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

CASE NO:

In the matter between:

SA AIRLINK (PTY) LTD	Applicant
and	
SOUTH AFRICAN AIRWAYS (SOC) LIMITED (In Business Rescue)	First Respondent
LESLIE MATUSON N.O.	Second Respondent
SIVIWE DONGWANA N.O.	Third Respondent
COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	Fourth Respondent

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NOTICE OF MOTION

PART A

TAKE NOTICE THAT the applicant intends to make application to this Honourable Court at 10:00 on Wednesday, 24 June 2020 or so soon thereafter as counsel may be heard for an order in the following terms:

1. Enrolling this application as an urgent application and, insofar as may be necessary, dispensing with the forms prescribed by the Rules of this Honourable Court and directing that this application be

heard as one of urgency under Rule 6(12) of the Uniform Rules of Court.

2. Pending the latest of the final determination of the relief sought in Part B below, the delivery of the notice in terms of section 151(2) of the Companies Act, 2008 ("**the Companies Act**"), and the delivery of the notice contemplated in section 145(5) of the Companies Act:

2.1 Interdicting the second and third respondents from convening or holding any meeting to consider the business rescue plan in relation to the first respondent ("**SAA**") proposed by the second and third respondents under section 151 of the Companies Act, 2008 ("**the Companies Act**") ("**the Proposed Plan**");

2.2 Interdicting the second and third respondents from introducing the Proposed Plan and calling for or conducting a vote for the preliminary approval of the Proposed Plan under section 152 of the Companies Act; and/or

2.3 Interdicting the second and third respondents from inviting discussion and entertaining or conducting a vote on any motion relating to or concerning the Proposed Plan including any motion as provided for under section 152(1)(d) of the Companies Act.

3. Directing the first respondent and/or the first, second and third respondents within 2 calendar days to provide the applicant with

copies of all minutes from meetings of the board of directors or any committee of the board of directors of the first respondent in which the following issues were debated, considered, discussed or voted upon:

3.1 Placing the first respondent under business rescue; or

3.2 The prospects of rescuing the first respondent.

4. Directing the first respondent and/or the first, second and third respondents to provide the applicant within 2 calendar days with copies of all correspondence and/or documents pertaining to instructions or communications from the Shareholder (Government) or the Minister of Public Enterprises to the board of directors of the first respondent, regarding placing the first respondent under business rescue or the prospects of rescuing the first respondent.

5. Ordering each respondent who opposes, jointly and severally with any other opposing respondent, the one paying the others to be absolved, to pay the costs of Part A of this application on the scale as between attorney and own client, including the costs of two counsel; *alternatively* directing that the costs of the application for the relief sought in Part A be reserved for determination in the application for the relief sought in Part B.

6. Granting further and/or alternative relief.

TAKE NOTICE FURTHER that the accompanying founding affidavit of **RODGER ARNOLD FOSTER** including the annexes and confirmatory affidavits thereto, will be used in support of Part A of this application.

TAKE NOTICE FURTHER that the applicant has appointed Webber Wentzel as its attorneys of record and the address at which it will accept service of notices and other process in this application is, at any time, vlad.movshovich@webberwentzel.com and daniel.rafferty@webberwentzel.com and, only during office hours, 90 Rivonia Road, Sandton, Johannesburg.

TAKE FURTHER NOTICE THAT if any of the respondents intends to oppose the relief sought in Part A of this application, such respondent must, by 10:00 on 22 June 2020, deliver its notice of intention to oppose ("**the notice of opposition**"), and thereafter by 20:00 on 22 June 2020 to deliver its answering affidavit(s), if any, so as to allow the applicant to deliver its replying affidavit(s), if any, by 16:00 on 23 June 2020.

TAKE FURTHER NOTICE THAT the opposing respondents are required to appoint in the notice of opposition addresses referred to in Rule 6(5)(b) at which such respondents will accept notice and service of all documents in these proceedings.

PLEASE ENROL THE MATTER FOR URGENT HEARING ACCORDINGLY.

PART B

TAKE NOTICE THAT the applicant intends to make application to this Honourable Court on a date to be determined for an order in the following terms:

1. Ordering that the resolution adopted by SAA placing SAA under business rescue, dated 5 December 2019 ("**the Resolution**"), is set aside.

1.1 *Alternatively*, declaring that the business rescue proceedings have terminated due to the failure by the second and third respondents to publish the business rescue plan within the required time to do so.

2. Declaring that there are now no reasonable prospects of rescuing the first respondent.

3. Declaring that, at the time that the resolution to place the first respondent into voluntary business rescue was taken, the Board could not have had reasonable grounds to believe that there appeared to be reasonable prospects of rescuing the company.

4. Ordering that SAA be placed under provisional liquidation.

5. That a *rule nisi* be issued calling upon all persons interested or otherwise affected to show cause, if any, on a date to be determined by the above Honourable Court, why SAA should not be placed under final liquidation.

6. To the extent necessary, that service of this order be effected upon:

6.1 the registered address of SAA;

6.2 the South African Revenue Service;

6.3 all employees of SAA at its principal place of business, being Airways Park, 1 Jones Road, OR Tambo International Airport, Kempton Park, 1620; and

6.4 any trade unions to which such employees belong.

7. Ordering that the appointment of the second and third respondents as business rescue practitioners of SAA is set aside, *alternatively*, removing the second and third respondents as business rescue practitioners of SAA.

8. In the event that the orders sought in paragraphs 1 to 4 are not granted, that the above Honourable Court appoint an alternate business rescue practitioner who satisfies the requirements of section 138 of the Companies Act, recommended by, or acceptable to, the holders of a majority of the independent creditors' voting interests who were represented in the hearing before the above Honourable Court, *alternatively* directing that the board of directors of SAA appoint a new business rescue practitioner within 10 days of this order.

9. Ordering each respondent who opposes, jointly and severally with any other opposing respondent, the one paying the others to be

absolved, to pay the costs of Part B of this application on the scale as between attorney and own client, including the costs of two counsel.

10. Granting further and/or alternative relief.

TAKE NOTICE FURTHER that the accompanying founding affidavit of **RODGER ARNOLD FOSTER** including the annexes and confirmatory affidavits thereto together with any supplementary founding papers as provided below, will be used in support of Part B of this application.

TAKE NOTICE FURTHER that the applicant has appointed Webber Wentzel as its attorneys of record and the address at which it will accept service of notices and other process in this application is, at any time, vlad.movshovich@webberwentzel.com and daniel.rafferty@webberwentzel.com and, only during office hours, 90 Rivonia Road, Sandton, Johannesburg.

TAKE NOTICE FURTHER that the applicant will deliver a supplementary founding affidavit by 3 July 2020.

TAKE NOTICE FURTHER that if any of the respondents intends opposing Part B of this application they are required:

a) to notify the applicant's attorneys of their intention to oppose by 29 June 2020;

b) to appoint in such notification an address referred to in terms of Rule 6(5)(b) at which they will accept notice of service of all documents in these proceedings; and

c) to deliver their answering affidavits, if any, within 15 days of the date of delivery of the supplementary founding papers as aforesaid.

TAKE NOTICE FURTHER that if no such notice of intention to oppose is received within the aforesaid five day period, application will be made at 10:00 on _____for the relief set forth above.

DATED AT JOHANNESBURG ON 20 JUNE 2020

WEBBER WENTZEL
Applicant's Attorneys
90 Rivonia Road
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2196
Tel: (011) 530 5867
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Email:
vlad.movshovich@webberwentzel.com and
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Ref: V Movshovich / D Rafferty /
R Hopkins / J Atkinson
3035646

TO: **THE REGISTRAR**

High Court
Johannesburg

AND TO: **SOUTH AFRICAN AIRWAYS (SOC) LTD (In Business Rescue)**
First respondent
6th Floor
Airways Park
1 Jones Road
OR Tambo International Airport
Kempton Park
1620
Email:Michaelbond@flysaa.com; goertel@ENSafrica.com; and lesmand@mweb.co.za

By hand and by email

AND TO: **LESLIE MATUSON N.O.**
Second respondent
Suite 23
Building 2, Oxford & Glenhove
114 Oxford Road
Houghton Estate
Johannesburg
2196
Email: goertel@ENSafrica.com; and lesmand@mweb.co.za

By hand and by email

AND TO **SIVIWE DONGWANA N.O.**
Third respondent
1st Floor
Corner House
77 Commissioner Street
Johannesburg
2001
Email: goertel@ENSafrica.com; and lesmand@mweb.co.za

AND TO **COMPANIES AND INTELLECTUAL PROPERTY COMMISSION**
Fourth respondent
Block F
77 Meintjies Street
Sunnyside

Pretoria
Email: Corporatelegal@CIPC.co.za

By hand and by email

AND TO **THE MASTER OF THE HIGH COURT**
Hollard Building
66 Marshall Street
Cnr Marshall & Sauer Streets
Johannesburg

By hand

AND TO **THE SOUTH AFRICAN REVENUE SERVICES**
Megawatt Park
Maxwell Drive,Sunninghill
Johannesburg

By hand

AND TO **THE EMPLOYEES OF SOUTH AFRICAN AIRWAYS (SOC) LTD (In Business Rescue)**

By hand and by email

AND TO **THE RELEVANT TRADE UNIONS OF THE EMPLOYEES OF SOUTH AFRICAN AIRWAYS (SOC) LTD (In Business Rescue)**

By hand and by email

IN THE HIGH COURT OF SOUTH AFRICA
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FOUNDING AFFIDAVIT

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I, the undersigned,

RODGER ARNOLD FOSTER

do hereby make oath and state as follows:

1. I am the Chief Executive Officer and Managing Director of the applicant, SA Airlink (Pty) Ltd ("**Airlink**"), and I am duly authorised to depose to this affidavit on its behalf. The facts contained herein are within my personal knowledge and belief, unless the context indicates otherwise, and are both true and correct.

2. I have been involved in the aviation industry for 33 years, and have considerable experience in the management of airlines, having been the Chief Executive Officer and Managing Director of Airlink for 28 years. I also have a Bachelors of Science (Bldg) qualification.

3. In making submissions in this affidavit, I have also relied on the advice of de Villiers Engelbrecht, the Chief Financial Officer and Financial Director of Airlink ("**Mr Engelbrecht**"). Mr Engelbrecht has been involved in the aviation industry for 16 years, and has the following qualifications: B. Compt (Accounting) and a Masters in Business Administration.

4. Any legal submissions included in this affidavit are made on the advice of Airlink's legal representatives, which advice I accept as being correct.

5. Where facts are not within my personal knowledge, and in further support of Airlink's case, I refer to the confirmatory affidavits that will be delivered herewith or as soon as possible after this affidavit is delivered.

PARTIES

6. The applicant is Airlink, a company duly registered and incorporated under registration number 1969/002554/07 with limited liability in terms of the laws of the Republic of South Africa, with its registered address and principal place of business at No. 3 Greenstone Hill Office Park, Emerald Boulevard, Greenstone Hill, Modderfontein, 1609.

7. The first respondent is South African Airways (SOC) Limited ("**SAA**"), a state owned company duly registered and incorporated under registration number 1997/022444/30 in terms of the laws of the Republic of South Africa, with its registered address at Airways Park, 1 Jones Road, OR Tambo International Airport, Kempton Park, 1620.

8. SAA was placed in business rescue in terms of Chapter 6 of the Companies Act, 2008 ("**the Companies Act**") on 5 December 2019, by way of a resolution that was adopted by the Board of directors of SAA ("**the Board**") on the same day ("**the Resolution**"), ostensibly in accordance with section 129 of the Companies Act (but in truth without there being compliance with section 129(1)(b)). In terms of the Resolution, which is annexed marked "**FA1**", the Company voluntarily commenced the business rescue proceedings.

9. The second respondent is Mr Leslie Matuson ("**Mr Matuson**"), an adult male business rescue practitioner with his principal place of business at Suite 23, Building 2, Oxford & Glenhove, 114 Oxford Road, Houghton Estate, Johannesburg, 2196. Mr Matuson is cited in his official capacity as business rescue practitioner of SAA. To the extent necessary, and in relation to the relief sought regarding his removal, or the setting aside of

his appointment, as business rescue practitioner of SAA, Mr Matuson is also cited in his personal capacity.

10. The third respondent is Mr Siviwe Dongwana ("**Mr Dongwana**"), an adult male business rescue practitioner, with his principal place of business at 1st Floor, Corner House, 77 Commissioner Street, Johannesburg, 2001. Mr Dongwana is cited in his official capacity as business rescue practitioner of SAA. To the extent necessary, and in relation to the relief sought regarding his removal, or the setting aside of his appointment, as business rescue practitioner of SAA, Mr Dongwana is also cited in his personal capacity.

11. The second and third respondents were appointed as the joint business rescue practitioners ("**the BRPs**") in respect of SAA on 5 and 18 December 2019 respectively. As such, they are responsible for the management of SAA while it remains in business rescue.

12. The fourth respondent is the Companies and Intellectual Property Commission ("**the Commission**") established by section 185 of the Companies Act, which is cited for its interest in this matter and in order to fulfil the requirement set out in section 130(3)(a) of the Companies Act.

NATURE AND PURPOSE OF THIS APPLICATION

13. In Part A of this application, Airlink seeks an interim order, pending the final determination of the relief sought in Part B of this application, *inter alia* interdicting the BRPs from convening any meeting to consider the business rescue plan proposed by the BRPs under section 151 of the Companies Act, 2008 ("**the Companies Act**") ("**the Proposed Plan**") and/or from introducing the Proposed Plan and calling for a vote for the

preliminary approval of the Proposed Plan under section 152 of the Companies Act.

14. This relief is necessary as most of the relief in Part B of the application can only be granted, or will only have practical effect, before the Proposed Plan is adopted. In addition, the BRPs have not yet made the required determinations regarding the independence of creditors as required under section 145(5) of the Companies Act. Until these determinations are made, the meeting under section 151 cannot be convened.

15. In Part B of this application, Airlink seeks orders, as contemplated under section 130 of the Companies Act, *inter alia*, that:

15.1 The Resolution is set aside (and thus setting aside the business rescue process);

15.2 SAA is placed under liquidation,

15.3 In the alternative to 15.1 and 15.2, that the appointment of BRPs is set aside, alternatively, that the BRPs are removed as the business rescue practitioners of SAA.

16. As will be dealt with in detail in this affidavit, the relevant facts and circumstances which have come to light in relation to the business rescue proceedings of SAA, and the content of the Proposed Plan published by the BRPs under section 150 of the Companies Act on 16 June 2020, reveal that there is no reasonable prospect of rescuing SAA as contemplated in Chapter 6 of the Companies Act, nor (given SAA's historical losses and the current state of SAA's finances and the Shareholder's stated unwillingness to fund SAA indefinitely) can the Board

of SAA have had reasonable grounds to believe that there was a reasonable prospect of rescuing the company at the time that the resolution was taken.

17. In the circumstances, this Court is asked to exercise its jurisdiction to set aside the Resolution that commenced the business rescue process, and to place SAA under liquidation. Indeed, it will be contended that, when the facts and circumstances are properly considered, this is the only just and equitable outcome.

18. The Proposed Plan will not lead to SAA operating as a viable commercial entity in future, and SAA will continue to trade incurring huge annual losses, while being entirely dependent on Government handouts. The Proposed Plan is based on commercial assumptions which are incorrect, unsustainable and at odds with commercial reality, SAA's historic performance and the norms in the airline industry. The key effect of the Proposed Plan is to prejudice concurrent creditors like Airlink and to discharge the mountain of SAA's historic debt without anyone, including the Government and former directors of SAA, being held accountable, while allowing the Government to maintain its 100% equity in and control of SAA and its subsidiaries.

19. The Proposed Plan is a sham and a fraud on the creditors, does not amount to a rescue of SAA, and does not yield a better dividend to creditors than they would receive on liquidation. The Proposed Plan conclusively demonstrates that SAA must be liquidated without further delay.

20. Further, it is evident that the BRPs have breached a number of their duties, as required by the Companies Act, and have engaged in unlawful acts which have prejudiced the interests of affected persons, including Airlink. Accordingly, in the event that the business rescue proceedings are not set aside, this Court will be asked to exercise its discretion to set aside the appointment of, or alternatively remove, the BRPs.

21. A full factual background is necessary to understand SAA's financial predicament.

RELEVANT BACKGROUND AND CHRONOLOGY OF THE BUSINESS RESCUE PROCESS

22. SAA was placed under voluntary business rescue by adoption of the Resolution on 5 December 2019. On 12 December 2019, the affected persons were notified, in accordance with section 129 of the Companies Act, that the Resolution had been adopted, business rescue proceedings had commenced and that SAA had appointed Mr Matuson, the second respondent, on 5 December 2019, as the business rescue practitioner. Mr Matuson's notice of appointment is annexed marked "**FA2**", and the notices of commencement of business rescue that were sent to creditors of SAA and employees of SAA are annexed marked "**FA3**" and "**FA4**".

23. On 18 December 2019, Mr Dongwana, the third respondent, was appointed as a joint business rescue practitioner along with Mr Matuson. Mr Dongwana's notice of appointment is annexed marked "**FA5**".

24. The first meeting of creditors, required in terms of the Companies Act, was held on 20 December 2019 ("**the first creditors' meeting**"). The notice to the creditors of the first creditors meeting, dated 17 December 2019, is

annexed marked "**FA6**". The first meeting of employees was also held on 20 December 2019. The relevant notice of the meeting to the employees, dated 17 December 2019, is annexed marked "**FA7**".

25. At the meetings held on 20 December 2019, the BRPs made presentations to the creditors and employees ("**the presentations**"). The presentations are annexed marked "**FA8**" and "**FA9**", respectively.

26. As set out in the presentation to the creditors, the main objectives of the first creditors meeting were to:

26.1 inform the creditors whether there was a reasonable prospect of a successful business rescue;

26.2 appoint a Creditors' Committee; and

26.3 receive claims of the creditors.

27. The presentation to the creditors states that business rescue involves proceedings to "*facilitate the rehabilitation of a company that is financially distressed*", which is consistent with the definition of "business rescue" set out in section 128(b) of the Companies Act.

28. The presentation states that the primary objective of business rescue is to develop and implement a Business Rescue Plan that either:

28.1 "*rescues the company by restructuring its affairs, business, property, debt or other liabilities and equity in a manner that maximises the likelihood of the company continuing its existence on a solvent basis*"; or

28.2 if it is not possible for the company to continue in existence, "*results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company*".

29. This is also consistent with the definition of "business rescue" set out in section 128(b).

30. The presentation sets out that, under section 150(5) of the Companies Act, the Proposed Plan must be published within 25 days after the date of appointment of the BRPs, or such longer time as may be allowed by:

30.1 the Court; or

30.2 the holders of a majority of the creditors' voting interests.

