COMPETITION TRIBUNAL REPUBLIC OF SOUTH AFRICA

Case No: 83/CR/Oct04

In the Consent Order proceedings between:

THE COMPETITION COMMISSION	Applicant
And	
SOUTH AFRICAN AIRWAYS (PTY) LTD	First Respondent
COMAIR LTD	Second Respondent
NATIONWIDE AIRLINES (PTY) LTD	Third Respondent

Panel: D Lewis (Presiding Member), U Bhoola (Tribunal Member) and N Manoim (Tribunal Member)

Heard on: 21 September 2006

Order and Reasons issued on: 4 December 2006

ORDER AND REASONS

INTRODUCTION

[1] This is an application for confirmation of a consent agreement as a consent order in terms of section 49 D (1) of the Competition Act (the 'Act'). The second and third respondents have opposed confirmation of the order on various grounds. We have decided to approve the consent order. Our reasons for coming to this conclusion follow.

BACKGROUND

[2] On 13 October 2003 the second respondent, hereafter referred to as 'Comair' lodged a complaint with the Competition Commission (the 'Commission') against the first respondent, hereafter referred to as 'SAA'. The complaint related to the manner in which SAA was compensating travel agents for their services. Comair alleges that SAA is a dominant firm in the market for domestic airline travel and that it uses this dominance to engage in exclusionary practices in contravention of section 8(c) and 8(d)(i) of the Act. In this case, the exclusionary practices relate to the remuneration of travel agents

- the allegation being that travel agents are rewarded in a manner that keeps them loyal to SAA to the exclusion of its rivals. Two remuneration practices are in issue in the complaint. The first relates to the provision of override commissions to travel agents in addition to normal flat rate commission. The second relates to what are termed 'trust payments'. These are lump sum payments made to travel agents at the end of a financial year if they attain certain prescribed targets in selling SAA tickets.

[3] The Commission referred the complaint to the Tribunal on 12 October 2004. The Commission sought the following remedies in its referral: [1]

> *A. It is declared that SAA's contracts with travel agents whereby it paid (or pays) travel agents amounts over and above the normal 7 % commission payments, are prohibited for the purposes of section 65 of the Act.*
>
> *B. SAA is to pay an administrative penalty to the National Revenue Fund contemplated in section 213 of the Constitution of the Republic of South Africa, Act 108 of 1996, in the amount up to 10% of SAA's annual turnover in South Africa.*

[4] Comair later applied for leave to intervene in the proceedings and was granted this relief on 6 April 2005.[2] Comair filed its own complaint referral in which it sought the following relief: [3]

> *1. The override commissions and trust payments made by respondent* [SAA] *to travel agents, and any other agreements in terms of which payments are made by the respondent to travel agents based on considerations of loyalty rather than efficiency benefits, constitute prohibited practices in breach of section 8(c) and/or 8(d)(i) of the Act;* (Our emphasis)
>
> *2. All existing agreements between respondent and travel agents of the sort referred to in paragraph 1 above are hereby declared to be void.*

[1] At page 11 of the Commission's complaint referral.
[2] See Comair Limited v Competition Commission and South African Airways (Pty) Ltd decision dated 6 April 2005.
[3] At page 13, paragraph 40 of Comair's particulars of claim.

3. The respondent shall be and hereby is interdicted and restrained from engaging in any and all of the conduct, or from entering any agreements of the sort, referred to in paragraph 1 above.

[5] On 15 February 2006 the third respondent, hereafter referred to as 'Nationwide,' another domestic competitor of SAA, applied to intervene in the Comair complaint referral case. The Tribunal granted Nationwide, intervenor status on 25 May 2006[4] and it too, filed a complaint referral.[5] Previously, in October 2000, Nationwide had filed a complaint with the Tribunal in respect of SAA's remuneration scheme for travel agents. This culminated in a finding against SAA which was fined R45 million for contravening section 8(d)(i) of the Act.[6] We will refer to this previous complaint as the 'Nationwide complaint' and the present complaint, which forms the subject of the consent application before us, as the 'Comair complaint.'

[6] Late in 2005 the Commission and SAA commenced negotiations to settle various complaints that were pending against SAA.[7] In the course of this process, the present consent agreement was entered into. On 24 May 2006, the Commission brought the present application to have the agreement confirmed as a consent order in terms of section 49 D (1) of the Act, read with section 58(1)(b). The intervenors are cited as respondents in this application.[8]

[7] Although the complaint referral had already been set down for hearing prior to the application for the consent order, the Tribunal directed that the consent order be heard first. [9]

[4] See Nationwide Airlines Limited v Competition Commission, South African Airways (Pty) Ltd and Comair Limited decision dated 25 May 2006.
[5] Nationwide's relief, which need not concern us now, was to expand the relief granted by the Tribunal in the first Nationwide complaint from 1 June 2001 to date. The Tribunal's original relief was confined to the period October 1999 to May 31, 2001.
[6] See the Competition Commission v South African Airways (Pty) Ltd Case Number: 18/CR/ Mar01, where the Tribunal held that on the facts of that case the override commission scheme in conjunction with another scheme for remunerating travel agent staff known as the Explorer scheme, constituted an abuse of dominance and contravened section 8(d)(i) of the Act.
[7] See SAA's answering affidavit, at page 39 of the consent order pleadings record (" the record").
[8] Initially this was not the case and after objections from the intervenors, the Commission amended the application to cite them. SAA did not oppose the application for amendment.
[9] Rule 25(1) of the Tribunal rules requires the Registrar to convene a hearing of an application for a consent order at the earliest possible date.

DESCRIPTION OF THE ORDER

[8] The consent order comprises:

1. A summary of the original complaint;

2. The Commission's findings in respect of the complaint;

3. The Commission's conclusion that SAA has contravened section 8(d)(i) of the Act;

4. A denial of liability or wrongdoing by SAA;

5. An agreement by the Commission and SAA regarding future conduct by SAA. This in turn is broken down into two sections. In the first part, SAA agrees that future agreements with travel agents would not contain certain features in respect of incentive payments. It also avers that it is not, at present, a party to any agreement which contains any of these features.[10] In the second part, SAA undertakes to implement a compliance program;

6. An agreement that SAA would pay an administrative penalty of R15 million by no later than 31 May 2007; and

7. A clause that allows SAA, at a future date, to apply to the Tribunal to amend any of the undertakings contained in the order, on written notice to the Commission.

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[10] Clause 5 of the consent order agreement reads as follows:
"*SAA, without derogating from the provisions of clause 8 hereunder, hereby undertakes…To refrain in the future from entering into any agreements, arrangements or understandings with travel agents which provide:*

5.1.1 for commission or incentives to be paid to the travel agents based on targets that are expressed by reference to the sales of SAA tickets by the travel agents in a previous period;
5.1.2 for commission to increase other than incrementally on a straight line basis above any base line stated in the agreements;
5.1.3 for any higher rate of commission to apply retrospectively to earlier SAA ticket sales once particular sales targets have been met;
5.1.4 that travel agents must increase the sales of SAA tickets in relation to a previous period to qualify for the payment of any commission or incentive;
5.1.5 for commission or incentives to be paid to travel agents which are conditional on the travel agents conducting a particular percentage of their business with SAA;
5.1.6 for differentiated base targets for domestic air-ticket sales to be applied to travel agents where the differences do not reflect variations in the cost of distribution through the different travel agents or in the value of the services provided to SAA by different travel agents in the distribution of its tickets; and
5.1.7 for commissions or incentives to be calculated on a period exceeding 12 months.

