 17 December 2019 or the date of termination of the Ad Hoc Arrangement, whichever was the earlier.

[28] On 17 December 2019, Airlink sent a letter to SAA and Mr Matuson demanding that SAA make payment of the November 2019 and the 1 to 5 December 2019 flown revenue forthwith, failing which Airlink would have no choice but to institute legal proceedings for the recovery of all amounts to which Airlink is entitled. Mr Matuson was also requested to consent to the institution of this application by close of business on 20 December 2019.

[29] The Practitioners had not responded to the request for consent to institute court proceedings. On 6 and 7 January 2020, Mr Foster had a meetings with Mr Matuson and Mr Oertel. At the January meeting, Mr Matuson and Mr Oertel indicated that Airlink was unlikely to recover any substantial amounts from SAA in respect of the above claims. They also confirmed that they would be happy to proceed to decide the issues between Airlink and SAA by way of an expedited arbitration.

[30] On 12 January 2020, at a further meeting with Mr Matuson and Mr Oertel, they indicated to Mr Foster that they were no longer interested in pursuing an expedited arbitration and that Airlink could institute legal proceedings in court should it wish to do so. It became apparent to Mr Foster at this meeting that there was little point in continuing to engage with SAA, and that Airlink should proceed to exercise its legal rights as a matter of expedition.

[31] SAA points out in its answering affidavit that the Practitoners were prepared to consider expedited arbitration proceedings, however, after having considered the position, it became apparent that this would have



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defeated the purpose of business rescue proceedings and would have resulted in an unfair process of allowing one creditor to institute proceedings and not others. The Practitioners formed the view that any dispute with Airlink would be more appropriately dealt with in terms of a dispute resolution process provided for in the business rescue plan.

Whether the moratorium in section 133 of the Act applies?

[32] In its founding affidavit, Airlink recognises that the enforcement of the payment of the amounts claimed is subject to the general moratorium on legal proceedings against a company in business rescue. It therefore sought leave of this Court, in terms of section 133(1)(b) of the Act, to bring these proceedings as the Practitioners had failed to give written consent to them being brought.

[33] The general moratorium on legal proceedings against SAA commenced on 5 December 2019. Section 133(1)(b) of the Act provides that no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except in certain circumstances, such as with the written consent of the practitioner or the leave of the court.[2]

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[2] Section 133(1) of the Act provides:

(1) During business rescue proceedings, no legal proceedings, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except –

[34] Although, in its notice of motion, Airlink seeks leave from this Court to commence legal proceedings in terms of section 133(1)(b) of the Act against SAA and the Practitioners, Airlink changed tact at the hearing of the application by submitting that section 133(1)(b) of the Act has no application to these proceedings, as the ticket proceeds constitute property which is unlawfully held by SAA.

[35] In support of this argument Airlink alleges that SAA holds the flown and unflown revenue as an agent of Airlink; that SAA has been given a mandate to collect Airlink's revenue and to pay it over to Airlink in exchange for payment of royalties and service charges; and that such revenue at all times belongs to Airlink because it was paid in relation to Airlink flights. Airlink, accordingly, contends that the agency relationship is premised on the fact that: (a) SAA sells Airlink tickets; (b) the contract for carriage is between Airlink and the passenger and

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(a) with the written consent of the practitioner;

(b) with the leave of the court and in accordance with any terms the court considers suitable;

(c) as a set-off against any claim made by the company in any legal proceedings, irrespective of whether these proceedings commenced before or after the business rescue proceedings began;

(d) criminal proceedings against the company or any of its directors or officers;

(e) proceedings concerning any property or right over which the company exercises the powers of a trustee; or

(f) proceedings by a regulatory authority in the execution of its after written notification to the business rescue practitioner.'

not between SAA and the passenger); (c) Airlink is the operator of the flights; (d) the tickets issued to the passenger reflect that the flight is operated by Airlink; (e) Airlink's conditions of carriage are applicable to the flight and are made available to the Airlink customers by SAA at the time of booking. These conditions of carriage set forth clearly that Airlink is the supplier to the customer.

[36] In addition, it argues that SAA is authorised to receive payments from the Airlink customers and to pay those amounts (less deductions due to SAA) to Airlink and that SAA receives the ticket proceeds on behalf of Airlink in its capacity as Airlink's agent. This, it submits, appears from the operating practice described above; and clause 8.1, 8.4, 8.5 and 8.13 of the Appendix 3 to the Commercial Agreement.

[37] Airlink contends further that acting in terms of the Commercial Agreement, SAA acts as Airlink's agent in relation to the receipt and holding of the ticket proceeds and holds the ticket proceeds as agent in trust. In addition it argues that the ticket proceeds are "warehoused" (temporarily retained by SAA) for a specific purpose, and should have been "earmarked" by SAA. SAA cannot, so it contends, use the funds for any purpose other than that permitted under the Commercial Agreement. Accordingly, it argues that Airlink has a superior claim to the ticket proceeds and the payments (monies) may only be used for that purpose. Hence, it contends that SAA is obliged to pay the ticket proceeds (less its own commission and amounts payable on behalf of

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Airlink) to Airlink and it has no right of retention of the ticket proceeds beyond the date for payment to Airlink.

[38] SAA disputes these allegations. Its contentions may be summed as follows: All payment of flight tickets are made into SAA's bank accounts. The monies paid to those accounts become the property of the respective banks.[3] It is not suggested by Airlink that the banks agreed to conduct accounts on the basis that SAA is Airlink's agent.[4] No primary facts are advanced that the funds in SAA's bank accounts can be identified as having been reserved for or "belonging" to Airlink by agreement with the banks or that the account holder (SAA) is not entitled to deal with those funds.[5]

[39] Whether an agency relationship exists between the parties is a matter of law. Thus, the relationship between the parties and whether an agency relationship exists must be construed from the terms of the Alliance Agreement read as a whole.[6] In determining the nature of the contractual relationship between SAA and Airlink, the Court must have regard to the Alliance Agreement read as a whole. No part of the agreement should be looked at in isolation. As is apparent from both the Alliance Agreement and the Commercial Agreement, SAA provides support services to Airlink as does Airlink to SAA. They provide these services as independent contractors and not as agent and principal,

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[3] The relationship between the bank and SAA is one of debtor and creditor. *Absa Bank Ltd v Intensive Air (Pty) Ltd & Others* 2011 (2) SA 275 (SCA) at par 20.
[4] *Intensive Air* at par 21
[5] *Intensive Air* at par 24
[6] *Lind v Spicer Bros. (Africa) Ltd* 1917 AD 147 AT 151

albeit that there relationship may appear to resemble an independent agent in so far as the sale of tickets is concerned.

[40] The definition of the terms "Airlink Support" and "SAA Support" respectively, in the Commercial Agreement make it clear that the relationship between Airlink and SAA is one of co-operation and support and provision of services. The term "SAA support" is defined as follows in the Commercial Agreement:

> "...means the areas of co-operation and facilities and services to be provided by SAA to Airlink in support of the Airlink Licensed Flights as set out in Appendices 1to 10."

[41] In addition, under the title "Support", clause 7 of the Commercial Agreement provides:

> "In order to achieve the objectives set out in the Alliance Agreement, and further to facilitate the optimal deployment of their respective resources within the Operating Area –
>
> 7.11 SAA shall for the duration of this Agreement provide the SAA support set out in Appendices 1 to 10 hereto to Airlink on the basis and on the terms and conditions set out in this Agreement hereto; and;
>
> 7.1.2 Airlink shall for the duration of this Agreement provide the Airlink Support set out in Appendices 1 to 10 hereof to SAA on the basis and on the terms and conditions set out in this Agreement."

[42] It is clear from these sub-clauses read in the context of the Alliance Agreement as a whole that the relationship between Airlink and SAA is one of the provision of support services to each other. As part of this support relationship, SAA sells tickets on behalf of Airlink and receives payment for those tickets in its various bank accounts across the world and then pays over the proceeds in accordance with clause 8.13 of the Appendix 3 to the Commerical Agreement. As explained on behalf of SAA, in its answering affidavit, in relation to the monies received into its bank accounts, passengers of SAA, Airlink and SA Express book through the same system, namely SAA's CRS. All the debit and credit card payments by these passengers in respect of tickets purchased on the 083 designated code are made into SAA's bank accounts (the bank accounts would depend on which country the passenger is purchasing the ticket from). SAA makes payment of the agreed expenses on behalf off Airlink (and SA Express). SAA accounts to Airlink (and to SA Express) and makes payment of the net amount, as calculated in accordance with the Alliance Agreement.