31. In accordance with that timeline, and in the absence of any extension being granted, the Proposed Plan was required to be published by 13 January 2020.

32. At the first creditors' meeting, however, the BRPs requested an extension for the publication of the Proposed Plan to 28 February 2020, on the grounds that:

32.1 they were "*evaluating various scenarios and the funding requirements for each*"; and

32.2 the "*development of the [Proposed Plan] requires engagement with various stakeholders to establish their level of agreement and preferred scenario*".

33. A majority of the creditors who voted at the first creditors' meeting agreed to the extension as requested by the BRPs.

34. The presentation further sets out that the BRPs were of the view that "*notwithstanding the inevitable risks and challenges, there is a reasonable prospect of a Business Rescue Plan being successfully implemented*". The BRPs, however, indicated that this was subject to the following:

34.1 "*Availability of further Post-Commencement Funding ("**PCF**")*"; and

34.2 "*Ongoing support from all stakeholders, including Government, Employees and Trade Suppliers.*"

35. The presentation further made it clear that "*[a]ll options will be investigated, together with input from stakeholders*".

36. In relation to liquidation, the presentation states that the BRPs "*believe that the business rescue process will achieve a better outcome for all stakeholders than immediate liquidation*". It states that PriceWaterhouseCoopers ("**PWC**") had, at that stage, performed an "initial high level calculation" and, taking into account that most of the aircrafts used by SAA are leased, there would be limited assets to be realised for distribution to creditors.

37. PWC's view was thus, apparently, that after the allocation of distributable proceeds to preferent creditors, no funds would be available for distribution to concurrent creditors. The contingent and damages claims that would crystallise on liquidation would also increase the quantum of the concurrent claims. The BRPs thus indicated that the preliminary assessment was that the anticipated concurrent dividend, if SAA was immediately liquidated, would be zero cents in the rand.

38. The presentation states that, in terms of the Companies Act, "*should the [BRPs] at any time conclude that there is no longer a reasonable prospect of rescuing SAA, the [BRPs] are obliged to advise affected persons and apply to court for an order discontinuing the proceedings and placing [SAA] into liquidation*".

39. Subsequent to the first creditors' meeting, a creditors committee ("**the Creditors' Committee**") was set up. Juliette Du Hutton of Bowman Gilfillan was appointed by SAA as the Independent Chairperson to the Creditors' Committee. Airlink is a member of the Creditors' Committee.

40. Airlink is a substantial creditor of SAA. At the commencement of the business rescue, SAA owed Airlink approximately R715 million. The Amount is, in Airlink's view, money collected by SAA on Airlink's behalf, is not a debt that could be compromised by the business rescue process, and was required to be paid over by SAA to Airlink in early December 2019. SAA and the BRPs held a different view and insisted that the R500 million was a pre-commencement debt that could be compromised through the business rescue process.

41. On 16 January 2020, arising out of the above unresolved dispute between Airlink and SAA, Airlink launched an application to recover certain of its funds held by SAA ("**the January 2020 application**"). The application was heard on 11 February 2020, and was dismissed by the Honourable Justice Kathree-Setiloane by way of a judgment dated 2 March 2020.

42. Airlink applied for and was granted leave to appeal against the judgment to the Supreme Court of Appeal ("**the SCA**"). The appeal is currently set down for hearing by the SCA on 4 September 2020. An earlier date for

the hearing could not be obtained, despite requests by Airlink directed to the President of the SCA in April 2020.

43. On 26 February 2020, the BRPs requested a further extension for the publication of the Proposed Plan until 31 March 2020. The relevant letter requesting this extension is annexed marked "**FA10**".

43.1 The letter sets out that the BRPs and SAA, with the assistance of experts, had since the first creditors' meeting, evaluated various restructuring scenarios, taking into consideration the distressed circumstances of SAA, the funding required and the time available to implement a viable restructuring, and had thus developed a proposed restructuring option.

43.2 The letter stated that "*once the proposed restructuring option and the steps required to implement that option have been finalised, the BRPs [would] be in a position to finalise the draft plan, which [would] include the estimated return to creditors*".

43.3 The letter goes on to state that the finalised draft plan would be provided to the Creditors' Committee prior to publication of the plan.

43.4 As the process of finalising the steps to implement the proposed restructuring option was still being finalised, the practitioners requested a one-month extension for finalisation of the plan. This extension was ultimately approved by the creditors. The letter notifying all affected persons of the approval for the extension is annexed, marked "**FA11**".

44. On 20 March 2020, the BRPs requested a further extension for the publication of the Proposed Plan until 29 May 2020, largely on account of

the effect of COVID-19 on the process. In the letter, the BRPs specifically noted the extremely detrimental impact that Covid-19 had already, and would continue to have, on the airline industry globally. They further noted that "*[t]his detrimental effect has already impacted SAA's business, with forward bookings collapsing substantially on international and regional routes…*" and that "*[t]he implications of the collapse in consumer demand, and now the President's necessary response to Covid-19, result in a bleak revenue outlook*". The relevant letter is annexed marked "**FA12**".

45. This further extension sought by the BRPs was also approved by the creditors. The letter to affected persons notifying them of the approval of the extension is annexed marked "**FA13**".

46. On 14 April 2020, the BRPs delivered a letter providing an update to affected persons regarding SAA's business rescue ("**the 14 April update letter**"). The relevant letter is annexed marked "**FA14**".

47. In the 14 April update letter, the BRPs outlined that the South African Government ("**the Government**") had previously announced that it would provide PCF of R4 billion to SAA, which would cater for the short-term liquidity shortages of SAA for a maximum of two months, give the BRPs an opportunity to assess SAA and present possible restructuring options to the Government, and for "*the Government to choose one of the restructuring options and commit the funding necessary to effect it through the business rescue process*" (emphasis added).

48. The 14 April update letter goes on to state that:

"*[t]his PCF of R4 billion was to be provided in two tranches of R2 billion as follows:*

3.1 The first tranche to be provided immediately by the existing lenders of [SAA] comprising of the South African Banks and was expected to be fully utilised by the end of December 2019 after the payment of salaries; and

3.2 The second tranche was to be provided by the Government directly to [SAA] once the first tranche was exhausted" (emphasis added).

49. The 14 April update letter further notes that, ultimately, the second tranche of funding by the Government was not forthcoming, owing to "legal challenges" that the Government faced with providing funding directly to SAA, and that existing SAA lenders would not provide additional funding. The letter also stated that SAA nevertheless managed to secure an additional R3.5 billion worth of funding from the Development Bank of South Africa ("**DBSA**"), which was only anticipated to cover SAA's liquidity shortfall until the end of February 2020, and that the Government had, in terms of the 2020 budget, allocated R16.4 billion "*for the repayment of legacy debt and PCF (provided by the existing lenders and the DBSA together with interest thereon)*".

50. The BRPs noted that the Government budget was meant to provide funding for the restructuring of SAA. The allocation of R16.4 billion by the Government to SAA, however, provided no clarity regarding if, and when, the Government would provide SAA with funding required for the proposed restructure of SAA, even though the Government had itself indicated its preference for the option of restructuring SAA. The R16.4 billion allocated in the Government budget was clearly meant only to extinguish SAA's historical and current debt in relation to amounts owed for PCF funding, and not for any restructuring costs.

51. The 14 April update letter also indicated that the BRPs "*since their appointment undertook various cost-cutting initiatives*" to enable SAA to continue to function, notwithstanding its lack of liquidity, which included:

> "*12.1 Suspension/cancellation of contracts that were onerous for [SAA] and in some instances deemed to be out of touch with market value and thus potentially corrupt;*
>
> *12.2 Renegotiations of various contracts to either align them with market value or to change the terms completely;*
>
> *12.3 Suspension of the loss making routes that were a cash flow burden on [SAA]*" (emphasis added).

52. It is further worth noting that, in the 14 April update letter, the BRPs indicated that they had, on 2 April 2020, written to the Government, via the DPE, in order to:

52.1 provide the Government with an update on how Covid-19 was impacting SAA's business;

52.2 present "*a care and maintenance plan and various options for the restart of the operations of SAA*"; and

52.3 request an extension for the foreign borrowing limits of SAA, which was required by potential funders for SAA's restructure and the care and maintenance period.

53. In response to the BRPs correspondence, however, the Government indicated that:

> "*18.1 Government will not support the extension of the foreign currency borrowing limit to permit foreign financing of the business rescue plan;*

18.2 nor for a care and maintenance budget as proposed by the [BRPs];

18.3 Government is unable to provide additional funding to sustain the business rescue process;

18.4 neither will lending guarantees be provided in respect of the business rescue process;

18.5 However, the [BRPs] must consider their options within their available resources".

54. On 23 April 2020, the BRPs delivered a "Notice to all Affected Persons", providing affected persons with an additional update on the business rescue process ("**the 23 April 2020 update notice**"). The 23 April 2020 update notice is annexed marked "**FA15**".

55. In the 23 April 2020 update notice, the BRPs, having evaluated the impact on SAA of the Government's refusal to continue to fund SAA's business rescue process, indicated that "*only two options [were] available*" to SAA, namely:

55.1 a "wind-down process" of SAA which "*secures a better return for SAA's creditors than would result from its immediate liquidation*", and would involve the termination of employees by agreement, and a "sales process"; or

55.2 the immediate liquidation of SAA.

56. In the 23 April 2020 update notice, the BRPs made it clear that the proposed wind-down process was contingent on the BRPs reaching an agreement with employees regarding the termination of their employment by 30 April 2020, failing which SAA would have to be placed into

liquidation, as there were insufficient funds for it to continue to honour its employment obligations and bear the costs of the proposed wind down process.

57. The BRPs also stated that, despite request, the Government was not prepared to fund the BRPs' proposed retrenchment package for SAA's employees. The BRPs further noted that the PCF funding of R5.5 billion already received for SAA had been exhausted in March 2020, and that, due to the national lockdown in response to the Covid-19 pandemic, all of SAA's air travel had ceased. The BRPs were thus of the view that "*SAA has no funds to continue trading and cannot pay a significant salary bill beyond April 2020*".

58. On 15 May 2020, SAA made a presentation to the Standing Committee on Public Accounts ("**SCOPA**") ("**the SCOPA presentation**"). The SCOPA presentation is annexed hereto marked "**FA16**".

59. In the SCOPA presentation, the BRPs outlined the following:

59.1 the restructuring option for SAA's business rescue is dependent on:

"*1. Availability of [PCF]*

2. Amount and timing of PCF

3. Desired restructuring outcome

4. Develop[ment of] a business rescue plan indicative of the anticipated restructuring plan"; and

59.2 the winding-down option for SAA's business rescue is dependent on:

"*1. Limited PCF required*

2. *Focus on sale of assets:*

2.1 *Appointment of valuation specialists*

2.2 *Initiation and management of sales process*".

60. The SCOPA presentation also provided a high-level summary of the content of the Draft Plan, which noted that the "*Government selected the Restructuring Option to: [k]eep the whole SAA Group of companies; [r]estructure SAA to get rid of inefficiencies; and [s]ave approximately 5,000 jobs in the SAA Group*". The "Restructuring Option" was to cost R7.7 billion. In addition, the SCOPA presentation also indicated that SAA had, from 5 December 2019 to 27 April 2020, used nearly R10 billion worth of PCF in funding the business rescue proceedings.

61. In Annexure 1 of the SCOPA presentation, the BRPs highlighted the "actions to date" taken during SAA's business rescue. Annexure 1 demonstrates the significant interaction the BRPs had with the DPE and the Government more broadly throughout SAA's business rescue process. Without limitation:

61.1 On 12 December 2019, "*[a] meeting was held with the Minister of the DPE and made an initial presentation*";

61.2 On 13 December 2019, "*[a] draft application from the provisions of the Public Finance Management Act ("**PFMA**") was submitted to [the DPE] and National Treasury to enable the [BRPs] to effectively conduct their mandate*". On the same day, a "*meeting with Lenders was held to provide an update on the Business Rescue Process (National Treasury and [the DPE] were also present)*". A meeting was also held with

National Treasury "*to discuss funding required for the business recue process*";

61.3 On 16 December 2019, a "*presentation was made of restructuring options to the DPE*";

61.4 On 17 December 2019, a "*meeting was held with National Treasury to inform them that the initial R2 billion would run out by 23 December 2019, according to the forecasts*";

61.5 On 18 December 2019, the BRPs *"submitted the formal application for PFMA exemption (after receipt of comments from National Treasury and [the DPE])*";

61.6 On 19 December 2019, the BRPs "*made a presentation to [the DPE] and National Treasury setting out the various restructuring options*";

61.7 On 23 December 2019, the BRPs "*made a further presentation to exco of National Treasury (and the Minister of Finance) on restructuring options*";

61.8 On 26 December 2019, the BRPs "*received the PFMA exemption letter, exempting the [BRPs] from complying with certain provisions of the PFMA*";

61.9 On 3 January 2020, the BRPs "*prepared an analysis which was presented to the shareholder for consideration of SAA's position and various options available to SAA…*";

61.10 On 15 January 2020, the DPE "*addressed a letter to the [BRPs] advising that Government supported the option of restructuring SAA by creating a New Holding Company...*";

61.11 On 16 January 2020, "*[a] meeting was held between all relevant stakeholders including the [BRPs], the Lenders and representatives of [the DPE] and National Treasury. It was decided that funding could not be obtained from the Lenders*";

61.12 On 22 January 2020, the BRPs "*approached the DBSA for funding (supported by Government)*";

61.13 On 6 February 2020, the BRPs made an "*[a]nnouncement of flight cessation on unprofitable routes, in line with the restructuring options selected by Government*";

61.14 As has already been mentioned above in relation to the 14 April update letter, the BRPs addressed a letter to the Government on 2 April 2020, which the Government responded to on 14 April 2020, regarding the funding for a care and maintenance plan and the restart of SAA's operations, and the extension of foreign borrowing limits of SAA; and

61.15 As at 15 May 2020, the BRPs were "*awaiting communication from Government*" regarding the business rescue going forward.

62. The SCOPA presentation was presented to a meeting before SCOPA on 15 May 2020, at which the Minister of the DPE and the BRPs were present ("**the 15 May 2020 SCOPA meeting**"). A summary of the meeting, drawn up by the Parliamentary Monitoring Group is annexed marked "**FA17**".

63. In the 15 May 2020 SCOPA meeting, the following was confirmed:

63.1 the DPE had previously received a draft of the business rescue plan from the BRPs on 5 May 2020, but "*rejected it because it was extremely inadequate*";

63.2 the BRPs were of the view that the option of "winding down" SAA was their preferred option over a "restructuring option" or SAA's liquidation, and that the business rescue plan would be drafted to give effect to the winding down option;

63.3 the BRPs have no previous experience in rescuing an airline; and

63.4 the Government would not accept the liquidation of SAA as an option.

64. During the 15 May 2020 SCOPA meeting, the various Members of Parliament and the Chairperson of SCOPA raised significant concerns over the length of the SAA business rescue process; whether SAA could actually be rescued given that Government had refused to provide any additional funding; why no evidence of wrongdoing by previous management had been uncovered and forwarded to the appropriate authority(ies) for further investigation and prosecution; and why the BRPs had not applied to court to place SAA in liquidation.

65. Additional concerns raised were that the BRPs did not have the skills or experience to rescue or run an airline; that the proposed "winding down" process was effectively a liquidation of SAA; and that the BRPs were accordingly operating outside of their mandate as business rescue practitioners and rather purporting to act as liquidators.

66. In the 15 May 2020 SCOPA meeting, the Minister of the DPE also made reference to the possibility that SAA may be "restructured" into a "new airline.

67. On 21 May 2020, in light of the increasing uncertainty regarding the status of SAA's business rescue process, Webber Wentzel, Airlink's attorneys of record, addressed a letter to the BRPs seeking clarity on SAA's business rescue, and in order to protect Airlink's rights ("**the WW letter to the BRPs**"). The WW letter to the BRPs is annexed marked "**FA18**".

68. In the WW letter to the BRPs, Airlink noted with concern that SAA's precarious financial position appeared to have deteriorated significantly; that the DPE's had previously suggested that SAA would be restructured into a new airline; and that in the 23 April 2020 Notice, the BRPs had noted that SAA did not have sufficient funds to continue honouring its employment obligations and to bear the costs of the proposed "wind down" process. The WW letter to the BRPs went on to note that:

"5. *The BRPs' view appears to be that, in the absence of substantial additional funding (which is not available), there is no reasonable prospect of rescuing SAA. In these circumstances, notwithstanding the views of Government or others, the BRPs are obliged to approach a court for an order converting the business rescue proceedings into liquidation proceedings. Instead, it appears that the assets of SAA are simply being flittered away on a daily basis making payments in connection with an obviously doomed airline, to the detriment of the creditors, and SAA. It also appears that the BRPs are seeking to take steps to wind down SAA's business, which is not within their mandate to do. The purpose of the business rescue proceedings is to rescue SAA; the BRPs cannot under the guise of business rescue wind down the*

company, preferring certain creditors and certain claims above others.

6. *In seeking to delay taking the necessary (and, from a legal perspective, inevitable) next step, the BRPs appear to be doing the Government's bidding and in any event not acting in the best interests of SAA and its creditors.*

7. *You will be aware that the BRPs are required to undertake their duties independently, impartially and skilfully in the best interests of the company and the creditors. It is becoming evident that the BRPs are not properly fulfilling their mandate and are taking instructions from, and are unduly influenced by, the shareholder. The failure to act impartially and independently, or in accordance with due care and skill, are not only egregious breaches of the BRPs' legal responsibilities, but also opens the BRPs up to personal liability.*"

69. In the WW letter to the BRPs, Airlink thus requested the BRPs to confirm whether they intended to place SAA into liquidation; to provide Airlink with full financial information in respect of SAA; to confirm that no funds which were due to Airlink had or would be paid by SAA to third parties; and to advise it of the steps that had been taken by the BRPs to date to preserve value for the creditors of SAA.

70. On 27 May 2020, the BRPs provided a further update to affected persons ("**the 27 May 2020 update letter**"). The relevant letter is annexed marked "**FA19**".

71. In the 27 May 2020 update letter, the BRPs sought to provide clarity regarding certain aspects of the business rescue over which concerns had been raised, arising out of the 15 May 2020 SCOPA meeting. In order to

avoid prolixity, I do not set out all of the issues dealt with by the BRPs. However, the following aspects bear mention:

71.1 The BRPs indicated that a business rescue process is consultative and requires engagement with all affected persons, including the creditors and employees who would be engaged with through the creditors' and employees' committees that were established to facilitate consultations and updates on the process.