[9] Analysed closely, what purports to be an agreement between the parties is limited to the content of the undertakings and the payment of the fine. The rest of the consent order, to the extent that it is material, contains a unilateral statement by each of the parties. Importantly, as we go on to examine later, there is neither agreement on the conduct that has taken place nor whether it has contravened any section of the Act. While the Commission sets out facts relating to SAA's alleged conduct and concludes that it has contravened section 8(d)(i) of the Act, this statement is no more than the opinion of the Commission and is not admitted by SAA. In short the parties agree on a remedy for a contravention, but disagree on whether the contravention has taken place.

STANDING OF THE INTERVENORS

[10] At the outset of these proceedings, which were heard on 21 September 2006, SAA, but not the Commission, objected to the participation of the intervenors. We overruled the objection and heard argument from all parties including the intervenors. We do not need to decide whether a complainant or a potential complainant will always be granted the right to intervene in consent order hearings. In this case however, both Comair and Nationwide had been granted intervenor status in these proceedings. As a result they have a legal interest in the outcome of the consent order application, since that order, if granted, would effectively terminate proceedings in which they are participants.

[11] The intervenors raised various objections to the consent agreement ranging from the want of compliance with the prerequisites of the Act, to the adequacy of the terms of the order and the amount of the fine. We consider each of these objections in turn.

OBJECTIONS

First ground for objection- Want of compliance with the prerequisites for a consent order

[12] The intervenors argue that a consent order requires an admission of liability by the respondent to be valid. The Commission and SAA argue that there is no such mandatory requirement. In the present consent agreement, as we noted

earlier, there is not only an absence of such an admission, but also an express disavowal of any liability.[11] Clause 8 of the agreement states:

> *"The Respondent records that nothing in this agreement amounts to, or should be taken to imply, an admission of liability or wrongdoing on its part."*

[13] Even the paragraph setting out the undertakings is prefaced by such a disavowal.[12]

[14] There is only one section in the Act that deals with the content of a consent order and that is section 49(D)(1) which states:

> *"If, during, on or after the completion of the investigation of a complaint, the Competition Commission and the respondent agree on the terms of an appropriate order, the Competition Tribunal, without hearing any evidence, may confirm that agreement as a consent order in terms of section 58(1)(b).* (Our emphasis)

[15] Section 49(D)(3) deals with the content of a consent order in a specific circumstance:

> *"With the consent of a complainant, a consent order may include an award of damages to the complainant."*

[16] What these quotations reveal is that the Act is silent on whether a consent order requires an admission of liability. Indeed, when it comes to stating the requirements for a consent order the legislature has been parsimonious, simply stating that the parties must agree on the terms of an *'appropriate'* order.

[17] It does not follow that because the Act is silent on this point that it may not, by implication, require a consent agreement to meet some prerequisite. This is where the parties to the order and their opponents join issue.

[11] See clause 8 of the consent agreement.
[12] See paragraph 5 which states "SAA without derogating from the provisions of clause 8 undertakes…."

Intervenors' argument

[18] The intervenors argue that it is a prerequisite of a valid consent order that it contain a statement of the conduct that contravened the Act and the section of the Act that was contravened. This must take the form of an admission by the respondent i.e. a plea of 'guilty' on stated facts. It does not suffice to have the Commission allege a contravention and the respondent to deny liability, and then for them, in the face of these seemingly irreconcilable positions, to agree a remedy in terms of the consent order. Expressed differently, dissent over conduct and its legal implications cannot lead to consent on the outcome.

[19] It is worth stressing at the outset that the debate over prerequisites is not a theological one. The intervenors are not suggesting that an absence of a confession disentitles the respondent from the reward of expiation in the form of the consent order. Rather, the debate is located in the world of the material. It asks what the juristic consequences of a consent order are. Depending on that answer, a consent order may have far reaching consequences, not only for the respective rights and obligations of the Commission, the respondent and complainant, but also for consumers.

[20] In order to appreciate their argument, we need to first consider what the consequences of an ordinary complaint proceeding that is not settled are, and then examine whether those consequences should logically apply to a consent order proceeding. To distinguish it from proceedings that terminate in a consent order, we will refer to this ordinary complaint proceeding as the 'full complaint' proceeding.

[21] The full complaint proceeding follows this life cycle; a complaint referral is filed, thereafter pleadings are exchanged, the matter is set down for a hearing where evidence is heard, and the outcome is a decision by the Tribunal, which takes the form of an order, accompanied by reasons. The central task of the Tribunal is to determine whether the evidence 'establishes' the existence of a prohibited practice. If it does, the Tribunal would then make a finding and impose some form of remedy. Either way these proceedings, whether they result in a finding against the respondent or not, would be regarded as completed. (The significance of this word 'completed' will become evident later

when we examine section 67(2) of the Act, which immunises a complainant from double jeopardy).

[22] However apart from the remedy imposed, other consequences follow upon the finding that there has been a prohibited practice and they are that:

1. The same or similar complaint may not again be brought against the respondent by either the Commission or a complainant. This is because of the provisions of section 67(2)) which states:

> *"A complaint may not be referred to the Competition Tribunal against any firm that has been a respondent in completed proceedings before the Tribunal under the same or another section of this Act relating substantially to the same conduct."* (Our emphasis)

We will refer to section 67(2) as the immunity provision;

2. If the respondent is found to contravene the Act again, in respect of similar conduct, then the respondent may be liable to a) a penalty, if the conduct is one for which a penalty is not competent on a first contravention, [13] b) an order of divestiture.[14] The respondent may also face the prospect of an increased fine on a subsequent occasion if it has previously been found to have been in contravention of the Act.[15] We will refer to these as the increased deterrence provisions;

3. The finding can become the basis to found a civil claim for damages against the respondent by any person affected.[16] The Tribunal, on

[13] See section 59(1)(b) which states that "[t]he Competition Tribunal may impose an administrative penalty only…(b) for a prohibited practice in terms of section 4(1)(a), 5(1), 8(c) or 9(1), if the conduct is substantially a repeat by the same firm of conduct previously found by the Competition Tribunal to be a prohibited practice." (Our emphasis)

[14] See section 60(2)(b)(ii) which states that "[t]he Competition Tribunal, in addition to or in lieu of making an order under section 58, may make an order directing any firm, or any person to sell any shares, interest or assets of the firm if …(b) the prohibited practice … (ii) is substantially a repeat by that firm of conduct previously found by the Tribunal to be a prohibited practice." (Our emphasis)

[15] See section 59(3)(g).