[43] Up until the date of commencement of SAA's business rescue proceedings, these payments to Airlink were made out of SAA's corporate account held with Standard Bank. By virtue of the monies lent (i.e. the prepayment from SAA to Airlink in terms of clause 8.13.1 of Appendix 3 to the Commercial Agreement) and depending on the accounting, Airlink becomes a creditor of SAA in respect of the flown revenue, thus giving rise to a debtor-creditor relationship.

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[44] In respect of the unflown revenue, in particular, SAA explains that Airlink initially paid these funds to SAA for flights that would be flown, and they went into its bank accounts, hence Airlink was SAA's creditor in respect of monies owing by SAA to Airlink. If that claim increased because some tickets already paid for were not flown, it meant that Airlink became a creditor of SAA for a greater amount.

[45] Airlink alleges "that SAA was obliged to deposit the amounts into a separate bank account". Yet it has failed to point to a single clause in the Alliance Agreements in support of this allegation. Nor for that matter is there a single clause in the Alliance Agreement that Airlink has been able to point to, which obliges SAA to "warehouse" the revenue from the Airlink ticket sales and use it for a specific purpose. As correctly contended for by SAA, it was under no obligation in terms of the Alliance Agreement to keep the amounts owing by it to Airlink in separate bank accounts or to use it for the specific purpose of transferring it to Airlink.

[46] Significantly, Airlink has also been unable to point to a single clause in the Alliance Agreement which provides that all monies collected by SAA from the sale of Airlink's tickets in terms of thereof shall be the property of Airlink and shall be held in trust for Airlink or on behalf of Airlink.

[47] Hence, that SAA is paid an (agents) commission for its ticket sales and that its staff accept reservation queries on behalf of Airlink, or that it collected monies form other international airlines on behalf of Airlink, does not make the relationship one of agency. Crucially, Airlink makes

no mention of a single clause in the Alliance Agreement that indicates that SAA holds the proceeds from the ticket sales on behalf of Airlink in trust.

[48] That SAA sold Airlink's tickets and earned commission as a travel agent does not without more, elevate its status to that of an agent who is expressly bound to hold monies in trust on behalf of its principal, and to place the proceeds in a trust account or in a bank account separate from its own. As I see it, none of Airlink's allegations support the proposition that the applicant is entitled to payment on any basis other than as a concurrent creditor of the first respondent.

[49] More particularly, there is no allegation of an agency agreement to support the applicant's claim. Each agreement has a standard "whole agreement" and "no variation" clause.[7] In addition, the Commercial and Licence agreements include a clause excluding an agency relationship which provides:[8]

> "The relationship between the Parties shall be that as between independent contractors, and accordingly no provision of this Agreement shall constitute any partnership or agency between the Parties, and neither Party shall have any authority to bind the other Party to third persons, save as may be expressly provided to the contrary herein or in the Alliance Agreement."

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[7] Clause 25 of the Alliance Agreement; Clause 26 of the Licence Agreement; Clause 26 of Licence Agreement Africa; Clause 13 of the Commercial Agreement; *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere* 1964 (4) SA 760 (AD) at 766B-767D; *Brisley v Drotsky* 2002 (4) SA 1 (SCA) at paras 1, 6-10, and 11-34.

[8] Clause 16.2 of the Licence Agreement; Clause 16.2 of the Licence Agreement Africa and clause 12.2 of the Commercial Agreement.

[50] I am, accordingly, of the view that the flown and unflown revenue from the sale of Airlink's tickets owing by SAA to Airlink did not become monies owned by Airlink or moneys held by SAA in trust on behalf of Airlink. There is simply no merit in Airlink's contention that the monies paid by passengers into the bank account of SAA are somehow "earmarked", "belong to" or "held on behalf of Airlink".

[51] By the same token, and to the extent that Airlink claims that it has a superior claim to the proceeds in SAA's bank account by virtue of being the owner of the ticket proceeds in SAA's bank accounts, this is not a case in which the account holder, the bank and a third person agreed that the funds in the bank account belonged to that third person and were to be held for a specific purpose.[9] Even if the bank has knowledge of the alleged claims of Airlink, it is not bound to subordinate its interests in the absence of agreement between the bank, SAA and Airlink.[10] No allegation of any bank agreeing to the structure is made or shown.

[52] Accordingly, SAA did not act as Airlink's agent but became obliged, from time to time as debtor, to make payments to Airlink in terms of the Alliance Agreement. Airlink contends that the words "any debt" in section 154(2) of the Act must be interpreted restrictively and that it "... must be an obligation to pay a monetary debt as part of a debtor and creditor relationship, and not any other obligation to perform under a contract." This is inconsistent with the purpose of the Act. It is

[9] *Joint Stock Co. Varvarinskoye v Absa Bank Ltd & Others* 2008 (4) SA 287 (SCA) at par 36
[10] *Echo Petroleum* at par 31

established law, in the context of prescription, that debt includes something owed or due, something (as money, goods or service) which one person is under an obligation to pay or render to another or a liability or obligation to pay or render something.[11] Hence, the classification of the debt is irrelevant. If a debt was owing prior to the commencement of business rescue (whether contractual or not), then it falls to be dealt with in the business rescue proceedings in accordance with the provisions of the Act and the business rescue plan.

[53] The amounts claimed by Airlink in this application are in respect of the purchase of tickets prior to the commencement of business rescue proceedings. They are pre-commencement debts in respect of which Airlink is required to submit a claim in the business rescue proceedings. The dates on which invoices and/or statements are rendered, as well as the dates on which the amounts become contractually due, are simply irrelevant for purposes of determining whether a debt constitutes a pre or post- business rescue debt. All things considered, the amounts which Airlink claims are due and payable to it, are debts for the purposes of SAA's business rescue and fall to be dealt with in accordance with its business rescue proceedings.

[54] In the circumstances, I am of the view that SAA's application is misconceived. Airlink is a concurrent creditor in the business rescue proceedings of SAA and should, as all other creditors, await the

[11] *Cook v Morrison & Another* 2019 (5) SA 51 (SCA) at par 14-15

business rescue plan and the section 151[12] meeting, to consider its rights as against SAA. It does not have a superior claim to the revenue from SAA's sale of its tickets.

[55] In the premises, SAA (in business rescue) has not acted unlawfully in retaining the proceeds from the sale of the tickets. In view of this conclusion, Airlink is required in terms of section 133(1)(b) of the Act to seek leave from this Court to commence legal proceedings to enforce payment in terms of the contractual obligations owed by SAA to Airlink, in terms of the Alliance Agreement, prior to the commencement of SAA's business rescue proceedings.

Leave to commence legal proceedings

[56] Section 133(1) of the Act provides that legal proceedings, including enforcement action, against a company in business rescue proceedings

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[12] Section 151 of the Act provides:

'(1) Within 10 business days after publishing a business rescue plan in terms of section 150, the practitioner must convene and preside over a meeting of creditors and any other holders of a voting interest, called for the purpose of considering the plan.

(2) At least 5 business days before the meeting contemplated in subsection (1), the practitioner must deliver a notice of the meeting to all affected persons, setting out-

(a) the date, time and place of the meeting;

(b) the agenda of the meeting;

(c) a summary of the rights of affected persons to participate in and vote at the meeting.

(3) The meeting contemplated in this section may be adjourned from time to time, as necessary or expedient, until a decision regarding the company's future has been taken in accordance with section 152 and 153.'

or in relation to property belonging to the company, or lawfully in its possession, may be commenced if the consent of the Practitioners or the leave of the Court is obtained.

[57] The moratorium on legal proceedings against the company under business rescue is of cardinal importance since it provides the crucial breathing space or a period of respite to enable the company to restructure its affairs.[13] The moratorium allows the business rescue practitioner, in conjunction with the creditors and other affected parties, to formulate a business rescue plan designed to achieve the purpose of the process.