71.2 The BRPs also noted that "*the BRPs continuously engage with the shareholder, which is also a major creditor, as a key party in this rescue, and the engagements are complimented by exchanges of correspondence and reports including those submitted to the lenders*".

71.3 The BRPs had previously presented a care and maintenance plan for SAA to the Shareholder, which the Shareholder rejected and for which it refused to provide funding.

71.4 The BRPs stated that the Shareholder had previously decided that SAA should be restructured, and that once the Shareholder had made its decision, the BRPs "*accelerated the implementation of cost-cutting mechanisms including renegotiation of leases, the suspension of flights on all loss-making routes as well as embarking on a Section 189 consultation process*".

71.5 The BRPs indicated that they had "*developed a full restructuring plan before COVID-19 in anticipation of a funding commitment, but the plan was not shared with affected parties as the funding aspect was still*

uncertain. This restructuring plan was however shared with the shareholder..." (emphasis added);

71.6 The BRPs further stated that "*[d]iscussions are now being held between the BRPs and the shareholder to possibly restructure the airline*".

71.7 The BRPs, in conclusion, indicated that they were now of the view that "*there is still a reasonable prospect of rescuing SAA, subject to the receipt of an unequivocal commitment thereto and the requisite funding, and that will be set out in the business rescue plan to be published in due course*".

72. On 27 May 2020, the DPE appeared before SCOPA regarding *inter alia* SAA ("**the 27 May 2020 SCOPA meeting**"). A Parliamentary Monitoring Group summary of the meeting is annexed marked "**FA20**".

73. In the 27 May 2020 SCOPA meeting, concerns were raised regarding, amongst other things, the failure of the BRPs to publish a business rescue plan despite the lapse of five months since it was due; whether the BRPs would take action against Ms Duduzile Myeni ("**Ms Myeni**") owing to a recent High Court decision finding Ms Myeni *inter alia* to be a delinquent director in respect of her conduct while the Chairperson of the Board of SAA; and full details regarding the sale of SAA aircrafts.

74. During the meeting, the DPE indicated that SAA had "*been in technical insolvency since 2013 and has relied too heavily on government to prop it up as over the last 13 years it has accrued a net loss of over R35 billion*". It was also indicated, in relation to Ms Myeni, that the Special Investigating Unit ("**SIU**") had been to SAA's premises to investigate potential offences

and historical SAA contracts. In this regard, Mr Bongani Nkasana, of Adamantem Chartered Accountants, indicated that, should the BRPs "*pick up any suspicious activities, contracts or contracts that are out of kilter with the market, the BRPs ensure that they are brought to the attention of the SIU and they work together in ensuring the SIU gets all of the information it needs*".

75. With regard to the business rescue plan, it was indicated that it was due to be published on 29 May 2020, and that the BRPs had previously communicated the reason for its delayed publication.

76. In a further update to affected persons on 28 May 2020 ("**the 28 May 2020 update letter**"), the BRPs requested a further extension for the publication of the Proposed Plan until 8 June 2020. The relevant letter is annexed marked "**FA21**". The letter states:

> "*10. Prior to the lockdown, the practitioners were in advance stages of a draft plan based on an initial proposed restructure, which sought the highest retention of jobs possible and the restructuring of SAA so that it was sustainable, non-reliant on shareholder funding in the future and a platform for growth.*
>
> *11. As advised in the update dated 27 May 2020:*
>
> *11.1. Unfortunately, the draft plan for a restructured airline, which was near complete, could not be finalised due the impact of COVID-19 which nullified all the assumptions that were included in the income projections which were used to build the proposed sustainable airline model.*
>
> *11.2. Accordingly, a new post Covid-19 plan was developed in order to preserve the assets of the airline until SAA could reliably predict the income patterns of the future. For these*

reasons, care and maintenance proposals were presented to the shareholder, so that the restructuring plan could be finalised when there was more certainty in the aviation industry.

11.3. When the practitioners were notified that the shareholder would not fund a care and maintenance plan, then the only option available to the practitioners was to propose a plan that would provide creditors with a better return, through a structured wind down, than a liquidation.

12. The practitioners proceeded to prepare a draft plan based on a better return, which would have been circulated to affected persons for consultation prior to the publication date of 29 May 2020.

13. However, pursuant to ongoing engagements with the shareholder, and as recently as 25 May 2020, the shareholder provided the practitioners with a proposed restructuring plan, for consideration and possible inclusion as the proposal in terms of the draft plan.

14. The practitioners have decided to prepare a revised plan taking into account the proposal by the shareholder for creditors and employees to consider" (emphases added).

77. The 28 May 2020 update letter went on to state that the BRPs intended to circulate the revised plan by 29 May 2020, and to consult with the relevant stakeholders in the week of 1 June 2020.

78. The requested extension to 8 June 2020 was approved by the creditors of SAA. The letter confirming the approval is annexed, marked "**FA22**".

79. Although the BRPs had been granted an extension for the publication of the Proposed Plan, the BRPs nevertheless delivered a draft of the proposed business rescue plan to the Creditors' Committee on

29 May 2020, for the creditors' consideration and comment ("**the draft Proposed Plan**"). The draft Proposed Plan is annexed marked "**FA23**".

80. On 1 June 2020, ENS, the BRPs attorneys of record, responded to the WW letter to the BRPs ("**the BRP letter to WW**"). The letter is annexed marked "**FA24**".

81. The BRP letter to WW to a large extent mirrors the statements made in the 28 May 2020 update letter. However, the following aspects are of particular significance:

81.1 The BRPs recorded that they are "*well aware of their statutory obligations and have complied, and will continue to comply, with their statutory obligations throughout the business rescue proceedings*"; and

81.2 The BRPs stated that they "*have been, and will continue, acting independently, impartially and skilfully throughout the business rescue proceedings*".

81.3 The BRPs failed, however, to provide any of the financial information requested by Airlink, and merely baldly denied the majority of the allegations made by Airlink regarding the DPE's interference in the business rescue process, and the BRPs' apparent unlawful disposition of SAA's assets.

82. On 3 June 2020, and in response to the draft Proposed Plan delivered by the BRPs to the Creditors' Committee, Ms De Hutton dispatched a letter to the BRPs raising certain concerns that creditors had about the business rescue process and the draft Proposed Plan ("**the Creditors' Committee**

submissions to the BRPs"), which will be discussed in full below. The letter is annexed marked "**FA25**".

83. On 4 June 2020, the BRPs held a virtual meeting with the Creditors' Committee in order to discuss creditors' concerns ("**the 4 June 2020 meeting**"). The minutes of the meeting are annexed, marked "**FA26**".

84. The BRPs' responses to the Creditors' Committee submissions to the BRPs are set out in full in the minutes of the 4 June 2020 meeting, and are not reproduced here. However, the following matters are of significance:

84.1 The background (set forth in paragraph 5 of the minutes) indicates that the BRPs had various engagements with the Shareholder and had, on multiple occasions, indicated their preference for a number of different methods to rescue SAA. Ultimately, the BRPs deferred to the Shareholder's view in respect of the business rescue proceedings.

84.2 **When the Shareholder indicated that it wished to restructure SAA rather than embark on a "winding down" process, the BRPs changed their view regarding the approach to be taken in the Proposed Plan.**

84.3 It was suggested that the secured bank creditors did have "skin in the game" (i.e. an interest in the business rescue and the outcome of the Proposed Plan) as they would have an interest in receiving payments from SAA rather than being required to enforce the guarantees against Government.

85. Notwithstanding the BRPs commitment to publish the Proposed Plan on 8 June 2020, the BRPs again on 8 June 2020 requested a further

extension for the publication of the Proposed Plan until 15 June 2020. This extension was approved by the creditors. The letter requesting the extension and email notifying all affected persons of the creditors' approval of the extension are annexed marked "**FA27**", and "**FA28**", respectively.

86. The Proposed Plan was eventually published and sent to the Creditors' Committee on 16 June 2020 (despite being due on 15 June 2020 and in the absence of a request for a further extension). I am advised that there is case authority for the proposition that the business rescue proceedings therefore terminated automatically upon the BRPs failure to publish the Proposed Plan within the extended time period to do so. Alternatively the failure to publish the Proposed Plan within the extended time to do so fortifies the case made out elsewhere in this affidavit that the resolution placing SAA into business rescue should be set aside on the basis that it is just and equitable to do so (in addition to the other reasons for the setting aside of the resolution as set out elsewhere in this affidavit.). The Proposed Plan is annexed marked "**FA29**".

87. Following the publication of the Proposed Plan, and in a media statement by the DPE dated 16 June 2020 ("**the DPE Statement**"), the Government reiterated its preference for business rescue as opposed to liquidation, and stated that it supports the business rescue plan where it results in a viable, sustainable, competitive airline that provides integrated domestic, regional and international flight services. Of particular importance is that the DPE said that "*[t]he aviation industry in South African requires the capabilities of a SAA that is reconstituted, restructured and reinvigorated, without the legacy burdens, including corruption, poor leadership and unsustainable costs, which have beset SAA's past*" (emphasis added).

88. In relation to the BRP's, the DPE indicated that, "*[they] have had significant additional financial resources at their disposal to enable them to restructure SAA by stemming the tide of wastage, an excessive cost-structure and cash burn. We will assess the plan which, we are concerned, might have not been adequately accomplished*" (emphasis added). The relevant media statement is annexed marked "**FA30**".

THE FINANCIAL HISTORY OF SAA

89. SAA's precarious financial position, which culminated in SAA being placed into business rescue, is not a recent development, but was years in the making.

90. As is clear from various public documents, and also most recently brought to the fore in the 27 May 2020 SCOPA meeting, SAA has been in financial turmoil for at least the past 8 years, having suffered a substantial loss every year since 2012.

91. The losses sustained by SAA are set forth in its Annual Financial Statements ("**AFSs**") and can be summarised as follows:

91.1 in 2013, SAA Group suffered a total comprehensive loss of R1.20 billion;

91.2 in 2014, SAA Group suffered a total comprehensive loss of R2.59 billion;

91.3 in 2015, SAA Group suffered a total comprehensive loss of R5.62 billion;

91.4 in 2016, SAA Group suffered a total comprehensive loss of R1.49 billion;

91.5 in 2017, SAA Group suffered a total comprehensive loss of R5.43 billion;

91.6 in 2018, SAA Group suffered a total comprehensive loss of R5.42 billion; and

91.7 in 2019, SAA Group suffered a total comprehensive loss of R5,04 billion (in terms of the draft AFS).

92. SAA has therefore suffered a cumulative comprehensive loss of over R26 billion between 2013 and 2019.

93. The previous losses and abysmal financial performance of SAA is confirmed in the Proposed Plan, which states:

93.1 SAA reported losses in each year since 2012 accumulating to over R27 billion in 2019 (paragraph 12.3.1.1.2);

93.2 SAA's secured long-term debt increased from R2 billion in 2012 to over R11,9 billion in 2019 (paragraph 12.3.1.1.4);

93.3 SAA's interest costs increased from R172 million in 2012 to R1,3 billion in 2019 (paragraph 12.3.1.1.5);

93.4 The last audited annual financial statements of SAA for the year ended 31 March 2017 were qualified and included a "*material uncertainty relating to going concern*" as SAA was at that time insolvent with its liabilities exceeding assets by R18 billion (paragraph 12.3.1.1.6); and

93.5 The unaudited results for the period to 31 March 2019 show that SAA's liabilities exceed its assets by R12,9 billion (paragraph 12.3.1.1.7).

Auditor-General Report - 2017

94. The Auditor-General's Report in the 2017 Integrated Report, annexed marked "**FA31**", contains a number of qualifications which suggest that, while the numbers reflected in the AFSs demonstrate serious financial distress, there is no way to be certain that these are even the correct figures for SAA, implying that the position could in fact be worse than is actually reflected in SAA's AFSs. An even greater cause for concern is the fact that the issues identified by the Auditor-General in 2017 were never raised by SAA's auditors in the years preceding the 2017 report, which brings into question not only the 2017 figures, but also those of the years preceding 2017.

95. In summary (and amongst others), the Auditor-General set out the following deficiencies in SAA's AFSs:

95.1 the SAA group did not adequately review the useful lives and residual values of property, aircraft and equipment at each reporting date in accordance with the required accounting standards;

95.2 some A-class rotables, equipment and furniture were not recorded in the financial statements, while other A-class rotables were recorded, but their existence could not be verified;

95.3 the SAA Group did not adequately assess property, aircraft and equipment for impairment at the reporting date in accordance with the required accounting standards;

95.4 the Auditor-General was unable to obtain reasonable assurance that inventory was valued correctly, and the existence of some inventory could not be verified;

95.5 SAA did not recognise maintenance costs as required - some maintenance costs were recognised in the incorrect accounting period, some were not recognised in profit or loss, some were recognised using incorrect exchange rates, and some were recognised as an expense when paid in advance;

95.6 the SAA Group did not establish adequate controls to maintain complete records of irregular expenditure, and the Auditor-General was unable to obtain sufficient appropriate audit evidence to confirm the amount of irregular expenditure to be disclosed by alternative means; and

95.7 the SAA Group did not establish adequate controls to maintain complete records of fruitless and wasteful expenditure, and the Auditor-General was unable to obtain sufficient appropriate audit evidence to confirm the amount of fruitless and wasteful expenditure to be disclosed by alternative means.

96. In addition, the Auditor-General noted the following instances of non-compliance by SAA with the relevant legislation:

96.1 The financial statements were generally not submitted for auditing within two months after the end of the financial year, as required by section 55(1)(c)(i) if the PFMA. The financial statements that were submitted, were not prepared in accordance with the prescribed

financial reporting framework and were not supported by full and proper records as required by section 55(1)(a) and (b) of the PFMA and section 29(1)(a) of the Companies Act.

96.2 Effective steps were not taken to prevent fruitless and wasteful expenditure, as required by section 51(1)(b)(ii) of the PFMA. Effective steps were also not taken to prevent irregular expenditure, as required by section 51(1)(b)(ii) of the PFMA. In addition, the Auditor-General was unable to obtain sufficient appropriate audit evidence that irregular expenditure was investigated and that disciplinary steps were taken against officials who had incurred and permitted irregular expenditure as required by section 51(1)(e)(iii) of the PFMA (and the same can be said for fruitless and wasteful expenditure).

96.3 Proper control systems to safeguard and maintain assets were not implemented, as required by section 50(1)(a) and 51(1)(c) of the PFMA.

96.4 SAA provided financial assistance to its subsidiaries without the approval of the shareholders in a special resolution, and without considering the solvency and liquidity of the company, in contravention of section 45 of the Companies Act.

96.5 Procedures for quarterly reporting to the National Treasury and for facilitation of effective performance monitoring, evaluation and corrective action were not established, as required by treasury regulation 29.3.

96.6 Amongst other procurement deficiencies, some goods, works or services were not procured through a procurement process which was

fair, equitable, transparent and competitive, as required by section 51(1)(a)(iii) of the PFMA. Moreover, contracts and quotations were awarded to suppliers whose tax affairs had not been declared by the South African Revenue Services to be in order as required by paragraph 14 of the Preferential Procurement Regulations and paragraph 21 of SAA's Supply Chain Management ("**SCM**") policy.

97. Of importance is the Auditor-General's statement that, "*the history of losses, lack of capital and volatility in foreign exchange rates, along with maturing loans and working capital deficiencies, indicate that a material uncertainty exists that may cast significant doubt on the company's ability to continue as a going concern*" (emphasis added).

98. In the 2017 Integrated Report, the then Chairperson of the Board, Mr JB Magwaza ("**Magwaza**"), himself conceded that the report was delayed due to uncertainty regarding the going concern status of the Group, and that SAA's history of poor financial performance had led to a reliance on debt (underpinned by Government guarantees) that was necessary to sustain its operations. Even according to Magwaza, this was an untenable situation for any business enterprise.

SAA Integrated Report for the year ending 31 March 2018

99. Section 8(3) of the PFMA provides that the Minister must submit to Parliament, for tabling in both Houses, the consolidated financial statements and the audit report on those statements, within one month of receiving the report from the Auditor-General.

100. Section 8(5) of the PFMA provides further that, if the Minister fails to submit the consolidated financial statements and the Auditor-General's

audit report on those statements to Parliament within seven months after the end of the financial year to which those statements relate, the Minister must submit to Parliament a written explanation setting out the reasons why they were not submitted, and the Auditor-General may issue a special report on the delay.

101. Section 55(1)(d) of the PFMA provides that the accounting authority for a public entity must, within five months of the end of a financial year, submit to the relevant treasury, to the executive authority responsible for that public entity and (if the Auditor-General did not perform the audit of the financial statements) to the Auditor-General, an annual report on the activities of that public entity during that financial year; the financial statements for that financial year after the statements have been audited; and the report of the auditors on those statements.

102. Section 65(1)(a) of the PFMA provides that the executive authority responsible for a department or public entity must table in the National Assembly or a provincial legislature, as may be appropriate, the annual report and financial statements referred to in section 55(1)(d) and the audit report on those statements, within one month after the accounting officer for the department or the accounting authority for the public entity received the audit report.

103. Section 65(2) of the PFMA provides that, if an executive authority fails to table (in accordance with section 65(1)(a)) the annual report and financial statements of the department or the public entity, and the audit report on those statements, in the relevant legislature within six months after the end of the financial year to which those statements relate, then the

executive authority must table a written explanation in the legislature setting out the reasons why they were not tabled, and the Auditor-General may issue a special report on the delay.

104. In addition, Section 30(1) of the Companies Act requires a company to prepare annual financial statements within six months after the end of its financial year (or such shorter period as may be appropriate to provide the required notice of an annual general meeting).

105. Despite the above, not only were the AFS for the year ending 31 March 2018 not tabled within the prescribed time period, but they have not yet been tabled even to this day. As noted in the SCOPA meeting on 19 February 2020, the provisions in the PFMA which give an entity authority to give reasons for not tabling financial statements, do not give the entity authority never to table the AFS at all.

106. Prior to SAA being placed under business rescue, and in a SCOPA meeting held on 13 November 2019, Mr Martin Kingston, a non-executive Director of SAA, indicated that SAA was technically insolvent and that no assurance could be given that it was a going concern. He also stated that, if SAA prepared financial statements on the basis of being a going concern, there was a risk of receiving a disclaimed audit opinion, which they were not prepared to take.

107. In addition, Mr Deon Fredericks, the then Chief Financial Officer of SAA, indicated that the draft financial statements for 2018/19 had not been approved by the Board because of concerns about its going concern status, and the Auditor-General agreed to wait until the issue was resolved.

