COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 18/CR/Mar01

In the matter concerning:

The Competition Commission

and

South African Airways (Pty) Ltd

DECISION

This is an application brought by the respondent, South African Airways (Pty) Ltd, to postpone the hearing of a prohibited practice case that the Competition Commission (the Commission) has brought against it pursuant to a complaint from the Nationwide Airlines Group (Nationwide). [1]

The respondent asks for the matter to be postponed pending:

1.1 "the finalisation of the applicant's investigation of the complaint currently being investigated by the Competition Commission under Case No. 2003/Oct/6000 ("the Comair complaint");

1.2 the final decision of this Tribunal concerning the joinder of the complainant in the Comair complaint."

It will be convenient, to refer, as the respondent has, to the current case before us as the 'Nationwide complaint' and the one currently being investigated by the Commission as the 'Comair complaint'.

The essence of the respondent's application is that the Nationwide complaint be postponed so that at the appropriate time we can consider an application, from whom it is not clear, to have the Comair complaint 'joined' as part of the Nationwide complaint.

The procedural history of this application is pertinent. On 18 October 2000,

1 The Nationwide Group comprises Nationwide Airlines (Pty) Ltd, Nationwide Air Charter (Pty) Ltd, Nationwide Aircraft Maintenance (Pty) Ltd and Nationwide Aircraft Support.

Nationwide, a rival airline to the respondent in the domestic market, filed a complaint with the Commission alleging that the respondent had contravened the Competition Act (the Act) specifically sections 8(c) and 8 (d)(i) in the following respects:

These complaints related to allegations that SAA was engaged in:

I) An anti-competitive incentive scheme for travel agencies;
II) An anti-competitive incentive scheme for consultants/employees of travel agencies;
III) Predatory pricing;
IV) Poaching of key personnel by the Respondent from the Complainant.

The Commission investigated this complaint and seven months later filed a complaint referral with Tribunal. In this complaint referral, or what we have termed the Nationwide complaint, the Commission made it clear that it had not referred all the issues that were contained in the original complaint but only those that related to compensation for travel agents the so-called override scheme and the Explorer Scheme.[2] The period of the complaint referral was confined to 1 September 1999 to April 2001.

Despite the fact that the complaint was filed in October 2000, it only became ready to be heard on the 26 April 2004, the same day that we heard the present application. The fact that this complaint has limped along is partly attributable to the Commission having amended its case after the respondent had filed its answering affidavit thus causing a delay, as all parties had to file amended pleadings. However most of the delay appears attributable to an abortive attempt by the respondent to have the Commission's referral reviewed in the High Court, which delayed the further prosecution of the matter by a period of nearly 15 months. The respondent abandoned its review after the Supreme Court of Appeal had decided a case raising the same point of law in the Commission's favour.[3]

A series of pre-hearing conferences were then held in order to get the matter to hearing. At a hearing on 24 November 2003, the matter was set down for hearing for 4 days, commencing on the 26 April 2004, with the consent of both parties.

On 9 October 2003, Comair, another airline that is a domestic rival of the respondent, filed a complaint with the Commission alleging that the respondent had contravened the Act again as in Nationwide, sections 8(c) and 8 (d)(i) thereof, by engaging in exclusionary practices. The exclusionary practices alleged included the use of the override scheme and something else

2 See affidavit of Wouter Meyer attached to the Complaint referral paragraph 5.2.
3 See Menzi Simelane NO and Others v Seven-Eleven Corporation (Pty) Ltd 480/2001 SCA.

referred to as 'trust payments' to travel agents in terms of which travel agents receive a lump sum at the end of SAA' s financial year based on the agents sale of SAA tickets. The Comair complaint relates to the period of 1 September 1999 to date. It thus overlaps with the period of the Nationwide complaint a period of some 18 months.

On 18 March 2004 the Commission wrote a letter to the respondent advising it that it was investigating the Comair complaint and asking a number of questions of the complainant. The letter was addressed to a Mr Chavarika, SAA's corporate counsel, a person who has filed affidavits in the Nationwide complaint and thus can be assumed to be familiar with the latter.