[58] An applicant for an order seeking leave to institute legal proceedings against a company in business rescue in terms of section 133(1) must establish a *prima facie* case against the company and give reasons why the proceedings were necessary and appropriate.[14]

[59] A *prima facie* case would be established only where the averments revealed a cause of action or a triable issue.[15] In addition, the Court has a discretion to grant leave to proceed, which should be exercised judicially and be guided by the interest of justice.[16] The purpose and object of section 133, read with the context of the Act as a whole, should be considered. Fairness and convenience are fundamentally

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[13] *Cloete Murray & Another NNO v FirstRand Bank Ltd t/a Wesbank* 2015 (3) SA 438 (SCA) at paras 12-14
[14] *Arendse & Others v Van der Merwe & Another NNO* 2016 (6) SA 490 (GJ) at par 16 and paras 26-28
[15] Arendse at par 26-27 and par 35
[16] Arendse at par 11

important considerations.[17] Factors identified in *Arendse* as relevant to the consideration include:

59.1 the effect that the grant or refusal of leave would have on the rights of the applicant as opposed to other affected persons and relevant stakeholders;

59.2 the impact that the proposed legal proceedings would have on the wellbeing of the company and its ability to regain its financial health; and

59.3 whether the grant of leave would be inimical to the object and purpose of business rescue proceedings as set out in sections 7 and 128 of the Act.

[60] SAA contends that Airlink has not addressed any of the issues in its founding affidavit and has accordingly failed to make a case for leave in terms of s133(1)(b) of the Act. An applicant seeking leave to commence legal proceedings in terms of section 133(1)(b) of the Act bears the onus of satisfying the court that it is in the interests of justice to grant it leave to commence legal proceedings against a company in business rescue. It therefore has a duty to place evidence before the court in its founding affidavit that is sufficient to discharge that onus.

[61] Airlink sets out its case for this relief at paragraph 92 to 101 of the founding affidavit. In a terse concluding paragraph, it is stated on behalf of Airlink that the Court is requested to hear the application in order to

[17] *Arendse* at par 11

prevent irreparable harm to Airlink as a result of the unlawful refusal of the Practitioners to pay over the substantial amounts that constitute Airlink's revenue. In addition, it avers that SAA is essentially using Airlink's money when it has no legal right to do so and it must surrender these funds forthwith as it is in the interests of justice to do. No facts are provided in support of the sweeping contention that Airlink will suffer irreparable harm absent payment from SAA should leave to commence these proceedings be refused.

[62] Moreover, what is starkly absent is even a single allegation that conforms to the requirements articulated by this Court in *Arendse*. No case is made out in its founding affidavit which distinguishes Airlink's claim from other creditors who are subject to the moratorium, and why Airlink should be given preferential treatment to them. Furthermore, Airlink makes out no case which discloses the impact of the grant of leave to commence legal proceedings against SAA in business rescue, on the one hand, and the refusal of the grant, on the other, on Airlink, SAA and every other concurrent creditor of SAA.[18]

[63] Lastly, Airlink fails to make out a case on the the impact that the proposed legal proceedings would have on the wellbeing of SAA and its ability to regain its financial health; and whether the grant of leave would be inimical to the object and purpose of business rescue proceedings as set out in sections 7 and 128 of the Act. In light of this

[18] *Cloete Murray & Another NNO v FirstRand Bank Ltd t/a Wesbank* 2015 (3) SA 438 (SCA) at paras 12-15; *Arendse & Others v Van Der Merwe & Another NNO* 2016 (6) SA 490 (GJ) at paras 16 and 28.

omission, there was no onus on the Practioners to adduce evidence that would establish hardship on SAA or other stakeholders if leave to commence proceedings is granted or that the grant of leave would be inimical to the objects of the business rescue proceedings.

[64] For these reasons, I consider Airlink to have failed to make out a case to lift the moratorium on legal proceedings against SAA in business rescue. I accordingly exercise my discretion against granting Airlink leave to commence legal proceedings against SAA in business rescue.

Costs

[65] I see no reason why costs should not follow the result.

Order

[66] In the result, I make the following order:

1. The application is dismissed with costs including the costs of two counsel were same was employed.

F KATHREE-SETILOANE
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Counsel for the applicant:	Adv AR Bhana SC (With Adv LM Spiller)
Instructed by:	Webber Wentzel

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Counsel for the respondents:	Adv Suttner SC (With J E Smit)
Instructed by:	Edward Nathan Sonnebergs Inc
Date of hearing:	11 February 2020
Date of Judgment:	02 March 2020

"DPE2"

SOUTH AFRICAN AIRWAYS

South African Airways
Airways Park, Jones Road
OR Tambo International Airport
Johannesburg, South Africa.

Private Bag X13
OR Tambo International Airport
1627

To all Affected Persons

17 June 2020

NOTICE OF MEETING OF CREDITORS AND OTHER HOLDERS OF A VOTING INTEREST IN TERMS OF SECTION 151 OF THE COMPANIES ACT 71 OF 2008, AS AMENDED ("THE COMPANIES ACT")

1. Notice is hereby given to all affected persons of South African Airways (SOC) Limited (in business rescue) ("the Company") of the meeting to determine the future of the Company in terms of section 151 of the Companies Act ("S151 Meeting") to be held as follows:

   Date: 25 June 2020

   Time: 11:00

   The Section 151 Meeting will be held electronically. A hyperlink providing access to the Section 151 Meeting will be circulated prior to the 25 June 2020.

2. In terms of section 151 and 152 of the Companies Act, the agenda for the S151 Meeting is as follows:

   2.1. An introduction of the proposed Business Rescue Plan ("the Plan") for consideration by creditors and a presentation of the salient terms and conditions of the Plan.

   2.2. Confirmation that the Joint Business Rescue Practitioners ("the BRPs") continue to believe there remains a reasonable prospect of the Company being rescued as contemplated in the Companies Act.

   2.3. The consequences for creditors if the Plan is adopted or rejected.

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2.4. A presentation by the employees' representative if they should wish to make such presentation.

2.5. Discussions and the conduction of a vote on the following motions:

2.5.1. To amend the Plan, in any manner moved and seconded by holders of creditors' voting interests, and satisfactory to the BRPs; or

2.5.2. Directing the BRPs to adjourn the meeting in order to revise the Plan for further consideration.

2.6. Determination of the vote for preliminary approval of the Plan (as amended if applicable) pursuant to an adjournment.

2.7. Results of the preliminary vote.

2.8. Report on the outcome of the vote for the adoption of the Plan.

3. Summary of rights of Affected Persons to participate in and vote at the Meeting:

3.1. Creditors, other holders of a voting interest and employees of the Company are referred to sections 144, 145 and 146 of the Companies Act, and are encouraged to seek independent legal advice in respect of their rights.

3.2. In terms of section 145 of the Companies Act, Employees –

3.2.1. Are entitled to be present at the S151 Meeting and make a submission before a vote is conducted on the Plan;

3.2.2. Are entitled to vote with creditors on a motion to approve the Plan to the extent that the employee is a creditor of the Company; and

3.2.3. If the Plan is rejected, are entitled to propose the development of an alternative plan or present an offer to acquire the interests of other creditors as provided for in section 153 of the Companies Act.

3.3. In terms of section 145 of the Companies Act, Creditors –

3.3.1. Have a right to vote to amend, approve or reject the Plan;

3.3.2. If the Plan is rejected, have a further right to propose the development of an alternative plan or present an offer to acquire the interests of other creditors as provided for in section 153 of the Companies Act; and

3.3.3. Whether secured or unsecured creditors, having a voting interest

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equal to the value of the amount owed to that creditor by the Company.

3.4. In terms of section 146 of the Companies Act, the Shareholder –

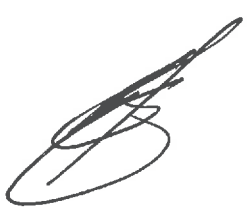
3.4.1. Is not entitled to vote to approve or reject the proposed Plan as it does not alter the rights associated with the class of securities held by the shareholder; and

3.4.2. If the proposed Plan is rejected, is entitled to propose the development of an alternative plan or present an offer to acquire the interests of other creditors as provided for in section 153 of the Companies Act.

4. Creditors should please note that should they for any reason be unable to attend the electronic meeting, they are entitled to exercise their vote by proxy form, which proxy form must be forwarded to BRPs prior to 17:00 on 24 June 2020.

5. Affected Persons are requested to provide any further questions and/or proposed amendments to the BRPs prior to the S151 Meeting so that the BRPs can consider and address same prior to the S151 Meeting to plan@saabusinessrescue.co.za.

6. Completed forms of proxy must be emailed to plan@saabusinessrescue.co.za.



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"DPE3"

public enterprises
Department:
Public Enterprises
REPUBLIC OF SOUTH AFRICA

EXPRESSION OF INTEREST FOR NEW AND RESTRUCTURED SAA

PRETORIA, 23 June 2020 - The South African government, during this period of business rescue for South African Airways (SAA), has received unsolicited proposals from private sector funders, private equity investors and potential airline partners for a new national airline that must emerge from the SAA business rescue process.

Government is intent on pursuing credible proposals for investment and strategic partnerships with the private sector, as well as equity participation for employees. Such partners will also introduce technical, financial, and operational expertise.

As the Shareholder on behalf of government, the Department of Public Enterprises (DPE), will engage interested parties constructively in pursuit of government's national developmental and strategic agenda to rebuild our economy in a post-COVID-19 era.

Government has expressed its intent and commitment to fundamentally restructure and transform SAA into a viable, sustainable and competitive national carrier. The broader aviation industry and the passenger air transport sector specifically, is essential for servicing and growing economic sectors, including tourism, business connectivity and cargo carriage.

The DPE is cognisant that airlines across the world have been facing severe drop in flights due to COVID 19, leading to financial and other pressures. Therefore, there are possibilities for airline partnerships to improve scale and scope and ensure continuity of value creation to the South African economy and long-term sustainability of the aviation industry.

Government is committed to support the formation of such a new airline with no legacy financial and operational issues which will be managed by competent, competitive and skilled personnel who have strategic and technical capabilities which are critical to the success of the new carrier.

Government would like to see the following characteristics of the new airline as envisaged in the new Business Rescue Plan:

- An efficient and modern aircraft fleet with hybrid density options acquired at competitive rates resulting in cost efficiency;
- An offering with the right routes, at the right times and at competitive prices;
- A motivated workforce, ensuring productivity and efficiency and determined to increase market share;
- A customer-centric airline designed to be lean, technology savvy, digitally native and agile to service all market segments;
- Appointment of an effective, competent, and empowered Board of Directors with appropriate aviation experience.

ENDS.

For more enquiries: Sam Mkokeli 0820842051

"DPE4"

PMG PARLIAMENTARY MONITORING GROUP

Business rescue plans for SAA: Engagement with Public Enterprises Ministry & Business Rescue Practitioners

Public Accounts (SCOPA)

15 May 2020

Chairperson: Mr M Hlengwa (IFP)

Meeting Summary

[LIVE] Public Enterprises Minister Gordhan briefs SCOPA on SAA, SA Express

The joint committee discussed the business rescue plans for SAA. It was briefed by the Department of Public Enterprises, the Ministry and the business rescue practitioners.

MPs were informed that SAA was unable to meet its financial obligations including payment of salaries. The Department assisted management to put in an application to the UIF for the payment of salaries. There was a partial payment via the UIF to the employees. The business was in a difficult position to show that it was still operational. The Minister stated that the covid-19 pandemic had a devastating impact on the aviation industry both globally and locally. South African Airways had felt the sting of the pandemic and the closures of international borders. The Minister also confirmed that the business rescue practitioners had not produced a business rescue plan. The Department had received a draft business plan but rejected it because it was extremely inadequate. The court action taken against SAA was also discussed. The court action arose from the business rescue practitioners wanting to proceed with the retrenchment process without a business rescue plan. The court ordered that the business rescue practitioners must present a business rescue plan before beginning a retrenchment process.

The business rescue practitioners highlighted the development of the business restructuring plan, the business restructuring plan timeline, the contents of the draft business restructuring plan, the utilisation and management of funds and the key actions taken by the business restructuring practitioners to date. The impact of covid-19 was also discussed. The business rescue practitioners stated that a "winding-down" option would be the one suggested over the restructuring option.

The Committee was concerned by both presentations. They were aware that SAA was already in trouble when it was hit by the impact of the covid-19 pandemic. The Committee held a very dim view on delays and the business rescue practitioners needed to be aware of that. The Committee stated that the constant shifting of goal posts was unacceptable. The South African Airways headache cannot continue to be a permanent feature of the South African discourse. Some members of the Committee queried whether liquidation was still an option and what was meant by "winding-down"? The Committee also wanted to know how much was spent on the fees of the business rescue practitioners? The Committee was also concerned that the business rescue practitioners had overstepped their mandate as they were not put in place to oversee the liquidation process or run an airline. More information was asked to be provided on the new airline, suggested by the Department, and how much this new airline would cost.

The Minister said that it was petulant for the business rescue practitioners to suggest a "winding-down" process when they did not receive the funding they requested from Government. The Committee was informed that from 1 May all employees of South African Airways were on unpaid leave as the entity was unable to pay the salaries of their employees. The Minister confirmed that Government would not accept liquidation as an option. It was the business rescue practitioners' responsibility to create a credible plan that presents different possible options. The outcome must be a viable and solvent business. The Minister asked how can the business practitioners justify taking R5.5 billion and spreading it over 162 days and not having a credible business plan for a viable business to emerge? The Minister shared the concern that the business rescue practitioners had not stuck to their deadline of 25 days. The Minister revealed that over four months the two business practitioners had been around paid R30 million. The Minister also agreed that the business rescue practitioners had overstepped their mandate and that they were not put in place to run an airline.

Meeting report

The Chairperson said that the meeting would be about staffing matters and for the Committee to receive an update on the state of affairs at SAA. The business rescue practitioners were supposed to have completed their work by 6 March and extensions were then applied for. SAA was faced with court action and tough decisions lay ahead. The Minister of Public Enterprises would explain some of the decisions that were taken. The business rescue practitioners had wanted R10 billion and Government had made a decision on that matter. That decision was to be further explained to the Committee. The focus of today's meeting would be on SAA. There were also some outstanding matters that arose out of the previous meeting and the Minister should address those matters in his presentation.

Briefing by the Minister, SAA & Department

Mr Pravin Gordhan, Minister of Public Enterprises, began the presentation by responding to the concerns set out in a letter sent by the Committee. The letter first requests that the Department report back on the matters that arose on the 19 February meeting. Secondly, there was supposed to be a business rescue plan that the Department had to present to the Committee on 6 March and the Department will provide an update on that. It was also requested that an update be given on the impact of the Covid-19 pandemic, both internationally and in South Africa. With respect to SAA in particular, the letter made reference to bailouts that have been provided in the past. The Department sent the Committee a pack of information which gives the history of the bailouts and contributions from the fiscus. The letter also asked how much SAA needs? Work still needed to be done on how much a new airline might need. The letter also made reference to a legal opinion within SAA. The Committee also requested information on the developments in SA Express. There would be a separate presentation given by the business rescue practitioners.

The Minister said that he would also address the non-business rescue matters first and then move on to the business rescue process itself. There was a misrepresentation of the meeting on 18 February. It was suggested that the Department muzzled the business rescue practitioners. The Department was telling the Committee that the work of the business rescue practitioners was incomplete. The investigations that they were required to do, in terms of Chapter Six of the Companies Act, was not completed and it was decided that the Department give them more time to do their work. The Department was fully committed to present a business rescue plan to the Committee as soon as it was available.

Ms Thandeka Mgoduso, Acting Executive Chairperson, SAA, provided the outlook of the board on the legal opinion. The legal opinion addressed itself to whether the directors of the board were trading recklessly or not. It was important to understand the situation that the board and company was in. The rationale why it took so long to prepare and table the accounts would be addressed by the Chair of the Audit Committee.

Mr Akhter Moosa, Chairman, Audit Committee of SAA, said that the legal opinion that SAA sought was around the reckless trading carried out by directors because of the short term nature of funding that was made available on the back of sovereign guarantees of the shareholder. It was not a legal opinion on whether SAA should or should not submit financial statements.

The Minister then proceeded to address the issue of bailouts. He read out a table stating the guarantees and cash injections SAA received between 2003 and 2020. A total of R31.243 billion was given to SAA in the form of cash injections. A total of R19.114 billion of guarantees was given to SAA.

Mr Phumulo Masualle, Deputy Minister of Public Enterprises, said that the business rescue practitioners had requested the liquidation of SA Express....[His connection was too poor for him to continue]

Mr Kgathatso Tlhakudi, DG, DPE, said the business was placed into provisional liquidation on 28 April 2020. The business was unable to meet its financial obligations including payment of salaries. The Department assisted management to put in an application to the UIF for the payment of salaries. There was a partial payment via the UIF to the employees. The business was in a difficult position to show that it was still operational, which was a requirement for it to still receive additional assistance. The liquidator was in charge of the liquidation process going forward. This would ensure that financial liabilities are dealt with.

The Minister proceeded to give an update on how the Covid-19 pandemic has had a significant impact on the international and national aviation industry. The pandemic has had a significant impact on the aviation industry as many countries are on different levels of lockdown. These lockdowns have had an impact on economies all over the world. One of the dimensions of lockdown has been the closure of borders. The closure of borders has resulted in the restriction of international and domestic travel. The impact has been devastating globally. Major airlines have plans that are grounded and parked off. There has been the grounding of international flights. The financials of airlines have also been impacted. Aviation is a narrow margin business. Airlines all over the world are requesting financial assistance from their respective governments. There has also been an impact on employees. Some have been laid off or on leave from their jobs in one way or another. Some employees are only having a portion of their salaries paid while others are on unpaid leave. The restart of the aviation industry will be slow. It depends on the opening of international borders and since every country is at a different level of lockdown this will happen incrementally. Fear of travel will impact on the load carrying factor of each aircraft as social distancing might still need to happen. This will in turn increase the price of tickets. Another challenge facing the aviation industry after the covid-19 pandemic will be the reluctance of people to travel. Business will

have to be done in a new way. It will take about three years for the aviation industry, globally, to recover. SAA was suffering due to the lockdown. Only in lockdown level 2 will domestic travel be allowed. The pandemic has also had a devastating impact on tourism. The question arises when will people across the world be comfortable to travel? The impact of the pandemic was changing every week. The Department would provide the Committee with the updated information in a couple of weeks.

He then commented on the business rescue process. There were a few issues that he wanted to emphatically clear up so that there was no misunderstanding. Government intended for some time to enter into a restructuring process for SAA which would enable it to become more financially viable, more competitive but also less dependent on the fiscus. The situation at the end of 2019 was regrettable. The board of SAA made a decision on 5 December 2019 that the business rescue was the better option to pursue given the constraints on raising finance, either from the fiscus or lenders in South Africa. The business rescue process, in terms of chapter six of the Companies Act, is about making sure that once the business rescue process was started the outcome should be a viable business. Government decided that the restructuring of SAA must continue albeit through the business rescue process. SAA was a national interest matter. The Companies Act does specify a number of things that have to be undertaken during the business rescue process. The legislation stipulates that the business rescue practitioners should make a decision if the business was rescuable. The business rescue plan should also be produced in 25 days with a provision of extensions if it was needed. Nobody imagined that there would be an extension of five months. There was very little aviation experience among the business rescue practitioners, if any. There was a concern over the use of consultants. There was also a question of money. A loan of over R3.5 billion was raised to assist post-commencement finance. The business rescue practitioners will take the Committee through the spending. What was also critical was the amount of money spent on fees by various players in this particular process. One of the requirements of the restructuring is how the R5.5 billion would be optimised? What are the other cost cutting mechanisms that are available? The business rescue plan would help Government decide whether to provide money when there was a request for money or should it supply money on the basis of a plan? Government's preference was the latter. Money should be used for the business rescue exercise. A draft copy of the business rescue plan was given to the Department on 5 May. On consultation, with legal advisors, it was found to be extremely deficient. It was in this regard that the Department consulted with an aviation expert company to ask what a post pandemic airline looked like. He also raised a point on labour. The Department had cooperation with all eight labour unions that are within SAA. The Department managed to create a labour consultative forum where all eight unions were represented. The unions signed a compact. They have also participated in technical workshops in helping design a future airline and making contributions. These employees have also taken a salary sacrifice. The Department was working with the unions on a social plan for those people who would not be accommodated. That involves training and skills development. He complimented the unions for their cooperation and participation. There have been offers to purchase SAA's assets but there is a screening process that is being undertaken to discern between what is genuine and what was not. He emphasized the Government was very aware of covid-19 and was aware that the business rescue process needed to be concluded a long time ago. The outcome of this process needed to be a viable airline, retaining as many workers as possible and making the airline non-reliant of the fiscus.

Briefing by Business Rescue Practitioners (BRPs)

The business rescue practitioners gave their presentation. The presentation was led by Mr Siviwe Dongwana. The presentation consisted of the development of the business restructuring plan, the business restructuring plan timeline, the contents of the draft business restructuring plan, the utilisation and management of funds and the key actions taken by the business restructuring practitioners to date. The impact of covid-19 was also discussed.

The primary objective of the business rescue was to maximise the likelihood of the company continuing in existence on a solvent basis, also known as the "restructuring option". The secondary objective was to result in a better return for creditors or shareholders that would from immediate liquidation of the company, also known as the "winding-down option".

The reasons for the delay in producing the business rescue plan were given. These reasons included uncertainty with regards to funding, the declaration of the State of Disaster by the President, the impact of covid-19 and further uncertainty with regards to funding. On 23 April, the business rescue practitioners had notified all affected parties that they would pursue the "winding-down" option as the best option for SAA due to financial constraints. Government wanted the restructuring option. The cost of the selected restructuring option was R7.7 billion. The total spend by the business rescue practitioners was R9.9 billion.

The total expenditure was broken down as follows: 20% was spent on fuel, 16% was spent on salaries and allowances, 12% was spent on subsidiaries, 12% was spent on aircraft leases, 12% was spent on Airlink and 28% was used for other expenses. The cash management initiatives comprised of value for money assessments, suspension of loss making routes and an assessment of outsourced services for insourcing.

(See Presentation)

Discussion

Mr A Lees (DA) said much of what he heard from the presentations was quiet frightening. He directed his questions to Mr Matuson. Can SAA be rescued without further funding from the State? Did they have external funding? He then had a question on page three of the presentation. It talks about the "winding down" option. Where in the Act does it make provision for the "winding down" option as opposed to liquidation? Given that the State has made it clear that there will be no further funding why did the business rescue practitioners not file for liquidation? What percentage of salaries were being paid to flight crews as of the 1 April? Were they getting 50% of their salaries or were they on unpaid leave? How much was the management of the airline being paid? Have the business rescue practitioners paid SARS all outstanding payments? He did not see any indication on slide 5 that the R2 billion that was provided to SAA in December has been repaid. Has the R2 billion been repaid? He then had a question for Minister Gordhan. Government refused to provide R7.7 billion that the business practitioners were asking for because there was no approved business rescue plan. If there was an approved business rescue plan, would the State provide all the funds stated in the approved rescue plan? He then had a question on the repatriation of South African citizens' flights. These flights were expensive and there was funding involved. What has the funding arrangements been for those flights? Who has funded the total cost of these flights? Has the money for these flights all gone to SAA? Has DIRCO taken any of the money or have any agents taken some of the funding? He then had a question for the Deputy Minister. Was the State going to oppose liquidation of SAA?

Mr G Cachalia (DA) asked the business rescue practitioners, in term of the Companies Act, how does Government select an option that business rescue puts forward by writing a cheque that it is unable to cash? If the BRPs job was to rekindle a company on a solvent basis but requires funding from Government to do so, which was not forthcoming, then surely it needs to move to liquidation. He then commented on Minister Gordhan's analysis on the current state of global aviation industry. If the best airlines were in "ICU" how will the worst airlines be resuscitated? Was Government going to continue handing bailouts to SAA and/or to its successor which will "arise from the ashes of its phoenix like demise"?

Mr S Somyo (ANC) said that in terms of the Companies Act specific things needed to be done during business rescue. The business rescue plan needed to be agreed to by the parties that are involved. The Minister confirmed that the draft plan was given to the Department. The draft was deemed to be inadequate. In the absence of that plan how did the Department view the continued critical actions taken by the business rescue practitioners? The BRPs required funds from the shareholder without that plan. There has been a five month period without a plan and they were still making decisions. There was also court action being taken by labour unions. Even if the Department gave the BRPs extra funding that would have had to be informed by the plan. How dare the practitioners give themselves and extension when it was not known where they were going? The practitioners were here today and there is no sight of the business rescue plan. A fine audit needed to be done and the Department needed to provide a breakdown of what the business rescue practitioners have actually used the large sums of money they had been given.

The Chairperson asked the Department if they could receive a copy of the draft business rescue plan as the Committee had not read it.

Ms N Mente-Nqweniso (EFF) said her first point of concern was on the plan. The Minister said that because of the deficiencies in the plan the Department requested legal opinion. He then made a decision that he could not support SAA because of the plan. Was the Minister not supporting SAA because of the deficient plan? What would the Minister's funding amount of preference be to SAA? In March, the last time the Committee met, part of the things SAA was going to do was look into its operational costs. Looking at the financials SAA have provided under operational losses versus the income, the explanation for the operational losses does not provide any confidence or comfort. She then discussed the pie chart that was shown in the presentation. There was a significant amount of money paid to creditors. Then there was also 28% paid to 'other'. Other is always problematic. She hoped that the Committee would get more details about that in the plan. When its states money spent on other did the BRPs make cuts to other unnecessary funding and make cuts to other contracts? What exactly was spent under 'other'? It was important that all interested parties were clear and transparent with one another. What are the contracts that have been paid? How many aircrafts does SAA have? The Committee needed to receive all that information. The money that is given to SAA is never accounted for. The Minister said that he did not support the draft rescue plan. He then mentioned a new airline. This did not make sense to her. If there was money for a new airline but yet there was no money to rescue a current airline. How much money would it cost to create a new airline? What would be the Minister's preferred figure in keeping SAA afloat? The business rescue process was part of the Companies Act and certain things needed to happen first before liquidation was declared. Can SAA sustain itself? If it cannot sustain itself then how much money does it need? SAA also needed to show where and how savings have been made.

Mr B Hadebe (ANC) asked if the BRPs had the required skills to rescue SAA. He asked this because they were supposed to have tabled a plan within 25 days. Instead the practitioners asked for extension after extension and in the process tax payer's money have been exhausted. Today there was still no business rescue plan. Do the BRPs think that they are still the relevant parties to carry out the mandate that they had been ordered to carry out within 25 days? There was even a legal process to stop retrenchments. There cannot be retrenchments before a plan has been accepted. He asked the Department why they kept quiet when the plan was not ready within 25 days. The presentation given by the practitioners also stated that they only did consultations after the plan was drafted. Why did the Department allow these events to unfold that went in contravention to the Companies Act?

The Chairperson said that if SAA was to be restructured, how were the subsidiaries going to be affected? In the financials the impairments increased in 2018 from R26 million to R568 million. Which accounts were impaired and for how much? He then questioned the practitioners. In the Companies Act that deals with contravention of the law it states that the practitioners must forward evidence to the appropriate authority for further investigation and possible prosecution. What has been uncovered and what has been done? It was important that consequence management was also a part of this process. An airline cannot crash without their being any consequences. During this whole process the Committee has not seen a move towards any consequences. The Minister applauded the unions but at the same time the unions took SAA to court. He wanted to hear from the practitioners about their level of engagement with the unions. If SAA was to be restructured or if there was going to be a new airline what is the cost of that? What Government must not do is to throw financial solutions to non-financial problems.

Minister Gordhan responded to the questions posed to the Department. What the Companies Act requires the BRPs to do is to decide whether the entity, in this case SAA, was rescuable. The Department was not a part of the creditors committee and the employees committee. The BRPs decided at some stage that the entity was rescuable. Secondly, the practitioners were to also conduct further investigations which included meeting with consultants. This would then be crafted into a business rescue plan. The R5.5 billion was not just to run the business. The first objective is to carry on with the business, trim the business down so that costs are cut and then as quickly as possible produce a business rescue plan. That plan will indicate what business model will be recommended for a viable, competitive airline not dependent on the fiscus and retaining the optimum number of jobs. This included selecting which routes will be taken in flying regionally, continentally and internationally. Then the most fuel efficient aircrafts are needed to fulfil this purpose. Depending on the routes and the aircraft an organisational model needed to be chosen. The next issue would then be how many staff is needed. A financial model was also needed that would support the new airline. There were different ways in starting a new airline. One way was to acquire assets from the old airline or there was the option of restructuring. Restructuring means the reorganising of the existing airline so that something new emerges from it. The impact of covid-19 has meant that any restart in creating a new airline would start small and then be built up over two or three years. The number of staff needed at the start-up phase of the airline will be different to the number of staff needed two or three years later. In relation to the post commencement finance (PCF) and questions over money, Minister Gordhan said it was not about not having money. The question is what do you provide money for? Is it to continue to spend? Or is it to spend in order to achieve the objective of a rescued business? If money was to be spent it must be according to an approved business rescue plan. The amount of money Government was willing to provide depended on the business model that is produced. The R7.7 billion that was given is about the restructuring process. The Department still needed to do projections on how much the new airline would cost and would then provide that information to the Committee. He then responded to Mr Lees' questions. foreign currency borrowing was a risky exercise. The volatility of foreign currencies and the exchange rate all needed to be taken into consideration. That is why the Department told SAA that it could not borrow. If they did borrow, what would the borrowing be for? Funds will be mobilised once there is a clear modelling plan that states how much funds will be needed for restructuring. The BRPs could provide more information on the funding behind the repatriation flights. DIRCO was the channel through which foreign governments were to approach the South African Government for assistance so that they could repatriate their citizens. He then responded to the comment Mr Cachalia made about most airlines being in ICU because of the covid-19 pandemic. Most airlines are asking "how do we survive and how do we thrive and how do we grow again in a post-covid environment"? That was the same question SAA was confronted with. Those airlines who cannot manage are shutting down. SAA was not operating so there were no bailouts. The Department wanted the business rescue process to be concluded as soon as possible. There needs to be a viable business at the end of this process. Bailouts will be given to the successor airline depending on what the requirements are and how Government was able to bring together different forms of capital to make it work. The extension after extension after the 25 day period, by the BRPs, was not something that should be taken lightly. Minister Gordhan said that the draft plan, which would be circulated to members, was an incomplete plan. It was not a matter of supporting the plan. There was no plan. He agreed with the question Ms Mente-Nqweniso asked, what was the 28% spent on others actually for? The evergreen contract was in respect to the pilots and the privileges and benefits that were assigned to them on an 'evergreen' basis. The "winding-down" option was not an alternative and the Department did not consider it to be an alternative to the actual outcome the Companies Act desires. The purpose of Government supplying R5.5 billion was to complete a business rescue process which must end with a viable, trimmed down, streamlined, cost-effective business. It was petulant for the BRPs to suggest a "winding-down" option when they did not receive the funding they requested. He wondered who was waiting in the wings to pick up the pieces and at what price? These are assets that belong to the public of South Africa. SAA has had many turnaround plans. He then responded to the question over why the Department kept quiet. The Department did not keep quiet. The request for extensions did not come to the Department. Those requests go to the creditors committee. The Department had various engagements with the business rescue practitioners and their legal advisors. The Department made it clear that they were not happy with these endless extensions and the fact that there was no business rescue plan after five months of work and the amount of money and fees that have been earned. He agreed with Mr Hadebe that before a plan was finalised there needs to be all forms of engagements and consultations. SAA had three important subsidiaries. The Air Chefs board decreased the number of employees it was currently using. They have cut various costs in order to survive until their future is determined. The second subsidiary was Mango. Soon after lockdown was announced the

management of Mango agreed to a 50% salary cut. Nothing of that sort happened at SAA. The third subsidiary was SAA technical. It was also seriously impacted by corruption in the past. It has also trimmed down its salary bill in order to survive. SAA technical was a very valuable asset as far as Government and the aviation industry in South Africa was concerned. The models over the cost of a new airline were still being concluded. Then various engagements needed to take place outside and inside Government as well.

Mr Dongwana responded to the questions posed to the BRPs. The Act did refer to a "winding down" option. The Act states that if it is not possible for the company to continue operating on a solvent basis and survive then there is an option of immediate liquidation of the company. The "winding-down" was an option that was better than liquidation as assets lose their value during liquidation. All salaries in SAA were paid for in April. SAA was also up-to-date with all taxes to SARS. The R2 billion that the practitioners received initially was going to be paid but as things stand it has not yet been paid. All the repatriation flights were paid for by foreign governments, through DIRCO, for their citizens. The repatriation of South African citizens flights were paid for by the passengers but the charge was minimum. SAA was not making any profits from those repatriation flights because it was considered a humanitarian mission.

He responded to Mr Cachalia who asked if SAA should be liquidated. The practitioners view was that the best way forward was not to liquidate but rather to run a structured "wind-down". The draft business plan is anticipating a "winding-down" process.

He replied to Mr Somyo's issue about the extensions. It was not that the business rescue practitioners wanted all the money for the restructuring process at the beginning but it was important that the practitioners knew whether the restructuring would be funded. That enables a development of a plan to be in the context of a very specific budget. It also enables the practitioners to take the plan to the creditors for approval. In the Companies Act it was also required that they provide projections for the next three years. It was important, in providing that information and numbers in the business rescue plan, that the business rescue plan was underpinned by a commitment of what funding would be made available. There was no committed amount that supported the business rescue and restructuring of the company. This made it difficult to finalise a business rescue plan. The practitioners accepted the concerns raised by members. The practitioners would look into how to best respond to the issues raised.

He responded to the 28% spent on other expenses. The pie chart was simply a summary of the preceding slide for ease of reference they were summarised in the pie chart.

He responded to the concern over the practitioners skills in aviation. They did consult with aviation experts and the practitioners were dependent on them. The Minister was correct when he said that the extensions were granted by the creditors committee and not the shareholder. The Companies Act provides for the creation of the creditors committee and employees committee. The employees committee is comprised of members for all the unions in SAA. It also has representatives from all non-unionised management and non-management staff. That committee elected a chairperson. It was stipulated that the practitioners consult with that committee on the business rescue plan. The unions, with exception of two unions, and non-unionised management took part in the section 189 process and it was done under the auspices of the CCMA. There have also been investigations into problematic contracts. All suspicious contracts have been sent to the SIU as the practitioners took the value for money aspect of the process very seriously. The practitioners were happy to provide a list of all contracts that were currently under investigation.

Mr Les Matuson, BRP, started by highlighting the leadership of Minister Gordhan during this tricky period in the aviation industry especially since the outbreak of the covid-19 pandemic. The Minister was committed to ensuring a sustainable new airline which was fiscally independent. The Minister has been consistent throughout the process. The practitioners were committed in working with the Department to achieve their desired outcome. He then responded to the comments on liquidation. The liquidation process was a very destructive one. The restructuring process would have a much better return than the liquidation process. Liquidation generally sows chaos. The company would lose Air Operator Certificate (AOC) and various licenses. Calculations showed that the dividends was very close to zero. Under liquidation the whole staff complement would be unemployed. The liquidation process was long and arduous process and could last between two to three years. There could be no dividends paid to any staff until the liquidation is complete. A liquidation process would materially erode value and the net recovery for creditors would be an absolute disaster.

Adv Melanchton *Makob*, Deputy Director General, DPE, commented on the labour court judgement. The court action emanates from the provisions of section 136 of the Companies Act that anticipates that the business rescue plan must be developed before any retrenchment can proceed. The BRPs wanted to proceed with the retrenchment process by issuing section 189 notices without a business rescue plan. The court ordered that the business rescue practitioners must present a business rescue plan before beginning a retrenchment process. Effectively saying that the notices they issued were procedurally unfair. The BRPs were ordered to withdraw the notices that were issued. The court ordered that the business rescue practitioners were allowed to offer and the employees were allowed to accept any voluntary severance package. The court pronounced on the matter that before any retrenchment process can begin there has to be a business rescue plan in place.

Mr Tlhakudi said that as an accounting authority he had a responsibility, in line with the Public Finance Management Act, to ensure that there is an effective, transparent and economical use of resources that was allocated to the Department and by extension to its entities. He had a responsibility that once these funds were transferred to entities that they were managed in accordance with the provisions of the Act. The requests from the BRPs have had to be scrutinized. The Department had approached the BRPs numerous times asking them how the funds were being utilised. The Department also asked them to address wasteful expenditure at the entity. The Department was still waiting for information on the 'onerous contracts' that the practitioners have spoken about. If aircrafts were returned to their lessors promptly during the lockdown period SAA would have been able to save almost R100 million a month in maintenance costs. In the last week the Department has had to plead with the BRPs that those aircrafts must be returned. He then responded to the issue of restructuring costs that stood at R7.7 billion. This figure was a moving target. The BRPs needed to justify to the Department where any request for funding will be spent and what will be the outcome produce.

The Chairperson asked the Deputy Minister to provide an update on what has happening at SA Express as he had received a message from a SA Express employee who said they had not been paid since March.

Deputy Minister Masualle said that presently there was a provisional liquidation order which the court is waiting any affected party to review that. The Department was having discussions with the appointed liquidators and has not arrived at any position yet. The Department was sympathetic to the employees of SA Express whose salaries were not being paid. The Department engaged with UIF and have been able to make interventions albeit ones that were not adequate.

Ms Mgoduso said that some financing questions have been unanswered. Specifically the operational costs and the R49 billion accumulated figure as well as re-negotiations and re-finances. What are the specific line items? The Chairperson requested information on increments that have contributed to the loss. The board has not received any financial report from the BRPs. There was also a question on the many turnarounds strategies that have been put on the table by SAA. She was not sure if the BRPs had taken previous work that had been done into consideration when they started the business rescue process.

Mr M Dirks (ANC) said that the practitioners did not answer whether they themselves had any aviation experience. He raised the issue of cost cutting measures. One of the tasks of the BRPs was to implement cost cutting measures. The BRPs must outline all the cost cutting measures they have put in place since they took over the airline. Have they returned those aircrafts that were loaned? Have the business rescue practitioners dealt with the issue of the evergreen contracts? Have they cut those contracts? What was the cost of each of the BRPs salary over the past five months?

Ms O Maotwe (EFF) said it was clear that the BRPs were not taking the Committee seriously and was not taking the Department seriously. The BRPs did not want to be held accountable. She proposed that they resign with immediate effect. If they do not resign the EFF would go to court to remove them. The practitioners were not forthcoming with how much they were being paid. How much money had they recouped from the evergreen contract? The business rescue practitioners were overstepping their mandate. They were performing the role of liquidators. Their essential role was to rehabilitate the company. Once they start the process of "winding-down" then they were going further than their mandate. She also questioned why the Minister insisted on privatising the SOEs under his leadership. There were other SOEs, like the SABC, who had recovered and were doing well. She did not agree with the Minister's view of trying to restructure and privatise SAA.

Ms B Van Minnen (DA) said that larger airlines were dumping airline shares as they did not see any future in the airline industry after the covid-19 pandemic. Why was Government giving such consideration to starting a new airline? How would it differ from the current situation in SAA with its many turnarounds plans? How can this course of action even been considered in the current airspace environment? Given the pronouncements of Mr Matuson, she was concerned that this process was aimed at starting a new airline all along.

Ms B Swarts (ANC) said that the business rescue plan was supposed to be completed in 25 days and now five months later the Committee only had a draft plan before it. She was concerned that the Department and the BRPs were at loggerheads with one another. The practitioners had not provided a business plan but rather an escape plan. The BRPs had never had the intention of ever rescuing South African Airways. They have not stated how much they are paying themselves, their consultants and their lawyers. The fact that they opposed the court order when they were taken to court by labour unions shows that their intentions was to make money for themselves and not to save the airline. How many meeting did the business rescue team have with the board of SAA and shareholders before important decisions were made? She was sure that the business rescue team would have sold off all of SAA's assets if Treasury did not remove the exemption they had given them.

Mr Cachalia asked the Minister if he will allow the private sector to step in to pick up SAA's assets to prevent a possible public sector failure. The private sector will give the fiscus and the public sector a welcome break.

Mr Somyo commented on the lack of aviation experience and skills the BRPs had. He asked the Minister how far away the Department was from the development of an aviation strategy which could be part of the sustenance that South Africans seeks to benefit from in terms of a new airline?

Mr Hadebe asked the BRPs if they had tabled a business rescue plan. If not, when are they planning to table such a plan? Five months into their appointment and no plan has been published. Do they think they are the suitable candidates to conduct this task of rescuing SAA? They were unable to indicate how their funds were going to be utilised even though the business rescue practitioner was an accounting authority. Were they suitable for the job?

Mr Lees said that section 141 was very clear. If at any time during the business rescue proceedings the practitioner concludes there is no reasonable prospect of the company to be rescued the practitioner must immediately stop the business rescue process and apply for liquidation. If there is no funding made available from the State and they cannot find any other sources of funding, can SAA be rescued? If the answer is no then why have they not applied for liquidation? He had information from flight crews in SAA and Mango that their salaries have not been paid and that they have been put on unpaid leave. Yet Mr Dongwana does not seem to know this. He did not know who to believe as he was getting reports that flight crew were on unpaid leave but the business rescue practitioners do not know that? In terms of section 132 of the Companies Act the BRPs are required to do monthly reports. Could the Committee see those reports?

Ms Mente-Nqweniso said it was clear that the Minister refused the bailout because there was no plan. There is no plan after five months. The Committee should not spend its time speaking to people who have no capacity to produce a viable plan to turnaround SAA. If this was a draft that meant it could still take another five months to be finalized. Does the Minister have the money to save SAA? If he has enough money to start a new airline it means that he cans save SAA and put new measures in place. The fact that the Committee did not have financials for 2019 informs them about the accumulated figure of expenditures versus the operational cost. The figures used in the presentation were not in line with the figures in the audited statement and this was problematic.

Mr Matuson said that they would accelerate the production of the business rescue plan and the comments of the Committee were noted and accepted.

Mr Dongwana said that neither he nor Mr Matuson had previous experience in rescuing an airline. That was why they received support from Alvarez and Marsal who have aviation experience. He then responded to the issue of evergreen contracts. Section 189 had two objectives and this was the order that the court responded to. The fees of the BRPs were regulated by the CIPC. The fees of the rest of the team can be provided to the Committee. He then responded to the question on why airplanes were not returned. They had returned some planes; however once the lockdown started and there was a band on international travel as a consequence of that they were not in a position to return planes. The aircraft lessors are supported by credit which is guaranteed by Government. The issue of returning aircrafts cannot be done in a reckless manner because it may result in guarantees being called on Government. The process of returning planes needs to be managed very properly. If the aircrafts were not returned in the manner agreed upon in the contract then additional claims will be made to SAA. SAA also had legal agreements as to how it was to maintain the airplanes that it needed to honour.

He highlighted that the practitioners provided regular reports to the Department. The business rescue plan will be geared towards a "winding-down" option and it will be completed as soon as engagements are done with all relevant parties and stakeholders. He said in response to Mr Lees that a "winding-down" option would provide a better return for creditors and the shareholders. He added that as of the 1st of May all employees were on unpaid leave and that SAA was unable to pay the salaries of employees.

The Chairperson said it was clear that the Committee needed to have more engagements with the BRPs. The more answers were given, the more questions arose. The Committee was also not pleased that it only received the draft business rescue plan during the meeting. All other matters, concerns and questions that were not answered would be sent to the Department and the BRPs in written form. The issue of SA Express also still needed to be discussed in further meetings. The shifting of goal posts was simply unacceptable. The SAA headache cannot continue to be a permanent feature of the South African discourse. The Committee would like a date for when the business rescue plan would be finalized. It cannot be an open-ended date. He mentioned that cost cutting and consequence management were two important features of the business rescue process that needed to occur.

Minister Gordhan responded to the issue of returning of aircrafts. Mr Dongwana only raised the obstacles to returning aircrafts while the rest of the world was actually doing it. He had not heard of all those complications before. On the issue of fees, a total of R30 million was shared between the two business rescue practitioners over four months. The hourly rate that is in the legislation was not a reflection of the amount of money the team was receiving. Each practitioner came with different teams. The point Ms Maotwe made about the BRPs overstepping their mandate needed to be reflected upon. In response to Ms Van Minnen he said the dumping of shares was an investment choice. The business rescue plan was about rescuing a business and creating a new entity that emerges that is more viable. He responded to Mr Cachalia. The private sector was required for providing many services to airlines. Government looked forward to a strategic equity partner. He did not want people to 'pick up' assets. Government wanted people to pay a fair price if and when a particular asset is put on sale. Value must be collected for that. The Department did not want a

garage sale out of this process. Other people cannot profit on what is currently public property. He responded to Mr Somyo's question. There was somewhat of an aviation strategy but both the Minister of Transport and the Department of Public Enterprises agreed they needed to review that strategy.

The Minister said that Mr Lees had his mind fixated on liquidation from the very beginning. He did not understand why. If he was a public representative concerned with the public interest then he should be looking for ways to create a viable entity, for public interest, with private sector participation. Liquidation as far as Government was concerned was not on the books. One has to ask the question who is waiting in the wings to pick up these assets? Has anybody cut a deal with someone in a nefarious fashion so that they make a deal off public assets? Mango is paying 50% salaries at the moment like many airlines were doing globally. There was a way of getting money to worker's if the interests of workers were taken to heart. The advice of the Department was ignored. Government's opinion of the business rescue process was that the process needed to be followed as prescribed by law. The outcome must be that there is a viable business at the end of this process. If the board wanted liquidation it could have decided to do so on 5 of December 2019. The decision at that time was to go into business rescue. The job of the BRPs was to make the best effort possible to ensure there is a viable business at the end of the process and not be petulant about when they receive money. Once it is decided that the business is rescuable then a commitment is made to create a credible plan which will take the entity in the right direction. The Act states it needs to be created in 25 days. Extensions are allowed but now it has been 162 days. How can the BRPs justify taking R5.5 billion and spreading it over 162 days and not having a credible business plan for a viable business to emerge? The BRPs were not put in place to run an airline. They were put in place to make a plan so that competent managers were appointed to run the airline. They say they do not have aviation experience so why do they want to run the airline for 162 days? In the Department's view the post-commencement finance needed to be stretched as much as possible. It was quite astounding that after all the interaction that occurred today Mr Dongwana still says, to the Committee and to the South African public, that the business rescue plan will be done through the "wind-down" option. It was shocking. Instead of saying that they will create a business rescue plan that presents two or three options on which the relevant players will be consulted which the Act requires them to do. Only then can Government either financially support one plan over the other. Here there is a determination to produce a business rescue plan for a "wind-down" without presenting any other options. A "wind-down" means in simple terms that assets will be incrementally disposed of so that creditors and other get what they want to get but at the end of which the airline has nothing. The key mission that the Companies Act mandates is not achieved. Government would not accept liquidation as an option. It was the BRPs responsibility, with all the money that has been spent, to emerge with a credible plan that presents different options and the outcome must be a viable business that is fair to creditors, fair to employees and fair to the public. The aviation industry in South Africa as a whole was in trouble. He hoped that through further consultation with the Committee and the BRPs some consensus could be agreed to.

The Chairperson said that an unhealthy relationship between the BRPs and Government was not in the best interest of SAA. R15 million for each of the business practitioners over four months did not sit well with him. This operation was not a money making scheme. The tax payer cannot continue to pay for something that has no end in sight. The Committee wants a timeline and date for when the matter would be concluded. All South Africans cannot afford an airline that will bleed South Africa further.

The meeting was adjourned.