108. Of significance is that, in the SCOPA meeting held on 19 February 2020, it was indicated that the reason for the delay in submitting the AFS was that, should the Annual Reports be tabled, they would effectively require SAA to be placed in liquidation. This is clearly indicative of the dire financial position of SAA, in that it is unable to produce any indication as to their financial position, despite SCOPA insisting that it submits its financials.

109. Summaries of the SCOPA meetings held on 13 November 2019 and 19 February 2020, which were prepared by the Parliamentary Monitoring Group, are annexed marked "**FA32**" and "**FA33**" respectively.

Government guarantees and cash injections

110. Despite the losses referred to in paragraphs 91 and 93 above, SAA has continued in existence as a direct result of substantial Government bailouts and guarantees, which the Board of SAA has effectively relied upon to continue trading. In a table presented at the 15 May 2020 SCOPA meeting, the guarantees and cash injections that SAA have received from Government between 2003 and 2019 are set out. The table indicates that a total of R31.24 billion was provided to SAA in the form of cash injections, and a further R19.11 billion in the form of guarantees by Government. The relevant table is annexed marked "**FA34**".

111. The Government has thus allowed SAA to trade under insolvent circumstances for many years, and has permitted SAA to incur billions of Rand in pre-commencement debt which it now has no prospect of repaying in full or in large measure. The effect of the Proposed Plan is, however, to absolve SAA of the responsibility of doing so, while

maintaining the Government's full equity interest. This is simply untenable.

SAA Board of Directors

112. SAA's financial distress can also be attributed to its Board of Directors. The recent High Court judgment declaring SAA's former non-executive chairperson, Ms Myeni, a delinquent director for life, is indicative of this ("**the Myeni judgment**"). Directors have been permitted to abuse SAA without any control being exercised over them by the Shareholder.

113. While the Myeni judgment is a prime example of uncovering the dishonest, reckless and grossly negligent actions of one director of SAA, it is beyond question that there are likely to be many more instances of misconduct at the hand of other directors. In this regard, the Honourable Madam Justice Tolmay ("**Judge Tolmay**") stated, in her judgment, that "*although all of SAA's woes can certainly not be attributed to her alone, she surely contributed significantly to the position SAA and the economy finds itself in today*" (emphasis added).

114. Judge Tolmay further stated that, in relation to Myeni's actions, there was a "*reasonable possibility that something sinister was going on behind the scenes.*" Given that Myeni was the previous chairperson (and essentially the 'leader' of the Board of directors) of SAA, it would be reckless not to carry out extensive investigations into the possible actions of other Board members under her direction and/or control.

115. All this underscores not only the potential liability of directors and other stakeholders, most importantly Government, for SAA's parlous financial position, but also the need for a full investigation of these aspects by the

BRPs, who have apparently for six months now failed to take any steps to initiate, let alone carry through, such investigations.

THE RELEVANT LEGAL FRAMEWORK

Provisions of the Companies Act

116. Section 130 of the Companies Act provides, in relevant part, as follows:

116.1 Subsection 130(1) provides that:

"*at any time after the adoption of a resolution in terms of section 129, until the adoption of the business rescue plan in terms of section 152, an affected person may apply to court for an order -*

(a) setting aside the resolution, on the grounds that-

...

(ii) there is no reasonable prospect for rescuing the company".

(b) setting aside the appointment of the practitioner, on the grounds that the practitioner-

(i) does not satisfy the requirements of section 138;

(ii) is not independent of the company or its management; or

(iii) lacks the necessary skills, having regard to the company's circumstances. (emphasis added)

116.2 Section 130(3) provides that:

"*An applicant in terms of subsection (1) must-*

(a) serve a copy of the application on the company and the Commission; and

(b) notify each affected person of the application in the prescribed manner".

116.3 Section 130(4) provides that:

"*Each affected person has a right to participate in the hearing of an application in terms of this section.*"

116.4 Section 130(5) provides that:

"When considering an application in terms of subsection (1) (a) to set aside the company's resolution, the court may-

(a) set aside the resolution-

(i) on any grounds set out in subsection (1); or

(ii) if, having regard to all of the evidence, the court considers that it is otherwise just and equitable to do so;

(b) afford the practitioner sufficient time to form an opinion whether or not-

(i) the company appears to be financially distressed; or

(ii) there is a reasonable prospect of rescuing the company, and after receiving a report from the practitioner, may set aside the company's resolution if the court concludes that the company is not financially distressed, or there is no reasonable prospect of rescuing the company; and

(c) *if it makes an order under paragraph (a) or (b) setting aside the company's resolution, may make any further necessary and appropriate order, including-*

(i) *an order placing the company under liquidation*". (emphasis added)

116.5 Subsection 130(6) provides that:

"*If, after considering an application in terms of subsection (1) (b), the court makes an order setting aside the appointment of a practitioner-*

(a) the court must appoint an alternate practitioner who satisfies the requirements of section 138, recommended by, or acceptable to, the holders of a majority of the independent creditors' voting interests who were represented in the hearing before the court; and

(b) the provisions of subsection (5) (b), if relevant, apply to the practitioner appointed in terms of paragraph (a)."

117. Section 139 provides for the removal and replacement of a BRP, and provides:

"(1) A practitioner may be removed only-

(a) by a court order in terms of section 130; or

(b) as provided for in this section.

(2) Upon request of an affected person, or on its own motion, the court may remove a practitioner from office on any of the following grounds:

(a) Incompetence or failure to perform the duties of a business rescue practitioner of the particular company;

(b) failure to exercise the proper degree of care in the performance of the practitioner's functions;

(c) engaging in illegal acts or conduct;

(d) if the practitioner no longer satisfies the requirements set out in section 138(1);

(e) conflict of interest or lack of independence; or

(f) the practitioner is incapacitated and unable to perform the functions of that office, and is unlikely to regain that capacity within a reasonable time.

(3) The company, or the creditor who nominated the practitioner, as the case may be, must appoint a new practitioner if a practitioner dies,

resigns or is removed from office, subject to the right of an affected person to bring a fresh application in terms of section130 (1) (b) to set aside that new appointment." (emphasis added)

The purpose of business rescue proceedings

118. The term "business rescue" for the purposes of Chapter 6 of the Companies Act, which deals with business rescue proceedings, is defined in section 128(1)(b) to provide for, amongst others, "*the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company*" (emphasis added).

119. In addition, section 7(k) of the Companies Act provides that one of the purposes of the Companies Act is to provide for the efficient rescue and recovery of financially distressed companies, in a manner that adequately balances the rights and interests of all relevant stakeholders. Any business rescue proceedings should, therefore, be in the best interests of all relevant stakeholders.

120. The primary purpose of the business rescue process established in terms of the Companies Act is thus to make provision for a mechanism by which viable companies, which are financially distressed and are at risk of being wound up or liquidated, can be rescued and continue as a going concern, in the best interests of the creditors. The secondary purpose of the business rescue regime, if the first cannot be achieved, is ultimately at the

very least to obtain a better return for a company's creditors than they would otherwise receive from immediate liquidation.

The duties of the business rescue practitioners

121. A wide range of duties is imposed on business rescue practitioners in terms of the Companies Act. Without limitation, the following duties are of relevance. A business rescue practitioner:

121.1 is an officer of the court and accordingly all duties arising therefrom are imposed on him;

121.2 has the same responsibilities, duties and liabilities as a director of a company, as set forth in sections 75, 76 and 77 of the Companies Act;

121.3 is afforded full management and control of the company in place of the pre-existing Board and management of the company, but may delegate his powers of functions to the pre-existing Board or management;

121.4 as soon as possible after being appointed, must investigate the affairs, business, property and financial standing of the company, and then consider whether there is a reasonable prospect of the company being rescued;

121.5 is required to inform the court and all affected persons, and apply to court for an order setting aside the business rescue proceedings, if, at any stage, he is of the view that there is no reasonable prospect of the company being rescued;

121.6 is required to reach a conclusion on whether there is any evidence of (i) voidable transactions, or the failure by the company or any director to

perform any material obligation relating to the company; and (ii) reckless trading, fraud or the contravention of any other law relating to the company. If so, he must take the appropriate steps, including referring the evidence to the relevant prosecuting authority and recovering any assets or taking the appropriate action in respect of any wrongdoer; and

121.7 must give effect to the rights of all affected persons, including the right of creditors to participate in the business rescue proceedings both formally and informally.

AIRLINK IS AN AFFECTED PERSON FOR THE PURPOSES OF SUBSECTION 130(1)

122. The term "affected person" for the purposes of Chapter 6 of the Companies Act, is defined in section 128(1)(a) to include a "creditor of the company". Airlink is a substantial creditor of SAA, and is accordingly an affected person that has standing to bring this application under section 130 of the Companies Act. I note that in the Proposed Plan, Airlink is reflected by the BRPs as having a claim of R277,929,957. The amount of Airlink's claim is disputed, and should be higher. The entry in the Proposed Plan does, however, recognise that Airlink is a substantial creditor of SAA.

THE REQUIRED PARTIES HAVE BEEN JOINED AND AFFECTED PERSONS NOTIFIED (SUBSECTIONS 130(3) AND (4))

123. SAA, the BRPs and the Commission are cited as respondents in this application and have been served with copies of the application.

124. Airlink has notified each affected person (or will have notified them by the time the application is heard) of this application in the prescribed manner, by delivering a copy of the court application, in accordance with regulation 7 of the Companies Regulations, 2011 (GG No. 34239), to each affected person known to the applicant. Airlink also hereby informs each affected person that they have a right to participate in the hearing of this application and invites any party that wishes to participate to do so.

THE SAA BUSINESS RESCUE PLANS

The draft Proposed Plan

125. At the outset, it must be noted that the information contained in the draft Proposed Plan was not sufficient or satisfactory, and prevented the full and proper consideration thereof. The draft Proposed Plan was vague, contained outdated figures and references to paragraphs that did not exist, and did not contain the necessary information or documentation to enable the creditors meaningfully to engage with, or comment on, the draft.

126. In this regard, whilst the BRPs averred in the draft Proposed Plan that the liquidation of SAA would place the creditors in a worse position than they would be under business rescue, the draft Proposed Plan does not include, *inter alia*, a liquidation calculation, the realisable value of SAA's assets, or an acceptable explanation of why business rescue is the preferred option or will result in the best outcome for the stakeholders. This negatively affected the creditors' ability to properly consider the draft Proposed Plan in the time prior to receiving the Proposed Plan.

Proposed restructure of SAA

127. The essence of the draft Proposed Plan is set forth in a diagram depicted in paragraph 19.2 thereof. The approach taken in the draft Proposed Plan is to restructure SAA by establishing a new holding company, called "New HoldCo", which will take over the shareholding of SAA, with the Shareholder being the sole shareholder of New HoldCo.

128. Thus, whilst provision is ostensibly made for a change in the corporate structure of the SAA group of companies, through the establishment of a new holding company, in reality, this has no effect on the 100% control by the current Shareholder, and the equity restructure is accordingly a façade. **If anything, it decouples SAA from its subsidiaries, with the effect that the assets of those companies are no longer available to SAA and its creditors.**

129. It also envisages a discharge of all of SAA's pre-commencement debts, including R 11 billion (or more) in concurrent creditors, for effectively no payment. It provides that SAA will pay R 600 million to those creditors over three years, but that if it fails to do so, the concurrent creditors will obtain equity in SAA in accordance with an unknown formula. There is no guarantee or Government backing for the payment of any amount to creditors, and it is proposed that the concurrent creditors would obtain a dividend from SAA in the amount of R 600 million over three years, the same period in which SAA is projected under the draft Proposed Plan to make a R20 billion loss.

130. There is thus no reasonable prospect of repayment and, at the end of the three year period, it is envisaged that the concurrent creditors will obtain

an unspecified equity interest in SAA. Whatever that interest might be, it is cold comfort - SAA is clearly a worthless enterprise if it cannot even repay R600 million over three years (to persons to whom it owed R11 billion - or more - in December 2019).

131. Upon the adoption of the draft Proposed Plan, SAA would continue in business. It would not be placed in liquidation, which is the pre-eminent mechanism by means of which all parties whose reckless, fraudulent or otherwise unlawful conduct led to SAA's demise might be examined and interrogated as part of the insolvency enquiry, and funds recovered.

Investigations undertaken by the BRPs

132. In the 19 February 2020 SCOPA meeting, it was noted that, after undertaking an assessment, the BRPs had come to the view that the entity was rescuable, but not as it existed at that moment due to corruption, poor management, mismanagement, poor choices of aircraft and the fact that most aircrafts were leased.

133. In the 27 May 2020 SCOPA meeting, a representative of SAA on behalf of the BRPs, Mr Bongani Nkasana, said that the SIU was currently at the SAA premises, conducting a number of investigations on offences and contracts of the past, and that the BRPs, in performing their responsibilities, would ensure that they bring any suspicious activities or contracts that they pick up to the attention of the SIU.

134. Despite this, however, and as correctly set out in the Creditors' Committee submissions to the BRPs, no mention (besides the reference in paragraph 7.5.6 to the review of procurement contracts) is made in the draft Proposed Plan of any of these investigations into potential misconduct by

the BRPs themselves or otherwise. The incorporation of the proposed new company appears to be a mechanism to enable SAA simply to escape the sins of its past. This approach is contrary to the BRPs duties to investigate potential unlawful activities by previous directors and/or contractors.

The Creditors Committee Submissions to the BRPs

135. The Creditors' Committee submissions to the BRPs (already attached as annex "**FA25**") in essence raise the following concerns of the creditors:

135.1 the draft Proposed Plan lacked relevant annexes and incorrectly cross-referred to paragraphs that did not exist, which made any meaningful consideration of the draft Proposed Plan exceptionally difficult;

135.2 the draft Proposed Plan contained inadequate explanation or substantiation regarding why business rescue would be preferable to an immediate liquidation, and lacked information in respect of the realisable assets of SAA, and a liquidation calculation;

135.3 the draft Proposed Plan provided no indication of how predicted losses of around R20 billion would be funded, and how the funding required for the restructure of SAA would be obtained, when Government had previously declined to provide any additional funding for SAA;

135.4 there was no indication of how the R600 million that is to be distributed to the general concurrent creditors will be allocated, and that the creditors have no "appetite" for the equity proposed in place of the R600 million, should creditors not receive all, or any, of the funds;

135.5 the creditors, many of whom are major suppliers to SAA, would not be prepared to continue to trade with SAA unless confidence is instilled that they will be paid, which confidence is lacking at present;

135.6 a substantial concern was the lack of information regarding the management of SAA going forward, as the draft Proposed Plan made no provision for the management of SAA after implementation. This was of particular concern given the well-publicised allegations of poor governance, corruption and mismanagement in respect of SAA, and particularly the recent declaration of Ms Myeni as a delinquent director;

135.7 if the creditors are only to receive 5 cents in the Rand, the Creditors' Committee was of the view that they would rather SAA be placed into liquidation;

135.8 the draft Proposed Plan envisages that the secured bank creditors will be paid in full, and will be permitted to vote on the Proposed Plan, when the secured bank creditors are merely conduits for Government funding and are not truly independent of the Government;

135.9 given the uncertainty regarding the routes to be flown, and the maintaining of seemingly unprofitable routes, it is not clear how the statement of income and expenses could have been prepared; and

135.10 the BRPs appear to have deferred to the Government to "*an unacceptable extent*" and are "*hiding behind the PFMA instead of taking responsibility for the business rescue process*". The Creditors' Committee conveyed their concern that the BRPs appear to have prepared the draft Proposed Plan "*in an effort to appease government*".

The future SAA

136. Despite the above, the draft Proposed Plan gives no indication of how the new "restructured"' SAA Board will be comprised and how it will function to bring SAA out of its insolvent state. Rather, in the 4 June 2020 meeting, Mr Ntlhane Makena ("**Makena**"), the BRPs' attorney, suggested that the restructuring of the Board is not within the BRPs mandate but is rather the responsibility of the Shareholder. This leaves the creditors, including Airlink, with little hope that meaningful change will be made in as far as the Board of SAA is concerned. Indeed, there is no credible plan to ensure that the company can continue as a going concern into the future, which is the main purpose of business rescue proceedings.

137. Annexure D to the draft Proposed Plan indicates that SAA is projected to make a loss of around R20 billion over the next three years, without any indication of how this will be funded, or how this will ensure a sustainable business in the future. There is no indication that SAA can or will curb or prevent further losses being suffered.

138. **Essentially, upon implementation, SAA is projected to make very substantial further losses, placing it once more in peril, without any effective plan to trade out of its financial predicament. To make matters worse, Makena, in the 4 June 2020 meeting, indicated that the figures contained in Annexure D to the draft Proposed Plan are the figures *before* Covid-19, and still need to be updated. Accordingly, the losses are likely to be even greater due to the impact of Covid-19.**

139. The draft Proposed Plan essentially proposes that SAA continue to incur debt in circumstances where it will not be able to generate an income sufficient to cover such debts, and where, on its own version, it will incur an expected loss of R20 billion over the next three years. Consequently, the draft Proposed Plan simply does not provide for any plan by which SAA will continue to exist and trade on a solvent basis, even once the plan has been implemented.

The position of creditors

140. The draft Proposed Plan ostensibly provides that, at best, the general concurrent creditors will be paid an amount of R600 million over a three year period, commencing from the resumption of domestic, regional and international flights (other than repatriation and Covid-19 related charters).

141. That payment, however, is intended to be made by SAA over the three years after the implementation of the plan, and not by any third party funder. It thus relies solely on the profitability of SAA. However, the plan does not contemplate SAA being profitable over that three-year period. There is thus in truth no prospect that payment will actually eventuate. Instead, creditors will be issued with a promissory note or similar instrument that will accrue interest over the three year period, and will be convertible into a form of "equity" in SAA upon the lapse of the three year period, should any amount due to them still be outstanding at that stage. While it is asserted that this works to place the creditors in a better financial position than if SAA were to be placed in liquidation, this is in fact not the case.

142. Given that the draft Proposed Plan indicates that SAA is expected to suffer a loss of around R20 billion over the next three years, and that there is, in effect, no actual proposed plan in relation to the future conduct of SAA's operations, it is highly unlikely that the general concurrent creditors will receive any of the R600 million as envisaged in the draft Proposed Plan. Indeed, the most likely scenario is that the creditors will have their claims converted into equity in SAA to the extent that the creditors remain unpaid. However, given the significant losses expected, the potential proposed equity to which the creditors may be entitled will be essentially worthless.

