

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, JOHANNESBURG

Case Number: **11399/2022**

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
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DATE	SIGNATURE

In the matter between:

**AIRLINK PROPRIETARY LIMITED**

Applicant

and

**SOUTH AFRICAN AIRWAYS SOC LIMITED**

First Respondent

**SIVIWE DONGWANA N.O.**

Second Respondent

**BONGANI NKASANA N.O.**

Third Respondent

**THE UNSECURED PFC CREDITORS IN THE  
RECEIVERSHIP OF SOUTH AFRICAN AIRWAYS  
SOC LIMITED**

Fourth

Respondent

**THE CONCURRENT CREDITORS IN THE  
RECEIVERSHIP OF SOUTH AFRICAN AIRWAYS  
SOC LIMITED**

Fifth Respondent

**THE LESSORS IN THE RECEIVERSHIP OF**

## **JUDGMENT**

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**This judgment has been delivered by being uploaded to the CaseLines profile on and communicated to the parties by email.**

Wepener J

*introduction*

[1] The applicant in this matter Airlink Proprietary Limited (formerly SA Airlink Proprietary Limited) (also referred to as SA Airlink Airways) (“Airlink”) seeks a declaratory order regarding its entitlement to claims against the first respondent being honoured by the second and third respondents (the Receivers in the Receivership of South African Airways SOC Limited) (“SAA”).

[2] The relief sought is:

- “1. Declaring that the applicant’s claim for flown ticket revenue (‘the flown claim’), as described in paragraphs 85 to 92 of the founding affidavit, constitute a Post-commencement Claim as defined in the Business Rescue Plan (‘the Plan’) of the first respondent, tot the extent that the dates of payment thereof in terms of the Commercial Agreement annexed as ‘FA4’ are after 5 December 2019.
2. Declaring that the applicant’s claim for unflown revenue (unutilised ticket liability) (‘the unflown claim’) as described in paragraphs 93 to 108 of the founding affidavit, constitutes a Post-Commencement claim as defined in the Plan of the first respondent to the extent that the first respondent was released after 5 December 2019 from the ticket liability to any particular passenger that is the subject of the unflown claim.

3. Directing the second and third respondents to recognise and treat the flown and unflown claims as claims by an Unsecured PCF Creditor in terms of the Plan and to make distributions to the applicant in preference to any Concurrent Creditors and Lessors and proportionately with other Unsecured PCF Creditors, including making an equalisation distribution to the applicant to achieve proportionate distributions between the Unsecured PCF Creditors.”

### *Background*

[3] The background can be succinctly stated: Airlink and SAA entered into a commercial agreement in terms of which Airlink permitted SAA to sell flight tickets on Airlink to the public on its own platform and to collect revenue therefor. SAA had to pay the proceeds collected by it (less certain agreed deductions) to Airlink.

[4] Two categories of revenue are disclosed in the papers: revenue for flown ticket sales and revenue for unflown ticket sales. Nothing turns on the two categories of revenue and the claim for both categories is the subject of this matter. There is also a dispute between the parties as to the exact quantum of each category of revenue. I am not required to determine that issue. It is common cause between the parties that Airlink has a claim. The dispute is whether the claim of Airlink remains enforceable in toto notwithstanding the implementation of a business rescue Plan (“the Plan”). In this regard it is common cause that SAA commenced voluntary business rescue proceedings and was placed under supervision on 5 December 2019. Business rescue practitioners were appointed to SAA and they prepared and published a Plan. This Plan was adopted on 14 July 2020 and became unconditional on 27 July 2020.

[5] On 30 April 2021 the business rescue proceedings of SAA ended upon the practitioners filing a notice of substantial implementation of the Plan.

[6] One of the main features of the Plan was the establishment of a receivership upon the implementation date. The purpose of which was, inter alia, to take on various liabilities that SAA had to certain of its creditors. Various amounts were (and remained to be) collected by or paid to the receivers to enable the receivership to make the distributions to the various creditors that the receivership took on consequent upon the implementation of the Plan. The Plan provides for a particular

ranking for the payment of distributions to different categories of creditors, by what is commonly known as “a payment waterfall”. Those creditors who are entitled to be paid from the receivership are precluded from pursuing their claims against SAA once it is discharged from the business rescue.

[7] The dispute that has arisen between Airlink on the one hand and SAA and the receivers on the other is whether Airlink continues to have claims against SAA now that SAA has been rescued. Airlink contends that the Plan, correctly interpreted, provides for it to assert its claims against the “rescued” SAA and to the extent that SAA is not liable to pay Airlink, Airlink then is entitled to a distribution from the receivership, proportionary with other unsecured PCF Creditors, and before any concurrent creditors (including lessors). SAA and the receivers on the other hand, contend that Airlink has no claims at all against the now rescued SAA, and that Airlink’s claims are limited to distributions from the receivership and only as a concurrent creditor, i.e. without any preference.