On 15 April 2004, four weeks after the Commission dispatched the letter, the respondent's attorneys wrote a letter to the Commission asking for the hearing of the Nationwide complaint to be postponed pending the outcome of the Comair complaint so that the two complaints could eventually be consolidated. The respondent motivated why it believed that consolidation was appropriate. We deal with this below. The respondent indicated that unless the Commission agreed to this proposal it would bring a consolidation application before the Tribunal.

On 19 April 2004 the Commission's attorneys wrote back to the respondent's attorneys advising that their client was opposed to consolidation and explaining why. Again we deal with these reasons later.

On 23rd April 2004, the Friday before the commencement of the Nationwide hearing, the respondent served the present application. The Commission opposed the application although it did not file a set of papers and argued on the basis of the respondent's papers.

The application was argued before us on 26 April prior to the commencement of the hearing. We ruled against the respondent. The respondent then advised us that it intended to review or appeal our decision to another forum and asked us to provide reasons for our decision and to postpone the hearing to give it time for the appeal/review. We postponed the proceedings sine die. We agreed to give our reasons on an expedited basis.

Basis for the application

The respondent argues that the Comair complaint will be based substantially on the same points of law and issues of fact as the Nationwide scheme. Both relate to the exclusionary effects of the override scheme and although the periods of the alleged transgressions are not identical there is at least one and a half years of overlap. It argues that because the Comair complaint will inevitably be referred, if not by the Commission then by Comair, there will be

a duplication of hearings on substantially the same issues. The benefit of evidence of Comair will not be available for the Tribunal. There is also the danger, the respondent alleges, that if there are multiple proceedings conflicting decisions may be reached on similar facts. The respondent also alleges that if the second complaint is persisted with it may be fined twice for the same conduct.

It alleges that these advantages outweigh any prejudice occasioned by the delay.

The Commission refutes all these contentions in its letter dated 19 April 2004. In the first place it points out that the Comair complaint is still subject to investigation by the Commission. Secondly, it alleges that the time periods of the complaints are different. Thirdly, the Commission argues that the trust payment is a feature of the Comair complaint not the Nationwide one. Whilst the Commission concedes that if the Comair complaint is referred there may be a duplication of evidence, it will be minimal and not sufficient to justify the consolidation of the two complaints. It points out that the Commission will not be deprived of the evidence of Comair as a representative of Comair will be called by the Commission to testify in the Nationwide hearing.

The Commission alleges that the postponement will lead to extreme prejudice to it, its witnesses and other parties involved. It points out that it has prepared for the commencement of the hearing on 26 April at great expense. It has subpoenaed witnesses and arranged for expert witnesses to come from London to attend the hearing.

Reasons

The jurisdictional basis for the application has been somewhat muddy. At times in the letter of 10 April 2004, and in the application the respondent appears to be seeking a postponement so that there can be a 'consolidation' of the case and at other times a postponement, so that there can be a 'joinder'. We understand the reference to joinder to be a reference to a 'joinder of convenience' as opposed to a 'joinder of necessity'.[4] During the hearing, counsel for the respondent Mr Subel, whilst relying on rule 45(1) of the Tribunal rules, which provides for joinder and is the mirror of rule 10(1) of the High court rules on joinder, also at times referred to the application as one for consolidation.

Counsel, when asked to clarify the situation, suggested that there was no substantial difference between a joinder application and a consolidation application when it came to the application of the principles. In this respect we agree with the respondent. Harms in his treatise makes this point relying on

4 See the discussion in Herbstein and Van Winsen "The Civil Practice in the Supreme Court of South Africa, Fourth Edition, pages 166-177

Nel v Silicon Smelters (Edms) Bpk [5]. Harms states that the principles remain the same, namely the objects of consolidation of actions are similar to those that apply in the case of joinder or issuing a third party notice: convenience, prevention of multiplicity of actions with resultant cost savings and the prevention of conflicting judgements.

We will assume then in the respondent's favour, that the application need not be labelled one or the other and that regardless of whether we regard it as a joinder of convenience or a consolidation application, the same principles apply.

Rule 11 of the High Court Rules is the rule that provides expressly for consolidation of actions.[6] Although we have no equivalent of this rule in the Tribunal rules there is no bar to applying it. Section 55(1) of the Competition Act gives the Tribunal member presiding a wide discretion to determine procedural issues. Rule 55(1) of the Tribunal rules states that if a question of practice arises in a case not provided for the in the Tribunal's rules, the Tribunal member presiding may have regard to the High Court rules. This makes it clear that the Tribunal could make the provisions of High Court rule 11 apply to our proceedings. Whilst Mr Subel argued that we have this procedural discretion he did not appear to make the link between this latitude to adopt High Court rules and High Court rule 11.

It is however understandable why the respondent avoided the emphasis on rule 11 of the High Court rules. That rule makes it clear that a consolidation is competent when more than one 'action' is dependant on the same set of facts or law. What is clear is that we are not dealing here with two procedures that are at an equivalent stage of ripeness.

The Nationwide complaint is a matter that is fully pleaded, has gone through the pre-trial phase (discovery, further particulars, exchange of witness statements) and but for this application, was set to be heard on the 26th April. The Comair complaint has yet to even reach the stage of a complaint referral and thus pleadings have not even commenced. In High Court parlance it cannot be classified yet as an 'action'. In terms of the Tribunal's rules, an action commences only with the filing of a complaint referral.[7] This has yet to occur in the case of the Comair complaint. It is still, as the letter from the

5 1981 4 SA 792(A) at 801-802

6 The Rule states that were separate actions have been instituted and it appears to the court convenient to do so, it may upon the application of any party thereto and after notice to all interested parties, make an order consolidating such actions, whereupon – a.) the said actions shall proceed as one action; b.) the provisions of rule 10 shall mutates mutandis apply with regard to the action so consolidated; and c.) the court may make any order which to it seems meet with regard to the further procedure , and may give one judgment disposing of all matters in dispute in the said actions.

7 Rule 15 of the Tribunal rules states that a complaint proceeding may be initiated only by filing a complaint referral in the form provided for by the rules.

Commission on which the respondent seeks to rely makes clear, an investigation into a complaint - not a complaint referral.

An investigation does not necessarily lead to a complaint referral nor if it does, is a complaint referral premised on the same terms as the complaint. (Note that this is precisely what has happened in relation to the Nationwide complaint as the extract from the Commission's referral affidavit has made clear.) The Commission is at large to amend a referral or to refer only portions of it.[8] Furthermore investigations are not expeditious proceedings. The Act gives the Commission a year to refer or to decide to non-refer a complaint. This time period may also be extended with the consent of the complainant.[9]

Unlike a typical High Court consolidation application where one has a full set of pleadings to test whether factual and legal issues are similar, we have no pleadings at all in respect of the Comair complaint and there is no certainty that it will ever be referred. Mr Subel suggested it was inevitable that it would be because both complaints relate to similar conduct, namely, override incentives and that if the one is referred, it followed so would the other.

We disagree. As the respondent's own experts suggest, it is the context in which this type of agreement operates that may be crucial to whether it may be impugned or not.[10] As the Commission is still investigating, we do not know yet whether the context of the Comair complaint may differ from that of the Nationwide complaint. Mr Pretorius, Counsel for the Commission, validly pointed out that as the overlap period was short, it is entirely possible that in the Comair complaint market conditions may be very different and that an outcome cannot be assumed. Thus the factual situations in which the alleged override scheme operates may be materially different and hence the burden of the evidence either party seeks to adduce may be very different to what it may be in the Nationwide complaint.

We also note that when the Commission amended its complaint referral it specifically added the words "and/ or any other competitors" after the word "complainant" in paragraphs 9.2 to 9.5 and paragraphs 10.2 to10.5, of the Complaint referral. It is thus entirely conceivable that the Commission may consider that at least one aspect of the Comair compliant, namely the period which overlaps with the period of the Nationwide complaint, is already contemplated in the present pleadings. Nor is the relief sought by the

8 See section 50(3)

9 See sections 50(2) and 50(4).

10 See page 18 of report by Theron and Du Plessis where the authors state: "The potential anti-competitive exclusionary effects of a fidelity discount cannot be properly assessed without close examination of its specific characteristics and the market in which the discount is being applied...Rather, the investigation has to consider each case on its merits with special attention to the following issues…these issues should be considered in detail for each scheme under consideration." The authors go on to examine how this issue is also affected by the duration of the scheme, transparency and barriers to entry.

Commission, relief peculiar to Nationwide.

This also deals with the respondent's jeopardy point. If these proceedings overlap with those of the second complaint the respondent can rely on section 67(2) of the Act 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."*

The case law on consolidation often refers to sets of facts that are undeniably similar; the same motor vehicle collision or defamatory statement. In competition law the factual fabric that leads to theories of exclusion, or lack of it, is often so nuanced that it is dangerous to make *a priori* assumptions that case A will resemble case B. Mr Subel may of course be proved correct. But that is still a hypothetical possibility on what we know of the Comair complaint at this stage, that is very little, it is not the categorical probability for which he contends.

Thus, it is by no means clear that the complaint referral is inevitable either in the form it is in presently or at all. This illustrates why the courts are reluctant to order a consolidation prematurely. In Beier v Thornycroft[11] the court referred to an earlier case of Hess v Marks[12], and in explaining why in that case consolidation had been refused, the court made the point that the one action was on the roll ready for trial while the others were not.

We find that a consolidation or joinder of convenience is not competent when there is no other complaint referral to consolidate the present one with and that to grant a postponement on the basis that there may one day be one, is similarly, not competent.

However even if we are wrong on this, we find that the application does not meet the test of convenience that the respondent alleges. The fact of its prematurity suggests that the complaint referral in Comair is by no means imminent. It appears to be early days in the investigation and if the Nationwide investigation is a guide, it could take several months to conclude. Recall that the Commission has a year to refer and that this complaint was filed in October 2003, exactly three years after the Nationwide complaint was filed. Then there would need to be the filing of a complaint referral, the exchange of the other two pleadings - a matter of at least another 3 months. Then after close of pleadings would follow discovery, the preparation and exchange of witness statements, and requests for further particulars, all of which were features of the present case. It is highly unlikely that the matter would be

11 1961 (4) SA 187 (N)
12 (1894) 1 O.R.175

ready for hearing, or put another way, reach the same stage of the race as the Nationwide complaint, before the end of the year. To delay the Nationwide complaint for this period of time in the vague hope that the other complaint will arrive and be susceptible of consolidation in that it relates to similar issues of fact or law, would substantially prejudice not only Nationwide, but the public interest the Competition Commission is there to protect. Recall that Nationwide, if there is a finding in its favour, is entitled to pursue a civil claim but only if we find that there has been a restrictive practice. The Act does not allow it to pursue a civil claim until there is a determination by the Tribunal that there has been a prohibited practice.[13] It is therefore also prejudiced in this respect, as well by a delay. Nor can we ignore that the thrust of the Nationwide complaint referral is the allegation that there has been exclusionary conduct. These are not allegations that should wait adjudication any longer than the three and a half years that have elapsed since the date the complaint was filed with the Commission. If the Commission's theory of exclusion is established, the complainant may have already exited the market, rendering relief academic.

We thus find that the applicant has not made out a case of convenience for having the matter postponed to await the Comair complaint's outcome. On the contrary, this application in itself would occasion substantial inconvenience. The Commission had prepared an overseas expert who had travelled to South Africa and was ready to commence testifying. Four days of hearing had been set aside and the Tribunal and the Commission had reserved time for this. The delay would cause not only logistical inconvenience but considerable expense in wasted costs as well.

The case law suggests that we have a wide discretion as to whether to order consolidation.[14] The case law also makes it clear that the party bringing an application for consolidation bears the onus.[15] We find that the respondent has failed to discharge the onus in this respect and that there will be considerable inconvenience occasioned by a postponement and prejudice to both the Commission and Nationwide.

The application is thus dismissed for two reasons: in the first place, it is premature and secondly, the applicant has not discharged the onus of establishing that it would be convenient to postpone *sine die* the present hearing for the possibility of subsequent consolidation with the Comair complaint, when it reaches an appropriate stage of procedural ripeness, itself at this stage a matter of conjecture, not certainty.

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13 See Section 65(9).

14 Mpotsha v Road Accident Fund And Another 2000 (4) SA 696 (C)

15 London & Lancashire Insurance Company Ltd v Dennis, NO and Others 1962 (4) SA 640 (N)

_____ 30 April 2004

N. Manoim Date

Concurring: D. Lewis, U. Bhoola

For the Commission: W. Pretorius, instructed by Roestoff, Venter, Kruse Attorneys

For the merging parties: Adv. A. Subel, instructed by Knowles Hussain Lindsay Inc on behalf of Edward Nathan and Friedland