143. In any event, and even if the R600 million is paid to creditors, Mokena indicated in the 4 June meeting that the quantum owing to the general concurrent creditors is approximately R11 billion (and may increase depending on what happens with aircraft leases that still need to be negotiated and potentially terminated). The draft Proposed Plan therefore has the effect of reducing the creditors' claims from R11 billion to a mere R600 million. In addition to the R11 billion, Mokena indicated that there is also amount of R1.2 billion in PCF owing to the creditors.

144. Paragraph 7.5.11 of the draft Proposed Plan further suggests that funds that could have been available to creditors may be used to capitalise subsidiaries, in a manner that is prejudicial to the creditors of SAA. If any of the subsidiaries are distressed, those companies must consider their own options, including liquidation or business rescue.

The Proposed Plan

145. The Proposed Plan was eventually published on 16 June 2020 (nearly five months after it was initially meant to be published) and after the approved

date of 15 June 2020 (without a further extension being applied for or granted). Despite this, however, it is clear that, much like the draft Proposed Plan, the Proposed Plan has been prepared in a haste and without due consideration to the interests of creditors (including Airlink), and brings little clarity or certainty on how SAA will continue to exist as a going concern, following its business rescue. Indeed, the Proposed Plan offers no acceptable or plausible plan for the rescue of SAA.

146. **In addition, despite the creditors outlining the issues identified in the draft Proposed Plan in their submissions to the BRPs, as well as attending the 4 June 2020 meeting to address these issues, the Proposed Plan does not appear, in any material way, to deal with the submissions made by the creditors, despite the BRPs indicating that significant changes would be made. The changes made are clearly only at the instance of and on the insistence of the Shareholder.**

Business rescue funding

147. The Proposed Plan indicates that Government has allocated R16.4 billion of its budget to fund SAA's payment of certain lenders (such as the secured bank creditors), and that additional funding (of roughly R10 billion) will be required for the proposed restructure (this not taking into account the amount required for the recapitalisation of SAA's subsidiaries). This additional funding is said to be "funded" or "raised" by Government.

148. There is, however, no indication in the Proposed Plan how this additional funding will be raised and where it will come from (especially given that, at the date of publication of the Proposed Plan, no potential strategic equity partner(s) had been identified by the BRPs, although this was envisaged

in the Proposed Plan). Accordingly, there is little certainty as to how the proposed restructure of SAA will actually materialise, absent certainty regarding the source, and flow, of funds.

149. Of even greater concern is that it appears, from the Proposed Plan and from the DPE statement, that Government has not yet confirmed their commitment to providing the necessary funding, which is essential for, and indeed a condition for, the Proposed Plan to come into operation and be implemented. This is confirmed at paragraph 42.1 of the Proposed Plan. Creditors cannot reasonably be expected to vote on a Proposed Plan where there is no certainty regarding funding in respect of SAA's business rescue, where there is no certainty regarding the position of the funding shareholder, and where their positions are not even secured.

150. In terms of the Proposed Plan, it is envisaged that the Government provides funds, or raises funds, for the business rescue, including for SAA's restructure, retrenchment costs of employees, repayment of amounts owing to the secured bank creditors, and the "*continuation of [SAA] as a going concern*". However, it appears from the Proposed Plan that the funding provided by Government is not provided in the form of a shareholder loan advanced to SAA, for which SAA will be liable, but rather as equity funding for the recapitalisation of SAA in terms of which additional shares are issued to the Shareholder, in exchange for the funding for SAA's business rescue.

151. Airlink submits that, in terms of the above recapitalisation, the Shareholder, together with the BRPs, attempt ostensibly to construct a

situation in which SAA is made to be reflected as solvent on an analysis of the projected balance sheets.

152. Not only is the Proposed Plan lacking in any relevant detail to enable a proper assessment of how certain figures have been arrived at by the BRPs, but it is also clear that, while SAA may be disguised as appearing solvent (as a direct result of Government "funding") it is in fact commercially and technically insolvent, in the sense that SAA will be unable to fund its operations without further debt funding (which it will in any event be unable to repay from its operational revenues and profits), for the foreseeable future.

153. In the BRP's own words, and as set forth in paragraph 42.1 of the Proposed Plan, without funding from the Government, the Proposed Plan will be "*unimplementable*". The same can be said for the financial position of SAA - without continued Government funding, SAA is incapable of existing as a stand-alone, solvent entity. It is clear from Annexures C and D to the Proposed Plan that, despite recapitalisation (which has the effect of restoring solvency), SAA will continue to operate at a loss.

154. Furthermore, while the Proposed Plan is centred around Government funding, it is hard to view the Proposed Plan as viable or credible, given that:

154.1 the Proposed Plan is conditional on Government funding which is obviously not yet secured; and

154.2 there is no indication as to how Government will 'raise' the required, additional funding and where this will come from.

155. In addition, despite Mr Makena indicating in the 4 June meeting with creditors that the numbers in Annexure D will be updated to reflect the correct figures post Covid-19, the Proposed Plan still indicates that the figures in Annexure D have been prepared pre-Covid-19. This, Airlink submits, results in there being little possibility of meaningful engagement with the numbers presented in the Proposed Plan, as they are not based upon present reality and therefore are not a true reflection of SAA's financial position (with the position obviously being worse post Covid-19). In this regard, not only is the position incorrect, but the numbers are misleading and indeed purposely misleading, in that the BRP's know that the numbers are wrong.

Restructuring of routes

156. The BRPs considered the viability of SAA routes and concluded that "*even by cutting costs by 25%... there were routes that remained significantly loss making with no option to optimise further at the Net Profit level*". These unsalvageable routes included:

156.1 Entebbe and Luanda (within SAA's regional route network); and

156.2 Cape Town, Durban and Port Elizabeth (within SAA's local route network).

157. Inexplicably, the above unsalvageable routes are proposed to be retained by SAA in the Proposed Plan, despite them being inevitably loss making (even after the application of cost saving measures).

158. The only explanation for this commercially nonsensical proposal is that the BRPs are acting pursuant to the instructions of the shareholder who (for policy reasons) has insisted upon the retention of certain loss making

routes that can have no commercial justification. This is prejudicial to creditors.

The position of creditors

159. As discussed above, under the draft Proposed Plan, general concurrent creditors would be paid an amount of R600 million over a three year period (subject to them being issued with a promissory note or similar instrument which would be converted into a form of "equity" should any amount remain outstanding at the end of the 3 (three) year period). The position under the Proposed Plan is the same, save for the fact that there is no longer provision for the form of equity as set out in the draft Proposed Plan. Rather, under the Proposed Plan, concurrent creditors are left with an amount of R600 million, payable over 3 years, with no guarantee of any return.

160. In circumstances where payment of the R600 million is questionable and unlikely taking into account the losses to be made by SAA in the upcoming three year period, there is no guarantee to the concurrent creditors of any value being received. There is thus no confirmed benefit for the concurrent creditors in the Plan. There is accordingly no reason why any creditor should view the proposal as better than a return (on liquidation) of zero cents in the Rand.

161. It is apparent that the equity has simply been removed, presumably on the insistence of the Shareholder, without any provision being made for creditors should payment from SAA not materialise. While it is Airlink's submission that the proposed equity was in no way desirable, the position

is even worse under the Proposed Plan. There is now no commitment from the Shareholder even to attempt to ensure the proposed minimal payment is made to concurrent creditors.

162. Despite Mr Makena indicating in the 4 June meeting that the BRPs would take the creditors dissatisfaction with the R600 million quantum to the Shareholder for consideration, it appears that there was no further consideration of this amount. Instead, while there has been no improvement to the position of creditors, an amount of R1.7 billion has been allocated to the payment of Lessors (which was not previously provided for in the draft Proposed Plan). Accordingly, it is evident that lessors are being treated as a different class of creditors, with no justification.

Recapitalisation of SAA subsidiaries

163. The Proposed Plan, at paragraph 14.6.10, highlights the financial instability of SAA's subsidiaries, and essentially validates the creditors concerns regarding the recapitalisation of subsidiaries through the business rescue process that was alluded to in the draft Proposed Plan. The Proposed Plan indicates that SAA Technical would require R1 billion for their recapitalisation, AirChefs will require R150 million and Mango will require an additional R1 billion. Although it is unclear whether this recapitalisation will form part of the proposed business rescue funding, it is Airlink's submission that such recapitalisation of SAA's subsidiaries should never have been considered or included in the Proposed Plan. Its

inclusion raises further questions about the purposes of the business rescue on the part of the Shareholder.

164. Rather, if those subsidiaries are considered to be financially distressed, they should be placed under their own business rescue processes and dealt with accordingly. There is no basis on which SAA should be assisting with the recapitalisation of its subsidiaries (especially in circumstances where it cannot afford to pay its own debts) with the effect that funding that should be used to fund SAA's own business rescue or pay its own creditors is being used to prop up the subsidiaries of SAA. This is once again, prejudicial to the creditors of SAA.

165. Furthermore, Airlink notes the outstanding loan of approximately R400 million that SAA has with Mango, which has not been taken into account in the Proposed Plan. It is Airlink's submission that there is no reason for this loan not to be called up in terms of the business rescue process, and this represents another instance where the BRPs have not taken the interests of creditors into account (and instead are favouring the interests of the shareholder over creditors).

Investigations undertaken by the BRPs

166. As noted above, one of the concerns of the Creditors' Committee was the fact that there was no indication in the draft Proposed Plan of the investigations that the BRPs had conducted to ascertain the extent of any potential misconduct at SAA.

167. Accordingly, the BRPs have elaborated (at paragraph 14.5 of the Proposed Plan) on the investigations conducted into the affairs of SAA, and report that, prior to business rescue, SAA had commenced with a

number of forensic investigations into alleged corruption, mismanagement and unlawful conduct. Further, that the BRPs supported this process by SAA, but could not give further detail on these investigations.

168. This in no way assists (or assures) creditors that the affairs of SAA have been properly investigated by the BRPs prior to the publication of the Proposed Plan, in circumstances where a failure to do so would be contrary to the duties of the BRPs. On the contrary, this indicates that the BRPs have, contrary to their duties, failed to conduct their own, independent, investigations.

169. Of additional concern is that the Proposed Plan indicates that announcements regarding the investigations will be made by the Company when it is able to do so. This raises further uncertainty as to the future of SAA, and what may happen as a result of any such announcements being made. Amongst other things, these announcements have the potential detrimentally to affect the public's trust in SAA and, once again, result in a decline of ticket sales which will negatively impact SAA's financial position.

170. What is clear from paragraphs 14.5.2.1 and 14.5.2.2 of the Proposed Plan is that there is evidence that contracts to which SAA was a party were tainted by corruption (although no detail is given about this). However, the Proposed Plan makes no provision for the recovery, by SAA, of losses caused by the corruption. Once again this is to the detriment of creditors.

On-going litigation

171. Paragraph 40.1.2 of the Proposed Plan states that the business rescue and the amount which creditors could receive in terms of the business rescue may be adversely affected by, *inter alia*, unforeseen litigation of

any nature whatsoever, howsoever arising, from any cause of action whatsoever. As indicated above, Airlink and SAA are immersed in on-going litigation, with an appeal having been set down for hearing by the SCA on 4 September 2020. If Airlink is successful in the appeal, this will have a material effect on the finances available to SAA (and can in no way be viewed by the BRPs as 'unforeseen'). Despite this, however, the potential consequences of this litigation have not been taken into account by the BRPs in the preparation of the Proposed Plan.

Annexures to the Proposed Plan

172. It must be noted that the annexures to the Proposed Plan (and the financial information contained therein) provide no breakdown of key figures, which are required for affected persons meaningfully to engage with, and assess, the Proposed Plan. Further, the suggested forecasts appear to be overly simplistic at best (especially given the complexity of SAA), and in all probability purposely skewed and misleading. In this regard, amongst others, the forecasts make no provision for the following figures, which are essential to the business of SAA:

172.1 exchange rate assumptions;

172.2 fuel price assumptions;

172.3 available seat kilometres (as well as revenue and cost per available seat kilometre); and

172.4 alternative projections based on the underlying assumptions.

173. In addition, and with no explanation, there seems to be a jump in share capital between 2020 and 2021 respectively from approximately

R33,626,336,949 to R53,855,321,109. Despite no explanation, this is of great significance given the fact that it essentially appears to restore SAA's factual solvency, despite it being clear in the forecast that the company will continue to trade in circumstances of commercial insolvency.

174. Specifically in relation to Annexure B, Airlink notes the following deficiencies:

174.1 there is no indication as to the category in which each creditor belongs. There is accordingly no indication as to whether the amounts owing to creditors are considered to be secured or unsecured; and

174.2 the amount reflected as Airlink's balance is incorrect, and is substantially less than the true amount, which is actually R715 million, in terms of Airlink's records. Again, in the absence of a proper breakdown, there is no way to establish how the BRPs arrived at these numbers.

175. Specifically in relation to Annexure C, Airlink notes the following deficiencies:

175.1 the assumptions on page 147 of the Proposed Plan highlight the uncertainty around South Africa's international travel ban, when the borders will reopen, and what the demand will look like for SAA when these things happen. Yet, the average fare per passenger in 2021 is said to be R4,516. This amount appears to be too high if one has regard to the assumptions;

175.2 in 2021, the fuel cost as a percentage of passenger revenue is only 14%, but seemingly increases to 21% in the years which follow. Airlink

submits that 14% is definitely too low, completely unrealistic, and is not a true indication of the fuel costs that SAA will actually incur. Also of concern is the fact that the fuel costs in 2023 and 2024 essentially remain the same, notwithstanding an increase in departures - this, Airlink submits, is simply not possible. The forecasts and assumptions are deliberately skewed and misleading.

176. The result of these deficiencies is that the forecasts appear to consist of sheer speculation at best, and deliberate skewing in all likelihood. It is not apparent what (if any) facts the figures are based upon. Nor is it apparent whether any of the assumptions are valid. The forecasts therefore appear to be pure guesswork at best (but in all likelihood unrealistically and purposely skewed), with the end result that any conclusions drawn from the forecast are worthless.

BRPs preference for business rescue as opposed to liquidation

177. The Proposed Plan proposes, amongst others, the following benefits of adopting the Proposed Plan as opposed to liquidation:

177.1 if the business rescue proceeds in terms of the proposed restructure, SAA will continue on a solvent basis;

177.2 according to PWC's calculation, the dividend received by creditors on liquidation would be less than the dividend anticipated to be received as a result of business rescue;

177.3 a liquidation would take longer and this would be to the detriment of creditors; and

177.4 if the business rescue proceeds in terms of the proposed restructure, a complete loss of jobs will be averted.

178. It is Airlink's submission, however, that these reasons are contrived. For the reasons stated above, it is evident (and unnecessary to repeat) that there is no basis on which the BRPs can contend that SAA will be able to continue in existence on a solvent basis. This is simply unattainable, even in terms of the proposed restructure of SAA.

179. In terms of the dividend received by creditors upon liquidation, the Proposed Plan indicates that PWC, in coming to their calculation in support of a liquidation dividend, relied on the asset and liability figures reported in the management accounts as provided by SAA's management and/or the BRP's, and have not sought to verify or audit such information for the purpose of calculating the liquidation dividend. This in itself is problematic, especially given the Auditor-General's findings (as detailed above) regarding the uncertainty of the numbers reflected in SAA's AFSs, and whether they are in fact true and correct. In any event, and even if the dividend received by creditors under liquidation would be zero cents in the Rand, for the reasons set out above, it is unlikely that creditors will even receive the dividend that is provided for under business rescue.

180. In addition, the advantages of liquidation (which the BRPs have seemingly neglected to consider) include that it will allow for SAA's assets to be sold and for proper and meaningful investigations to be held into the financial affairs of SAA. This could potentially result in the recovery of assets or action(s) taken against directors, the Shareholder and others who may have

been responsible for the hopelessly insolvent state of SAA and its inability to satisfy the debts owed to its creditors.

181. In liquidation proceedings, a liquidator will also be able to use such proceedings to conduct an insolvency inquiry, interrogate witnesses (including previous Board members, employees and other people with relevant knowledge), set aside voidable dispositions, and recover amounts owed to SAA by its debtors. These powers are especially relevant given the history of corruption and mismanagement at SAA which is responsible for its current financial state.

182. Under business rescue however, SAA's debts owed to concurrent creditors will simply be "discharged" in terms of the Proposed Plan. In this regard, the dividend received under liquidation cannot be viewed in isolation.

183. Despite the intention of the Proposed Plan to compromise stakeholders' rights, Airlink reserves its rights in law to institute proceedings against the BRPs, Board members of SAA, the DPE and the Shareholder in relation to harm it has suffered on account of reckless and unlawful actions of these parties.

184. In relation to the timing of liquidation not being in favour of the creditors, it is Airlink's submission that liquidation should have been implemented (at the behest of the BRPs) a long time ago and prior to the business rescue proceedings progressing to the point that they have. The BRP's therefore cannot rely on the timing of liquidation as a disadvantage thereof, where any delay that negatively affects creditors under liquidation will be as a result of the BRP's own actions. Clearly, the longer one waits to place SAA in liquidation, the more detrimental it will be to the creditors.

185. Furthermore, and in relation to the employees of SAA, it is Airlink's submission that even under the proposed restructure (and on its own numbers), SAA will continue to experience losses as it has in the past. In the circumstances, it is reckless to retain employees in circumstances where SAA will not be able to pay them. Further, the focus of business rescue is (or should be) on creditors' claims. The benefits of job retention should not be considered at the expense of creditors' interests. This is not in line with the purpose of business rescue.

186. In all the circumstances, Airlink submits that a liquidation of SAA will be more beneficial to the creditors of SAA than the "rescue" and restructure set forth in the Proposed Plan. Indeed, it is the only viable option.

The Genesis Report

187. In furtherance of Airlink's submissions, a report compiled by Genesis-Analytics ("**Genesis**") is attached hereto marked "**FA35**" ("**the Genesis Report**"). The Genesis Report essentially details the shortcomings of the Proposed Plan and the unlikelihood of the restructured business achieving its projected outcomes. The Genesis Report also highlights other potential issues arising from restructuring the airline.

188. In its assessment of the Proposed Plan, Genesis highlights as problematic the lack of rationality of the proposed SAA restructuring, the implausibility of the revenue and cost assumptions contained in the Proposed Plan, the economic losses that will continue to occur under the Proposed Plan, and the likely impact that the business rescue of SAA will have on the South African airline industry more broadly.