[16] See Section 65 (9) which states that "[a] person's right to bring a claim for damages arising out of a prohibited practice comes into existence - (a) on the date that the Competition Tribunal made a determination in respect of a matter that affects that person; or (b) in the case of an appeal, on the date that the appeal process in respect of that matter is concluded."

request of a person, must provide a certificate that it has found that the conduct constituted a prohibited practice in terms of the Act and specifying the section of the Act contravened. A plaintiff requires this certificate in order to commence a civil action.

[23] Thus to summarise - a finding in a full complaint proceeding has consequences in respect of that conduct from the point of view of the respondent's future immunity, increased deterrence for future transgressions and civil liability to a third party.

[24] The intervenors argue that the same consequences that follow a full complaint hearing where a finding has been made also follow a consent order. Comair argued that because a consent order must be an *appropriate* order this means an order, which has a remedy *appropriate* to the competition harm alleged. It notes that the word 'appropriate' is also used in section 58(1)(a) which provides that the Competition Tribunal may make an "*appropriate order in relation to a restrictive practice".* The only way to determine this is to know what that harm was, so that the Tribunal can assess whether the remedy is proportionate to the harm alleged. This means that the Tribunal must know what the conduct was and what section of the Act has been contravened. Without this it cannot decide whether the order is appropriate. Once it has decided that the order is appropriate it has made a 'finding' or a 'determination' and so sections 59(1)(b), 60(2)(b)(ii) and 65(9) of the Act apply, i.e. the consequences for increased deterrence and civil liability.

[25] Secondly, Comair argues that the consent order ends the complaint proceeding and thus the proceedings can be considered *'completed'* proceedings. Since section 67(2), as we observed earlier, provides immunity to respondents in respect of *completed* proceedings, it follows that the respondent to a consent order is entitled to immunity. However, one has to know to what conduct immunity attaches. As the language of section 67(2) suggests, one needs to know whether it is *substantially the same conduct*, even if it is charged under a different section of the Act. Comair relies on this, to read into section 49D, a requirement that the respondent admits liability. A unilateral allegation by the Commission, not admitted by the respondent, as in the present order, does not suffice.

[26] The Commission has responded to this by arguing that 'completion' of proceedings does not equate to 'termination' of proceedings. A consent order may terminate proceedings, but it does not necessarily complete them in the sense intended by the section. The section therefore, according to the Commission, applies only to full complaint proceedings as they have run the full course and in that sense are complete as contemplated by 67(2).

[27] Nationwide also made a separate argument relying on the Rules of the Competition Commission which provide for the form in which a consent order must be filed. In terms of rule 18(2)(b)(i) when referring a consent order the Commission must:

> *"If the Commission and the respondent agree the terms of an appropriate order, the Commission must –*
> *(a)…*
> *(b) attach to the referral –*
> *(i) a draft order*
> *(aa) setting out the section of the Act that has been contravened;*
> *(bb) setting out the terms agreed between the Commission and the respondent, including, if applicable, the amount of damages agreed to between the respondent and the complainant.*
> *(cc) signed by the Commission and the respondent indicating their consent to the order.* (Our emphasis)

[28] This provision in the rules, Nationwide argues, makes it perfectly clear that the parties have to agree on which section of the Act has been contravened.

[29] In summary then, the intervenors are relying on three arguments to reach their conclusion about the prerequisites for a valid consent order. In the first place, an argument that relies on the meaning attributed to the word *appropriate* in section 49D. In the second place, an analysis of what consequences follow upon the granting of Tribunal orders in prohibited practice cases, which suggests that the legislature could not have contemplated consent orders without an admission of liability. Thirdly, that even if the Act is silent on this point, the Commission's rules cure the lacuna.

Commission and SAA

[30] SAA argued that the consent order did not entitle it to immunity and that consequently one could not rely on section 67(2) to provide content to a consent order. This approach seems to have taken the intervenors by surprise since they had expected SAA to argue that it was entitled to immunity without a plea of guilty.

[31] Thus on the SAA argument, and we did not understand the Commission to argue any differently, the consequences of a full complaint procedure do not attach to a consent order, unless the order provides for it. The Commission and SAA are thus perfectly free to establish the terms of the order as they see fit. Although they did not argue this point specifically, we assume they would also conclude that if a consent order does not contain an admission of liability then the increased deterrence provisions and the civil liability provisions would, likewise not apply.

[32] Having denied that the order leads to any of the consequences suggested, they go on to argue that there appears to be a strongly implied indication in the Act that a consent order does not need to contain an admission of liability.

[33] This is due to the curious language of section 49(D)(4)(a), the provision that allows a complainant, after a consent order has been granted, to apply for a declaratory order. Section 49D(4) states:

> *" A consent order does not preclude a complainant from applying for –*
> *(a) a declaration in terms of section 58(1)(a)(v) or (vi);or*
> *(b) an award of civil damages in terms of section 65, unless the consent order includes an award of damages to the complainant."* [17]

[34] A declaratory order is an order by the Tribunal declaring that particular conduct contravenes the Act i.e. it is precisely the same outcome that would be achieved by an admission of liability if that were a requirement. They ask why the legislature would insert this provision, which would appear to be superfluous, if a consent order had to contain an admission of liability. The

[17] Section 58(1) (v) provides for a declaration that conduct of a firm is a prohibited practice. Section 58(1)(vi) provides for a declaration that the whole or any part of an agreement is void.

answer for them is that the legislature did not intend a consent order to have an admission of guilt as a prerequisite and hence, on their reading, the provision is not superfluous.

[35] Comair and Nationwide argue that this is not the only implication of that provision. The subsection is necessary because the Commission and respondent may agree on an admission that falls short of the complainant's legal expectations. They may settle on a lesser count or a language formulation that is inadequate for purposes of the complainant's civil case. Hence in such situations, subsection 4(a), far from being redundant, creates a procedure for a complainant to gain redress, as it fills the lacuna that may have been created between a complainant's expectations of the extent of the respondent's liability, and the formulation agreed upon by the Commission and respondent.

[36] The Commission and SAA conclude that the Act does not set out any prerequisites for a valid consent order. The Commission argues that there are strong policy reasons as well to justify its interpretation. Its experience is that respondents are reluctant to make admissions of liability either for fear of subsequent civil proceedings or consequences for the firm's reputation. If an admission of liability were to be a prerequisite, far fewer respondents would be willing to settle issues by way of consent orders. This would mean that the Commission would have to spend greater resources in litigating cases to their conclusion and the remedy that a consent order might bring to the market might only come into effect much later, if at all.

Analysis

[37] Section 49(D) contains no express provision regulating the content of a consent order. More specifically, as we noted earlier, it contains no provision requiring that the Commission and respondent agree that the conduct that informs the consent order contravened the Act, or that the consent order state what section of the Act has been contravened.

[38] The debate is over whether the consent order should more closely resemble its analogue in criminal proceedings, the plea bargain, or in civil proceedings

where parties frequently agree to a court order imposing on a defendant a remedy without an admission of any wrongfulness on its part.

[39] Both these arguments tacitly assume that the consent order must necessarily be one or the other and not anything more nuanced, occupying the space in between. We find for the existence of a space in between, as we shall go on to develop in an analysis of section 49D. But let us first consider the opposing approaches.

[40] Firstly, Nationwide uses the Commission's rules to plug the gap and to read back into the Act what Nationwide identifies as deficient in it. We reject this approach on two grounds. First, it is by no means clear that rule 18 requires an admission by the respondent that it has contravened the Act. While sub-rule (aa) requires the Commission to set out the section of the Act that has been contravened, it does not require that the respondent agree with this conclusion. Significantly, in sub-rule (bb) it states that the draft order must set out the terms "...*agreed between the Commission and the respondent..."* If the drafters had intended to include agreement on the contravention to form part of the order, this would have been stipulated in sub-rule (bb). Instead, the explicit mention is in sub-rule (aa), which suggests that the minimum requirement for a valid order is that the Commission state what the alleged contravention is, not that the Commission and respondent agree upon this conclusion. This is how the Commission has approached the present order – it gives its legal conclusion of the section contravened and considers that it has complied with its rules. We would agree with this, but even if we are reading the rule too mechanically, and it requires an admission by the respondent of the section of the Act contravened, we cannot use the rule as an aid to interpret the statute.

[41] As the Competition Appeal Court has stated in Anglo South Africa Capital (Pty) Ltd and others v Industrial Development Corporation of South Africa and the Competition Commission:

> *"In any event regulations (or Rules in this case) which have not been drafted by the legislature cannot be treated together with the Act as a single piece of legislation nor can these Regulations be employed as an aid to the interpretation of the Act. (See Moodley v Minister of Education and Culture, House of Delegates 1989 (3) SA 221 (AD) at 233 E – F). Thus, Rule 46*

cannot be used to interpret the provisions of the Act and in particular, Section 53(1) and to restrict the express provision of Section 53(1)(c).”[18]

[42] The interpretation contended for by Nationwide suffers from precisely this defect. It forces a restricted meaning upon a section of the Act, which contains no such limitation.

[43] Secondly, the intervenors rely on inferential reasoning. The fact that the Act has, as we have noted, several consequences for a finding that there has been a prohibited practice, must mean that a consent order amounts to a finding and hence if it is to be a finding, it must have the facts and legal conclusions on which a finding can be made, which leads to the conclusion that a consent order must contain an admission of liability. Similarly, by inferential reasoning, consent orders are a completion of proceedings and if that is the case, section 67(2) applies and affords immunity – without clarity on the crime there cannot be clarity on immunity, and hence, the same conclusion that a consent order must contain an admission of liability is reached. The problem with this argument is that it assumes that there has to be a relationship between the consequence and the antecedent condition viz. the content of the consent order. This is not so. A simpler answer is to say that if the consequence does not fit the antecedent the consequence does not apply.

[44] Finally, we go on to consider Comair’s reliance on the word *appropriate,* the sole adjective used in the section to qualify a consent order. Comair’s argument is that the Tribunal cannot determine the appropriateness of a remedy without having regard to what the conduct is. Once one has to have regard to the conduct, one needs to know what it is that a respondent is admitting to having done, so one can assess the utility of remedy in relation to the admitted wrongdoing. Comair argues that it is healthy for a respondent to be required to carefully weigh up admissions concerning its conduct, knowing that it will have consequences. Comair is also of the view that the deterrent machinery in the Act, those sections we considered earlier in relation to increased deterrence, would be considerably undermined by ‘guiltless’ settlements.

[18] 2003(1) CPLR 10 (CAC) at 17 e- g.

[45] To argue, as a matter of public policy, that consent orders that contain remedies should not be granted unless accompanied by an admission of liability, is perfectly legitimate. However, there are equally compelling public policy arguments for not requiring an admission. The Commission argues that consent orders are a vital part of its legal machinery in enforcing the Act, as they constitute *" a constructive alternative to litigation"*. [19] Of course this is an answer to why there should be consent orders, not why consent orders should contain an admission of guilt. However, if from its experience it appears respondents are so unwilling to make admissions of guilt that it would make seeking consent orders a futile exercise, then one would have to take seriously claims that the regime survives, precisely because the Commission does not have to extract *mea culpas*.

[46] Our function is not to make this public interest choice for the legislature, unless there is a clear indication that we have been mandated to do so by the legislation. What we have to consider is whether the use of the word *appropriate* in section 49D creates an interpretive gap would justifies us extending the meaning of the language to read in a requirement that consent orders must contain an admission of guilt for their validity. We would suggest there is not such a gap.

[47] As a point of departure, we would have to question why the legislature would have signalled its intent to convey such an important legal conclusion, so cryptically, and through the use of a word subject to a range of meanings, only some of which support the Comair interpretation.[20] We would suggest that the use of the word *appropriate* here means no more than *suitable* - it is *suitable* in the sense that it is an agreement that suits the contending interests of the Commission, as the proxy of the public interest, and the respondent, and in that sense, can be said to be *appropriate* as between themselves. 'Appropriate' is not so elastic a notion that it can have read into it a requirement for an admission of guilt by the respondent.

[48] In summary, the intervenors' approach, by whichever of the three interpretive paths proffered, one needs to follow, requires one to make a most ambitious reading of section 49D to make a case for the existence of the missing words,

[19] See Commission's replying affidavit, at page 96 of the record paragraph 11.1.
[20] The Concise Oxford English Dictionary defines *appropriate* as "suitable or proper."

"a consent order requires an admission of liability". Whilst one may sometimes be required to do so in an interpretive exercise, we would suggest that this is not such an occasion. [21]

[49] But, it is not clear to us either that the argument, advanced by the Commission and SAA, for why a consent order does not require an admission of guilt, is any less susceptible to the criticism of straining meaning from whence none may be intended. Recall that the argument, giving subsection 4(a) a meaning that does not amount to a tautology – why would one have to ask for a declaration of guilt if a consent order is already required to contain a plea of guilt - is premised on the assumption that this is the only interpretation that can be given.

[50] However, as we noted earlier, the intervenors correctly point out that this is not the only possible meaning of the subsection. Since in the Act, a damages claim is contingent upon a prior finding by the Tribunal that there has been a prohibited practice, it is not surprising that subsection (4)(a) has been inserted to protect a complainant's right to get the appropriate finding to found its damages claim, since it is not party to the terms of the consent order. Recall that a complainant's right to bring a claim for damages commences not on the date the prohibited practice occurs, but after the Tribunal has determined that there has been a prohibited practice. Without a finding by the Tribunal there is no right to bring a civil claim.[22] Because actions for competition law damages create a division of labour between the competition authorities and the civil courts - the Tribunal finds whether conduct is wrongful, but cannot award damages, whilst a civil court can assess and award damages, but not determine whether the conduct is unlawful - the Tribunal's finding frames the parameters of what can be claimed in the civil suit.[23] Thus there may be a difference between what a complainant would like stated in admission, assuming there was one, and what the Commission and respondent are

[21] See E A Kellaway, Principles of legal interpretation, Butterworths, 1995, at 141, who relies on Mersey Docks and Harbour Board v Henderson Brothers 1888(13) App Cas 595 607 for the proposition that – "*a court should be careful not to so interpret a statute as to create a casus omissus where it is reasonably possible to avoid such interpretation, or unless strong necessity requires such interpretation*."