[8] One of the defences raised by SAA is that this matter is res judicata because both the High Court and the Supreme Court of Appeal have adjudicated upon the issue. I shall deal with this at the outset. The requirements for a plea res judicata are well established and no novel development of the law was argued before me. The exceptio re iudictae is based on public policy and its aim is to prevent the same issue being litigated on continually between the same parties.<sup>1</sup>

[9] SAA relied upon two judgments to which I shall return. In order to decide whether the plea is good regard must be had to the relief sought herein and the relief sought and determined in the court proceedings which were finalised. The relief sought in this application is a declarator that, having regard to the wording of the business plan, the applicant became entitled to relief. That is the distinction between this application, according to the applicant, and the two judgments. Both judgments of the High Court<sup>2</sup> and the Supreme Court of Appeal<sup>3</sup> were based on an acknowledgment that the business rescue plan was not yet in existence. Neither court pronounced on the validity or extent of the business plan. This latter fact is

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<sup>1</sup> See *African Farms and Townships v Cape Town Municipality* 1963 (2) SA 555 (A) at 564.

<sup>2</sup> This judgment and the facts therein set out can be read at the following webpage: <https://matusonassociates.co.za/wp-content/uploads/2019/12/In-the-matter-between-SA-Airlink-and-SAA-and-BRPs.pdf>.

<sup>3</sup> *SA Airlink v SAA (SOC) Limited and Others* (238/2020) [2020] ZASCA 156 (30 November 2020).

common cause between the parties. The relief sought in the High Court was as follows:

“Declaring ‘. . . that the monies payable to it by SAA are not ‘debts owed’ as contemplated in section 154(2) of the Act<sup>4</sup> or are not debts owed by SAA immediately before the beginning of the business rescue process, and are subject to the provisions of section 154(1) of the Act and that debts for flown and unflown tickets be paid to Airlink.”

[10] It is apparent that the same parties litigated about the same debt. The difference is that the past litigation there was no business rescue plan whilst in this application it is now in existence. In my view, the arguments previously made in court, especially as to agency, are irrelevant and none of them were upheld in those courts. Kathree-Setiloane J held in the High Court matter:<sup>5</sup>

“[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 on 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.”

[11] These findings were with reference to section 154(2) of the Companies Act and the words “debt owed” contained therein.<sup>6</sup> The High Court further said:<sup>7</sup>

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<sup>4</sup> Companies Act 71 of 2008 (“Companies Act”).

<sup>5</sup> At para 53-54.

<sup>6</sup> See High Court judgment at para 21.

<sup>7</sup> At para 52.

“. . . 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 deal with in the business rescue proceedings in accordance with the provisions of the Act and the business rescue plan.”

The court held that the Airlink claim was a pre-commencement claim in the context of business rescue.

[12] The judgment of the High Court was upheld in the Supreme Court of Appeal. The Supreme Court of Appeal made reference, inter alia, to the fact that throughout the negotiations and the ultimate re-arrangement of their business relationship subsequent to the business rescue, SAA and Airlink disagreed on whether Airlink was entitled to payment of the November 2019 – early December 2019 ticket sales revenue (that is relating to the accounting period immediately preceding the commencement of business rescue) and that Airlink maintained that this revenue was not a “debt owed” by SAA as envisaged in section 154 (2) of the Act, and Airlink considered itself entitled to immediate payment of the monies. Airlink’s appeal was grounded on the same three issues as raised in the judgment in the High Court:

12.1. First, that SAA held the revenue as Airlink’s agent and therefore it was Airlink’s own money;

12.2. Second, that even if the revenue was a debt owed by SAA, such debt arose only after commencement of the business rescue and could not be compromised in terms of section 154 (2) of the Act;

12.3. Third, because SAA had elected to abide by the Alliance Agreement subsequent to commencement of business rescue, it was not open to it to raise the section 133 moratorium as a defence;

[13] The Supreme Court of Appeal said:<sup>8</sup>

“This contention is untenable for the further reason that once SAA received the funds for Airlink ticket sales an obligation immediately arose for it to account in respect thereof to Airlink on the agreed date. In this way, on receipt thereof the funds became a debt owed by SAA to Airlink which would be due for payment as per agreement between the parties.”

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<sup>8</sup> At para 27.