189. The Genesis Report notes that a business rescue plan that requires funding of the magnitude set forth in the Proposed Plan requires a robust financial feasibility assessment that quantifies the expected returns to the funder. Despite this, however, this crucial aspect is wholly absent in the Proposed Plan. The following was noted by Genesis in relation to the projections contained in the Proposed Plan:

189.1 The projections in the draft Proposed Plan differ materially to the projections in the Proposed Plan. By way of example, the draft Proposed Plan projected SAA revenues to be R20.9 billion for its first year following business rescue, whereas the Proposed Plan projects SAA revenues to be only R2.2 billion for the same year.

189.2 There are also significant differences in the cost assumptions. By way of example, fuel costs were expected to account for 25% of total revenues in the draft Proposed Plan, but only 14% in the Proposed Plan.

189.3 the Proposed Plan does not consider the significant economic losses suffered by creditors (and the wider airline industry) as a result of SAA's insolvent trading over the past decade,

190. Not only do these unexplained and unjustified discrepancies and exclusions undermine the credibility of the Proposed Plan's revenue and costs projections, they also significantly reduce the likelihood of the business rescue process achieving its desired outcome (which is the continued existence of SAA on a solvent basis).

Lack of rationale for the proposed restructure

191. The Genesis Report highlights the lack of rationale contained in the Proposed Plan for maintaining the bulk of SAA's flight network. In this regard, Genesis notes that the Proposed Plan proposes to cancel 20% of SAA's routes, despite 75% of their routes being loss-making. Further, of the 11 routes which are significantly loss-making with limited prospects of ever being profitable, the Proposed Plan proposes to maintain six of these. However, there is no explanation in the Proposed Plan on the operational measures that would be taken by SAA to improve the financial performance of these routes. In fact, the Proposed Plan projects that the load factors will be significantly lower than the historical load factors achieved on SAA flights, which suggests that losses on these routes are, if anything, likely to increase.

192. Although the Proposed Plan anticipates that costs will be reduced as a result of significant staff redundancies, in terms of which only 1000 of SAA's employees will be retained, this is on the assumption that Government will be willing and able to fund the retrenchment of redundant employees. The Proposed Plan predicts that staff levels will increase to 2900 by 2024, thus which will likely undermine the cost savings expected from the redundancy program. Moreover, the Genesis Report states that, *"[t]o the extent that SAA is able to reduce staff levels significantly on certain loss-making routes, this is likely to have adverse impacts on service levels and load factors, and subsequently undermine SAA's ability to make these routes profitable."* By all accounts, therefore, the Proposed Plan's solution to reduce SAA's costs by way of retrenchments is not likely to yield the results intended, and required to render SAA's business profitable.

Lack of disclosure of the underlying data and assumptions

193. As highlighted above, the Genesis Report also sets out how the financial projections contained in the Proposed Plan provide little information of revenue and cost assumptions, making it impossible to ascertain how these figures were arrived at by the BRPs. In this regard, even the draft Proposed Plan contained a greater scope of operational metrics than the Proposed Plan does.

194. The absence of these metrics amounts to a contravention of section 150(3)(a) of the Companies Act, which provides that the financial projections prepared by the BRPs must include disclosure of any material assumptions on which the projections are based.

195. The Genesis report states that there must be disclosure regarding how the revenue and cost projections are driven by the projected performance of individual routes. It states that without this disclosure, it is not possible to assess the merits of retaining each of the planned routes or the assumptions used to measure their financial viability.

196. In addition, the Genesis Report states that the Proposed Plan does not reconcile the reported share capital of R33.6 billion in FY2020 to the projected share capital of R53.9 billion in FY2021. This reconciliation is important as the BRP claims to restore SAA to technical solvency, but it is not clear how this will be achieved.

Plausibility of revenue and cost estimates

197. The Genesis report further notes that the amount of R4516 as revenue per passenger for this year is very high, considering that the Proposed Plan itself

anticipates very minimal international and regional travel in 2021. Further, the Genesis Report states that, "*the revenue per passenger is projected to increase only marginally over the remainder of the period (i.e. R5 161 by FY2025), which suggests that the revenue projections are not linked to expected route profiles or passenger mix. Cargo and "ancillary" revenues make up a significant portion of total revenues (close to 10% in FY2025), but the [Proposed Plan] contains no information on how these projected revenues will be derived.*" It is clear that the BRPs completely overestimate cargo revenue (30% of total revenue in FY2021 and close to 10% in FY2025), given that SAA does not have a dedicated cargo division. Typically in the airline industry, it is Airlink's experience that cargo revenue carried in the available belly space of passenger aircraft will account for not more than 1% of total revenue. Even SAA's historic Cargo revenues of 6% of total revenue are not likely to be achievable as the plan does not include revenue from a designated freighter fleet, which in the past had contributed significantly to the overall Cargo revenue. This reinforces Genesis' scepticism of the probity of this assumption in the Proposed Plan.

198. In assessing the reasonableness of the projections contained in the Proposed Plan, Genesis identified significant discrepancies for fuel cost (one of SAA's largest cost items), which accounted for between 25% and 30% of SAA's total revenue in the past three years. Under the Proposed Plan however, these costs will only account for between 10% and 15% of SAA's total revenue.

199. If the BRPs had used the figure of 25% (which is in line with historical performance), this would have resulted in the projected costs being R7.8 billion higher over the five year period. Accumulated operating losses

would also increase in this regard, from R4.8 billion to R12 billion over the same period. This is a significant difference, which completely undermines the financial merits of the Proposed Plan. In my experience, 10% to 15% is entirely unrealistic as an estimate and the experience in the airline industry is that fuel costs are approximately 30% of total revenue. Again, this reinforces Genesis' analysis.

200. In addition to the understatement in fuel costs set forth in the Proposed Plan, the Genesis Report further highlights that the proposed funding needed from the Government is also significantly understated. Genesis suggests that the initial working capital required from Government would be R6.4 billion as opposed to the R2.8 billion provided in the Proposed Plan. In this regard, the Genesis report states that, "*[t]he anticipated R2.8 billion working capital requirement is significantly lower than the up-front operating loss projections in the [Proposed Plan]. Excluding capex, retrenchment costs, concurrent creditor dividends, unflown ticket liabilities and post-commencement creditors, the initial years' losses are projected to be R3.2 billion in FY2021, R2.3 billion in FY2022 and R0.9 billion in FY2023.*"

Economic Value of Projected Financial Outcomes

201. The Genesis Report indicates that, even if SAA were able to achieve the revenue and cost projections set out in the Proposed Plan (which, Airlink submits, is not possible), the Government, at best, will derive a return that is significantly lower than its own cost of capital. The rate of return will be negative should realistic projections of revenue and costs be taken into account.

202. In short, the Genesis report states that the Proposed Plan provides no reasonable prospects of success in achieving the Proposed Plan's objectives, namely SAA continuing on a solvent basis.

203. In light of the above, the Government (and consequently taxpayers) would be significantly better off by placing SAA in liquidation, and using the funds for other, more urgent priorities.

Implications for the South African Airline Industry

204. The Genesis Report notes the likely discouraged mind set of SAA's competitors (who do not have access to the same Government funding as SAA do) in the airline industry, given its continued existence on a non-commercial basis.

205. In this regard, Genesis states that, with SAA continuing to operate on a loss-making basis and (with Government funding) continuing to operate loss-making routes, this is likely to prevent other, potentially more effective, airlines from entering the market, and simultaneously denying consumers a choice of alternative airlines.

Conclusions

206. In summary, the Genesis Report identifies the following crucial shortcomings of the Proposed Plan and disclosed projections of SAA's revenue and costs::

"*28.1. The failure to identify the true causes of SAA's failure, which include poor corporate governance and a sub-optimal route structure.*

28.2. The lack of a robust financial feasibility that quantifies the expected returns to government and taxpayers from the proposed funding.

28.3. The proposal to cancel only 20% of SAA's routes despite 75% of the routes being loss-making.

28.4. The lack of disclosure of revenue and cost assumptions, which makes it impossible to understand how projected revenues and costs were derived.

28.5. A significant understatement of projected fuel costs, which render the financial projections wholly implausible.

28.6. A lack of alternative projections that stress test the financial projections to adverse outcomes with respect to the critical revenue and cost factors.

29. Due to the above shortcomings, the BRP does not provide a credible projection of SAA's future prospects. When correcting for the errors identified in this report, the BRP financial projections show that SAA has no reasonable prospects of being financially viable. In addition, continued government funding of SAA will undermine effective competition in the South African airline market."

THE GROUNDS FOR SETTING ASIDE THE RESOLUTION UNDER SECTIONS 130(1) AND (5)

207. Section 130(1), read with section 130(5), sets out the grounds for setting aside the Resolution and thus the business rescue process. As set out below, on the information and documents presented by the BRPs, and taking into account the previous financial mismanagement and accumulated and proposed debt, there are no reasonable prospects for rescuing SAA.

208. What has been proposed is not a rescue of SAA at all, but is rather the unlawful use of the business rescue process to suit the needs of the Shareholder to the detriment of other stakeholders. Taking into account the circumstances and documents, it is just and equitable for this Court to set aside the business rescue process

There are no reasonable prospects of rescuing SAA

The Proposed Plan does not rescue SAA and there are no reasonable prospects of rescue

209. On a full reading of the Proposed Plan, and what follows from the analysis of the Proposed Plan set forth above, it is evident that there is no reasonable prospect of meaningfully rescuing SAA as envisaged in Chapter 6 of the Companies Act.

210. As has already been pointed out in the above discussion on the Proposed Plan, and particularly in relation to the findings set forth in the Genesis Report, the Proposed Plan, which retains much of the material from the draft Proposed Plan which was subject to substantial and material criticism, does not establish any proper basis for a rescue of SAA's business.

211. Instead of bringing an application to set the business rescue proceedings aside, the BRPs have published the Proposed Plan in circumstances where SAA is and will continue after the implementation of the Proposed Plan to be commercially and factually insolvent, with no reasonable prospects of being rescued.

212. **Airlink submits that the Proposed Plan is ultimately a sham, which is designed to benefit, and indeed only benefits, the Shareholder. The**

Shareholder is merely required to repay funds which were effectively advanced on its behalf by the secured bank creditors, and which, owing to the guarantees, would in any event have to be paid by the Shareholder. In return, the Shareholder, who should be the party most adversely affected by any financial distress, and should stand last in line to receive funds in ordinary liquidation or business rescue proceedings, effectively retains all of its equity in SAA, and separate equity stakes in each of SAA's subsidiaries.

213. Moreover, it is noteworthy that the only reason why the BRPs have calculated the concurrent creditors' dividend at zero cents in the Rand upon liquidation is on the basis that all the Government-guaranteed loans are not repaid by the Government, but by SAA. The Government's action in permitting and enabling SAA to obtain loans which it had no hope of repaying amounts to wrongful and (at best) reckless conduct by the government. As such, SAA and its creditors should be able to recover any funds which the Government obliged SAA to incur through government-backed guarantees.

214. Furthermore, the lenders could not possibly hope to recover from SAA the funds they ostensibly lent to it, as it was never in a position to satisfy the loans that it was taking out on Government's instruction and with its assistance. The secured lenders would always look to Government for payment of the Government-guaranteed loans.

215. In effect, Government was the lender to SAA, in the context of the government-guaranteed debt. Any such debt (or any contingent liability by SAA to Government under the government guarantees) would have had to

have been subordinated to all other claims for audit purposes (as SAA could otherwise never hope to be considered a going concern). Yet now, these debts to Government are effectively treated as not being subordinated, but as ranking above the debts of the concurrent creditors.

216. If the BRPs had properly analysed the legal liability of third parties and who the true debtor of the loans was, they would have discovered either that the Government would pay the lenders directly and would not be able to reclaim any such amounts from SAA, or that SAA at least has a claim against the Government in the amount of the relevant loans, as a result of reckless conduct and lending, facilitated by Government guarantees. In either scenario, the liquidation dividend to the concurrent creditors would have been substantially increased. In this regard, it is noteworthy that the Government allocation to pay secured (i.e. government-backed) creditors is R16.4 billion.

217. The net effect of the Proposed Plan is ultimately that the general concurrent creditors' claims, including that of Airlink, have been severely compromised, while the Shareholder has effectively retained its interest in SAA, without any of the debt or liability.

218. Moreover, one of the practical effects of the supposed "restructure" will be to absolve the Shareholder and its previous directors from any possible financial or other responsibility in relation to the unlawful manner in which SAA has previously been trading, as it avoids the implications of an insolvency inquiry into the alleged malfeasance that has likely occurred in respect of SAA's finances and contracts.

219. **In the circumstances, it is evident that the Proposed Plan is no real rescue plan at all, but is rather nothing other than an obvious stratagem ultimately to benefit the Shareholder and to prejudice the interests of creditors. This is clearly contrary to the purpose of business rescue, which is to rescue a company that is financially distressed in a manner that is beneficial to all stakeholders, especially affected persons.**

220. Instead, the Proposed Plan is a sham and constitutes an unlawful use of the business rescue process. It has been proposed to "rescue" a company which cannot be rescued (and was to the knowledge of the Board incapable of rescue at the time the resolution was taken), in a manner that is prejudicial to the interests of all other affected parties, other than the Shareholder. In addition, as dealt with above, there is nothing in the Proposed Plan to ensure the proper management and financial sustainability of the company after the conclusion of the business rescue process.

221. Airlink thus submits that the resolution placing the company under business rescue should be set aside on the grounds that there is no reasonable prospect of rescuing the company (and indeed there never was at the time it was placed under business rescue), and that the Proposed Plan is plainly contrary to the purpose and provisions of the Companies Act.

222. Airlink seeks (and is entitled to) the documents described under Part A of the notice of motion because it is apparent that the purpose of the Proposed Plan is to advance an agenda other than the rescue of SAA.

These documents are relevant to the true motivation behind the business rescue proceedings, and to ascertaining whether the Board held the genuine belief that the company could be rescued, at the time that the resolution placing the company into business rescue was passed.

Unlawfulness of the business rescue process and the Proposed Plan

223. In addition to the contention that there are no reasonable prospects of rescuing SAA, as set forth above, Airlink submits that the business rescue procedure, and the Proposed Plan itself, is unlawful, because of the undue influence that the Shareholder has exerted over the process.

224. I am advised that, as business rescue practitioners, the BRPs are required to undertake their duties independently, impartially and skilfully in the best interests of SAA and its creditors. Further, the BRPs are required independently and impartially to develop and publish any proposed business rescue plan, albeit in consultation with all affected persons.

225. Notwithstanding these duties, the BRPs have, throughout the business rescue process, permitted the Shareholder to dictate and control the business rescue process, and ultimately the content of the Proposed Plan.

226. The BRPs conduct in this regard is evidenced by reference to the numerous documents already mentioned above in the section dealing with the relevant background to this application and the business rescue process, and the inclusion, in the Proposed Plan, of features that have no commercial justification and are in fact prejudicial to the finances of SAA.

227. The SCOPA presentation, which contains a chronology of much of the BRPs engagement with the Shareholder and Government more broadly, is

replete with references to the Shareholder having dictated (or at least unduly influenced) the terms of the business rescue proceedings, and the content of the Proposed Plan. For example, reference is made to the Shareholder having "*selected the Restructuring Option*" for the business rescue of SAA; numerous discussions are shown to have occurred throughout the business rescue process between the BRPs and the DPE, and the Shareholder more broadly, in respect of the approach to be taken in the Proposed Plan; and the Shareholder clearly dictated, controlled and facilitated SAA's acquisition of pre-commencement funding and PCF from third parties.

228. The various update notices and letters to affected persons, including the 14 April update letter, the 23 April 2020 update notice, the 27 May 2020 update letter, and the 28 May update letter ("**the BRP update notices and letters**"), also clearly demonstrate the very high levels of influence that the Shareholder exerted over the business rescue process.

229. The most significant example of the Shareholder having controlled the business rescue proceedings, and having dictated its wishes to the BRPs, is demonstrated by the about turn made by the BRPs between the 23 April 2020 update notice and the 27 May 2020 update letter.

230. In the 23 April 2020 notice, the BRPs indicated that, given the circumstances that prevailed, including most significantly the recent developments and impact of the worldwide Covid-19 pandemic, only two options remained for SAA: (i) a wind-down process, to secure a better return to creditors than a liquidation, or (ii) the immediate liquidation of SAA. The choice between the two would be determined by the outcome

of the negotiations between SAA and SAA's employees, as there would otherwise be insufficient funds.

231. In the 23 April 2020 notice, the BRPs thus appeared unequivocally to be of the view that the only options in respect of SAA were either to engage in a "*managed cessation of the operation of [SAA]*" (a "wind down"), or the liquidation of SAA.

232. However, in a dramatic shift of opinion, in the 27 May 2020 update notice, the BRPs stated that "*[i]t is the considered view of the [BRPs] that there is still a reasonable prospect of rescuing SAA*", and chose to abandon their erstwhile view that there were "*only two options available to them*", namely a wind down or liquidation, given SAA's precarious financial position.

233. The BRPs view in respect of whether to wind down or liquidate SAA was clearly premised on the fact that, should SAA not reach any agreement with its employees regarding their retrenchment, SAA would have to be liquidated because it had no funds to continue the business rescue process. At the time of the 27 May update letter, (and, it should be noted, to the date of deposition), SAA has, however, not reached any agreement with its employees, and the issue of retrenchments is currently the subject of court proceedings. The view of the BRPs regarding whether SAA would ultimately have to be liquidated could thus not have changed because of new developments in respect of an agreement with employees.

234. Instead, the true reason for the BRPs' change in approach is revealed in the 28 May 2020 update letter, where they record that the change had been determined (I submit dictated) by the Shareholder. The 28 May 2020 update letter states that the BRPs had already proceeded to prepare

a draft plan that would provide for a "structured wind down", but that, because of ongoing engagements with the Shareholder in which the Shareholder itself "*provided the [BRPs] with a proposed restructuring plan*", the BRPs then opted to change their approach to the business rescue proceedings entirely, and proceeded to prepare a draft plan that would give effect to the wishes of the Shareholder.

235. The draft Proposed Plan and the Proposed Plan attest to this fact, as they were clearly formulated in a manner that purports to give effect to the option selected by the Shareholder to "restructure" SAA.

236. The minutes of the 4 June 2020 meeting with the Creditors' Committee merely serves to confirm the BRPs acquiescence. In the 4 June 2020 meeting, the BRPs confirmed, as already mentioned above, that their view had been changed because the Shareholder had instructed them to prepare the Proposed Plan with a view to restructuring SAA, instead of winding down SAA, and because the Shareholder "*would not fund a wind down and <u>were opposed to liquidation</u>*" (emphasis added).

237. The 15 May SCOPA meeting also reveals that the Shareholder was of the view that a "new airline" could be formed out of a "restructured" SAA, and that liquidation was not an option that Government would accept. The BRPs thus appear to have replaced their own independent and impartial view regarding the prospects of rescuing SAA, with the views of the Shareholder to the effect that a restructure of SAA was the required option, and that a liquidation would not be contemplated.

