

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA
HELD AT PRETORIA

Case No.: 2006May2303

In the matter between

NATIONWIDE AIRLINES (PTY) LTD

Complainant

and

SOUTH AFRICAN AIRWAYS (PTY) LTD


Respondent

FILING NOTICE

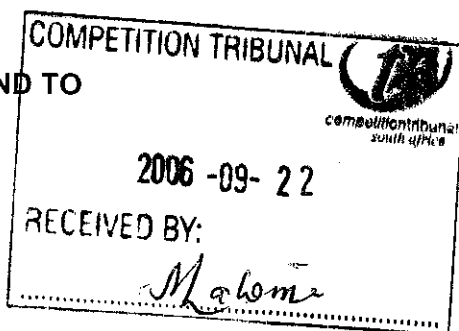
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: **FORM CT1(2) TOGETHER WITH
ANNEXURE THERETO**

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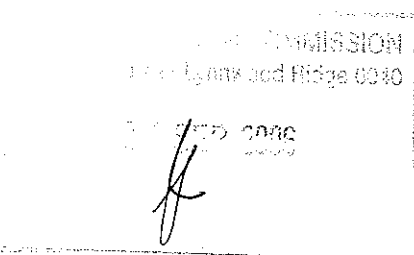
: 
(SGD) L VERSTER
ROESTOFF, VENTER & KRUSE
ATTORNEYS FOR APPLICANT
LADYBROOKS BUILDING 14 –
12TH STREET
CNR BROOKLYN & CHARLES STREET
MENLOPARK
DOCEX 13, HATFIELD
REF: L VERSTER/bb/KN0073(4)

AND TO



: **THE REGISTRAR
COMPETITION TRIBUNAL
BUILDING C, 3RD FLOOR
DTI CAMPUS
CNR MEINTJIES & ESSELEN STREETS
SUNNYSIDE**

AND TO



: **THE REGISTRAR
COMPETITION COMMISSION
DTI CAMPUS
BUILDING C
CNR MEINTJIES & ESSELEN STREETS
SUNNYSIDE**

AND TO

: SOUTH AFRICAN AIRWAYS (PTY) LTD
JOHANNESBURG INTERNATIONAL
AIRPORT

RECEIVE A COPY ON THIS 21st

DAY OF September 2006.

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competitiontribunal

south africa

Notice CT1 (2) About this Form

This form is issued in terms of section 51 of the Competition Act.

Within 3 business days of filing this notice, you must serve a copy of it on the respondent and any other person who has previously filed a Complaint Referral in the matter.

Unless this is a consent proceeding, the respondent may answer this referral within 20 business days after being served this referral.

If the answer raises only a point of law, it must set out the question of law to be resolved. Any answer must be in affidavit form, setting out in numbered paragraphs:

- a concise statement of the grounds on which the Complaint is opposed;
- the material facts or points on which the respondent;
- an admission or denial of each ground and of each material fact relevant to each ground set out in the Complaint Referral.

An allegation of fact set out in the Complaint Referral that is not specifically denied or admitted in an answer will be deemed to have been admitted.

Please see Competition Tribunal Rules 14 through 19.

Form continues on Page 2.

Contacting the Tribunal

The Competition Tribunal
Private Bag X28
Lynnwood Ridge
Pretoria 0040
Republic of South Africa
tel: 27 12 394 3300
fax: 27 12 394 0169
e-mail: ctsa@comptrib.co.za

Referral of Complaint by Complainant

Date: 20 September 2006

From: (Name and address of Complainant:)
Nationwide Airlines (Pty) Limited
(Lanseria Airport)

To: The Registrar of the Competition Tribunal, and:

(Name of respondent and [if applicable] other participants :)
South African Airways (Pty) Limited
(Johannesburg International Airport)

Concerning:

(Commission file number:)
2006May2303

The Competition Commission received a complaint against the above named respondent on: 22-May-2006

Upon completing its investigation, the Competition Commission issued a Certificate of Non-Referral on 20-Sep-2006

In terms of section 51(1) of the Competition Act, the Complainant alleges that the Respondent contravened the provisions of the Competition Act, section 8(d)(i) _____ by engaging in the following prohibited conduct:

(Concise statement of the alleged prohibited practice:)

See attached affidavit by V.P. Bricknell on behalf of Nationwide Airlines (Pty) Ltd



competitiontribunal south africa

Notice CT1 (2) Page 2

About this Form

This form is issued in terms of section 51 of the Competition Act.

Within 3 business days of filing this notice, you must serve a copy of it on the respondent and any other person who has previously filed a Complaint Referral in the matter.

Unless this is a consent proceeding, the respondent may answer this referral within 20 business days after being served this referral.

If the answer raises only a point of law, it must set out the question of law to be resolved. Any answer must be in affidavit form, setting out in numbered paragraphs:

- (a) a concise statement of the grounds on which the complaint is opposed;
- (b) the material facts or points on which the respondent;
- (c) an admission or denial of each ground and of each material fact relevant to each ground set out in the Complaint Referral.

An allegation of fact set out in the Complaint Referral that is not specifically denied or admitted in an answer will be deemed to have been admitted.

Please see Competition Tribunal Rules 14 through 19.

Contacting the Tribunal

The Competition Tribunal
Private Bag X23
Lynnwood Ridge
Pretoria 0040
Republic of South Africa
tel: 27 12 394 3300
fax: 27 12 394 0169
e-mail: ctsa@comptrib.co.za

Referral of Complaint by Complainant

In terms of section 51(1) of the Competition Act, the Party named above seeks an order granting the following relief:

(Concise statement of the order or relief sought:)

1. Declaring the override incentive scheme to be a prohibited practice in contravention of Section 8(d)(i) of the Act;
2. Imposing an administrative penalty in terms of Section 59(1)(a), read with sub-sections (2), (3) and (4) of the Act;
3. Ordering SAA to pay costs of this matter; and
4. Further and/or alternative relief.

Complainant's Address for Service

The Complainant will accept service of any document in terms of this complaint at any of the following addresses:

(Provide Name of Contact person, Postal and Physical addresses, Telephone Number, Fax Number and email address, if available.)

Roestoff, Venter & Kruse Attorneys
Ladybrooks Building
14 - 12th Street
Cnr Brooklyn & Charles Streets
Menlopark
Tel: (012) 460 0987 Fax: (012) 460 9140 E-mail: boniat@rvk.co.za

- This referral is to proceed as a consent proceeding.
- This referral is to proceed as a contested proceeding. Attached is an affidavit setting out the grounds of this complaint, and a statement of the material facts and the points of law relevant to it, as required by Competition Tribunal Rule 15(2).

Name and Title of person authorised to sign:

V P. Bricknell

Authorised Signature:

Date:

20-Sep-2006

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA
HELD AT PRETORIA

Case No.: 2006May2303

In the matter between

NATIONWIDE AIRLINES (PTY) LTD

Complainant

and

SOUTH AFRICAN AIRWAYS (PTY) LTD

Respondent

THE COMPLAINANT'S FOUNDING AFFIDAVIT

I, the undersigned,

VERNON PETER BRICKNELL

do hereby declare under oath and state as follows:

1

- 1.1 I am the Chief Executive Officer of Nationwide Airlines (Pty) Limited ("Nationwide") and duly authorized to make this affidavit on behalf of the Complainant.
- 1.2 The facts hereinafter deposed to fall within my personal knowledge unless stated to the contrary and are both true and correct.

2.

The Respondent is South African Airways (Pty) Limited ("SAA"), a limited liability company incorporated and registered in terms of the laws of the Republic of South Africa, with its head office at the Johannesburg International Airport.



3.

3.1 Nationwide filed a complaint with the Competition Commission ("the Commission") on 22 May 2006 against the anti-competitive practices by SAA in terms whereof SAA pays override commissions to travel agents throughout South Africa, being commissions for booking passengers on SAA flights in addition to the standard commission of 7% provided by airlines to travel agents.

3.2 Upon completing its investigation the Commission issued a Certificate of Non-Referral on 20 September 2006. A copy of the aforesaid certificate is attached hereto, marked Annexure "A".

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This is a direct referral to the Competition Tribunal ("the Tribunal") by Nationwide in terms of Section 51(1) of the Competition Act No. 89 of 1998 ("the Act").

BACKGROUND

THE NATIONWIDE COMPLAINT : CASE NO 18/CR/MAR01 (Hereinafter referred to as the "First Nationwide Complaint")

5.

On 13 October 2000 Nationwide filed a complaint with the Commission against SAA in terms of Section 49B(2)(b) of the Act, alleging that:

5.1 SAA together with its subsidiaries, SAA Airlink and SA Express have a market share in excess of 45% of the airline passenger market in South Africa and is consequently dominant within the relevant market.

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- 5.2 SAA abused its dominance by entering into agreements with travel agencies as well as consultants/employees of such travel agencies, which had an exclusionary effect.
- 5.3 The aforementioned override agreements created very strong incentives for travel agents to reach particular targets for growth in sales of SAA tickets, consequently acting as a barrier to fair access into the market.
- 5.4 The incentive schemes constitute a contravention of Section 8(d)(i) or alternatively 8(c) of the Act.

6.

The Commission concluded its investigation into the complaint and a referral was made to the Tribunal on 18 May 2001. The aforementioned schemes were alleged to be prohibited practices in contravention of Section 8(d)(i) or alternatively 8(c) of the Act, in terms whereof a dominant firm is prohibited from requiring or inducing a supplier or customer not to deal with a competitor, unless the firm concerned can show technological, efficiency or other pro-competitive gains, which outweigh the anti-competitive effects of its act

7.

It was submitted that the effects as a result of the incentive schemes implemented by SAA, prevented competitors such as Nationwide, from expanding within the relevant market and caused significant commercial and financial harm to its competitors.

8.

- 8.1 In terms of the SAA override incentive scheme, travel agents receive a flat basic commission for all sales up to a target figure that is set for them in the contract. The target figure is expressed in rand value. If travel agents exceed the target they become eligible for two further types of commission that are



paid over and above the basic commission, which continues to be paid on sales over the target. In terms of the final category travel agents receive "override commission" which is an additional omission paid if the agent meets and exceeds the target and is payable on the total of all sales achieved above and below the target.

- 8.2 In terms of the second category of commission, the "incremental commission", a travel agent becomes eligible for this additional commission if it earns a certain percentage of sales above target. This commission, unlike the override commission, is payable only on the amount above the target and is therefore not back to rand one, but "back to rand base". For this reason the incremental commission rate is much higher than the override and base commission rate and might sometimes be subject to escalation as well.

9.

The Tribunal heard the complaint referral and issued its judgment comprising of its reasons and order on 28 July 2005. The Tribunal made *inter alia* the following findings:

- 9.1 The first relevant market is the market for purchase of domestic airline ticket sales services from travel agents in South Africa.
- 9.2 The second relevant market is the market for domestic scheduled airline travel.
- 9.3 The two relevant markets referred to above, are inter-dependent of each other.
- 9.4 In both the markets, SAA has a market share in excess of 45% that is a dominant firm and that it is presumed to have market power in terms of the Act

 S.L.G.

- 9.5 The practical effect of the incentive override scheme and the explorer scheme is that they induce suppliers not to deal with competitors of SAA and therefore constitute an exclusionary act in terms of Section 8(d)(i) of the Act.
- 9.6 The Override Incentive scheme changed the manner in which commission would be paid to the travel agent upon the sale of SAA tickets for scheduled domestic air travel by inducing agents to attain higher levels of SAA ticket sales in order to achieve a profitable level of commission and by providing very substantial financial rewards for high levels of growth in SAA ticket sales.
- 9.7 The Explorer scheme rewarded individual employees of travel agents with free international flights if they achieve certain volumes of sales of SAA tickets, and rewarded the proprietors of travel agencies with free international flights based on SAA's share of the travel agencies' total sales of air tickets.
- 9.8 The Override Incentive scheme and Explorer Scheme therefore have anti-competitive effects.
- 9.9 The effect of the anti-competitive conduct of SAA on the structure of the market was to inhibit rivals, such as Nationwide from expanding in the market whilst at the same time reinforcing its dominant position.
- 9.10 SAA contravened Section 8(d)(i) of the Act by the implantation of the override scheme and the use of the Explorer Scheme contributed to the anti-competitive effects of the override incentive scheme.

10.

The relevant period in terms of the complaint was eventually limited to the period ending with the referral to the Tribunal i.e. 18 May 2001. It was at all relevant times the intention of Nationwide to submit further complaints against SAA should its abusive behaviour continue.

 GLL

11.

11.1 Subsequent to the ruling by the Tribunal, the Tribunal issued a certificate of decision in terms of Section 65(6)(b) of the Act, on 9 January 2006, confirming that the conduct by SAA was found to be a prohibited practice in terms of Section 8(d)(i) of the Act

11.2 Nationwide proceeded with a civil claim for damages in the High Court of South Africa and issued summons against SAA on 4 July 2006.

THE COMAIR COMPLAINT : CASE NO 83/CR/OCT04

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Comair thought it prudent to initiate its own complaint against the practices by SAA and submitted its complaint to the Commission on 13 October 2003. The matter was referred to the Tribunal on 12 October 2004. It was alleged that SAA engaged in conduct that is prohibited in terms of section 8(d)(i) or alternatively section 8(c) of the Act. It was furthermore submitted that the agreements entered into between SAA and the travel agents are prohibited in terms of section 5(1) of the Act.

13.

The conduct forming the subject matter of the First Nationwide Complaint, which was found to be a prohibited practice in terms of the Act, is substantially the same conduct which forms the subject matter of the Comair Complaint and primarily concerns the practices by SAA of paying volume-based incentives to travel agents.

14.

The relevant period in terms of this complaint overlaps with the First Nationwide Complaint but extends up to October 2004. This complaint furthermore addresses issues additional to those raised in the First Nationwide Complaint.

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 SLL

15.

15.1 On or about 15 February 2006, Nationwide filed an application with the Tribunal for an order to be recognized as a participant in terms of Section 53(1)(a)(iv) of the Act and for leave to intervene in the Comair complaint proceedings in terms of the Tribunal Rule 46(1).

15.2 Nationwide submitted that it has a direct and material interest in the Comair complaint proceedings and should therefore be regarded as a complainant in its own right in the Comair complaint.

15.3 On 25 May 2006 the application for leave to intervene was granted by the Tribunal.

16.

The Comair Complaint is currently pending before this Honourable Tribunal.

NATIONWIDE'S FURTHER COMPLAINT :CASE NO 2006MAY2303 ("the Second Nationwide Complaint")


17.

Since the inception of the Act on 1 September 1999, SAA engaged in its anti-competitive conduct, by paying loyalty based Incentives to travel agents to book passengers on SAA rather than competing airlines such as Nationwide, irrespective of its competitiveness on price and service, as set out in paragraph 8 above.

18

Travel agents' ability to distort consumer choices in order to accomplish their own commercial objectives, leads to competitive harms in that consumers will be flying on

7



more expensive tickets and at less preferable times than if the ticket offering had been unbiased.

19.

This anti-competitive conduct permits SAA to maintain and grow its dominant share of the air travel industry notwithstanding the fact that it might not provide the most competitive prices and/or service to passengers, which leads to a less competitive market in which there are higher fares, less choice for consumers and less innovation. Moreover, the effect of this anti-competitive conduct is to harm other participants, in the market such as Nationwide, by capturing their market share.

20.

The aforementioned override agreements with travel agents are still in existence and SAA is therefore continuing with its anti-competitive conduct.

NATIONWIDES' SUBMISSIONS

21.

In terms of the Tribunals' reasons and order as referred to in paragraph 9 above, the following is submitted:

21.1 Airlines use travel agents to sell their tickets and in return remunerate the agents for their services by way of commission. Due to the fact that travel agents are responsible for the sale of the majority of domestic airline tickets, other vehicles for ticket sales cannot be regarded as competitively significant substitutes. Accordingly, the first relevant market is the market for the purchase of domestic airline ticket sale services from travel agents in South Africa



- 21.2 The second relevant market is defined as being the market for domestic scheduled airline travel, as this is the market where, if the behaviour is exclusionary, the final effect will be experienced across the domestic airline travel market as a whole.
- 21.3 These two relevant markets are inter-dependent of each other.
- 21.4 SAA's market share is well over the 45% threshold and hence it is presumed to be dominant in terms of Section 7(a) of the Act which states categorically that a firm is presumed dominant if it has 45% of the market.
- 21.5 The override incentive scheme provides a compelling commercial inducement to agents to prefer selling SAA tickets to those of its domestic rivals and, to a significant extent, agents are able to influence customers preferences so as to give effect to these incentives. The practical effect of the scheme constitute an exclusionary act in terms of Section 8(d)(i) of the Act.
- 21.6 The override scheme does not provide technological, efficiency or other pro-competitive gains that outweigh their anti-competitive effect.

22.

SAA with a market share in excess of 45%, is a dominant firm within the South African air travel industry and is accordingly prohibited from engaging in exclusionary acts. Nationwide and other airlines are unable to compete with SAA's override commission since such practices will result in negative operating margins and ultimately in losses that would be unsustainable. Furthermore, SAA has a far more extensive route network than its competitors, domestically, regionally and internationally, which provides SAA with a far greater value and volume of business.

 S.L.L

23.

SAA's incentive override agreements clearly fall into the category of incentives that reward loyalty rather than bearing a relation to costs saved or extra benefits secured by SAA and have the effect of "requiring or inducing" a supplier not to deal with a competitor, in violation of Section 8(d)(i) of the Act.

24.

As a result of SAA's anti-competitive conduct, Nationwide suffered and continues to suffer damages as a result thereof, on the basis that the nature and implementation of the incentive scheme diverts passengers away from Nationwide towards SAA directly reducing Nationwide's passenger number and hence revenue, while increasing those of SAA.

25.

SAA's anti-competitive conduct furthermore deprives passengers of the opportunity to fly with a competitor, such as Nationwide and instead offers them a different flight, time and price with SAA which results in the reduction in the overall numbers of passengers flown with Nationwide

26.

SAA's anti-competitive conduct is still ongoing and Nationwide reasonably apprehends that it will continue in future irrespective of the Tribunal's ruling in the First Nationwide Complaint, finding SAA's conduct to constitute a prohibited practice in terms of the Act.

27.

This conduct by SAA is materially preventing or lessening competition in the market generally and the ability of Nationwide to compete with SAA in the market.

10

A handwritten signature in black ink, appearing to be 'A SLL', located in the bottom right corner of the page.

Nationwide therefore continues to suffer damages as a result of SAA's continued conduct.

28.

In conclusion it is submitted that the override incentive schemes between SAA and travel agencies, which have already been found to constitute a prohibited practice in terms of Section 8(d)(i) of the Act, are still in existence and SAA's conduct is ongoing, irrespective of the aforementioned finding by the Tribunal.

29.

Nationwide requests the Tribunal to make the following order:

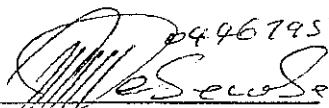
- 29.1 declaring the override incentive scheme to be a prohibited practice in contravention of Section 8(d)(i) of the Act;
- 29.2 imposing an administrative penalty in terms of Section 59(1)(a), read with subsections (2), (3) and (4) of the Act;
- 29.3 ordering SAA to pay the costs of this matter; and
- 29.4 further and/or alternative relief.



DEPONENT

I certify that the Deponent acknowledged that he knows and understands the contents of this affidavit, which affidavit was undersigned in my presence and certified at LANSERIA on this 20TH day of SEPTEMBER 2006 at 15 h 40. The Regulations contained in Government Notice R1258 of 21 July 1972, as amended by Government Notice R1648 of 19 August 1977, have been complied with.

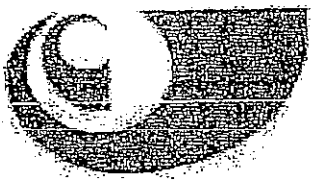



0446795-7
MSB

COMMISSIONER OF OATHS

NAME:
CAPACITY:
ADDRESS:

"A"



competition commission south africa

Notice CC 8

Notice of Non-referral of Complaint

About this Notice

This notice is issued in terms of section 50 of the Competition Act.

The complainant may refer the complaint directly to the Competition Tribunal (011-0001111(2)) within 20 business days after the date of this notice. Please refer to Competition Tribunal Rules 12(6) & 17.

Date: 20/09/2006

Concerning:

(Name and file number of complaint:)

Nationwide Airlines (Pty) Ltd
vs
South African Airways (Pty) Ltd

Case Number: 2006May2303

The Competition Commission received a complaint against the above named respondent on: 22/05/2006

Having completed its investigation, or the time having expired for referring the complaint to the Tribunal in terms of section 50(2) of the Competition Act, the Competition Commission gives notice that:

- The Commission will not refer any part of the complaint to the Competition Tribunal.
- The Commission will not refer to the Competition Tribunal the particulars of the complaint listed on the attached sheet, but will refer the remaining particulars of the complaint.

Contacting the Commission

The Competition Commission
Private Bag 927
Kyalamwood Ridge
Pretoria 00010
Republic of South Africa
Tel: 27(0)2 394 2200
Fax: 27(0)2 394 2200
Email: cas@compcom.co.za

Name and Title of person authorised to sign on behalf of the Competition Commission:

Mr Thulani Kunene: Manager: Enforcement and Exemptions

Authorised Signature:

