REPUBLIC OF SOUTH AFRICA

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

CASE NO: 2020/01078

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

2 March 2020 .....

In the matter between:

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

JUDGMENT

KATHREE-SETILOANE J,

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

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

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

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

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

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

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

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

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

Background

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

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

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

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

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

(collectively, "the Alliance Agreements").

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

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

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

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

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

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

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

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

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

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

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

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

12.5 Airlink is also the operator of the flights.

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

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

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

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

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

...

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

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

...

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

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

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

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

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

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

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

Clause 6.1 which provides:

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

Clause 6.1.4 which provides:

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

Clause 6.2 which provides:

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

Clause 7.2 which provides:

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

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

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

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

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

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

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

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

The flown revenue

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

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

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

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[1] Section154 of the Act provides:

Discharge of debts and claims

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

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

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

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

Unflown revenue

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

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

Breach of the Alliance Agreements

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

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

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

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

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

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

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

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

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

Whether the moratorium in section 133 of the Act applies?

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

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

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

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

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

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

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(a) with the written consent of the practitioner;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Leave to commence legal proceedings

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

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[12] Section 151 of the Act provides:

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

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

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

(b) the agenda of the meeting;

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

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

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

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

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

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

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[13] *Cloete Murray & Another NNO v FirstRand Bank Ltd t/a Wesbank* 2015 (3) SA 438 (SCA) at paras 12-14

[14] *Arendse & Others v Van der Merwe & Another NNO* 2016 (6) SA 490 (GJ) at par 16 and paras 26-28

[15] Arendse at par 26-27 and par 35

[16] Arendse at par 11

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

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

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

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

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

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

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[17] *Arendse* at par 11

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

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

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

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

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

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

Costs

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

Order

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

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

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

Counsel for the applicant: Adv AR Bhana SC (With Adv LM Spiller)

Instructed by: Webber Wentzel

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