238. The conduct of the BRPs in this respect demonstrates a clear lack of independence on their part. They have ultimately acquiesced in the

Shareholder's will in respect of SAA's business rescue, and in the formulation of the Proposed Plan.

239. In justification of their conduct, the BRPs have sought to rely *inter alia* on the proposition that the provisions of the Public Finance Management Act, 1999 ("**the PFMA**") trump those of the Companies Act. This can be seen, for example, in paragraph 6 of the minutes of the 4 June meeting, where it is stated that, regarding the allegation that the BRPs are "*hiding behind the PFMA*" or "*deferring to government*", "*[the BRPs'] view is that the PFMA clearly trumps the Companies Act where there is a conflict*".

240. This approach, however, is contrary to Chapter 6 of the Companies Act as well as the purpose of business rescue as set out above. Indeed, the BRPs conduct is contrary to the Companies Act as a whole. I am advised that section 4(4) of the Companies Act provides that, to the extent that the provisions of both the Companies Act and the PFMA can be complied with, in that the BRPs are able to comply with the Companies Act without infringing the PFMA, then both Acts must be complied with.

241. In the circumstances, the provisions of the PFMA cannot be construed to trump those of the Companies Act in relation to the BRPs duties of independence and impartiality in respect of the business rescue process, their duty to afford all affected persons the opportunity to participate in the business rescue proceedings, and their duty to determine whether there are reasonable prospects for rescuing SAA and to devise a business rescue plan if there are such prospects.

242. The PFMA does not permit the BRPs to act in accordance with the dictates, or to defer to the decisions, of the Shareholder, simply because it

is the Government. SAA seeks the benefits and protections of the business rescue regime set forth in the Companies Act. In doing so, it is obliged also to assume the duties and responsibilities imposed by that legislation (provided that, in doing so, the provisions of the PFMA are not breached).

243. The PFMA simply requires the approval of National Treasury or the Minister of Finance in respect of certain specific transactions. There is no inconsistency between that and the BRPs' duties in terms of the Companies Act. The BRPs' unlawful conduct as aforesaid simply cannot be justified by a reference to the PFMA.

244. Where the BRP's (acting independently and impartially) are of the view that there is no reasonable prospect of rescuing SAA, they are obliged to approach a court for an order converting the business rescue proceedings into liquidation proceedings. Instead, the BRPs have acted contrary to their duties, and have failed to exercise their independent judgement (seemingly at the behest of the Shareholder), with no lawful justification for doing so. The BRPs have, therefore, acted contrary to their duties in continuing with the business rescue proceedings.

245. It appears that the assets of SAA are being used on a daily basis for payments in connection with the airline, to the detriment of the creditors, and SAA. As mentioned above, the purpose of business rescue is to rescue a company. The BRP's cannot therefore, under the cloak of business rescue, prefer certain creditors and the Shareholder above other creditors, thus prejudicing the latter class.

246. As previously mentioned, the draft Proposed Plan that was made available to the Creditors' Committee on 29 May 2020, and which was supposedly published to enable the creditors to comment on the Proposed Plan, lacked relevant annexes and significant information. This made any meaningful consideration of the draft Proposed Plan impossible. This was a breach of the consultation requirement in section 145 of the Companies Act.

247. It is evident that the BRPs, despite having months to attend to drafting the Proposed Plan, prepared the draft Proposed Plan and then the Proposed Plan in haste in order to ensure that it accorded with the Shareholders' preferred option of restructuring SAA. They did so in order to appease the Shareholder, and without due consideration of the interests of creditors, including Airlink.

248. There is further no indication in the Proposed Plan (besides the BRPs vague references to alleged corruption, mismanagement and unlawful conduct in paragraphs 14.5 and 14.6.6 of the Proposed Plan) that the BRPs have meaningfully investigated the affairs of SAA to establish whether there is evidence of voidable transactions, reckless trading, fraud and/or other contraventions of law. The only indication of the BRPs having done so appears to be that the BRPs have co-operated with the SIU's efforts to uncover wrongdoing, which in any event was already underway prior to business rescue proceedings.

249. The duty of the BRPs to investigate the affairs of SAA in this context must be undertaken independently, and during the course of the business rescue, with any findings and steps to be taken therefrom being duly

reported in the business rescue plan. These are steps that the BRPs are duty bound to take, and which should have been taken prior to the publication of the Proposed Plan. This is yet another reason why liquidation should be preferred over business rescue, as a liquidator will be required to undertake these investigations, to the benefit of SAA and its creditors.

250. The notorious and publicised allegations of corrupt and other wrongful practices by the Board and management of SAA, together with the Myeni judgment (which is a clear finding to that effect), demonstrate that Myeni, together with a number of other Board and management members, and also Government and its officials, may well be guilty of corrupt and/or voidable transactions, reckless trading, fraud or other contraventions of the law. At a minimum, this required thorough investigation and reporting by the BRPs prior to the publication of the Proposed Plan.

251. Any investigation and/or prosecution, which may well lead to the recovery of SAA's assets, or at the very least be beneficial to SAA's public image (which will be necessary for SAA's future revenue generation) can only be beneficial to SAA. It is only the Government, including a number of Ministers of Government departments and previous directors of SAA, who stand to benefit from the lack of investigation into these aspects. The BRP's failure to conduct such investigations, either adequately or at all, is demonstrative of their lack of independence from the Shareholder.

252. The facts set out above demonstrate that the business rescue process and subsequent plan are unlawful, due to the unlawful influence and control exerted on the process and the BRPs by the Shareholder. Such

influence is clearly contrary to provisions of the Companies Act and the purpose of business rescue.

253. The above facts also lead to the conclusion that the BRPs are incompetent and have not fulfilled their statutory duties. They have failed to exercise the proper degree of care in the performance of their functions and have acted unlawfully.

254. In the above circumstances, the appointment of the BRPs falls to be set aside in terms of section 130(1), or they fall to be removed under section 139 of the Companies Act.

It is just and equitable to set aside the resolution

Unlawful use of business rescue process by Shareholder

255. As set forth above, it is clear that the Shareholder has exerted a controlling and improper influence over the business rescue process, with the Proposed Plan itself stating that it is the preferred plan of the Shareholder. It is evident that the Shareholder, through the DPE, has had control over the business rescue process and has dictated to the BRP's how it should proceed. The DPE has made it clear that liquidation is not an option for SAA, despite the fact that there is no reasonable basis on which SAA can be rescued.

256. In the circumstances, it is apparent that the Shareholder is unlawfully using the business rescue process for its own benefit, at the expense of SAA's creditors and other affected persons.

257. It is submitted that the interference by the Shareholder, and the threat that this poses to the independence of the BRP's, is sufficient to justify the

setting aside of the business rescue process on the basis that to do so would be just and equitable. However, there are further reasons that justify this conclusion.

No benefit to creditors and other stakeholders, including the fiscus

258. As has been highlighted above, the Proposed Plan clearly demonstrates that there is no appreciable benefit to the relevant stakeholders and affected persons, most significantly the creditors.

259. At best, the general concurrent creditors are to receive a dividend of R600 million over a three year period, which approximates a mere 5 cents in the Rand in respect of the R11 billion worth of the creditors' actual collective claims. However, given the financial difficulties of SAA, viewed in light of its financial history, and the fact that SAA is predicated to make additional losses amounting to around R6.7 billion in the following three years after implementation of the Proposed Plan, it is more probable than not that the general concurrent creditors will receive the "equity" in SAA as set forth in the Proposed Plan as an alternative to the R600 million allocation, which equity will essentially be worthless and of no benefit or use to the creditors.

260. Additionally, and in light of the severe strains on the fiscus as a whole, due *inter alia* to the Covid-19 pandemic, any further bailouts and funding of SAA would place further unsustainable strain on the fiscus, and divert very substantial amounts of public funds into an unrecoverable SAA, instead of using such funds for other public purposes,.

261. For these reasons (and those set out above), and given that the only stakeholder to benefit under the Proposed Plan is the Shareholder, it would be just and equitable to set aside the business rescue process.

The circumstances result in artificial voting - unfair to truly independent creditors

262. Section 147(3) of the Companies Act provides that *"[a]t any meeting of creditors, other than the meeting contemplated in section 151, a decision supported by the holders of a simple majority of the independent creditors' voting interests voted on a matter, is the decision of the meeting on that matter*".

263. Further, in terms of section 152(2) of the Companies Act, a business rescue plan will only be approved if the holders of more than 75% of the voting interests voting on the plan approved the plan, and if "*the votes in support of the proposed plan included at least 50% of the independent creditors' voting interests, if any, that were voted*". (emphasis added)

264. From the Proposed Plan, it is clear that certain bank creditors, which have provided both pre-commencement funding and PCF, have had their debts guaranteed by the Government ("**the secured bank creditors**"). In this regard, while the Proposed Plan attempts to show that these lenders are in the same position as other creditors, this is simply not the case. The lenders are guaranteed payment regardless, whereas the creditors are promised an amount with no indication of how this will be guaranteed. Even on the BRPs own version, Government has already appropriated the R16.4 billion to be paid to lenders, and it is therefore essentially of no

consequence. It is Airlink's submission that, these lenders should not have a vote on the Proposed Plan.

265. In the minutes of the 4 June meeting, the BRPs have indicated that the secured bank creditors will vote on the Proposed Plan, once published, and the BRPs appear to treat them as independent creditors.

266. Although it is not clear from the Proposed Plan, there is a reasonable likelihood that, given the quantum of their claims, the secured bank creditors will hold more than the required 50% of the independent creditors' voting power at any meeting to vote on the Proposed Plan. This is, however, not certain at this stage, as the various voting rights of the various creditors have not yet been determined by the BRPs or indicated with any accuracy.

267. This state of affairs is, however, artificial and has been constructed by the Shareholder in order to enable the Shareholder to extend additional funding to SAA where it was unable lawfully to do so itself. This has effectively resulted in the Shareholder being able to exercise control over the vote in respect of the approval or rejection of the Proposed Plan in terms of sections 151 and 152 of the Companies Act.

268. The secured lender loans to SAA are effectively loans by the Government, but in circumstances where the Government is constrained in the funding it can provide to SAA. This was recognised in the 14 April 2020 update letter, and underlies the reference to "legal challenges" in respect of advancing funds directly to SAA. It was for this reason that the secured bank creditors, supported by the Shareholder, and backed by Government guarantees of SAA's debt, agreed to provide SAA with funding.

269. It is, however, evident that despite the secured bank creditors being the *de jure* lenders to SAA, the *de facto* lender is the Shareholder, which has facilitated the transactions by way of providing Government-backed guarantees in respect of the amounts lent by the secured bank creditors. The secured bank creditors are thus mere conduits for Shareholder funding.

270. Although the BRPs have previously indicated that the secured bank creditors will be regarded as independent creditors, I am advised that the BRPs are required to make an official determination on their independence, and to communicate such determination to the creditor concerned, at least 15 days before a vote is held to approve or reject the Proposed Plan.

271. Any determination that the secured bank creditors are independent creditors of SAA would, however, for the reasons set out above, be artificial and would merely create a means by which the Shareholder can control the outcome of the vote on the Proposed Plan.

272. Moreover, the secured lenders have no financial interest in the outcome of the vote on the Proposed Plan, as they will always look to recover what is due to them from the Government, not SAA.

273. The payment of the secured lenders' debts is thus not reliant on the content or outcome of the business rescue plan. Accordingly, the secured lenders have no real interest in the outcome of the vote. On the other hand, the Shareholder has a clear interest in the content and outcome of the vote on the business rescue plan.

274. An outcome where the secured creditors will effectively form the majority of the creditors voting on the Proposed Plan is clearly unfair and prejudicial to the true independent creditors of SAA, such as Airlink, who should be determining the fate of the Proposed Plan under the Companies Act.

275. In the circumstances, it is apparent that the interests of the secured bank creditors and the Shareholder will be completely aligned, in that the Shareholder is able to exert control over the secured bank creditors' decisions in relation to the vote on the Proposed Plan.

276. Given that the secured bank creditors' independence is thus ultimately illusory, and that the true lender and entity exercising the voting power is the Shareholder, the circumstances result in artificial voting, which is unfair and prejudicial to creditors. This simply reinforces that it is just and equitable to place SAA in liquidation.

277. In addition, the BRPs were required under section 145(5) of the Companies Act to determine whether a specific creditor is independent, and to give written notice of that determination to the creditor concerned at least 15 business days before the section 151 meeting. Airlink has not received such notice and is unaware of any other creditor having received such notice. Until these determinations are made and the relevant notices delivered, the section 151 meeting and any vote on the Proposed Plan cannot take place. Indeed, the relevant voting rights of the creditors cannot be ascertained until the determinations are made.

THE GROUNDS FOR SETTING ASIDE THE APPOINTMENT OF THE BRPs UNDER SECTION 130(1)

The BRPs are not independent

278. As has already dealt with above, the BRPs have, throughout SAA's business rescue process, commencing on 5 December 2019, acted under the dictates of the Shareholder, represented by the DPE.

279. Since the commencement of the business rescue proceedings, the BRPs have taken instructions from, and acquiesced in the decisions of, the Shareholder in respect of all decisions relating to SAA that have been taken under the auspices of "consultation". At all relevant times, the BRPs have ultimately deferred to the control of the DPE regarding the approach to be taken in the business rescue proceedings, and in respect of the content of the iterations of the proposed business rescue plan.

280. The conduct of the BRPs in engaging with the Shareholder cannot be described as mere consultation with the Shareholder. It is manifest that the BRPs are not adequately independent of SAA and the Shareholder. The conduct of the BRPs in this instance demonstrates undue deference to the views of the Shareholder, bias, and a lack of objectivity in relation to the affairs of SAA.

281. In these circumstances, there are more than sufficient grounds for the Court to set aside the appointment of the BRPs due to a lack of independence from SAA and its Shareholder, on the basis that it would be just and equitable to do so.

HBM J.

THE GROUNDS FOR REMOVING THE BRPs

282. In the event that the Court is not persuaded to set aside the appointment of the BRPs, it will be contended that the Court should, in the alternative, remove the BRPs from their positions as the business rescue practitioners of SAA.

Conflict of interest or lack of independence

283. As has already been demonstrated above, the conduct of the BRPs in relation to the Shareholder, as represented by the DPE, demonstrates a manifest lack of independence and objectivity, and bias. This constitutes a sufficient basis for the Court to remove the BRPs from their positions as the business rescue practitioners of SAA.

284. The BRPs conduct, however, also evidences a conflict of interest in that the BRPs have effectively aligned themselves with the Shareholder and its views and interests. The BRPs' preference for the Shareholder's interests has resulted in a complete disregard of the concerns and interests of the other affected persons, especially the creditors of SAA, which are at odds with the interests of the Shareholder.

285. The BRPs' lack of independence and conflict of interest is manifested in the BRPs' decision to continue with the business rescue proceedings and to restructure SAA in terms of the Proposed Plan. The Proposed Plan does not serve to rescue SAA, and indeed there are no prospects of success in any attempt to rescue SAA. This is not only the view of Airlink and other creditors, but it appears that it was also the view of the BRPs, as demonstrated by *inter alia* the 23 April update notice, prior to the Shareholder's instructions to the BRPs to continue the business rescue

process, and to put forward the proposal to restructure SAA in the manner contemplated in the Proposed Plan.

286. The BRPs subservience to the Shareholder, and their willingness to do the DPE's bidding, is plain on a full consideration of the documents placed before the Court in this application, but especially from the BRP update notices and letters, the SCOPA presentation, and the minutes of the 4 June 2020 meeting.

287. Throughout the business rescue process, the BRPs have held discussions with and taken instructions from the Shareholder, without affording similar opportunities to other affected persons, especially creditors.

288. On multiple occasions, as can be seen, for example, from paragraphs 6.4, 6.8 and 8 of the 27 May 2020 update notice, together with "Annexure 1" to the SCOPA presentation and the 27 May 2020 SCOPA meeting, the BRPs have provided the Shareholder with information and opportunities to comment on, and determine, the business rescue process as well as the content of the Proposed Plan. Other affected persons were not similarly afforded such information or opportunities. This approach is unlawful and unjustifiable.

289. I am advised that, in terms of the Companies Act, the right to consultation in respect of the business rescue of a company, and the content of the business rescue plan, is a right primarily afforded to the creditors of the company. The shareholder, as an affected person, can of course be consulted by the business rescue practitioners, but the extent of such consultation should not be more extensive than the consultation with the creditors of the company.

290. The BRPs effectively reversed the role and rights of the creditors and the Shareholder in this instance, by affording the Shareholder a greater opportunity to comment on the content of the Proposed Plan and keeping the Shareholder appraised of the status of the rescue, when the creditors were left in the dark. This demonstrates a lack of independence and a conflict of interest on the part of the BRPs. Moreover, the content of the Proposed Plan and its obvious bias towards the interests of the Shareholder show a lack of objectivity on the part of the BRPs.

291. A reasonable and informed third party would undoubtedly form the view that the BRPs could no longer act with the necessary impartiality or objectivity.

292. In all these circumstances, viewed collectively, and in light of the content of the Proposed Plan, it is submitted that a proper case is made out for the removal of the BRPs in accordance with section 139 of the Companies Act

Incompetence, or a failure to perform the duties of a business rescue practitioner, and the failure to exercise the proper degree of care

Incompetence

293. The skill and competence of the BRPs in the performance of their role in the process of the rescue of SAA has been questioned by numerous stakeholders, including a number of the creditors and members of parliament. This is evident from the summary of the 15 May 2020 SCOPA meeting. In the same SCOPA meeting, the BRPs themselves publically admitted that they had no previous experience in rescuing an airline. As set out above, their performance has demonstrated that they lack the

necessary competence and skill to perform the role to which they have been appointed.

294. More particularly, the proposals set forth in the Proposed Plan, which envisage *inter alia* a "restructuring" of SAA, with the retention of illogical un-profitable routes to be flown, and the lack of information regarding how SAA will actually be restructured in light of the prediction that SAA will still incur significant losses in the three years following implementation of the Proposed Plan, evidence that the BRPs lack the competence and skill to perform their role.

Failure to perform duties and exercise a proper degree of care

295. By conducting the business rescue proceedings in the manner in which they have, and by acquiescing in the decisions of the Shareholder, the BRPs are in breach of their duty *inter alia* to exercise the appropriate level of care in respect of managing the affairs of SAA, their duty to act in the best interests of SAA and all affected persons, and to exercise an independent mind and judgement in respect of decisions relating to the management of SAA and its business rescue proceedings.