[22] Section 65(9) which states that "*A person's right to claim damages arising out of a prohibited practice comes into existence on the date that the Tribunal made a determination in respect of a matter that affects that person."*

[23] Sections 58(1)(v) and 65(6), read with sections 62(1) and 62(5).

prepared to agree upon. One must bear in mind that the complainant's private interest, and the Commission's mandate to enforce the public interest, may not always coincide. One need only to compare the declaratory orders sought by the Commission and Comair in their complaint referrals in this case, to see that this point is not purely academic. This subsection, therefore, has a perfectly clear function in filling the gap between civil and public law expectations of a Tribunal order. This means we cannot conclude from the formulation of subsection 4(a) that a consent order does not require an admission of guilt – it appears to serve a different function in securing the rights of complainants to civil damages in a system where the Tribunal's finding of what the contravention was, not the act itself, becomes the foundation on which the damages claim is constructed.

[51] Amidst some complex contending arguments for what the section means, perhaps sight has been lost on a more prosaic one. The reason that section 49D contains no content requirement for a consent order is not that the legislature was remiss, but rather because it did not intend to be prescriptive on this point.

[52] We read two expressions of legislative intent in section 49D; firstly, that a consent order can take different forms; secondly, that what determines the consequences of a consent order is its content, not the fact that it is a consent order. Thus, depending on their content, different consent orders will have different consequences. We derive this interpretation from the treatment of damages in the Act. Let us examine each one of these issues in turn.

[53] Firstly, a consent order, it is made clear, need not provide for damages to be paid to the complainant. Where it does not, the complainant retains the right to claim damages, but it cannot on this ground object to the consent order being granted. Where it does provide for an award of damages, the complainant's consent is required, and by doing so, the complainant waives its right to a further civil claim in respect of that conduct.[24] What this indicates is the legislature's wish not to be prescriptive about the content of a consent order, but to make this the subject of negotiation.

[24] Section 49D(4)(b) and section 65(6)(a).

[54] Secondly, we can derive from the approach to damages that the consequences of the consent order depend on its content –it is because a consent order contains an award for damages that the respondent receives civil immunity; if it does not there is no civil immunity. Thus, it is not as the intervenors seem to suggest that the consequences inform the content, rather it is the other way round. This explains the use of the word *appropriate*. An order is *appropriate* in the sense that it suits the ends that the contracting parties want it to have.

[55] It follows that if a consent order contains an award of damages and that this award of damages immunises the respondent from civil claims from the complainant, that the content of the consent order must be sufficiently precise to enable a later determination as to what conduct of the respondent is the subject of this immunity. From this we can conclude that where the consent order is to have the effect of giving civil immunity, the content of the order should not just include the statement of the award of damages, but would also have to contain a description of the conduct that gave rise to it, as well as the section of the Act contravened. Now although this content requirement is not expressly provided for in the Act, it is by implication. One cannot have immunity without being clear what conduct has been immunised, otherwise this could lead to interminable disputes later. Thus, in this circumstance it is permissible to read back into section 49D, a requirement that where there is an award of civil damages, an admission of liability that founds that award, will be necessary. If this were not the case this could lead to dispute in the future with a complainant contending that it retains the right to bring an action and a respondent contending the matter is *res judicata*.

[56] The same logic that informs this approach to civil liability can be applied to the consequences of an admission of guilt. That is, it is not an express requirement, but where the parties have a consent order, which contains an admission of liability, this will have different consequences to a consent order without one. In short, the legislature is agnostic about the admission of guilt in a consent order – rather it wanted to create procedure for the settlement of disputes between the Commission and respondents where they could design a bespoke agreement, *appropriate* to the circumstances of a case and the consequences that they want to provide for.

[57] Where a consent order contains an admission of liability one can conclude that it has the same consequences as a finding that there has been a prohibited practice in a full complaint hearing. First, the Tribunal in confirming that order can be said to be making a finding or determination. Although it is not doing so pursuant to a trial, by establishing that the conduct contained in the admission amounts to a contravention of the Act, the Tribunal is still making a finding to the extent that it is matching a conclusion of fact with a conclusion of law. Because the Tribunal in this type of order reaches a finding or a determination in relation to a prohibited practice, the approval of the consent agreement in these circumstances, has subsequent consequences for the purposes of immunity, repeat offences and civil claims. (Recall that these were the sections of the Act that became applicable when the Tribunal had made a *finding* or *determination* or when there has been a *completed* proceeding.)

[58] Where a consent order contains no admission, then the Tribunal makes no finding or determination in relation to a prohibited practice, as on the papers, no prohibited practice is conceded by the respondent. This type of order will therefore not bring in its wake the consequences for repeat offences and civil liability. No doubt these are to the great advantage of the respondent, and hence there may be a reluctance to ever settle by way of an admission of guilt. However, there will be no immunity either, because this would not constitute a completed proceeding, the requirement that triggers the grant of immunity, and this may count heavily for some respondents, who wish to resolve a complaint finally, and not be dogged by it in future, in the face of a determined and well resourced complainant, or by other as yet undeclared putative complainants, who might emerge in the future.[25]

[59] Of course, if this latter type of consent order has no consequences, not even for immunity, what is the point of having it? One answer we suggest, and no doubt a very important one, is that it in all likelihood settles the matter with the Commission. Although the Act is silent on this point, at least as a matter of common law, the Commission could probably be estopped from bringing the same complaint again that it had settled. The complainant, however whose

[25] That is, of course assuming that their claims have not been time-barred by section 67 (1), which states that "[*a*] *complaint in respect of a prohibited practice may not be initiated more than three years after the practice has ceased."*

complaint gave rise to the consent order, could not be estopped as it had not settled with the respondent, and nor could section 67(2) be raised against it as this would not be a completed proceeding. In this respect, we agree with the Commission and SAA that section 67(2) only applies to a completed proceeding, in the sense that it is a proceeding where a finding could be made in respect of conduct that had contravened the Act. In this sense, a completed proceeding is one where there has been a conclusion made on the merits. It would thus apply to a consent order in terms of an admission of liability, but not to one where this feature is absent. The fact that a consent order without an admission of liability may *terminate* a proceeding in respect of the respondent and the Commission, does not render this a *completed* proceeding for the purpose of section 67(2) - here there has been no conclusion on the merits. Anyone else who wishes to bring the complaint again is free to do so.

[60] We would summarise our conclusions of law as follows:

1. There is no judicial prerequisite that a consent order must contain an admission of liability by the respondent – a consent order may contain one if the parties have so agreed, in which case the consequences will differ from the type of order in which such an admission is absent. By admission of liability, we refer to a statement of facts admitted by the respondent that describes conduct that contravenes the Act, and the section implicated.

2. If a consent order does contain an admission of liability then it has the following consequences –

    (a) The consent order immunises the respondent for the purposes of section 67(2).

    (b) The consent order can be used against respondent in terms of the repeat contraventions provisions in the Act (Sections 59(1)(b) and 60(2)(b)(ii)). Section 59(3)(g) would apply as the respondent would, at least in respect of the conduct forming the subject of the consent order, have previously been found in contravention of the Act.

(c) The consent order may be used by a complainant to commence civil proceedings in that it may request the tribunal to issue the certificate contemplated in section 65(6)(b). This however will only be issued to the extent of the admission made in the language of the consent order. If this is insufficient for a complainant, it may still rely on 49(D)(4)(a) proceeding, to cure the lacuna between its expectations and the admission contained in the order.

3. If a consent order does not contain an admission then –

(a) It does not immunise the respondent in terms of section 67(2). A respondent may be able to raise estoppel against the Commission, but not against a complainant or any third party that could show an interest. The complainant has two choices; it can proceed in terms of section 49D(4) – in this case it will not have to proceed to obtain a notice of non-referral, but it will be confined to the remedies suggested by that section. So for instance if the complainant sought an interdict against the respondent, because it was dissatisfied with the terms of the consent order, it could not do so proceeding in terms of section 49D(4), because it confines a complainant's remedies to either a declaration that there has been a prohibited practice or an order voiding an agreement. Secondly, the complainant can still proceed with remedies not provided for in section 49(D)(4). However, it would first require a notice of non-referral from the Commission, as it would need to commence the complaint de novo. Presumably this would be obtainable expeditiously, as the Commission would have no further interest in pursuing the matter.[26] A third party which is not the complainant would also be entitled to bring a complaint, but would have to obtain a

[26] We concede that there is something bureaucratic in this, but the language of sections 50(2)(b) and 50(3)(b) suggests that a notice of non-referral must be granted at a time when the Commission has decided not to prosecute or to only partially prosecute a complaint. Where the Commission has done so and settles, the complainant must, if not precluded by section 67(2) as discussed, commence *de novo*. If both the complainant and the Commission act with expedition, and there is no reason why they should not, as the complainant has already formulated the complaint in its initial submission and the Commission has already taken a view of the matter in settling - then the delay in getting to the complaint referral stage, need not be long.

notice of non-referral. Unlike the complainant, the third party cannot rely on section 49D(4), which expressly limits this remedy to a complainant. This is because in terms of the Act a complainant is the person who submitted the complaint to the Commission in terms of section 49B(2)(b).[27]

(b) It has no consequences for repeat of conduct forming the subject of consent. Sections 59(1)(b) and 60(2)(b)(ii) of the Act cannot be used against a respondent in the event that it is found to have contravened the Act in respect of conduct that formed the subject matter of a prior consent order which did not contain an admission of guilt. Section 59(3)(g) would not apply as the respondent would not, at least in respect of the conduct forming the subject of the consent order, have been found in contravention of the Act.

(c) It has no consequences for civil liability. A complainant must still proceed in terms of section 49D(4)(a), and a third party, not the complainant which alleges that it has been affected by the conduct would have to submit its own complaint to the Commission in terms of section 49B(2)(b).

[61] We consider later the nature of our discretion to grant consent orders as it will differ depending on the nature of the consent order.

[62] In conclusion we find that there is no prerequisite that a consent order must contain an admission of liability.

Second ground for objection – a consent order containing an administrative fine must contain an admission of liability.

[63] The second objection, which is raised by Nationwide, is related to the first. Nationwide argues that if a consent order contains a provision for the payment of an administrative fine, as the present one does, it must contain an admission of guilt. This argument is not based on any constitutional ground or

[27] See definition of "complainant" section 1(1)(iv).

public policy, but on the language of section 59, the section which provides for the Tribunal to impose an administrative penalty. In the first place Nationwide argues that section 59 only applies if there has been a contravention, and the contravention is one for which the Act makes a fine permissible.[28] Secondly, section 59(2) sets out the requirements for determining the appropriate penalty. Several of these subsections contain a reference to the *contravention*. Thus, Nationwide argues, the Tribunal cannot impose a fine without an admission of liability, as it neither knows whether the respondent was guilty of conduct for which the Act makes a fine a competent remedy, nor does it know how to weigh the fine according to the criteria in section 59(3) which make the nature of the contravention a central issue in calculating the fine.

[64] The problem with this argument is that the Tribunal is not acting in terms of section 59 when it approves a consent order that provides for the payment of a fine. Rather, it is acting in terms of section 58(1) (b), which states:

> *"In addition to its other powers in terms of this Act, the Competition Tribunal may confirm a consent agreement in terms of section 49D as an order of the Tribunal."*

[65] The Tribunal is thus confirming a consent order, in which an administrative penalty is provided for - it is not using its own discretion to impose the administrative penalty – if it was, it would be acting in terms of section 59(3). The administrative penalty in the consent order is reached by way of agreement between the Commission and the respondent. Without the respondent's acquiescence it would not appear in the consent order. Thus, the Tribunal performs different functions in approving a consent agreement containing an administrative penalty, which has been arrived at by way of negotiation between the Commission and the respondent, and imposing a penalty as a remedy pursuant to a full complaint proceeding where the Tribunal has to exercise its discretion as to whether, in the first place to impose a penalty and secondly, if it does, where to set it. This does not mean that we must not enquire into the justification for the penalty, but justification can be addressed without an admission of guilt. Thus we may enquire from the Commission how it arrived at the fine, as we are testing whether the public

[28] Recall that not all prohibited practices render a respondent susceptible to an administrative penalty. See section 59(1).

representative has acted rationally in discharging its function; we are not testing whether the respondent can justify the fine. Hence, no admission by the respondent is required in this respect, even a pronunciation of innocence, if it should so choose, would not interfere with our ability to confirm the order. [29] We might in certain cases require more information from the Commission to justify its agreement, we would also have regard to the provisions of section 59(3) in doing so, but this is different to requiring an admission from the respondent. Here we act in terms of section 58(1)(b) relying not on an admission, but on the Commission's version of the facts.

[66] No-fault penalty payments are not unusual in administrative proceedings. The United States consent agreements in non-criminal matters, feature this remedy frequently. The payment of a penalty provides an effective form of deterrence, particularly in dominance cases where behavioural remedies may prove more difficult to either craft or subsequently enforce.

[67] We find that there is no requirement for a consent order, which provides for the payment of an administrative penalty, to be accompanied by an admission of liability by the respondent.

Third ground for objection – the terms of the undertaking are inadequate

[68] Comair, which has raised this objection, argues that the undertaking set out in clause 5 of the order, effectively an interdict, is insubstantial. Comair raises two types of objection to the formulation of the undertaking; firstly, it is formulated too narrowly, we will refer to this as the objection based on principle; secondly, the detail of its terms are unclear or inadequate, we will refer to this as the objection based on detail. Recall that Comair in its complaint referral sought an interdict. The material difference between that prayer for an interdict and the undertaking in the order is that Comair seeks to interdict any type of remuneration system where the basis for compensation is

[29] This is the difference between requiring an admission for consequences that relate to immunity, civil or administrative on the one hand, and consequences for fines on the other. In the former a later court cannot immunize without knowing what the respondent has been found to have done. In the latter, in assessing the appropriateness of a fine or remedy, we can assess it with regard to the Commission's statement of the case, even though not admitted by the respondent, because here we are supervising the Commission's conclusions about the statement of the competition harm and its resolution.

more loyalty inducing than it is efficient. [30] Comair's version thus proposes a test, stated in general terms, that makes an economic conclusion about the outcome of the agreement. It does not tell the reader, however, what terms might infringe this test; the reader would have to reach this conclusion unassisted by the terms of the order. The consent order in contrast, contains no general test, but contains a detailed description of the terms that would be impermissible for SAA to include in its agreements or arrangements with travel agents. Thus, unless an arrangement found its way into the consent agreement's *numerus clausus* of forbidden terms, it would not contravene the order, even if it were more loyalty inducing than efficient.

Discretion

[69] In order to determine the merits of these objections, we must first have an appreciation of what our discretion is in relation to the confirmation of consent orders. All parties agree that we are not a mere rubber stamp to the Commission and respondent's bargain, but cannot agree on the extent of our discretion. The fact that section 49D (2) provides that we may either refuse to grant an order, or grant it only if certain changes are made, puts the matter of the Tribunal having some type of discretion beyond dispute. The difficulty is appreciating its extent. Predictably SAA and the Commission minimise the discretion whilst the intervenors elevate it.

[70] It is not necessary for the purpose of this decision to go into the extent of our discretion in any great detail. However, there is a relationship between the extent of our discretion and the nature of the order. In discussing the first objection we noted that it was the content of the consent order not the fact of it that determines the consequences. Since the consequences may differ because of the content, it follows that our discretion should also differ depending on the content, because the extent of the discretion should be a function of its consequences. The more the order contains terms that settle issues finally, thereby depriving other parties of further remedies, the more careful we have to be about granting it, to ensure that the Commission does

[30] Presumably Comair derives this formulation from our decision in respect of the Nationwide complaint, where in considering European cases on target based incentive schemes we observed that *"*[t]*he cases indicate that the nature of these schemes is not to promote efficiency because they are not volume driven, but to promote loyalty."* See Commission v SAA op cit paragraph 254.

not enter into sweetheart deals with respondents that, as one United States writer expressed it, 'mock the public interest'.[31]

[71] By way of example, an order may contain an admission of guilt in respect of egregious conduct, but may be remedially inadequate in relation to the seriousness of the contravention. A respondent who secures an overly lenient remedy from the Commission, by way of a consent agreement, would not only enjoy the benefit of immunity in future, but also may have precluded a complainant from seeking a more effective remedy in circumstances where it would, but for the consent order and the consequent immunity, have been willing to do so.

[72] The fact of this case provides a perfect illustration of this danger. Let us assume that SAA feared that the terms of Comair's interdict were more onerous than terms the Commission was willing to agree in a consent order, and that it considered it possible that if the matter were not settled, the Tribunal might, if it found a contravention, impose the Comair relief; SAA might be willing to concede to an admission of liability in the consent order, despite the adverse consequences that this might entail for it civilly and for repeat contraventions, in order to trigger the immunity provision in section 67(2), and so preclude Comair from seeking a stronger form of relief. For this reason, where a consent agreement has the effect of depriving a complainant of a remedy that it seeks, or diluting it, the tribunal may show less deference to the Commission's prosecutorial prerogative. However, since no admission of guilt is contained in the consent agreement Comair is not deprived of a further remedy. As we noted earlier, if Comair is dissatisfied with the terms of the undertakings in clause five of the consent agreement, it is not deprived of its remedy to bring another complaint and to get a notice of non-referral from the Commission, because SAA is not entitled to section 67(2) immunity on the current order.

[73] Given that immunity is not a consequence of this order, we will therefore view it with greater deference to the Commission's prosecutorial judgment than we might an order containing an admission of liability.

[31] See Lloyd C Anderson *Mocking the Public interest: Congress restores Meaningful Judicial review of Government Antitrust consent decrees*, U of Akron Legal Studies Research Paper No. 06-08.

[74] The present order, as we have observed, contains several remedies. First there is provision for the payment of an administrative penalty. Secondly, there is an undertaking in respect of future remuneration schemes with travel agents, and thirdly, there is an undertaking by SAA in respect of the implementation of a compliance program. The latter has not been the subject of objection and no more need be said of it.

[75] We now briefly go on to consider Comair's objections.

Objection based on detail

[76] One of the undertakings in the agreement is that SAA must not increase the commission *"other than incrementally on a straight line basis above any base line stated in the agreements."* Comair finds in this formulation a basis to quibble whether it covers what it terms *"jumps in the linear schedule setting."* Another undertaking prohibits retrospective commission payments to be made to agents once a target has been met. Comair queries whether this covers only full retroactivity as opposed to only partial retroactivity. Finally, it questions the calculation period for the payment of commissions. The undertaking provides that this may not exceed 12 months whilst Comair considers this period should be at least half of that. The Commission's response is that these alleged loopholes in the undertakings are either based on an incorrect reading of the agreement or relate to conduct which has not yet been shown to contravene the Act.

[77] We agree with the Commission. None of the complaints of the alleged loopholes expose any significant defects in the undertakings. They amount to a belt and braces reading of the undertakings, which serve, by their pettiness, to confirm that the Commission has struck a good bargain rather than the reverse. The only objection which does not relate to ambiguity, relates to the length of the commission period. It is true that in the Nationwide case the Commission's expert had testified that a period of one year was sufficiently long for an agreement to have an anticompetitive effect. [32] However, the expert was testifying about agreements which contained the objectionable features

[32] See Commission v SAA op cit paragraph 161.

that the Commission has sought to eradicate through the other undertakings mentioned. If the one-year period is understood in the context of an agreement from which other allegedly objectionable features have been purged, then the one- year period is not problematic.

[78] As far as the points of detail are concerned it is by no means clear that the undertakings are inadequate on this point. Even if we are wrong on this, we would defer to the Commission's judgment on this.

Objection based on principle

[79] Insofar as the point of principle is concerned we see validity in both positions. Comair makes a fair argument that objectionable remuneration schemes can take a variety of forms and that the Commission's shopping list is an inadequate way of preventing SAA from recreating the mischief in another guise. For Comair then, the solution is to identify the theory of harm and make that the lodestar for the content of the interdict. Comair, however, is a competitor and at present a non-dominant one. It may well have an interest in relief that is framed so broadly that it may chill SAA from implementing a scheme for remuneration that, while not capable of being replicated as successfully by a non-dominant firm, may still not be proscribed by the Act. Hence, the Commission may quite legitimately feel that it is more comfortable getting undertakings in respect of arrangements whose anticompetitive propensities it has experience of, than a wider formulation that may chill arrangements it does not have experience with. Whilst this approach by the Commission may err on the side of conservatism, it is by no means irrational or overly lenient. There is also a legitimate concern that an order so widely framed as Comair wishes it, may be too vague to be useful. Whilst we do not need to come to a definitive view on this, it is a legitimate concern for the Commission to have, as the body charged with enforcing compliance with a consent order.

Conclusion

[80] We are satisfied that the Commission has arrived at an undertaking that is reasonable, having regard to the harm that the Commission alleges to have taken place and judged according the standard of deference which we would

accord the Commission in respect of a consent order that does not contain an admission of liability.

Fourth ground for objection - adequacy of the fine

[81] Both intervenors take the view that the fine proposed in the consent agreement is too lenient. Comair argues that the fine is low, when one has regard to –

1. The length of the infringement period. In the Nationwide complaint the Tribunal held that it had only had evidence to show that the infringement took place during a specified period of 20 months. On the Commission's version of the facts, the present conduct continues for a period of three years after the end of the 20-month period that the Tribunal had identified in Nationwide;

2. The fact that SAA had introduced the trust payment system at a time when the overrides were coming under scrutiny in the Nationwide complaint;

3. The fact that SAA has already been found to have been in contravention of the Act. Here Comair seeks to rely on section 59(3)(g) which requires the Tribunal to consider whether a complainant has previously found to have contravened the Act. [33]

[82] Given that these features were absent in the Nationwide complaint for which the Tribunal fined SAA R45 million, Comair argues that the penalty should be significantly in excess of R 45 million. Comair also objects to the fact that SAA is given more than a year to pay the penalty as opposed to the period of 20 days stipulated in the Nationwide decision.

[83] The Commission counters this criticism by arguing the artificiality of treating these two complaints as sequential. Rather, the Commission argues, we should have regard to the fact that there is a considerable overlap between the periods of the complaints. Nor had the Nationwide complaint been disposed of at the time the Comair complaint was lodged. Although the Nationwide

[33] See Comair's affidavit paragraph 9 on pages 71-3 of the record.

complaint was submitted to the Commission some three years earlier than that of Comair, the complaint did not relate solely to the effect of the remuneration scheme on Nationwide, but also on other players in the market including Comair, as our decision makes clear.[34] Secondly, when Comair lodged its complaint in 2003 the hearing into the Nationwide complaint had not yet commenced. On the eve of the date for the hearing of the Nationwide complaint SAA had sought a stay in proceedings so that the Comair complaint, at that time still the subject of a Commission investigation and not yet referred to the Tribunal, could be consolidated with that of the Nationwide complaint. Although the Tribunal had refused the stay, a decision which was upheld on appeal, this does illustrate that the two proceedings have a history that is more parallel than sequential.

[84] For this reason the Commission has taken, as its point of departure in arriving at an appropriate penalty, what fine might have been imposed had the Tribunal heard the matters as a single consolidated complaint. The Commission then applied the same methodology that we applied in calculating the fine, but has updated the facts since that date, considering not only aggravating factors, such as the longer time period, but also mitigating factors such as the fact that SAA had agreed to settle the matter on the terms sought. It came to the conclusion, following the approach outlined, that the Tribunal would have fined SAA a total of R 60 million. Since we in fact fined SAA R45 million in respect of the Nationwide complaint, the R15 million represents the difference, and hence the fine in the consent order. The Commission has attached its workings in this respect to its replying affidavit. [35]

[85] We are not in a position to assess whether the factors relied upon in the updating exercise are correct or whether the Commission has given correct weightings to the various new circumstances. We are however satisfied that it has applied its mind to the problem and that its method of considering the two cases as one for the purpose of arriving at an overall fine from which the previous fine has been subtracted, is, given the unusual history of the prosecutions in this matter, a fair one.

[34] See Commission v SAA op cit paragraph 5.
[35] See Annexure A to the Commission's replying affidavit, at pages 101-104 of the record.

[86] Again in matters of setting a level of fine we would give considerable deference to the Commission. In a leading Australian case, NW Frozen Foods Pty Ltd v ACCC, the Court had to decide whether to approve the equivalent of a consent agreement in its procedures. The Court noted that fixing penalties is not an exact science and for this reason the Court does not ask whether it would arrive at the same amount without the aid of the parties, but rather whether the amount concerned can be accepted by the Court as appropriate. The Court went on to say that the beneficial effects of settling complex litigation would be jeopardised if courts were to conclude that proper settlements were clouded by unacceptable risks. The Court held that it would not depart from an agreed figure merely because is might be disposed to select some other figure. [36]

[87] There is much to be said for these cautionary words. We therefore, have no reason to interfere with the setting of the administrative penalty proposed in this case.

[88] As far as the generous payment period is concerned SAA, in its papers, makes the point that it has been a respondent in four matters, which it settled at the same time with the Commission. SAA's total liability in respect of these four matters, including the R 45 million in respect of the Nationwide case, amounts to R 100 million. This total liability and its cash flow implication for SAA were taken into account in determining the payment period. [37] This is a perfectly reasonable explanation for the longer time period and does not constitute a ground for either refusing the order or suggesting a change to be made to it.

CONCLUSION

[89] We have considered the various objections to the consent agreement and conclude that none justifies us in exercising our discretion to refuse to grant the consent order. There is no other reason for us not to approve the order. To cure what we considered an ambiguity in the agreement, the parties to the order, agreed at the hearing that they would delete the word *"and"* at the end

[36] (1996) 71 FCR 285 141 ALR 640.
[37] See SAA's answering affidavit at pages 39-40 and 54-55 of the record.

of clause 5.1.6. [38] We approve the consent order contained in the notice of motion as amended by this deletion.

COSTS

[90] We make no order as to costs. Given the uncertainty about the legal status of consent orders in our jurisprudence to date, the intervenors were entitled to come and protect their interests. We have furthermore found their contributions to the debate enormously helpful to us in coming to our own conclusions.

ORDER

[91] We make the following order:

1. The consent order as amended during the hearing is approved;

2. There is no order as to costs.

_____

N Manoim

D Lewis and U Bhoola concurring.

Tribunal Case Manager: M Murugan-Modise

For the Commission: J Campbell SC instructed by Cheadle Thompson and Haysom.

For South African Airways: A Subel SC and R Bhana instructed by Hofmeyr Herbstein & Gihwala.

For Comair: D Unterhalter SC and J Wilson instructed by Webber Wentzel Bowens.

For Nationwide: W Pretorius instructed by Roestoff Venter Kruse.

[38] This amendment indicates that the clauses that the Commission objects to are to be considered separately and not cumulatively.