[14] It was suggested that the findings of the Supreme Court of Appeal were obiter and thus not binding. I do not agree. The Supreme Court of Appeal, after finding that the point of agency had no merit continued to deal with the issue of a pre- and post-commencement debt, which was a real live issue before it. The SCA did not express an opinion on a non-essential or incidental matter that would not be legally binding. The question of pre- and post-commencement debt was squarely before for the Supreme Court of Appeal as set out in para 15 of that judgment.<sup>9</sup>

[15] The Constitutional Court has in this regard held:<sup>10</sup>

“The fact that obiter dicta are not binding does not make it open to courts to free themselves from the shackles of what they consider to be unwelcome authority by artificially characterising as obiter what is otherwise binding precedent. Only that which is truly obiter may not be followed. But, depending on the source, even obiter dicta may be of potent persuasive force and only departed from after due and careful consideration.”

Thus, even if it was an obiter dictum, there is no reason to depart from it. I hold that the finding of the Supreme Court of Appeal regarding the nature of Airlink’s debt was on an issue directly raised before it and definitively dealt with by it.<sup>11</sup> In my view, Airlink is not out of the starting blocks with this application and seeks the enforcement of the same debt it sought, unsuccessfully, to enforce in the past.

[16] After the High Court judgment the business rescue plan was finalised and eventually adopted. In that Plan Airlink was listed as a concurrent creditor due to its status, having been found to be a pre-commencement debt and claim. Airlink took no legal steps to have this Plan, which was consistent with the High Court judgment, altered or challenged. Its claim was that of a concurrent creditor. It is common cause that the post-commencement creditors were settled during the course of the business rescue proceedings from the working capital injection provided and the working capital is no longer available as it has been fully utilised. In the circumstances, I am of the view that one has to consider para 37 thereof, which

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<sup>9</sup> “. . . Secondly, that even if the revenue was a debt owed by SAA, such debt arose only after commencement of the business rescue and thus could not be compromised in terms of s 154(2) of the Act. . . .”

<sup>10</sup> *Turnbull-Jackson v Hibiscus Court Municipality and Others* (CCT 104/13) [2014] ZACC 24; 2014 (6) SA 592 (CC); 2014 (11) BCLR 1310 (CC) (11 September 2014).

<sup>11</sup> See *The Director-General of the Department of Agriculture, Forestry and Fisheries for the Republic of South Africa and Another v Nanaga Property Trust represented by its Trustee for the Time Being* (2689/2014) [2016] ZACGHC 22 (21 April 2016) para 6 and *Public Protector South Africa v The Commissioner for the South African Revenue Service and Others* (84074/2019) [2021] ZAGPPHC 467 (15 July 2021) para 22.

provides, as required in terms of section 150(2)(b)(v) of the Act, that the order of preference in which proceeds were to be applied to pay creditors, if the Plan was adopted, as follows: In terms of section 135 of the Act, creditors were to be paid in the following order of priority to the extent that there were funds available to pay all categories of creditors: the business rescue costs, including but not limited to legal costs, the costs of advisors, operating costs and other costs associated with the business rescue; employees for their employment during business rescue (to the extent that they have not been paid for their services during business rescue); secured PCF Creditors; unsecured PCF Creditors, and Concurrent Creditors.

[17] This resulted, inter alia, that, based on the information which the business rescue practitioners had to hand, the general concurrent creditors would receive a general concurrent dividend of R600 000 000 over a three-year period as a result of the adoption of the Plan with provision for an increase as set out in para 37.5 of the Plan. It is thus clear that, when voting in favour of adoption of the plan occurred, Airlink knew that the High Court had found that its claims were pre-commencement debts in respect of which Airlink was required to submit a claim in the business rescue proceedings and that Airlink was a concurrent creditor in the business rescue proceedings. Despite this knowledge, Airlink waited until 22 March 2022 to launch the present proceedings, again seeking to declare the debts as being post-commencement debts. It says this in the replying affidavit:<sup>12</sup>

“As the SCA would find only on 30 November 2020 that Airlink’s position was incorrect, Airlink had not applied itself at the time to the question whether, if it was found that its claims were in respect of debts that became owing before the beginning of the business rescue process as envisaged in section 154(2), those claims were nonetheless Post-commencement Claims as defined in the Plan.”

[18] Airlink, surprisingly, alleges that it had not applied itself to the question whether those claims were nonetheless post-commencement claims. One would be surprised as the courts have held that they are pre-commencement claims. Despite the improbabilities of Airlink, a creditor of almost R900 000 000, not having “. . . applied itself. . . to the question whether those claims were nonetheless post commencement claims as defined in the Plan”, it waited from until 30 November 2020 until 22 March 2022 to issue the present application, well knowing that the Plan

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<sup>12</sup> At para 25.13.



was being implemented and would result in a compromise in respect of pre-commencement claims in accordance with the terms of section 154(2) of the Act. Airlink now asserts, despite the lapse of this time and the implementation of the Plan, that the Plan, correctly interpreted, provides for Airlink to assert its full uncompromised claims against the rescued SAA as if the debts were post-commencement debts. This stance is contrary to the findings of the High Court and the Supreme Court of Appeal, and appears to be an afterthought. Airlink could have had no doubt that it fitted in to the category of general concurrent creditors as confirmed on Annexure B to the Plan. That, in my view, is how Airlink, and all other parties, understood the Plan. The inclusion of Airlink in the category of concurrent creditors in the Plan, makes that plain. Airlink submitted that this is not correct as it qualified its claim submitted to the business rescue practitioners. That qualification was in relation to the argument that SAA held the funds as their agent, which submission the High Court rejected and which Airlink hoped to have success on appeal, which it did not. The qualification is of no consequence.

[20] The question here is whether the definitive findings that the debt owed by SAA to Airlink is a pre-commencement debt and that Airlink is therefore a concurrent creditor, decided by the previous courts can be escaped. In my view, Airlink cannot escape to findings that its debt is a pre-commencement debt, resulting in it being a concurrent creditor.<sup>13</sup> That results in the fact that Airlink's claim is unenforceable against the rescued SAA and can only be asserted against the Receivership in accordance with its status as a concurrent creditor.

[21] As a second bow to its string, Airlink avers that the wording of the definitions in the Plan has resulted in its claim being a post-commencement claim. Firstly, it would be contrary to the findings of the High Court and Supreme Court of Appeal. Secondly, definitions aside, Airlink was consistently regarded and listed as a concurrent creditor in the Plan. It seeks to justify a claim from the wording of the Plan itself. When interpreting the Plan, one must have regard to the context and meaning of the wording of the Plan. In *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others*<sup>14</sup> ("Capitec") the Supreme Court of Appeal,

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<sup>13</sup> High Court judgment para 54.

<sup>14</sup> 2022 (1) SA 100 (SCA) at para 25.

with reference to *Natal Joint Municipal Pension Fund v Endumeni Municipality*<sup>15</sup> (“*Endumeni*”), says that the interpretation must be approached as follows:

“It is the language used, understood in the context in which it is used, and having regard to the purpose of the provision that constitutes the unitary exercise of interpretation. I would only add that the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitute the enterprise by recourse to which a coherent and salient interpretation is determined. As *Endumeni* emphasised, citing well-known cases, ‘(t)he inevitable point of departure is the language of the provision itself. Furthermore, the SCA states that *Endumeni* is not a charter for judicial constructs premised upon what a contract should be taken to mean from a vantage point that is not located in the text of what the parties in fact agreed, nor does *Endumeni* license judicial interpretation that imports meanings into a contract so as to make it a better contract, or one that is ethically preferable.”

[22] Paragraph 17 of the Plan reads as follows:

“17. CREDITORS OF THE COMPANY AS AT THE COMMENCEMENT DATE

17.1 As required in terms of section 150(2)(a)(ii) of the Companies Act, a complete list of the Pre-commencement Creditors of the Company, as reflected in the Company’s records, as at the Commencement Date, is attached hereto as Annexure B.

17.2 Annexure B indicates which of the aforesaid Pre-commencement Creditors.”

[23] Airlink, as was held by the Court, is reflected as a concurrent creditor on Annexure B.

[24] In addition, the shareholder provided some funding on a particular basis and for a specific purpose, including post-commencement creditors. The context of this payment speaks against Airlink having a preferent claim or a claim to these funds.

[25] The classification of creditors in the definitions clause to the Plan did not contemplate, or consider, when claims would be due and payable. It clearly contemplated where the creditors had a claim arising prior to commencement or

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<sup>15</sup> 2012 (4) SA 593 (SCA) para 18.

after commencement and not when those claims would become due and payable. This issue too, is against the submission of Airlink.

[26] In the context of the Plan, and the Act, the different categories are pre-and post-commencement claims, the applicant has a pre-commencement claim and it must so be dealt with.

[27] I find that the Plan did not intend to change the status of Airlink's claim.

[28] In all the circumstances, the declarator sought by Airlink falls to be dismissed. Both parties asked for costs of two counsel, which was not contentious.

*Order*

[29] The application is dismissed with costs, including the costs of two counsel, one of which is a senior counsel.

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**Wepener J**

**Heard:** 18 July 2023

**Delivered:** 25 July 2023

For the Applicants:

Adv F Snyckers SC,  
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