296. As has been demonstrated above, the BRPs have unlawfully afforded the Shareholder an opportunity to dictate the business rescue process, and have failed adequately to consult with, or to consider the interests of, all other affected persons. The BRPs failed in their duties independently and impartially to investigate the affairs of the company, and to reach a proper and considered conclusion on whether SAA is capable of being rescued.

297. No reasonable business rescue practitioner could have reached the view that SAA is capable of being rescued. The BRPs have only reached this

conclusion by yielding to the dictates of the state, in circumstances where SAA is, and continues to be, factually and commercially insolvent.

298. As further set out above, the BRPs have not undertaken adequate, if any, investigation into *inter alia* SAA's affairs, transactions and financials in order to reach a conclusion as to the previous occurrence of any voidable transactions, failures by the company or any director to perform any material obligations, or reckless trading, fraud or the contravention of any other law relating to the company.

299. A proper investigation, and referral for prosecution, should already have occurred given that, in the 14 April update letter, the BRPs indicated that they had previously suspended or cancelled "*contracts that were onerous for [SAA] and in some instances deemed to be out of touch with market value and thus potentially corrupt*" (emphasis added).

300. Further, by allowing the Shareholder to influence the business rescue process, and the content of the business rescue plan, in the manner in which they have, the BRPs have failed adequately to give effect to the rights of the creditors to participate in the business rescue proceedings and the development of the Proposed Plan in the manner envisaged in the Companies Act. As demonstrated above, the BRPs have, contrary to the dictates of the Companies Act, afforded the Shareholder greater rights to participate in the business rescue proceedings than the creditors themselves.

301. In the premises, the BRPs have breached their duties as officers of the court, their duty to act with independence and impartiality and to make independent judgements, their duty to act in the best interests of the

company and all affected persons, and numerous specific duties in relation to their role as business rescue practitioners in assessing the viability of rescuing the company, and ascertaining whether any wrongdoing had previously been committed by the SAA or its directors.

Engaging in illegal acts or conduct

302. I am advised that any decisions taken relating to the restructuring of SAA or the sale or dissipation of its assets can only be lawfully made in the event of the formulation and approval of a lawful business rescue plan.

303. Further, I am advised that, for the duration of SAA's business rescue proceedings, in terms of section 134(1) of the Companies Act, SAA and/or the BRPs may not dispose of, or agree to dispose of, any property lawfully within the possession of SAA, unless it is (i) in the ordinary course of SAA's business; (ii) in a bona fide transaction at arm's length for fair value approved in advance and in writing by the BRPs; or (iii) in a transaction contemplated within, and undertaken as part of the implementation of, a business rescue plan that has been approved in terms of section 152 of the Companies Act.

304. In terms of section 134(2) of the Companies Act, SAA and/or the BRPs are BRPs are required to obtain the prior consent of any person who has a security or title interest in respect of any property of which SAA wishes to dispose.

305. It is apparent, however, that throughout the business rescue process, the BRPs have utilised funds which are owed to, or which would but for their dissipation by the BRPs be paid to, Airlink and other creditors. The BRPs

have done so knowingly, and contrary to the Companies Act and their duties as business rescue practitioners.

306. Further, the BRPs have unlawfully opted to continue with the business rescue proceedings in circumstances where there is clearly no reasonable prospect of SAA being rescued, to the substantial detriment of creditors' and other affected persons' interests.

307. It is thus evident that the BRPs have engaged in unlawful acts and illegal conduct in the conduct of the business rescue process. In the circumstances, the BRPs fall to be removed from their office as business rescue practitioners of SAA.

THE BRPs HAVE HAD SUFFICIENT TIME TO CONSIDER THE MATTER AND THE MATTER NEED NOT BE DELAYED (SUBSECTION 130(5))

308. SAA's business rescue process began on 5 December 2019, and continues to the date hereof, a period of over six months. Further, as set forth above, the BRPs have been afforded no less than five extensions for the publication of the Proposed Plan.

309. The BRPs have held numerous meetings with the Creditors' Committee and the Employees' Committee, and have expressed their views in respect of the prospects of SAA being rescued on numerous occasions, including in the various BRP notices.

310. It is accordingly clear that the BRPs have been afforded a sufficient amount of time to consider and establish, for themselves, whether there is a reasonable prospect of rescuing SAA, and, if so, how best it can be rescued.

311. In the circumstances, and given the comprehensive record that is available to it, this court is best placed to determine whether there is any reasonable prospect of SAA being rescued, whether SAA's business rescue process ought to be set aside, and whether SAA ought to be placed into liquidation.

312. There would be no benefit in affording the BRPs another opportunity to assess the prospects of the rescue of SAA. In fact, given the substantial delay that has been experienced between the date of commencement of the business rescue process and the date of publication of the Proposed Plan, and considering the very precarious financial circumstances of SAA, together with the prejudice that has been suffered by the creditors owing to the delay, no further delay would be unjustifiable.

IT IS NECESSARY AND APPROPRIATE TO PLACE SAA UNDER LIQUIDATION (SUBSECTION 130(5))

313. In terms of section 344 of the Companies Act, 1973, the circumstances in which a company may be wound up by Court, include:

313.1 Where the company is unable to pay its debts under section 345, which include where it is proved to the satisfaction of the Court that the company is unable to pay its debts (section 344((f));

313.2 Where it appears to the Court that it is just and equitable that the company should be wound up (section 344(h)).

314. SAA has, for a number of years, been both commercially and factually insolvent. From the PMG summary, it is clear that SAA has been technically insolvent since 2013, and, as a result of relying on successive

bailouts by the Government, has accrued a net loss of over R34 billion over the past 13 years.

315. Even in accordance with the Proposed Plan, and after implementation of the "rescue" and the rescue funding, SAA is projected to suffer additional losses amounting to around R20 billion over the course of the next three years, without any clear indication of how SAA's business will be actually be rescued.

316. Any rescue of SAA, if at all possible (which is rejected by Airlink, as there are no such prospects), would require the development of a plan that, at a minimum, also deals with the business of SAA going forwards, the cutting of costs and the increase of revenue, methods to ameliorate the negative customer and supplier perception of SAA in order to enable SAA to function profitably, and an effective means by which to manage SAA's historical debts.

317. The Proposed Plan establishes no such plan, and, and as demonstrated above, is ultimately a sham that has been dictated by the Shareholder. In the circumstances, it is submitted that there is simply no reasonable prospect of SAA being rescued at this stage. The business rescue process is in any event irreparably tarnished, given the undue influence of the Shareholder and the lack of independence of the BRPs. It is, at this stage, simply not possible to recover the process, and there is insufficient time and resources for the process to be commenced afresh.

318. SAA is unable to pay its debts and, it is submitted, has no prospects of ever being able to do so. It would accordingly be just and equitable in the circumstances that SAA be liquidated.

319. Indeed, there is advantage to the creditors in the event of SAA being liquidated, in that the remaining assets of SAA would no longer be required for the ostensible business rescue process. These assets could therefore be liquidated and sold in satisfaction of SAA's debts. Further, the liquidation of SAA carries with it the advantage that an insolvency inquiry in terms of the Insolvency Act, 1936 may enable the recovery of any assets of SAA that were unlawfully disposed of, and for action to be taken against the erstwhile directors of SAA, to the extent that any wrongdoing has been committed.

APPOINTMENT OF AN ALTERNATE PRACTITIONER (SECTIONS 130(6) AND 139(3))

320. Firstly, to the extent that the Court does not set aside the Resolution, but sets aside the appointment of the BRPs, I am advised that the Court is required, in terms of section 130(6) of the Companies Act, to appoint an alternative practitioner who satisfies the requirements of section 138 of the Companies Act, and who is recommended by, or acceptable to, the holders of a majority of the voting interests of the independent creditors who were represented in the hearing before the Court.

321. Secondly, and to the extent that the Court does not set aside the Resolution or the appointment of the BRPs, but removes the BRPs from their position as business rescue practitioners of SAA, I am advised that the company, or the creditor who nominated the practitioner, must appoint a new practitioner.

322. In those circumstances, SAA ought to be required to appoint a new business rescue practitioner within 10 days of the date of the order of this Court.

INTERIM RELIEF UNDER PART A

323. I am also advised that the following requirements have to be met for interim relief to be granted (as is necessary to obtain interim relief in Part A):

323.1 A *prima facie* right;

323.2 A well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;

323.3 That the balance of convenience favours the granting of an interim interdict; and

323.4 That the applicant has no other satisfactory remedy.

324. I have above traversed various facts relevant to the current proceedings. Those facts are directly relevant to the grant of the relief sought in the notice of motion. Below, I highlight a non-exhaustive list of considerations which are relevant to the legal requirements for the grant of the relief sought in Part A of the notice of motion.

Clear right / Prima facie right

325. If interim relief is not granted and the Proposed Plan is voted on and adopted, Airlink will lose its right to approach this Court under section 130. Also, the Proposed Plan is fatally flawed and extremely prejudicial. As discussed above, the business rescue process has been unlawfully

utilised and dictated by the Shareholder to the detriment of the creditors, including Airlink.

326. The appropriate and just and equitable remedy is to set aside the business rescue process, which would otherwise result in the unlawful compromising of Airlink's rights, and to place SAA into liquidation, where a proper and independent insolvency enquiry can be held.

327. In addition, and as stated above, the BRPs were required under section 145(5) of the Companies Act to determine which creditors are to be considered "independent creditors" for the purposes of voting on the Proposed Plan at the section 151 meeting and to give written notice of that determination to the creditor concerned at least 15 business days before the section 151 meeting. The creditors, including Airlink, have a right to these determinations, which are in any event vital in order to ascertain the various voting rights, and, indeed, the right to challenge these determinations under section 145(6) within 5 days of them being made. Airlink thus has a right to interdict the meeting until these legal requirements are met.

328. Airlink thus has at the very least a *prima facie* right to interim relief in order to ensure Airlink's rights to relief are not compromised pending the hearing of Part B.

Injury actually committed or reasonably apprehended

329. In the event that the BRPs are not interdicted from convening any meeting to consider the Proposed Plan and/or introducing the Proposed Plan and calling for a vote for the preliminary approval of the Proposed Plan under section 152 of the Companies Act, Airlink will suffer irreparable harm.

330. As mentioned above, Airlink is only entitled to bring this application until such point as the Proposed Plan is adopted. Therefore, in circumstances where the interim relief is not granted, and the Proposed Plan is ultimately adopted, Airlink will lose its claim in terms of section 130(1)(a)(ii) of the Companies Act and any future dispute resolution will be largely academic.

331. In addition, section 154(2) of the Companies Act provides that, "*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*".

332. For the reasons above, it is essential that the interim relief be granted prior to the meeting of creditors, which is imminent and is scheduled to take place on 25 June 2020. If the Proposed Plan is adopted subsequent to the vote, this application will be moot. Accordingly, for the relief sought to have any effect, it must be granted before 25 June 2020.

Balance of convenience, insofar as applicable

333. It is Airlink's submission that the only consequence for SAA and the BRPs if the interim interdict is granted, is a delay in the convening of a meeting to consider the Proposed Plan and/or introducing the Proposed Plan and calling for a vote for the preliminary approval of the Proposed Plan.

334. It is important in this regard to keep in mind that the Proposed Plan was meant to be published on 13 January 2020. However, as a result of several requests for extensions from the BRP's, the Proposed Plan was only published on 16 June 2020. In the circumstances, it is submitted that a further delay in the business rescue proceedings will not be prejudicial to

the BRPs and SAA, given that they have requested repeated extensions up until this point. In light of the previous extensions, this delay will not be significant.

335. In any event, and if the interdict is granted, Airlink undertakes to expedite the determination of Part B of this application as far as possible. This will ensure that the interdict will only subsist for a limited period.

336. Moreover, at this stage, owing to Covid-19, the airline industry is largely dormant, and the BRPs can in the meantime in any event (to the extent possible owing to Covid-19) operate SAA in the ordinary course of business, while the business rescue process is pending.

337. Timing is of the utmost importance for Airlink in this instance. If the interim relief is refused, Airlink will suffer irreparable harm as it will be unable to bring this application once the Proposed Plan has been adopted. Accordingly, there is a short window of time in which Airlink has to act in bringing this application.

338. The balance of convenience therefore clearly favours the granting of interim relief in these circumstances.

The absence of similar protection by any other remedy

339. The urgency of this matter is clear from the provisions of the Companies Act. Section 151(1) of the Companies Act provides that, within 10 business days after publishing a business rescue plan, the BRP's must convene and preside over a meeting of creditors and any other holders of a voting interest, for the purpose of considering the plan. It is at this

meeting that a vote for preliminary approval of the Proposed Plan is set to take place (unless the meeting has first been adjourned).

340. Section 130(1)(a) of the Companies Act provides that an application of this nature can be brought at any time after the adoption of a resolution to begin business rescue proceedings, until the adoption of a business rescue plan.

341. Given the time frames in which this application has to be brought, there is no alternative remedy available to Airlink, save for seeking urgent interim relief. As indicated above, Airlink will lose its right to bring this application once the Proposed Plan is adopted.

342. As set out above, Airlink will suffer irreparable harm should the BRP's not be interdicted from convening a meeting to consider (and subsequently vote on) the Proposed Plan. It is Airlink's submission that this harm can only be avoided by an interim order granted on an urgent basis.

343. This application was launched as soon as possible after the Proposed Plan was published, and Airlink has accordingly acted as quickly as possible in bringing this application,

TIMELINE UNDER SUBSECTION 130(1) AND URGENCY

344. Subsection 130(1) of the Companies Act provides that an application under section 130 can be brought at any time after the adoption of the Resolution, until the adoption of the business rescue plan. A business rescue plan has not yet been adopted and as such this application is within the prescribed timeframe. The vote in relation to the Proposed Plan is, however, imminent and is set for 25 June 2020. Part A of this

application thus must be heard before the Proposed Plan is voted on. If the Proposed Plan is adopted subsequent the vote, this application will be moot. Accordingly, for the relief sought to have any effect, it must be granted before 25 June 2020. This application has thus been set down on an urgent basis for 24 June 2020

345. Some of the facts set out above (under the various grounds for setting aside the resolution and placing SAA under liquidation) became known to Airlink from 5 December 2019 as the business rescue proceedings progressed. However, it was not clear what financial backing the BRPs would have and what they actually proposed in relation to the rescue of SAA until the proposed business rescue plan was published on 16 June 2020.

346. It is noteworthy that, as indicated above, even the draft Proposed Plan circulated to the Creditors' Committee on 29 May 2020 lacked critical financial detail, and the proposals therein were expressly said by the BRPs not to be final or approved. The BRPs at all times prior to 16 June 2020 informed the Creditors' Committee that the business rescue plan was still in flux and that everyone should wait for the final proposal before passing judgment.

347. The BRPs also refused Airlink's earlier requests for financial information.

348. The lack of information available prior to 16 June 2020 is partly due to the inadequate consultation by BRPs with the creditors of SAA (a point which will be expanded on below) and the late disclosure to the creditors of critical information relating to the financial affairs of SAA. This includes the late delivery of the details of the "Proposed Restructure" set out in the

Proposed Plan. The BRPs did not take the creditors into their confidence in relation to critical aspects of the Proposed Plan.

349. Airlink therefore only had sufficient information to bring this application once the Proposed Plan was published on 16 June 2020, which was also the first time that certain critical documentation in relation to the prospects of the Proposed Plan was disclosed.

350. Ultimately, the Proposed Plan was the mechanism for the BRPs to show the creditors the BRPs' best proposal for rescue. It is at that point that it became clear that the BRPs have no financial backing for a real rescue of SAA, and that the plan is essentially a sham (as set out above).

351. Airlink acted as soon as possible in bringing this application after receiving the required information and documents.

352. In order to provide the respondents with sufficient time to answer to the merits of Part B, the application seeks an interim interdict that will operated pending the outcome of Part B. Of course, Airlink is willing to agree to an expedited hearing of Part B, and to that end has set forth an expedited timetable in its notice of motion.

353. Due to the limited time before the proposed voting and adoption of this plan (being 7 days from 16 June 2020), Airlink had no option but to bring Part A of this application on the timeframes set out in the notice of motion. On account of the seriousness of the breaches of rights and the irreparable harm that will be experienced by Airlink and other shareholders, Airlink submits that Part A of this application must be heard on an urgent basis. Airlink reserves the right to supplement these papers,

which were prepared in great haste, to the extent necessary and prior to the hearing of the relief sought in Part B. The notice of motion makes provision for supplementary founding papers to be delivered expeditiously.

354. In the circumstances, Airlink prays that this court condones any non-compliance with the Uniform Rules of Court and hears this application on an urgent basis as set out in the notice of motion to which this affidavit is attached.

CONCLUSIONS

355. Airlink submits that, for all of the above reasons, there are no prospects of rescuing SAA under the business rescue proceedings as contemplated in Chapter 6 of the Companies Act, and that is just and equitable (and the only necessary and appropriate order) to set aside the Resolution and place SAA under liquidation.

356. Airlink has been obliged to bring these proceedings as a result of the unlawful conduct of the BRPs. The BRPs should not have continued with the business rescue proceedings and should have placed SAA in liquidation. The BRPs were forewarned about Airlink's and the Creditor Committee's concerns, but abrogated their powers to the Shareholder and did its bidding. They must thus, in any event, have their appointment set aside or be removed.

357. Before Part B is decided, Airlink submits that interim relief should be granted.

358. Airlink has been put to substantial unnecessary expense in bringing these proceedings in respect of matters where the BRPs were clearly obliged to

act and to take steps themselves to place SAA in liquidation, as they effectively conceded in April 2020 they should do. The Proposed Plan reinforces that view. The BRPs have not taken account of the reality of SAA's position, and have acted according to the dictates of the Shareholder. They have forsaken their independence, and failed in their basic duties.

359. If any party opposes the relief, Airlink submits that the opposition would, moreover, be vexatious and frivolous.

360. In all the circumstances, Airlink submits that a punitive costs order is warranted in all the circumstances, including against the BRPs in their personal capacity.

WHEREFORE, Airlink prays for the relief set forth in the notice of motion.

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RODGER ARNOLD FOSTER

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn before me at ROSEBANK on this the 20 day of June 2020, the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

SOUTH AFRICAN POLICE SERVICE
CLIENT SERVICE CENTRE
2020 -06- 20
CSC
ROSEBANK
SUID-AFRIKAANSE POLISIEDIENS

0581947

Commissioner of oaths

Full names: N B MABUSELA

Business address: 15 SYBRAND AVE ROSEBANK

Designation: SAPS

Capacity: