

COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 42/CR/Apr10
014928

In the matter between:

The Competition Commission Applicant

and

South African Airways (Pty) Ltd Respondent


Panel : N Manoim (Presiding Member), Y Carrim (Tribunal Member) and T Madima (Tribunal Member)

Heard on : 06 June 2012

Decided on : 06 June 2012

Order

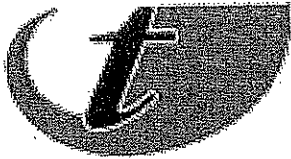
The Tribunal hereby confirms the order as agreed to and proposed by the Competition Commission and the respondent, annexed hereto marked "A".



Presiding Member
N Manoim

Concurring: Y Carrim and T Madima

"A"



competitiontribunal south africa

Form CT 6

Notice of Motion

About this Form

This Form is issued in terms of the Competition Tribunal Rules.

Please indicate in the space provided the nature of your motion, including specific reference to the relevant section of the Act or Tribunal Rules.

If this Notice of Motion concerns a matter being brought in terms of Division E of Part 4 of the Competition Tribunal Rules, it must comply with the requirements of Competition Tribunal Rule 42(3).

Date: 12-Apr-2012 File # _____

To: The registrar of the Competition Tribunal


Concerning the matter between:

The Competition Commission (Applicant)

and South African Airways (Pty) Ltd (Respondent)

Take notice that the Applicant intends to apply to the Tribunal for the following order:

Confirmation of the attached settlement agreement concluded between the Applicant and the Respondent a consent order of the Competition Tribunal in terms of section 49D Read with Section 58(1) of the Competition Act, No. 89 of 1998, as amended.


competitiontribunal
south africa

2012 -04- 13

RECEIVED BY: Tebogo

TIME: 15h14

Name and Title of person authorised to sign:

Wendy Mkwanzani- Chief Legal Counsel

Authorised Signature:

Date:

[Signature]

12-Apr-2012

Contacting the Tribunal

The Competition Tribunal
Private Bag X24
Sunnyside
0132
Republic of South Africa
tel: 27 12 394 3300
fax: 27 12 394 0169
e-mail: ctsa@comptab.co.za

For Office Use Only

Tribunal file number:

Date filed:

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA
(Held In Pretoria)

CT Case No. 42/CR/Jul10

CC Case Nos. 2006Mar2215

2008Jan3474

2009Dec4850

In the matter between:

THE COMPETITION COMMISSION

Applicant

And

**SOUTH AFRICAN AIRWAYS (PROPRIETARY)
LIMITED**

Respondent

In re

THE SETTLEMENT OF VARIOUS MATTERS

**SETTLEMENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND SOUTH AFRICAN
AIRWAYS (PROPRIETARY) LIMITED IN TERMS OF SECTION 49D READ WITH SECTION 58(1)(b) OF
THE COMPETITION ACT, NO. 89 OF 1998 (AS AMENDED)**

The *Commission* and *SAA* hereby agree that application be made to the *Tribunal* for confirmation of this *Consent Agreement* as an order of the *Tribunal* in terms of section 49D read with section 58(1)(b) of the *Competition Act*, on the terms set out below.

1. **Definitions**

1.1. For the purposes of this *Consent Agreement* the following definitions shall apply:

1.1.1. "**2010 SWC Complaint**" means the complaint initiated against the *2010 SWC Respondents* by the *Commissioner* on 18 December 2009 in terms of section 49B of the *Competition Act*, under case number 2009Dec4850;

1.1.2. "**2010 SWC Respondents**" means, collectively, BA/Comair, *SAA*, 1Time Airlines, Mango Airlines, SA Express and others;



- 1.1.3. "**Air Cargo Complaint**" means the complaint initiated against the *Air Cargo Respondents* by the *Commissioner* on 27 March 2006, in terms of section 49B of the *Competition Act*, under case number 2006Mar2215;
- 1.1.4. "**Air Cargo Respondents**" means, collectively, SAA, British Airways Plc, Air France Cargo-KLM Cargo, Alitalia Cargo, Cargolux International S.A., Singapore Airlines, Martinair Cargo and Lufthansa Cargo AG;
- 1.1.5. "**CLP**" means the *Commission's* Corporate Leniency Policy as published in Government Notice 628 of 2008;
- 1.1.6. "**Comair**" means Comair Limited;
- 1.1.7. "**Commission**" means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the *Competition Act*, with its principal place of business at 1st Floor, Mulayo Building (Block C), the DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng;
- 1.1.8. "**Commissioner**" means the Commissioner of the *Commission*, appointed in terms of section 22 of the *Competition Act*;
- 1.1.9. "**Competition Act**" means the Competition Act, No 89 of 1998 (as amended);
- 1.1.10. "**Settlement Agreement**" means this agreement, duly signed and concluded between the *Parties*;
- 1.1.11. "**Date of Confirmation**" means the date on which this *Agreement* is confirmed as an order of the *Tribunal*;
- 1.1.12. "**Dawn Raid**" means the dawn raid conducted by the *Commission* on SAA on or about 30 March 2010, and which was conducted as part of the *Commission's* investigation of the *2010 SWC Complaint*;
- 1.1.13. "**Days**" unless otherwise stated, means business days;
- 1.1.14. "**Far East Complaint**" means the complaint initiated against the *Far East Respondents* by the *Commissioner* on 28 January 2008, in terms of section 49B of the *Competition Act*, under case number 2008Jan3474;
- 1.1.15. "**Far East Respondents**" means, collectively, SAA, Cathay Pacific, Malaysia Airlines and Singapore Airlines;
- 1.1.16. "**IATA**" means the International Air Transport Association;



- 1.1.17. "**Infringing Conduct**" means conduct in contravention of section 4(1)(b)(i) of the *Competition Act* as described in paragraph 4.3 (and the subparagraphs thereto) of this *Settlement Agreement*;
- 1.1.18. "**Lufthansa**" means Lufthansa Cargo AG;
- 1.1.19. "**Parties**" means the *Commission* and SAA;
- 1.1.20. "**Prime Cabins**" means certain passenger airline tickets for sale in "business" and "economy" cabins aboard an aircraft;
- 1.1.21. "**SAA**" means South African Airways (Proprietary) Limited, a company duly incorporated and registered in terms of the company laws of the Republic of South Africa, with its principal place of business at SAA Airways Park, Jones Road, Kempton Park;
- 1.1.22. "**Suite of Complaints**" means, collectively, the *Air Cargo Complaint*, the *Far East Complaint* and the *2010 SWC Complaint*;
- 1.1.23. "**Tribunal**" means the Competition Tribunal of South Africa, a statutory body established in terms of section 26 of the *Competition Act*, with its principal place of business at 3rd Floor, Mulayo building (Block C), the DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria.

2. Background to the *Settlement Agreement*

The *Settlement Agreement* contemplated herein brings to conclusion the *Suite of Complaints* initiated by the *Commission* against SAA, the component parts of which are more fully described below:

- 2.1. The *Air Cargo Complaint* – being a complaint initiated by the *Commission* against the *Air Cargo Respondents* during March 2006 in terms of which the *Air Cargo Respondents* were alleged to have contravened section 4(1)(b)(i) of the *Competition Act* by fixing (either by agreement or concerted practice as between themselves or through the auspices of IATA) rates of fuel and other surcharges in respect of the transport of cargo on routes to and from South Africa;
- 2.2. The *Far East Complaint* – being a complaint initiated by the *Commission* during January 2008 against the *Far East Respondents* in terms of which the *Far East Respondents* were alleged to have contravened section 4(1)(b)(i) of the *Competition Act* by fixing prices and/or trading terms relating to the sale of passenger airline tickets in respect of *Prime Cabins* on routes to and from South Africa and Far East Asia (which complaint was initiated pursuant to

BM
NR

Cathay Pacific having sought corporate leniency for the conduct in question in terms of the *CLP*;

- 2.3. The *2010 SWC Complaint* – being a complaint initiated by the *Commission* during 2010 into alleged instances of price fixing of passenger airline tickets by the *2010 SWC Respondents*, in contravention of section 4(1)(b)(i) of the *Competition Act*.

3. **The Air Cargo Complaint**

- 3.1. On 27 March 2006 the *Commissioner* initiated the *Air Cargo Complaint* against the *Air Cargo Respondents* in respect of an alleged contravention of section 4(1)(b)(i) of the *Competition Act*, relating to a component of prices (namely fuel surcharges) in the international market for air freight and/or cargo services, including services into and from South Africa.
- 3.2. SAA was one of the air cargo airlines alleged to have been involved in this conduct through its division, SAA Cargo.
- 3.3. Upon completion of its investigation into the *Air Cargo Complaint*, the *Commission* found:
- 3.3.1. All or some of the *Air Cargo Respondents* engaged in discussions and exchanged and confirmed information by way of telephone calls or e-mails with firms such as Lufthansa, which acted as coordinator in these discussions. The contacts occurred between March 2002 and February 2006.
- 3.3.2. The discussions and information exchanges occurred between various air cargo carriers, who are also members of *IATA*, and related to fuel surcharges.
- 3.3.3. *SAA inter alia* referred to the discussions and information exchanges with other air cargo carriers in the consideration of fuel surcharge rates or at any rate *SAA* did not act independently in setting its fuel surcharge rates.
- 3.4. The *Commission* thus concluded that *SAA* acted in contravention of section 4(1)(b)(i) of the *Competition Act*.

4. **The Far East Complaint**

- 4.1. On 16 January 2008, pursuant to Cathay Pacific having sought and been granted corporate leniency in terms of the *CLP*, the *Commissioner* initiated the *Far East Complaint* (relating to routes outbound from South Africa to South East Asia, Hong Kong and China) against the *Far East Respondents*.



4.2. During the period under investigation, SAA and Cathay Pacific were party to a code share agreement in respect of the Johannesburg-Hong-Kong-Johannesburg route (which was the only route serviced by SAA during the relevant period).

4.3. Upon completion of its investigation of the *Far East Complaint*, the *Commission* found that:

4.3.1. SAA with other *Far East Respondents* had on a number of occasions in the years 2004, 2005 and February 2006 participated in discussions related to market fare levels and coordinated increases on certain market fares for flights out of South Africa to Hong Kong;

4.3.2. Further, the *Commission's* evidence revealed that during the period under investigation the *Far East Respondents* (including, *inter alia*, SAA) may also have fixed certain other trading conditions including those pertaining to seasonality of fares.

4.4. Accordingly, the *Commission's* investigation of the *Far East Complaint* found that SAA contravened section 4(1)(b)(i) of the *Competition Act*.

4.5 SAA admits that it engaged in the Prohibited Practices in contravention of section 4(1)(b)(i) of the *Competition Act*, in respect of outbound SAA traffic to Hong Kong.


5. **The 2010 SWC Complaint**

5.1. On 25 November 2009, an employee of *Comair* sent out an email to the *2010 SWC Respondents*, which email purported to set out *Comair's* views regarding certain factors and dynamics in the airline industry, specifically as they pertained to the 2010 Fifa Soccer World Cup, which would in *Comair's* view impact on the manner in which domestic airlines would manage their inventory (flights and seats) and the pricing thereof during the period leading up to and during the 2010 Fifa Soccer World Cup.

5.2. Given SAA's prior experience with competition law, the email immediately raised concerns within SAA that it may be considered as evidence of collusion in contravention of section 4(1)(b) of the *Competition Act*. Accordingly, on 1 December 2009, SAA made an application for corporate leniency in terms of the *CLP* (and which application was rejected by the *Commission* as it did not meet the requirements for corporate leniency as set out in the *CLP*, as SAA did not admit to a contravention of section 4(1)(b) of the *Competition Act*).

6. **Future Conduct**

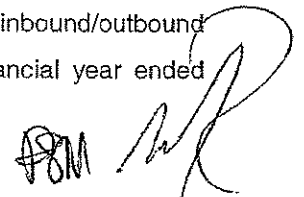
6.1. SAA confirms that the *Infringing Conduct* has already ceased and it undertakes:

FSM 

- 6.1.1. Not to engage in conduct which amounts to directly or indirectly fixing a purchase or selling price or any trading condition in contravention of section 4(1)(b)(i) of the *Competition Act*;
- 6.1.2. To co-operate, to the best of its ability, with the *Commission* in any ongoing investigations in respect of each of the matters constituting the *Suite of Complaints* and in respect of any subsequent prosecution of the other respondents to any such ongoing investigations. Such co-operation includes, without limitation:
- (a) The provision of all and any documents (or categories of documents) which the *Commission* identifies as being within the possession or under the control of *SAA* and which are relevant to the *Commission's* ongoing investigation and/or prosecution of any one or more of the matters comprising the *Suite of Complaints*;
 - (b) The making available to the *Commission* of all and any witnesses as the *Commission* may identify to testify to conduct forming part of the conduct under investigation in any one or more of the matters comprising the *Suite of Complaints* in proceedings before the *Tribunal* (to the extent that such witnesses are in *SAA's* employ), Where witnesses are no longer in *SAA's* employ, but previously were in its employ, *SAA* undertakes to use its best endeavours to procure the co-operation of such witnesses with the *Commission* in the manner aforesaid; and
 - (c) To develop and implement a competition law compliance programme, with corporate governance so as to supplement its existing competition law compliance regime, designed to ensure that all its relevant employees are aware of the provisions of the *Competition Act* and do not contravene them; and to submit a copy of the aforementioned compliance programme to the *Commission* within 90 Days of the date of confirmation of this *Consent Order Agreement* as an order of the *Tribunal*.

7. Administrative Penalty

- 7.1. In terms of section 58(1) (a) (iii), and 59(2) and (3) of the *Competition Act*, *SAA* is liable to pay an administrative penalty in respect of the *Infringing Conduct*.
- 7.2. The *Parties* have agreed that *SAA* should pay an administrative penalty of R18,799,292 being an amount equal to 2.5% of *SAA's* combined turnover derived from inbound/outbound travel on the Johannesburg-Hong-Kong-Johannesburg route for the financial year ended



2010, within thirty calendar days of the confirmation of this *Consent Order Agreement* as an order of the *Tribunal*.

7.3. SAA shall pay the administrative penalty into the following bank account of the *Commission*:

Name of Account: THE COMPETITION COMMISSION FEES ACCOUNT

Bank name: ABSA BANK, PRETORIA

Account No: 4050778576

Branch Code: 323 345

7.4. The *Commission* will pay the administrative penalty into the National Revenue Fund in terms of Section 59(4) of the *Competition Act*.

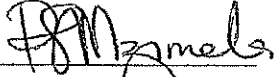
8. Full and Final Settlement

8.1. This *Agreement*, upon confirmation by the *Tribunal*, is entered into in full and final settlement and concludes all proceedings between the *Commission* and SAA and/or its subsidiaries relating to:


8.1.1. The conduct that is the subject of the *Commission's* investigations under case numbers 2006Mar2215, 2008Jan3474, 2009Dec4850 (which, collectively, constitute the *Suite of Complaints*);

8.2. It is recorded that as at the *Date of Confirmation* there are no other pending matters against SAA either referred to the *Tribunal* or under investigation by the *Commission*.

Dated and signed at Kempton Park on the 10 day of February 2012
2011


Siza Mzimela

Chief Executive Officer, South African Airways (Proprietary) Limited and duly authorised signatory

Dated and signed at Pretoria on the 10 day of Feb 2012
2011 

Mr Shan Ramburuth
Commissioner: Competition Commission