IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: 13034/2013

DATE: 1/6/2015

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED.

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DATE SIGNATURE

In the matter between:

COMAIR LIMITED	**APPLICANT**
And	
THE MINISTER OF PUBLIC ENTERPRISES	**FIRST RESPONDENT**
THE MINISTER OF FINANCE	**SECOND RESPONDENT**
THE MINISTER OF TRANSPORT	**THIRD RESPONDENT**
GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	**FOURTH RESPONDENT**
SOUTH AFRICAN AIRWAYS SOC LTD	**FIFTH RESPONDENT**
THE STANDARD BANK OF SOUTH AFRICA LTD	**SIXTH RESPONDENT**
CITIBANK N.A. (INC IN THE USA)	**SEVENTH RESPONDENT**
NEDBANK LTD	**EIGHTH RESPONDENT**

JUDGMENT

Fabricius J,

1.

Comair has operated in the airline industry in South Africa since 1946 and following the deregulation of the domestic airline industry, it entered the main domestic routes in 1992. In 1996 it became a franchise partner of British Airways and from that point its domestic routes were all flown under the British Airways livery and branding. In 2001 it launched its first low cost airline branded as Khulula.com. South African Airways is a State-owned company, which is governed by the ***South African Airways Act of 2007***. The State, represented by the Minister of Public Enterprises is its only shareholder, and it is also a Schedule 2 public entity in terms of the ***Public Finance Management Act 1 of 1999 ("PFMA").***

The preamble to the former Act is contextually important inasmuch as it provides that the sole shareholder, the State, "regards South African Airways as a national carrier and strategic asset that would enable the State to preserve its ability to contribute to key domestic intra-regional and international air linkages".

2.

Background facts:

On 26 September 2012 the Minister of Public Enterprises, with the concurrence of the Minister of Finance, (although there is a dispute about the concurrence aspect) provided a R 5 billion guarantee to SAA. Comair says that this is not the first time that Government has been called upon to assist SAA financially. Since 2007 there have been at least three instances of that funding. Government had indicated that these interventions were based on exceptional circumstances, and were intended to allow SAA to operate on a commercially viable basis in a competitive market,

Comair alleges. In the introduction to the Founding Affidavit under the heading of "SYNOPSIS" Comair then makes the following background allegations:

2.1

SAA has continued to operate on a non-commercial manner which is anti-competitive and prejudicial to the other participants in the domestic air transport services;

2.2

Because of its undisciplined commercial behaviour SAA has repeatedly driven itself into serious financial difficulties resulting in it looking to Government for a bailout;

2.3

There is every indication that given SAA's financial position, further funding from Government will be required;

2.4

Given SAA's current financial woes it will be unable to repay any loans drawn down against the guarantee. The obvious result would be that Government would be compelled (and ought reasonably to have foreseen this reality) to make good on the

guarantee. In fact, “guarantee” was a misnomer: the fact is that it amounts to a form of direct government funding by the Executive branch of Government to SAA, in a move that unconstitutionally bypasses the various safeguards inherent in the parliamentary appropriation procedure. Further, the decision was taken notwithstanding the fact that the Government had formulated a clear domestic air transport policy in various documents since 1990, in terms of which it committed itself to the following principles:

2.4.1 There should be a deregulated and openly competitive domestic air transport environment;

2.4.2 SAA should operate autonomously and on a commercial basis, it should not enjoy privileges as a result of being a government enterprise;

2.4.3 Government would in future not guarantee loans to SAA or any other airline with government interests, private airlines have to borrow at their own risk;

2.5

Comair was provided with no opportunity to make representations to the Government prior to the taking of the guarantee decision, notwithstanding that the

decision constitutes a fundamental deviation from Government's own domestic air transport policy, and would have a prejudicial effect on Comair and the domestic air transport industry.

3.

Accordingly, Comair alleges that given these facts, and the relevant policies that Government issued, it has been compelled to launch a review application to vindicate its rights and those of the public.

Comair's cause of action:

Given the abovementioned brief facts which Comair referred to as background material it alleged that the relevant decision to guarantee loans by SAA was:

3.1

Unlawful and *ultra vires* the ***PFMA*** and in violation of the separation of powers principle, and relevant sections of the Constitution, because while the decision

purported to grant a guarantee, in fact the guarantee was a form of direct executive funding without the necessary legislative appropriation procedures being followed;

3.2

In violation and *ultra vires* other provisions of the ***PFMA***, read together with the ***SAA Act***;

3.3

In violation of the requirements for lawful, reasonable and procedurally fair administrative action (as guaranteed by ***S. 33*** of the ***Constitution*** and given effect to by the ***Promotion of the Administrative Justice Act 3 of 2000 ("PAJA")***) and the rule of law, because the decision was;

3.3.1 in violation of the requirements of just administrative action;

3.3.2 in any event irrational;

3.3.3 procedurally unfair and in breach of Comair's legitimate expectations;

3.3.4 in violation of the constitutional rights under ***s. 22, S. 9*** of the ***Bill of Rights***, and was therefore in breach of the Government's obligations in terms of ***s. 7***

(2) of the ***Constitution*** to protect, promote, and fulfil the rights in the ***Bill of Rights***.

4.

Relief sought:

Viewing these rights cumulatively, Comair sought the following relief in the initial Notice of Motion:

4.1

A declaration to the effect that the guarantee decision was unconstitutional and unlawful;

4.2

The review and setting aside of the guarantee decision;

4.3

The suspension of the setting aside of the guarantee decision for a period of six months, during which time, to the extent that the Government decides to grant any

financial assistance to SAA, it is to do so in the light of the findings of this Court's judgment and;

4.4

An order that if the Ministers and/or the Government contemplate granting any financial assistance to SAA during the two-year period contemplated in the guarantee:

a) such assistance must comply with Government's domestic air transport policy:

b) they must file a proposal setting out the form that the financial assistance is intended to take, the procedure to be followed to providing that assistance and any conditions attaching thereto; and

c) the Court may, at Comair's instance, determine whether the proposal complies with the judgment and order of this Court.

In crafting this relief Comair has sought, so it alleges, to ensure that it is just and equitable, that a proper balance is struck between the need to vindicate the rights

that have been violated, and the need to ensure that the relief is fair to other affected parties, including the Government and SAA.

5.

The mentioned guarantee to SAA for the sum of R 5.6 billion was fixed for a period of two years until September 2014. Certain conditions were attached to it. The hearing of the application was set down for February 2014. The First, Second and Fifth Respondents opposed the application, whilst the Third Respondent filed a Notice to Abide but also filed an Explanatory Affidavit. On 12 June 2013, realizing that it would not make 30 September 2014 as a going-concern, The SAA Board made an application to the Minister of Public Enterprises for the extension of the guarantee, pending the outcome of its application for re-capitalization. The application was accompanied by a memorandum setting out the background to the application, and the motivation and analysis of SAA's financial condition as a going-concern. On 19 July 2013 the Minister of Public Enterprises sent a letter to the

Minister of Finance requesting an extension of the R 5.6 billion guarantee and indicated that it required the extension in order to continue as a going-concern immediately after the expiry of the R 5.6 billion guarantee. The Minister tabled two options in the letter pertaining to the form of the extension; the first being a two-year extension to 30 September 2016, and the second a one-year extension to 30 September 2015. The Minister supported the two-year extension to 30 September 2016. Prior to the Minister of Finance making a financial decision as to his concurrence, he met with the Minister of Public Enterprises to deliberate on this request. The Minister said that the engagements were intended to determine what the appropriate method would be to keep SAA as a going-concern while the long term turnabout strategy ("LTTS") was finalised and implemented. The result of these engagements was consensus between the Ministers, and it was decided that it would be appropriate instead to grant SAA a perpetual guarantee so as to provide it the time needed for the finalization and implementation of the LTTS. Accordingly these engagements resulted in the concurrence by the Minister of Finance as contemplated in ***s. 70*** of the ***PFMA***. On 29 November 2013, the Minister of Finance

conveyed his concurrence with a perpetual guarantee ("the extended guarantee"). The Minister also imposed conditions to the extended guarantee which were the following: "a) to submit monthly reports to the National Treasury and the Department of Public Enterprises on the implementation of the LTTS. These reports will be considered at the monthly meeting of the monitoring task team that has been established. b) The Minister of Finance and the MPE to jointly approve SAA's shareholders' compact. c) The shareholders' compacts to be translated into performance agreements for the Executive Management team and be the basis for determining remuneration. Punitive measures to be implemented in the event that SAA fails by a material margin to deliver on the profitability target set in the LTTS (with these terms to be agreed and defined in the shareholder compact). d) In the event that SAA substantially fails against the LTTS, Government has the right to appoint representatives to take over management of the Company (with the term "substantial failure" to be agreed and defined in the shareholder compact). e) The amount of the perpetual guarantee to be reduced by the amount of any capital injection made by the shareholder".

The extended guarantee, as I will refer to it in this judgment was therefore granted prior to the hearing of the application concerning the initial guarantee.

Comair's amended Notice of Motion:

As a result of the extended guarantee approved by the Ministers, the hearing in February 2014 did not proceed, and Comair filed an amended Notice of Motion dated 10 April 2014 with the following terms:

1. " Declaring that the decisions taken by the First Respondent, with the purported concurrence of the Second Respondent: 1.1 On or about 26 September 2012 to provide the Fifth Respondent with a R 5 billion guarantee ("the guarantee"), from the Fourth Respondent, for two years from 1 September 2012 ("the guarantee decision"); and

   1.2 On or about 29 November 2013 to change the time-frame of the guarantee from the Fourth Respondent into a perpetual guarantee without a time-limit ("the extension decision"),

   are unconstitutional and unlawful.

2. Reviewing and setting aside the guarantee (as extended).

3. Suspending the setting aside of the guarantee for eight months from the date of the order, during which time, to the extent that the First, Second and/or Fourth Respondents decide to grant any financial assistance to the Fifth Respondent, they are to do so in a manner which is consistent with this Court's judgment and order and in accordance with the terms of paragraph 4 below.

4. Insofar as the First, Second and/or Fourth Respondents contemplate granting any financial assistance (including but not limited to any guarantees) the Fifth Respondent in substitution of or in addition to the guarantee (as extended) during the suspension period in paragraph 3:

   4.1 Any such financial assistance shall comply with the Government's domestic air transport policy as reflected in the ***Domestic Air Transport Policy of May 1990*** read with the addendum to the ***Domestic Air Transport Policy of August 1991***, the ***White Paper on the National Transport Policy, 1996*** and the ***Airlift Strategy***

approved by the Cabinet on 26 July 2006 (save in the event of there being reasonable grounds to deviate from, which are clearly and publicly given prior to taking the decision, and after allowing the Applicant and other affected parties a reasonable opportunity to comment on any proposed deviation);

4.2 The First, Second and Fourth Respondents shall, at least two months prior to taking their decision to grant such financial assistance, notify the Applicant and file in this Court a proposal, confirmed on affidavit, setting out the form that the financial assistance is intended to take, the procedure to be followed prior to providing that assistance, including the provision of notice to affected parties and a reasonable opportunity to comment on the proposed decision to grant such financial assistance, and any conditions attaching to that assistance;

4.3 The Applicant may, within 10 days of receipt of such proposal and on notice to the Respondents, apply to this Court for a determination of whether the proposal complies with the judgment and order of this

Court. Costs of the application were also sought. The First and Second Respondents were then called upon in terms of ***Rule 53 (1) (a)*** to show cause why the guarantee decision and the extension decision should not be declared unconstitutional and unlawful, and the guarantee should not be set aside. “Further documents relating to the extension decision were then sought, and a Supplementary Affidavit was filed which persisted in the relief relevant to the granting of both guarantee decisions, although the first guarantee had clearly expired.

6.

At this stage of the proceedings, the affidavits without the answering affidavits to the Amended Notice of Motion and the additional Supplementary Founding Affidavit comprised some 2 000 pages. After the answering affidavits were filed and the Replying Affidavits thereto, as well as the affidavits relating to the Joinder Application in terms of which Standard Bank of South Africa was joined as Sixth

Respondent, Citibank was joined as Seventh Respondent, and Nedbank Ltd as Eighth Respondent, the affidavits and annexures before me comprised some 4 800 pages, and that is without further eight arch lever files containing documents relevant to the decision taken by the Ministers. Despite the fact that the initial guarantee decision had lapsed, Comair persisted in seeking relief in regard thereto. I managed to read all affidavits and documents relevant to the issue between the parties, and wish to say that where I do not refer to any particular document in this judgment, it must not be taken to mean that I have not read it and am not aware of its contents. Reading thousands of pages in Court proceedings is one aspect, writing a judgment is another, inasmuch as it is requires of a Judge as to crisply and concisely as possible to set out the parties various contentions on the facts and the law, and then to critically examine them and to arrive at a conclusion. Analysing a few thousand pages in that context is neither possible, necessary, nor desirable and accordingly I will deal with the main topics of the Applicant's cause of action and the Respondents' answer thereto and the crux of their argument.

7.

7.1

After the Sixth to Eighth Respondents had been joined not long before the hearing and had filed affidavits and had presented argument, Applicant produced a Draft Order in Court on 7 May 2015 which now reads as follows:

"DRAFT ORDER

1. Declaring that the decisions taken by the First Respondent, with the purported concurrence of the Second Respondent:

   1.1 on or about 26 September 2012 to provide the Fifth Respondent with a R 5 billion guarantee ("the Guarantee"), from the Fourth Respondent, for two years from 1 September 2012 ("the Guarantee decision"); and

   1.2 on or about 29 November 2013 to change the time frame of the Guarantee from the Fourth Respondent into a perpetual guarantee without a time limit ("the Extension decision"),

   are unconstitutional

2. Reviewing and setting aside the Guarantee (as extended).

3. Declaring that the declaration in prayer 1 and the setting aside in prayer 2 will only apply from 28 April 2015;

4. Declaring that

   4.1 the guarantee issued to the Sixth Respondent as security for the Fifth Respondent's obligations to it under the loan agreement signed on 27 June 2014; and

   4.2 all other guarantees issued by the First, Second or Fourth Respondents to ABSA, the Seventh Respondent and the Eighth Respondent pursuant to the Guarantee decision and/or the Extension decision and/or the Guarantee prior to 28 April 2015

   are and remain valid and binding notwithstanding the grant of any relief in this Order.

5. Suspending the declarations in prayer 1 and the setting aside of the Guarantee in prayer 2 for twelve months from the date of the order, during which time, to the extent that the First, Second or Fourth Respondents

decide to grant any financial assistance to the Fifth Respondent, they are to do so in light of the findings in this Court's judgment and order and in accordance with the terms of paragraph 6 below.

6. Insofar as the First, Second and/or Fourth Respondents contemplate granting any financial assistance (including but not limited to any guarantees) to the Fifth Respondent in substitution of the Guarantee (as extended) during the suspension period in paragraph 5.

6.1 Any such financial assistance shall comply with the Government's domestic air transport policy as reflected in the Domestic Air Transport Policy of May 1990 read with the Addendum to the Domestic Air Transport Policy of August 1991, the White Paper on National Transport Policy, 1996 and the Airlift Strategy approved by Cabinet on 26 July 2006 (save in the event of there being reasonable grounds to deviate therefrom, which are clearly and publicly given prior to taking the decision, and after allowing Comair

and other affected parties a reasonable opportunity to comment on any proposed deviation);

6.2 The First, Second and Fourth Respondents shall, at least two months prior to taking the decision to grant such financial assistance, notify the Applicant and file in this Court a proposal, confirmed on affidavit, setting out the form that the financial assistance is intended to take, the procedure to be followed prior to providing that assistance and any conditions attaching to that assistance.

6.3 The Applicant may, within 10 days of receipt of such proposal and on notice to the Respondents, apply to this Court for a determination of whether the proposal complies with the judgment and order of this Court.

7. Those Respondents who oppose the relief sought herein are to pay the costs of this application, jointly and severally, the one paying, the other to be absolved."

I was told that Applicant did not wish to impugn the individual guarantees that Government had provided to the Banks as follows: to Nedbank on 10 December 2014, to ABSA on 28 January 2015, to Citibank on 9 July 2014 and to Standard Bank on 9 July 2014. These had not been disclosed to Applicant until their Answering Affidavits to Comair's joinder application had been filed.

8.

Comair's "three key questions" and argument:

According to Comair's Counsel, and as extensively dealt with in the Heads of Argument, the application raised three key questions:

8.1 When is it lawful for Government Ministers to bind the fiscus by granting significant guarantees to State-owned companies?;

8.2 In the light of the Government's domestic air transport policy, when, and in what manner, is it reasonable, rational and procedurally fair for the Government to give financial assistance to State-owned airlines?; and

8.3 On the facts of this case, was it lawful and in accordance with the principles of just administrative action, the principle of legality, and the ***Bill of Rights***, for SAA to be provided with a R 5 billion guarantee?

The guarantee was advanced in order to enable SAA's auditors to sign off on the entity as a going-concern, and with the intention that it would allow SAA to secure loans to provide working capital on the basis of that guarantee. The guarantee was issued despite the fact that SAA was technically insolvent at the time. This is not in dispute. It was submitted that this guarantee was issued when it was obvious that it would be called-up, thus binding the fiscus to make payment in the sum of R 5 billion. Therefore, this guarantee functioned as a form of direct funding which violated the requirements of the ***PFMA***, and the ***Constitution***: Two Ministers bound the Government to provide SAA with R 5 billion while bypassing the normal parliamentary appropriation process with the various checks and balances. This violated the principle of separation of powers. A guarantee was also issued in contradiction of, and in violation of, ***South Africa's Air Transport Policies*** which specifically required, in the domestic sphere, equal treatment of all participants,

including SAA, and required Government not to provide guarantees for loans for SAA, while other private airlines had to secure loans without such guarantees on ordinary commercial terms. The issue of the guarantee was not justified as a necessary and reasonable exception to the policy (the policy was not even considered), nor was any lawful amendment to the policy made or suggested, so said Comair. Comair's entry into, and continued involvement in the domestic market was and is predicated on the policy. It had a legitimate expectation that Government would act in accordance with the policy, and Government had therefore a duty to consult with the industry prior to deviating from it, or if intended to do so. The guarantee decision was accordingly unlawful, irrational, unreasonable and procedurally unfair and violated Government's extant domestic air transport policy. Comair's conclusion was that the guarantee decision was therefore in violation of the requirements for just administrative action as required by ***PAJA,*** and the principle of legality, which requires the exercise of all public power to be rational and lawful, and required proper consultation in order for the decision making process to

be rational, and also for the constitutionally protected right to one's trade in terms of s. 22 and to equal protection of the law in terms of ***s. 9*** of the ***Bill of Rights***.

9.

After the extended guarantee was issued, and the further affidavits in relation thereto filed, Comair persisted with this approach, despite the First and Second Respondents' objection that the question had become moot, inasmuch as the first guarantee had expired, and because the extended guarantee was not dependant on the first guarantee for its validity.

10.

Is the issue relating to the guarantee decision moot?:

I do not intend dealing with the Respondents' answer to Comair's cause of action relating to the first guarantee in the present context. On behalf of the First and

Second Respondents Mr J. Gauntlet SC submitted that it was common cause that the first decision that Comair attacked, and sought a review and a structural interdict, had expired and had been replaced. Accordingly, the relief sought in prayer 1.1 of the Amended Notice of Motion was moot – not only because the 2012 guarantee had expired by effluxion of time, but also because it had been replaced by the perpetual guarantee. Nevertheless, and rather surprisingly, Comair persisted in this relief. Comair submitted in this context that even if prayer 1.1 of the Amended Notice of Motion was technically moot, it would nevertheless be in the interests of justice for this Court to determine the matter. It accepted that the case was moot if it no longer presented a live controversy, but sought to invoke issues of extended standing under ***s. 38*** of the ***Constitution*** to circumvent Constitutional Court authority directly in point on the topic of mootness. It was obvious that there is no live claim for restitution in the respect of the first guarantee. The order sought in prayer 1.1 was also neither forward looking nor general in its application.

See: ***Director-General Department of Home Affairs vs Mukhamadiva 2014 (3) BCLR 306 (CC) at 15***. It is clear that the relevant principle is that Courts should not

decide matters that are abstract or academic, and which do not have any practical effect either on the parties before the Court or the public at large. Courts of law exist to settle concrete controversies and actual infringement of rights, and not to pronounce upon abstract questions, or give advice on differing contentions. The same principle has been stated to mean that one should rather not deal with vague concepts such as “abstract”, “academic” and “hypothetical” as yardsticks. The question rather ought to be a positive one, i.e. whether a judgment or order of Court will have a practical effect, and not whether it will be of importance for a hypothetical future case.

See: ***Premier van die Provinsie van Mpumalanga vs Groblersdal se Stadsraad 1998 (2) SA 1136 (SCA) at 1141***. In ***National Coalition for Gay and Lesbian Equality vs Minister of Home Affairs 2000 (2) SA 1 (CC) at par. 21,*** it was said that a matter is moot and not justiciable if it no longer presents an existing or live controversy. This seems to be the most practical and decisive question.

Mr Gauntlet SC submitted that were prayer 1.1 of the Amended Notice of Motion to be granted there would be no practical effect. There was no utility in the order, and

no benefit in pronouncing on any of the issues in relation to it. The controversy regarding the legality of the first decision would itself be resolved by adjudicating on the second decision. Also, the elaborate remedial relief sought (including the suspension of setting aside that which had already lapsed) cannot conceivably have any practical effect. It would be an elaborate academic exercise. I agree with this submission. Mr Unterhalter SC on behalf of Comair submitted that I need to take into account the so-called Oudekraal-principle; i.e.: ***Oudekraal Estates (Pty) Ltd vs City of Cape Town 2004 (6) SA 222 (SCA) at par. 31***. The principle articulated in this judgment is that a successful challenge to a previous administrative decision does not automatically result in nullity of a subsequent administrative decision. The Court will still have to determine whether the perpetual guarantee should be set aside in this particular context. The legal validity of the 2012 guarantee is not at all, or for that matter on the Ministers' approach, a pre-condition for the 2013 guarantee. Validity of the former does not bear on the latter. Neither the subsequent decision nor its empowering provision rests on the legal validity of the initial decision. The legal foundation for the second decision is ***s. 70*** of the ***PFMA***, and not

the existence of the first decision. The 2013 decision, which was subject to its own conditions, supplanted the 2012 guarantee decision. Comair also relied upon the interest of justice in this context, which Mr Gauntlet SC classified as the assertion of a backstop. The argument was flawed, because the fact that it has bearing on the interests of justice do not militate in favour of entertaining prayer 1.1 in circumstances where this would almost duplicate much of the judicial resources to be expended on determining prayer 1.2. He pointed out that the motion record then stood at about 4147 pages, including the 1908 pages filed in relation to the relief now sought in prayer 1.2 of the Amended Notice of Motion. It would not be in the interests of administrative justice that a Court of first instance and any potential Court of Appeal be burdened with a record of twice the length. In any event, whether or not prayer 1.1 was determined, all the issues identified in Comair's Heads of Argument relating to the extended guarantee would be ventilated, and their case and arguments would be heard in determining prayer 1.2.

11.

I agree with the contentions advanced by Counsel for the First and Second Respondents. The attack on the issue of the first guarantee and the relief sought in that context is in my view moot in sense that there would be no utility in the order, and no benefit in pronouncing on any of the issues in relation to it. Any order in this context would have no practical effect on either of the parties or others. I therefore do not intend dealing any further with any of the arguments advanced in respect of the original Notice of Motion, although I appreciate that there would be a lot of overlapping when I deal with the arguments pertaining to the extended guarantee.

12.

The extended guarantee (the perpetual guarantee):

In respect of this decision Comair put forward the following background facts: In late January 2014, and on the eve of the hearing of the matter in respect of the guarantee decision, and after pleadings had closed and Heads of Argument had

been filed, the Minister of Finance revealed in a Supplementary Affidavit that on 29 November 2013 he had purportedly concurred, in terms of ***s. 70*** of the ***PFMA***, with a request from the Minister of Public Enterprises to extend the guarantee in perpetuity (or to convert the guarantee to a perpetual guarantee). Comair says that the extension of the original guarantee occurred by way of the second decision namely the "extension decision". This extension occurred, so it was said, because SAA had been unable to repay the R 1.54 billion loan advanced on the strength of the guarantee. In consequence thereof, Comair amended its relief and it now challenged the lawfulness of the extension decision and the guarantee decision. Its updated Heads of Argument of 23 February 2015 deal primarily with the unlawfulness of the extension decision. In this context it put forward six main grounds for challenging the lawfulness of this decision:

12.1

Given SAA's remarkably poor financial position, the extension decision was unlawful and in violation of the ***PFMA***, and in any event, irrational and unreasonable;

12.2

There was a failure by the Ministers to consider the ***Domestic Air Transport Policy*** when taking the decision, which decision violates the policy;

12.3

The decision was *ultra vires* ***s. 70*** of the ***PFMA*** since there was no agreement in relation to the conditions;

12.4

The decision was once again, irrational, and unreasonably taken prior to the finalisation of the long-term turnaround strategy ("LTTS");

12.5

The decision was procedurally unfair because it was taken without first consulting with participants in the market, such as Comair;

12.6

The decision violated the constitutional requirement of equitable treatment.

13.

Central facts relied upon by Comair:

Comair alleges that these facts are common cause or have not been directly or pertinently disputed by the Respondents;

13.1

SAA sought the extension of the guarantee, which had been a two year guarantee, because it was unable to repay the R 1.544 billion loan advanced to it on the strength of the guarantee;

13.2

SAA was factually insolvent when the extension decision was taken, with its liabilities exceeding its assets by billions;

13.3

SAA would be unable to repay loans advanced against the guarantee;

13.4

SAA was at that time only able to make repayment of the interest obligations on its huge loan commitment by obtaining further loans on the central Government guarantees, which only added to its debt burden;

13.5

The Ministers were fully aware of SAA's financial position and therefore its inability to repay loans, but nevertheless granted the extension in perpetuity to allow further borrowing;

13.6

Despite this, an approved LTTS, which the Ministers had required as a condition for the grant of the guarantee, and which originally had to have been submitted by 31 January 2013, had still not been finalised in an approved manner at the time the extension decision was taken. Furthermore, the Minister of Finance still required that changes be made thereto, and the Treasury took the view that the draft LTTS prepared by SAA would not turn SAA around;

13.7

Considering whether to grant the guarantee extension, the Ministers failed to have regard to the domestic air transport policy, which specifically provided for how Government would deal with SAA and other participants in the domestic air transport market;

13.8

The Ministers did not consult with Comair prior to taking the extension decision;

13.9

The Ministers purported to grant the guarantee extension on 29 November 2013 and allowed SAA on the strength thereof to borrow at least R 1.7 billion for the purposes of working capital, and allowed for the extension of the terms for repayment of the R 1.54 billion. Yet, they only finally reached agreement on the conditions that would apply to the use of the guarantee in October 2014, and only advised SAA of these conditions thereafter.

14.

When dealing with factual allegations which have not been admitted I will follow the well-known approach to be taken in opposed motion proceedings where factual disputes arise as set out in ***Plascon-Evans Paints Ltd vs Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (AD) at 634***. The question in that context is whether the facts averred in the Applicant's affidavits which have been admitted by the Respondent, together with the facts alleged by the Respondent justify the order sought. I will also deal with the question of separation of powers in the context of this case, and the role of the Court in relation to policy decisions taken by the executive arm of Government. I have firm views on this topic which I will express. I will also deal with the correctness or otherwise of Comair's approach to this litigation namely that the extension decision, like the guarantee decision is administrative action within the ambit of the definition of ***s. 1*** of ***PAJA,*** alternatively that if it is not, the principle of legality applies in any event. I may immediately say that I do not agree that this is the correct approach. It is in my view jurisprudentially incorrect to regard ***PAJA*** and the legality principle as parallel bases for review, both equally

available to Courts in cases where public conduct could qualify as administrative action, and thus to treat the two bodies of law as free alternatives that one may pick and choose between at will, to use the phrase used by ***C. Hoexter, Administrative Law In South Africa 2ND Edition (2012) at 131.*** This so-called "free alternative trend" conflicts with clear precedent giving expression to an established general principle of constitutional adjudication.

See: ***Minister of Health vs New Clicks South Africa (Pty) Ltd 2006 (2) SA 311 (CC)***, ***par 92 and further***.

This means that ***PAJA*** should apply where it is applicable, and general norms such as legality may only be resorted once it has been determined that ***PAJA*** does not apply. The more general principle of constitutional adjudication - subsidiarity – determines that any legislation enacted pursuant to a constitutional command to give effect to constitutional rights, may not be circumvented in favour of direct reliance on the Constitution. This means that this principle is intended to ensure that Courts show due regard to the interpretation afforded a constitutional right by the legislature, and to avoid the development of parallel systems of law dealing with the

same subject matter. The whole topic is dealt with clearly and concisely by ***D. Brand and M. Murcott*** in ***Annual Survey Of South African Law, Juta & Company, 2013 at 61*** and further. I associate myself with the criticism of the so-called dual approach. It is jurisprudentially unsound.

15.

The ability to review the extension decision:

Comair submitted that the extension decision, like the guarantee decision is administrative action: it falls within the definition of ***s.1*** of ***PAJA,*** being the exercise by two Ministers of public power conferred by ***s. 70*** of the ***PFMA***, that has the capacity to affect legal rights, legitimate expectations or interests. It says that the nature of the decision does not fall within any of the exceptions to the definition of administrative action in ***PAJA***, and evidently does not constitute executive action. In this context they say that administrative action must therefore be lawful, reasonable, rational and procedurally fair. They submit that even if I were to hold that the

extension decision was not administrative action, but a species of executive action, the decision was certainly the exercise of a public power, and must therefore comply with the rule of law and its progeny, the principle of legality. This required the decision to be rational (this included the procedure leading to and the substance of the decision, which requires the consideration of relevant issues and material, and may include giving interested persons an opportunity to be heard), and it must be ***intra vires*** the empowering legislation. Moreover, where a decision has an effect on a party's legitimate expectations, our law has always held that the principles in relation to legitimate expectations would require such a party to have a hearing.

See: ***All-Pay Consolidated Investment Holdings (Pty) Ltd and Others vs Chief Executive Officer of the South African Social Security Agency and Others 2014 (1) SA 604 (CC) par. 60***, relying on ***Grey's Marine Hout Bay (Pty) Ltd and Others vs Minister of Public Works and Others 2005 (6) SA 313 (SCA) par. 23 and 24.***

16.

Competition Law issues:

On behalf of the First and Second Respondents it was submitted that Comair's complaints were wholly inter-twined with issues to be adjudicated by the ***Competition Act No 89 of 1998***. Absent a determination by the proper authorities that the competition issues raised by Comair were meritorious, Comair's cause of action, as pleaded, was not established. It did not assist Comair, so it was asserted, when the deficiencies in the case pleaded in the Founding Affidavit had been pointed out, to jettison the competition complaints comprising its cause of action as formulated in its founding papers. In its Founding Affidavit Comair identified the following "difficulty" with Government assistance to SAA: "It [the decision to grant the guarantee] not only is in violation of the Domestic Air Transport Policy, constituting unequal treatment, but... it clearly leads to a distortion of the market, because it requires no specific alteration by SAA of the very conduct that has caused its financial difficulties, and reflected great harm upon firms that compete under the commercial disciplines of the market." It is clear that throughout the

Founding Affidavit the issue is formulated in different guises, as Mr Gauntlett SC pointed out. At times it is construed as a violation of policy, then an infringement of the right to equality, unreasonableness and procedural unfairness. Comair itself said in this regard that "the situation is untenable as a matter of economics, sustainability of the industry, and the principles of competition and equality". Also throughout the founding papers Comair specifically referred to anti-competitive conduct, unfair advantages created by the impugned decision, inequality in the market, distortion of the market, SAA's dominance, anti-competitive effects including price predation, dumping of excess volume, poaching of passengers, and the need for pro-competitive conditions for maintaining and protecting competition in the industry. All these issues are of course Competition Law complaints, and many of the terms pleaded are defined and governed by the Competition Act. When the point of jurisdiction was raised by the Respondents in this context, namely that only the competition authorities had the jurisdiction to determine these issues, Comair made a U-turn, according to First and Second Respondents. However, even when seeking to found a review purportedly based on unreasonableness, irrationality and

procedural unfairness, Comair contended that those decisions led to a distortion of the market, prejudiced competitors, permitted SAA to compete unfairly etc. I agree with Mr Gauntlett SC that I have no jurisdiction to decide issues based on allegations which the competition authorities would have to investigate and determine them from a factual and a legal point of view. Comair did not ask that these issues be referred to the competition authorities in terms of the Competition Act. This Act does not contemplate concurrent jurisdiction. In ***Gcaba vs Minister for Safety and Security 2010 (1) SA 238 (CC)*** it was confirmed that the Constitution recognises the need for specificity and specialisation in a modern and complex society under the rule of law, and once a set of carefully crafted rules and structures have been created for the effective and speedy resolution of disputes and protection of rights in a particular area of law it is preferable to use that particular system. Any reliance on market distortion and anti-competitive behaviour must be dealt with in terms of the provisions of ***s. 65 (2)*** of the ***Competition Act***. This Court cannot entertain them. I will therefore not take any such allegations and references to concepts which fall within the ambit of the ***Competition Act*** into account, when

determining whether or not Comair has established the cause of action relied upon. I cannot however hold *in limine* that the whole of its cause of action is solely based on concepts that the competition authorities would have to deal with. Looked at it holistically, it is clear that Comair relies also on the mentioned provisions of ***PAJA*** and the principle of legality. I therefore propose to deal with its case on that basis alone.

17.

The interpretation of s. 70 of PFMA:

17.1

S. 70 of the Act reads as follows: "70. Guarantees, indemnities and securities by Cabinet members. – (1) A Cabinet member, with the written concurrence of the Minister (given either specifically in each case or generally with regard to a category of cases and subject to any conditions approved by the Minister), may issue a guarantee, indemnity or security which binds –

(a) the National Revenue Fund in respect of a financial commitment incurred or to be incurred by the National Executive; or

(b) a national public entity referred to in s. 66 (3) (c) in respect of a financial commitment incurred or to be incurred by a public entity.

(2) Any payment under a guarantee, indemnity or security issued in terms of –

(a) Subsection (1) (a), is a direct charge against the National Revenue Fund, and any such payment must in the first instance be defrayed from the Fund's budgeted for the Department that is concerned with the issue of the guarantee, indemnity or security in question; and

(b) Subsection (1) (b), is a charge against a national public entity concerned.

(3.) A Cabinet member who seeks the Minister's concurrence for the issue of a guarantee, indemnity or security in terms of (1) (a) or (b), must provide the Minister with all relevant information as the Minister may require regarding the issue of such guarantee, indemnity or security and the relevant financial commitment.

(4) The responsible Cabinet member must at least annually report the circumstances relating to any payments under a guarantee, indemnity or security

issued in terms of (1) (a) or (b), to the National Assembly for tabling in the National Assembly".

According to the definition section, the "Minister" is the Minister of Finance.

This section must be read together with ***s. 213*** of the ***Constitution*** which establishes a National Revenue Fund and which states in terms of s. 213 (2) that money may be withdrawn from the National Revenue Fund only –

(a) In terms of an appropriation by an act of parliament; or

(b) As a direct charge against the National Revenue Fund, when it is provided for in the Constitution or an act of parliament.

S. 218 of the ***Constitution*** provides for Government guarantees and states that a loan may only be guaranteed if the guarantee complies with any conditions set out in national legislation. Each year, every government must publish a report on the guarantees it has granted.

Comair submitted that s. 70 must be interpreted with due regard to ***s. 213 and 218 of the Constitution***, the principle of separation of powers and the Bill of Rights. It relied upon, amongst others, In re: ***Certification of the Constitution of the Republic***

of South Africa 1996 (4) SA 744 (CC) par. 109, where it was stated that the separation of powers principle includes "the principle of checks and balances [which] focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of Government from usurping power from one another." See also ***Doctors For Life Int vs Speaker of the National Assembly and Others 2006 (6) SA 416 (CC) par. 37***, where it was stated that the principle of separation of powers is not simply an abstract notion but was reflected in the very structure of our Government. Accordingly, so it was submitted, the ***Constitution*** made it clear that it is parliament that was vested with the primary competence to authorize payments from the National Revenue Fund, and indeed it was only an act of parliament that could allow charges against the National Revenue Fund other than by way of appropriation. It was for this reason that the power of appropriation was quintessentially a legislative function.

17.2

In the context of Applicant's argument that SAA would not be in a position to repay any loans made against a guarantee, and that the Ministers knew this or ought to

have known it, it is appropriate at this stage to emphasize what a "guarantee" is in terms of the provisions of s. 70. It is a means by which the guarantor undertakes to pay on the happening of a certain event but does not promise that that event will not happen.

See: ***Forsyth et al, Caney's The Law of Suretyship 6TH Edition (Juta & Company Ltd, 2010 at 34.***

It is correct, as was contended by Mr Gauntlett SC, that the Ministers did not need to have any optimism in this regard. It is the essential nature of a guarantee that it creates direct liability. Section 70 makes it abundantly clear that this is what was envisaged by the legislature.

This interpretation is of course relevant to the topic of whether the granting of a guarantee was irrational or not having regard to the dire financial affairs of SAA. It is clear that the word "guarantee" must be interpreted in the context of s. 70 as a whole, which in itself must be interpreted having regard to its purpose, keeping the provisions of ***s. 213 and 218*** of the ***Constitution*** in mind. The plain meaning of the word is also indicative of the fact that direct liability to pay is envisaged. For the

correct and modern approach to interpretation of a statute or document see: ***Natal Point Municipal Pension Fund vs Endumeni Municipality 2012 (4) SA 593 SCA at 602*** and further.

18.

Non-compliance with s. 70:

While conceding that the decisions were made pursuant to ***s. 70*** of the ***PFMA***, and that s. 70 indeed authorizes government guarantees, and accepting the constitutional validity of s. 70, Comair contended that the relevant decisions did not comply with s. 70. Comair submitted that its ground of review in this context was the Minister's failure to take account of the extant ***Domestic Air Transport Policy.*** With reference to the decision of ***MEC for Agriculture, Conservation, Environment and Land Affairs vs Sasol Oil (Pty) Ltd and Another 2006 (5) SA 483 (SCA) par. 19,*** it submitted that extant policies were relevant considerations which had to be taken into account by decision makers, and when Government had an extant policy that governed a particular area of its activity, it and its officials were not at liberty

simply to ignore that policy, and should seek to act in accordance with it, unless there was a reasonable basis for deviating from it, with such deviating basis being clearly articulated. It submitted that extant policies gave rise to legitimate expectations, which required decision makers to observe procedural fairness when any decision was taken to deviate from a policy or to amend it. It is common cause that the Ministers did not have regard to the policies relied upon Comair in this context and particularly the ***1990 Domestic Air Transport Policy ("DATP"), the 1991 Addendum, 1996 White Paper on National Transport Policy, and the 2006 Airlift Strategy***. It submitted that the key principles that flowed from these documents were that:

1.) Economic decisions in relation to the domestic air transport market should be left to competitive forces to resolve it;

2.) All the participants in the domestic air transport market should be treated equally by Government, in particular insofar as government contracts, financial support, reciprocal privileges, the rendering of uneconomical services, the strategic value of aircraft, etc. are concerned;

3.) SAA would not enjoy any privileges in terms of any legislation or any other practice as a result of it being a government enterprise;

4.) Government would not guarantee new loans to SAA or any other airline with government interest, whilst private airlines had to borrow at their own risk;

5.) SAA should operate on a sound commercial basis.

On this basis it was contended that the ***Domestic Air Transport Policy*** was materially relevant to whether or not the Minister should have provided a guarantee to allow SAA to obtain loans. The submission therefore was that before taking the extension decision the Minister should have properly considered the Policy, and only deviated therefrom on clearly articulated and reasonable grounds, and after affording affected parties a reasonable opportunity for submissions.

19.

Accordingly, Comair submitted that the failure to have regard to the relevant policy documents was a failure to have regard to relevant considerations in terms of ***s. 6***

(2) (e) (iii) of ***PAJA***, and also a failure which violated the terms of **s. 70 (3)** of the ***PFMA*** which required all relevant information to be placed before the Minister of Finance by the Minister of Public Enterprises at the time of issuing a guarantee. Comair submitted that the extension decision at least impacted on Comair's constitutional right to equality and rational regulation of the air transport industry, and the deviation from the policy occasioned by the extension decision impacted on its legitimate expectation that Government would act in accordance with its ***Domestic Air Transport Policy***. In this context it relied on ***Premier, Province of Mpumalanga and Another vs Executive Committee of the Association of Governing Bodies of State-Aided School – Eastern Transvaal 1999 (2) SA 91 (CC) at par. 41.***

20.

The unlawfulness arising from the failure to consider the Policy:

Comair submitted that this failure rendered the extension decision unlawful in that:

1.) There was a material failure to consider a relevant consideration in violation of ***s. 6 (2) (e) (iii) of PAJA***;

2.) It rendered the extension decision irrational and unreasonable, in terms of ***PAJA*** and/or the principle of legality;

3.) It rendered the decision to be in violation of **s. 70 (3)** of the ***PFMA*** since it evidenced a failure to place all relevant information before the Minister of Finance by the Minister of Public Enterprises at the time of taking the extension decision, and was accordingly also unlawful under **s. 6 (2) (i)** of ***PAJA*** and/or the principle of legality.

Given SAA's parlous financial position, at the time that the extension decision was taken, it was evident, or ought to have been reasonably evident, that SAA would be unable to repay the loans to be advanced against the guarantee as extended in perpetuity. Both Ministers admitted that SAA was, and is, in a dire financial position, and was technically insolvent. I may say at this stage that the affidavits are abound with allegations and documentation and annexures relating to the financial position of SAA, and why it was in such a position. I do not propose to deal with these topics

in any great detail inasmuch as it is common cause on the papers that SAA was technically insolvent and had been so for some time. “Technical insolvency” in this context meant that its assets were less than its liabilities but that it was still able to pay its debts at least for a certain period, but not solely out of any profits. The extension decision was therefore *ultra vires* the Minister’s powers in terms of ***s. 70*** of the ***PFMA*** read together with ***s. 213 and 218*** of the ***Constitution*** and the principle of separation of powers, so it was argued. In any event, the decision was irrational and unreasonable as being in violation of ***s. 6 (f) (ii) and (h)*** of ***PAJA***. The crux of Comair’s argument in this context is that s. 70 is not a back-door mechanism to allow for payment of money from the National Revenue Fund by two Ministers, as they see fit. Whatever the worthiness of the cause the Ministers may wish to support, or whatever motive they may have to do so, this type of funding is the exclusive prerogative of parliament through a constitutionally compliant appropriation process. In this context reliance was again placed on the ***Certification of the Constitution of Republic of South Africa decision supra at par. 109*** where it was stated that “It seems plain that when a legislature…determines appropriations to be

made out of public funds, it is exercising its power that under our Constitution is a power peculiar to elective legislative bodies. It is a power that is exercised by democratically elected representatives after due deliberation." The separation of powers principle in this context prevented the branches of Government from usurping power from one another, so it was argued.

21.

The Ministers' and SAA's argument relating to s. 70 of the PFMA:

In this context I will deal with a number of contentions by Comair, SAA and the Ministers. Before doing so however I deem it convenient to repeat what the Minister of Finance considered appropriate considerations for a guarantee. The Minister makes a number of points which I deem to be material within the context of whether or not his decision amounted to administrative action, but also in the context of policy decisions that the Government is entitled to make when it decides to act in terms of ***s. 70*** of the ***PFMA***. In my view the language of ***s. 70*** of the ***PFMA*** is quite

clear, and its constitutionality is not being attacked in these proceedings. The crux of Comair's argument in this specific context is that the Minister's decision bypasses the various safeguards inherent in the parliamentary appropriation procedure, as they put it. The Minister of Finance (Minister P. Gordhan, as he then was) said that ***s. 70 (4)*** of the ***PFMA*** expressly provides for the manner in which parliament was required to oversee decisions taken in terms of s. 70. Any guarantee cannot and does not circumvent parliament therefore. It is a measure authorized by constitutionally-enabling legislation. A guarantee in terms of s. 70 is demonstrably not intended to bypass the ordinary budget process. Any direct funding given to SAA is subject to the same parliamentary oversight as any other. As far as Comair's argument relating to policy was concerned, he said that policies are there to guide government conduct, but cannot constrain it. He also added that one needed to take into account not only the actual financial position of SAA in the past or at the time, but needed to take into account commercial, infrastructural, macro-economic, public finance, human resources and state ownership considerations into account. These constituted a complex factual matrix which should not be divorced from the question

for adjudication: whether the government guarantee is reviewable, and not whether this Court agrees with the decision to grant the government guarantee.

22.

The Minister of Finance's affidavit:

The Minister (Minister Nene) in the Further Supplementary Affidavit, dated 21 November 2014 made the following assertion which I deem to be material to the outcome of this application, and which I have selected from the about 110 page affidavit:

22.1

Comair's case has no merit because it is based on flawed commercial and economic assumptions. It is limited to purely financial considerations and fails to take into account other overwhelming considerations in favour of granting the guarantee;

22.2

It also significantly misconceives the nature and rationale of the perpetual guarantee. The guarantee substitutes the guarantee previously attacked by Comair;

22.3

It is clear that in 2013 SAA had both a liquidity and insolvency problem. Whilst SAA had requested a two year guarantee, this would only have addressed the liquidity concern. To resolve the insolvency aspect, it was necessary to grant a perpetual guarantee. This is because equity requires there be no obligation to pay the capital or pay dividends. A time-limited guarantee would therefore imply that there was an obligation that all repayments must be made by the termination date. That is why the Treasury memorandum, was considered in this context, and concluded that a perpetual guarantee was required;

22.4

Comair's reliance on the binding nature of various government policies, was misconceived in law;

22.5

A decision taken by the Executive in the context of ***s. 70*** of the ***PFMA*** not only concerns itself with purely financial considerations, but such decisions are complex in nature, involving issues of public finance and economics. They are policy-laden and polycentric. The decisions have been deliberated on with the expert assistance of senior economists and other National Treasury officials;

22.6

The decisions are hard decisions made by Government of the day in circumstances prevailing at the time. It was not for a commercial competitor to second-guess these decisions;

22.7

Public interest and consumer interest were clearly not served by withdrawing all shareholders' assistance inasmuch as having regard to the nature of Comair's business, it would never be entirely competitive with SAA in any event;

22.8

Unlike an ordinary commercial enterprise, SAA served certain strategic state purposes and Government had wider responsibilities in this context. It was not only concerned with financial returns, but also with economics, development and equity impeditives. Thus immediate financial concerns were not decisive. (I may add at this stage that that is exactly the reason why I do not propose dealing with hundreds of pages of financial statements and other analyses concerning SAA's financial position or its ability to achieve a turnaround either within the immediate future or further down the line. It is common cause that SAA is technically insolvent and this requires no further debate);

22.9

Comair's case was premised on immediate financial considerations as they would apply to a fully capitalized and purely private airline. SAA was not such an enterprise;

22.10

Comair's argument was also misplaced inasmuch as the original guarantee was not merely extended, as it was put. It was replaced with a perpetual guarantee and the original guarantee had lapsed;

22.11

The perpetual guarantee had its own conditions attached to it which were intended to, and did, allow SAA to continue as a "going concern". There was accordingly no so-called violation of the original guarantee condition;

22.12

Subjecting the exercise of the executive s. 70 powers to Court scrutiny was inappropriate in the circumstances of this case, and would be inconsistent with the doctrine of separation of powers. Overwhelming public interest in exercising this statutory power conferred by ***s. 70*** of the ***PFMA*** warranted the original guarantee and the perpetual guarantee. Nothing in any of the policy documents relied upon imposed a legally-relevant fetter on the exercise of statutory powers. Recommendations and arguments of the Treasury were taken into account. Previous

guarantees were issued, and neither the Cabinet nor parliament had ever questioned this exercise or questioned the Minister's political and economic judgement. Any such decision did not mean that it must be popular with all sectors of society, or find favour with SAA's commercial competitors. Government was of the view that the decisions were demonstrably in the national interest. The LTTS and its effect on the commercial viability of SAA, cannot impact on the validity of the perpetual guarantee. A perpetual guarantee was deemed to be necessary having regard to the history of SAA's affairs, and its envisaged future, and Government was entitled to assess the situation as it develops from time to time.

It is my view that the Minister put the crux of his argument as follows (par. 132 of the affidavit): "The correct review test gives effect to the separation of powers. In this context this constitutional principle requires that Government be permitted to exercise ***s. 70*** of the ***PFMA*** in order to protect with the guarantees as strategic asset in the form of a national carrier entrusted with important developmental priorities. That financial considerations may operate as countervailing consideration is not a review ground. Financial considerations have been identified, assessed and

considered. They are qualitatively and quantitatively outweighed by more pressing considerations. Financial risks are also mitigated by the conditions imposed by my predecessors' concurrence..."

23.

I must emphasize that it is not for a Court to decide whether or not the Government is right in regarding SAA as a strategic asset or not. It is also not for me to decide whether I would have taken different decisions relating to the viability of SAA and its future. I may have decided to engage strategic partners, as this topic was also debated, and I may have decided to sell off certain of its subsections, and I may have decided to make it more compact and competitive. This is all irrelevant in my view. If a government takes a lawful policy decision, it is not for a Court to decide otherwise. Fortunately, I must add. I cannot second-guess or dispute the Minister's opinion that SAA serves wider developmental and national needs. Its disorderly failure would probably impact drastically on the South African economy, and in the

assessment of National Treasury, which is the guardian of the South African economy, SAA's disorderly demise would be disastrous. It is his view that neither Minister was bound to "support" the various policy documents relied on by Comair, especially not in preference to the ***PFMA***. The ***PFMA*** was constitutionally ordained legislation. It governs the impugned decision. It also provides that it prevails in the event of any inconsistency between itself and any other legislation by way of the provisions of s. 3 (3). It is obvious that a policy cannot qualify as legislation. The crux really is, in his view, that a decision contemplated by s. 70 is a complex one which presents multi-faceted considerations bearing on Government's developmental goals, the impact on the national economy, job creation and the balance of payments amongst others. Most experts' opinion that Comair relied upon concerned themselves merely with pure financial considerations, but this was not the correct test to apply when deciding what was necessary in the particular context. The conditions imposed provided sufficient safeguards in his opinion, and it is clear from the information before him and his predecessor, that months of research, analysis, deliberation, negotiation and re-evaluation preceded the consensus that

was reached between him and the Minister of Public Enterprises. He concurred in writing and the requirements of s. 70 were fully complied with.

24.

I cannot fault the Minister's reasoning in this context. There is nothing in ***s. 70*** of the ***PFMA*** which implies that it may only be resorted to when it is reasonably certain that a guarantee will not be called up. Had the ***Constitution*** or the ***PFMA*** intended that a guarantee should only be issued where payments would not be made under it, ***s. 70 (4)*** of the ***PFMA*** would therefore be redundant. This cannot be a correct principle of construction of a Statute.

See***: Steyn, Die Uitleg Van Wette 5th Edition, Juta and Company 1981, at 119 and 226***.

Also, neither rationality nor reasonableness warrants a commercial competitor's attempt to achieve a judicial intervention in public finance decisions by the Ministers.

Reliance on "commercial irrationality" is also misplaced. The evidence of economists in this application is extremely interesting and enlightening but certainly not decisive.

See: ***Du Plessis vs De Klerk 1996 (3) SA 850 (CC) at par. 180***: "The judicial function simply does not lend itself to the kinds of factual enquiries, cost-benefit analysis, political compromises, investigations of administrative/enforcement capacities, implementation strategies, and budget priority decisions which appropriate decision-making on social, economic and political questions requires." I agree with Mr Gauntlett SC that a s. 70 enquiry is not a commercial or private financial one. It is an economic or public finance one. The question is not whether in rand and cent terms it is the best solution for SAA, Comair, or the shareholder, or chartered accountant of either. The question is whether – in the Minister's estimation – the immense importance of SAA's strategic role to the South African economy warrants shareholder support in the form of a government guarantee.

See also: ***Minister of Home Affairs vs Scalabrini Centre 2013 (6) SA 421 (SCA) at par. 5***: "It is not the providence of Courts, when judging the administration, to make their own evaluation of the public good, or to substitute the personal assessment of

the social and economic advantage of a decision. We should not expect Judges therefore to decide whether the country should join a common currency or to set a level of taxation. These are matters of policy and the preserve of other branches of government and courts are not constitutionally competent to engage in them." (Quoted by ***G. Hoexter, Administrative Law in South Africa, 2nd Edition p. 148***). I may of course add on a lighter note that most Judges would of course gladly have something to say about the level of taxation, but if they say that they must do so in the tearoom and not in a judgment. In the same vain one can refer to the dicta in ***Ekhuruleni Metropolitan Municipality vs Dada N. O. 2009 (4) SA 463 (SCA) at par. 1, 10*** and ***13 and Offit Enterprises (PTY) Ltd vs Coega Development Corporation 2010 (4) SA 242 (SCA) at par. 48***.

25.

The correct legal position on government policy:

It is clear from all the affidavits filed in these proceedings that Comair to a very large extent relies on policy documents of the Government, and via that route attempts to establish a cause of action within the framework of ***PAJA***. It is therefore necessary in my view to deal with the correct legal position. I intend referring only to the most relevant considerations.

25.1

Policy may not emasculate the power of the authorized decision maker.

See: ***Akani Garden Route (Pty) Ltd vs Pinnacle Point Casino (Pty) Ltd 2001 (4) SA 501 (SCA) at par. 7***, where Harms JA said the following: ""Government policy" is inherently vague and may bear different meanings…I do not consider it prudent to define the word either in general or in the context of the Act. I prefer to begin by stating the obvious, namely that laws, regulations and rules are legislative instruments, whereas policy determinations are not. As a matter of sound government, in order to bind the public, policy should normally be reflected in such

instruments. Policy determinations cannot override, amend or be in conflict with laws (including subordinate legislation). Otherwise the separation between legislature and executive will disappear."

This approach was endorsed by the Constitutional Court which also held that a policy must be consistent with the operative legislative framework. It serves as a guide to decision-making and may not bind the decision-maker inflexibly.

See: ***Arun Property Development vs Cape Town City 2015 (2) SA 584 (CC) at 601 par. 45 - 46***.

It is clear that the relevant policies invoked by Comair were not adopted under the authorizing Act, the ***PFMA***. The policies cannot amend, dilute or undo s. 70 of the ***PFMA***;

25.2

Policies cannot supplant the statutory provisions which are sole source of the ambit of the power of any procedure related to it.

See: ***Computer Investor's Group Inc vs Minister of Finance 1979 (1) SA 879 (T) at 898 C - E***: "Where a discretion has been conferred upon a public body by a

statutory provision, such a body may lay down a general principle for its general guidance, but it may not treat this principle as a hard and fast rule to be applied invariably in every case. At most it can only be a guiding principle, and in no way decisive. Every case that is presented to the public body for its decision must be considered on its merits. In considering the matter the public body may (I underline)have regard to a general principle, but only as a guide, not as a decisive factor." This exposition on the law was also confirmed in - ***(Pty) Ltd vs Deputy Director General, Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management 2006 (2) SA 191 (SCA) at par. 10***. I therefore do not agree with Comair's approach that the Ministers were obliged to have had regard to the policies;

25.3

Policies therefore cannot constrain the exercise of a discretion or detract from a duty conferred by a statutory provision. This point is related to the first mentioned. A good South African authority is ***Baxter, Administrative Law, Juta and Company Ltd 1984, at 6*** and the decision of the ***House of Lords in R v (Alconberry***

Developments Ltd) vs Secretary of State for the Government, Transport and the Regions, [2003] AC 295 (HL) par. 143. This case also addressed the situation where the policy is one made under the same Statute in terms of which the decision is to be made. Here, as Mr Gauntlett SC pointed out, Comair sought to transpose a shifting set of policy documents over more than 25 years pertaining to Transport, made under other Statutes, to a discretionary public finance decision by another Minister in terms of a section of another Statute, and one constrained only by ***s. 218 of the Constitution***. It is not permissible;

25.4

A policy may only be applied when it is compatible with the enabling legislation.

See: ***Baxter supra at 416.*** In this case the enabling legislation is ***s. 70*** of the ***PFMA***. This section does not authorize the formulation of transport policies, or contemplate its own dilution by transport policies. Accordingly this section cannot be interpreted or applied in a manner subservient to extraneous policies least of all, as Mr Gauntlett SC submitted, a compendium of policies comprising a mere addendum to a pre-constitutional policy a White Paper which never made it into Law, and an

expired strategy on airlifting. It is in any event clear from the policy documents themselves that they, in their own wording, provided for a flexible approach defending on the actual factual position from time to time, and unsurprisingly reserved the Government's right to intervene appropriately when national interest had to be considered, and the integration of SAA into the economy. In this context Minister Gordhan also stated that the interests of the country, as determined by Government, would not necessarily coincide with that of suppliers and consumers of aviation services.

The ***Airlift Strategy 2006*** says the following (at p. 12): "...SAA is unique in the South African environment as the only carrier that has extensive international, regional and domestic operations. Many of these actively promote the country's strategic interaction with the international community".

The Ministers could therefore not have adopted the approach Comair contended for. Had they done so, and considered themselves bound by a policy which is incompatible with the relevant enabling legislation, they would have taken into

account a consideration which in Law was not only irrelevant, but could not have been applied in the exercise of their statutory powers.

I do not therefore propose to deal with the wording of the policies themselves any further, but it is clear from a mere reading thereof that their text and the context do not support the case put forward by Comair. The ***Airlift Strategy of 2006*** clearly introduced the concept of national interests, and what those are, is for the Government to decide. They obviously change over time and no reasonable observer can expect that certain policies in relation to any particular topic, would strictly be adhered to regardless of national and global circumstances.

26.

Is the Minister's decision in terms of s. 70 of the PFMA an administrative action?:

In determining this question one must have regard to the actual wording of the section in the context of the Act, the mentioned constitutional provisions, and the

functions that the Ministers themselves have said that were performed and that are required by the particular section itself. An administrative action was described in broad terms in ***Grey's Marine Houtbaai (Pty) Ltd and Others vs Minister of Public Works and Others*** supra ***at par. 24***, as follows: "The conduct of the bureaucracy (whoever the bureaucratic functioning might be) in carrying out the daily functions of the State, which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals." Administrative action excludes the executive powers of Government, which clearly includes the formulation of government policy, but the implementation of policy is generally regarded as being administrative in nature.

See: ***Permanent Secretary, Department of Education and Welfare, Eastern Cape and Another vs Ed-U-College (PE) (s. 21) Inc. 2001 (2) SA 1 (CC) at par. 18***.

In ***Minister of Education vs Beauvallon Secondary School [2015] 1 All SA 542 (SCA)***, it was said by Leach JA at ***par. 12, p. 549***, that there is no simple litmus test to determine whether a decision by a public official is administrative or executive in nature, and in order to determine the issue a close analysis needs to be undertaken

of the nature of the public power or function in question in the light of the facts of each case. In doing so, it is important to remember that a decision heavily influenced by considerations of policy is a clear indication of it being executive rather than administrative, in nature.

Having regard to considerations that were present in the Minister's mind, the purpose and the ambit of ***s. 70*** of the ***PFMA,*** read with ***s.s 213 and 218*** of the ***Constitution,*** it is my view that the action of the Minister in issuing the perpetual guarantee or agreeing thereto was not of an administrative nature, but rather of an executive nature. The provisions of ***PAJA*** that Comair relies upon can therefore not be used to found a cause of action. It is of course obvious however that the relevant Ministers, when utilising ***s. 70*** of the ***PFMA***, must act lawfully, and there's no doubt about that. The Ministers said that there was agreement in relation to the conditions, and Comair has contended the contrary. Applying the ***Plascon Evans*** test supra I cannot hold that there was no such agreement. The conditions were agreed upon much later, but this cannot be an issue in my view. I do not agree with Mr Unterhalter SC on behalf of Comair, who submitted that both the requesting Minister,

and the minister of Finance must agree on the conditions on which a guarantee will be provided, and that this must be done at the particular time of the guarantee. Section 70 does not say so, and it cannot be so interpreted on a proper interpretation of the section, and in the context of the Act as a whole. The Act falls solely under the auspices of the Minister of Finance, and it is he or she who must determine the conditions having regard to all relevant factors, the object of the Act and the particular government purpose. The conditions were imposed on SAA and these also qualify the terms of the guarantee. Mr Gauntlett SC submitted that Comair has no legitimate concern in whether the conditions, which were indisputably imposed, and had been agreed upon, had been conveyed promptly, perfectly and in *pari passu* to either SAA or the Banks which provided the funds on the strength of the guarantee. Neither SAA nor the Banks have suffered any uncertainty as regards the operative conditions of either guarantee. No entity has demonstrated any prejudice to itself in this context and Comair certainly could not and did not. This point therefore raises no reviewable irregularity either. As regards the perpetual guarantee Comair contended that the Minister of Finance could not concur in

granting the perpetual guarantee, because the Minster of Public Enterprises had requested a fixed guarantee. Mr Gauntlett SC contended that neither in Contract Law nor in Public Law nor in logic does this argument apply. What was required by the section was that the decision makers reach consensus. The means for initiating the decision-making process and through which concurrence is reached are not prescribed, and cannot logically mirror each other. Section 70 (1) contemplates a meeting of the mind, he said, not a paper trail carbon copy. All that was required was that the Minister of Finance recorded his concurrence, at the conclusion of the decision making process in writing. This is what ***s. 70 (1)*** of the ***PFMA*** required, and I agree with his contention. A purely contractual approach to this topic is out of place. Both Ministers had deposed that they had indeed reached consensus in the terms recorded by the Minister of Finance. This puts the matter beyond question because concurrence is not a matter of form but of fact. The decisions recorded in the Minister of Finance's concurrence and confirmed on affidavit by both Ministers are accordingly not capable of contestation.

27.

Alleged violation of constitutional rights:

Comair in this context relies on the provisions of ***s. 9 (1) and s. 22*** of the ***Constitution***. Mr Gauntlett SC contended that because of the operation of the doctrine of avoidance and the principle of subsidiarity, this challenge does not properly arise. There is no doubt in our law that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is a cause which should be followed.

See: ***S vs Mhlungu 1995 (3) SA 867 (CC) at 895 E*** and ***Motsepe vs Commissioner for Inland Revenue 1997 (2) SA 898 (CC) at 908 D – E***.

In ***Minister of Health vs New Clicks South Africa (Pty) Ltd 2006 (2) SA 311 (CC) par. 437***, the following was said in this context: "Where, as here, the Constitution requires parliament to enact legislation to give effect to the constitutional rights guaranteed in the Constitution, and the parliament enacts such legislation, it will ordinarily be impermissible for a litigant to found a cause of action directly on the Constitution without alleging that the Statute in question is deficient in the remedies

that it provides. Legislation enacted by parliament to give effect to a constitutional right ought not to be ignored. And where a litigant founds a cause of action on such legislation, it is equally impermissible for a Court to bypass the legislation and to decide the matter on the basis of the constitutional provision that is being given effect to by the legislation in question." Accordingly, in relation to ***s. 9*** of the ***Constitution***, Applicant had to make out a case justiciable before this Court in terms of the ***Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000***. In relation to s. 22, in the light of the pleadings, the applicable legislation would be the ***Competition Act 89 of 1998***. I agree with this submission, and may add that during argument Mr Unterhalter SC did not place much reliance, if any, on this argument.

28.

In the light of the above the conclusion is unavoidable that the Ministers acted lawfully when guaranteeing the loan in perpetuity. The provisions of ***PAJA*** do not apply. In any event, Comair has not made out a case which would seek the granting

of relief in terms of ***PAJA***. The policies relied on do not establish a legitimate expectation either to be heard or consulted, or that they would be followed irrespective of the relevant facts that Government needed to consider. The policies expressly recognised the dynamic nature of the market and the need for flexibility, and the ***SAA Act*** in turn describes SAA as a strategic asset. (See the third recital to the preamble to the ***South African Airways Act 5 of 2007***). Having regard to the past granting of guarantees and taking a holistic view of these considerations, there could never have been a reasonable expectation that the Ministers would not intervene in the drastic circumstances which Comair itself conceded applied, when the relevant decisions were made. In any event, any such representation, if there was one, was made by the Department of Transport and not by the two decision makers. Also, any representation made must be competent and lawful. This requirement is also not met because it is not competent in law for Cabinet Ministers to fetter their constitutional statutory duties and functions, as I have already said with reference to the ***Food Corp*** supra. It is therefore my finding that the facts clearly do not support a basis for forming a legitimate expectation. Comair was also in any

event unable to plead the necessary requirements to establish such a legitimate expectation in its Founding Affidavit. The doctrine must be pleaded properly. See: ***South African Veterinary Council vs Szymanski 2003 (4) SA 42 (SCA) at par. 11 and 13***, and ***Walele vs City of Cape Town 2008 (6) SA 129 (CC) at par. 36***. Whether or not a legitimate expectation exists is a question of fact to be determined in the prevailing circumstances in which it is asserted. The test is objective.

See: ***President of the Republic of South Africa vs South African Rugby and Football Union 2000 (1) SA 1 (CC) at par. 216***. I therefore agree with Mr Gauntlett SC that Comair's conceptualisation of a legitimate expectation based on quotations from policy – despite the quotations departing from established practice, and despite the policy not emanating from the decision makers, and not amounting to a representation by either decision makers to Comair, is contrary to binding South African case law. It is accepted that only the clearest of assurances can give rise to a legitimate expectation. The policy documents contain no categorical assurance. In any event it is clear that the policies were evolving. There is therefore no merit in this ground for review.

29.

Irrationality of the decision in the context of the principle of legality:

Having regard to the perilous financial situation of SAA, it was submitted that the decision to grant the perpetual guarantee was irrational, because the extension decision, in the light of the dire straits of SAA, could not be located in any rational scheme that would achieve the objects of the ***PFMA.***

It is clear that the exercise of public power must comply with the doctrine of legality. The executive (in this context) may exercise no power and perform no function beyond that conferred upon it by law. Any decision taken must be rationally related to the purpose for which the power was conferred.

See: ***Pharmaceutical Manufacturers Association of South Africa and another: In re Ex parte President of the Republic of South Africa 2000 (2) SA 674 CC par. 84, Affordable Medicines Trust and Others vs Minister of Health and Others 2006 (3) SA 247 CC at par. 49, and Democratic Alliance vs President of the Republic of South Africa 2012 (1) SA 417 SCA at 445 – 446.***

I have already mentioned the number of considerations that the Ministers had in mind when agreeing to issue the perpetual guarantee, which went beyond the purely financial aspects. For instance, SAA as a national carrier with a mandate that requires it not to operate for purely commercial gain, but also to operate routes that are not profitable in order to support the strategic interests of South Africa. As part of the developing turn-around strategy, such routes would either be discontinued in the future, or possibly 'ring-fenced'. On behalf of the Fifth Respondent Mr Maenetje SC said that there was no doubt that in the absence of shareholder support, SAA would not be able to continue to operate. This would be detrimental to the South African economy and strategic objectives, given its contribution to South Africa generally and the gross domestic product.

I have read the divergent views of a number of experts in this context. A number of inescapable facts however must not be forgotten: Comair does not compete with SAA internationally, and could not transport the international tourists to South Africa. It could not convey the cargo to-and-from South Africa. It could not assimilate the

dozens of service providers to SAA and the many thousands of employees, nor could any other airline on short to medium notice.

Furthermore, the possible or even probable inability to pay by the requester of a loan in the context of ***s. 70*** of the ***PFMA*** is an inherent factor in the authority given to the Ministers to guarantee such a loan. It is constitutionally envisaged and permitted. Amongst others, ***s. 70 (4)*** of the ***PFMA*** makes this abundantly clear.

I agree with that submission. Any optimism or pessimism regarding the recipients' ability to re-pay any loan is not a requirement for any relevant guarantee. ***Section 70*** and ***sections 213 and 218*** of the ***Constitution*** do not require this.

Having regard to all of the material that was before the Ministers at the time, and the whole history of SAA, I cannot say that the decision to guarantee loans on a perpetual basis subject to the stated (and perfectly rational conditions) is of such a nature that the purpose of the ***PFMA*** is not achieved, or cannot be achieved, as Mr Unterhalter SC submitted. I also keep in mind that members of the executive have a wide discretion in selecting means to achieve constitutionally permitted objectives and that courts may not interfere with the means selected simply because they do

not like them or because there are other appropriate means that could have been selected.

See: ***Abbott vs Centre for the Study of Violence and Reconciliation and Others 2010 (3) SA 293 CC at par. 51***.

The Ministers gave reasons why failure of SAA would have been catastrophic for all of its service providers and employees, tourists, trade to-and from South Africa and the economy as a whole, including the financial markets and South Africa's credibility therein. In my view these were permissible and relevant considerations in the present context and were mandated by the ***Constitution*** and the ***PFMA***. The Ministers therefore did act lawfully. Although they took most considerations into account then the mere financial ones contained in the Treasury Memorandum, they were in my view entitled to do so, if not obliged. That is part of the executive function herein: to carefully consider the wide ramifications of the failure of SAA. This they did. I have also kept in mind that an enquiry into rationality can be a slippery path that might easily take one inadvertently into assessing whether the decision is founded upon reason – in contra-distinction to one that is arbitrary –

which is different to whether it was reasonably made. All that is required is a rational connection between the power being exercised and the decision, and if that exists, a finding of objective irrationality will be rare.

See: ***Minister of Home Affairs vs Scalabini Centre supra at par. 65 – 66***

Whether a decision is rationally related to its purpose is a factual enquiry blended with a measure of judgement, it was held, and here courts are enjoined not to stray into executive territory.

The decision-making process must also be rational.

See: ***Democratic Alliance vs President of the Republic of South Africa,*** supra ***at par. 12.***

Mr Unterhalter SC contended that the Minister of Finance did not sufficiently weigh-up the financial aspects referred to in the Treasury Memorandum versus the other factors that moved him to concur in the request for a guarantee. Although he did give reasons for his decision, so he submitted, he did not show in his affidavit how this assessment was made. A mere tabulation of relevant factors was not enough. This may well be so in certain cases but a holistic reading of the First and Second

Respondents' affidavits do in my view give sufficient details of the process of decision-making involved, in which a number of government departments had also made a contribution, including the Department of Tourism. I cannot find therefore that the process was irrational.

30.

Sixth to Eighth Respondents' arguments:

These Respondents were joined on 18 March 2015. They filed affidavits and raised certain issues pertaining to the relief sought in the main application. All had made individual loans to SAA which were backed by a written guarantee of the Government, as represented by the First and Second Respondents. They submitted that if I were to grant prayer 1, i.e. declaring the guarantee unlawful, I ought to make the order prospective only, so that the individual guarantees would not be affected. Applicant agreed in a supplementary affidavit that "Comair is willing to agree that the declaration of inability and the setting aside of the Guarantee has a prospective

effect, and a declaration that the Bank-specific guarantees already granted remain valid, so as to ensure that the security for loans already granted is protected".

This ought to have been the end of the Banks' interest in the proceedings, but further points were raised which I will briefly deal with.

30.1

On behalf of the Seventh Respondent Mr Loxton SC submitted that in the context of prayers 1 and 2, Comair had made a distinction between the decisions in the terms of which the guarantee was purportedly issued and then extended, and the guarantee itself. The guarantee did not form part of the record and did not exist. Prayers 2 and 3 of the Notice of Motion were incompetent and the whole debate about the effect of the suspension of the setting aside of the guarantee was pointless. Mr Chaskalson SC on behalf of Nedbank associated himself with this argument with a good measure of glee, although this was not raised in the Bank's Answering Affidavit made on 27 April 2015. There is no merit in this argument, and it completely ignores the commercial realities inherent in the process of a Bank-specific guarantee, and what the Ministers had said in their affidavits. In Nedbank's

own affidavit the following appears: "20.1 The banks in this matter lent billions of Rands to SAA relying on government's decision to provide a R 5, 006 billion guarantee to SAA. They extended loans on the particular terms contained in their respective loan agreements to an entity that was at the time factually insolvent, only because their loans would be secured by the government". The Minister of Finance admitted that he had made the relevant guarantee decision in terms of ***s. 7 (1) (a)*** of the ***PFMA***. He also concurred in the granting of the perpetual guarantee, he said. The same confirmation was made by the Minister of Public Enterprises in his (her) affidavits. In the 2014 Budget Review of the National Treasury the same factual assertion was made. The ***Treasury Memorandum of 30 October 2013*** confirmed that a guarantee had been issued. The Annual Financial Statements of 2013 of SAA, dated February 2014, reflected this as well. Standard Bank said so in its own affidavit, and so did ABSA in its, although it had not been joined as a Respondent. Also, on 28 September 2012, the Second Respondent wrote to SAA saying that the Minister of Finance had provided his concurrence for a government guarantee of R 5, 005 billion effective from 1 September 2012 to 30 September 2014.

In the light of these undisputed facts I am not inspired by this belated argument, and it was not justified on the affidavits before me. It must be remembered that the guarantee/perpetual guarantee was given to SAA via the responsible Minister. On the strength of those guarantees SAA approaches the financial market for a loan, which is then guaranteed in writing by the particular Ministers on behalf of the Government. This is the practical way in which ***s. 70*** of the ***PFMA*** functions.

30.2

Nedbank also belatedly objected to Comair's standing herein. Apart from a mere reference thereto in the First Answering Affidavit of the Minister of Public Enterprises, this was never an issue in the further affidavits or the proceedings before me. Mr Chaskalson SC submitted that no-one had the standing to challenge the Ministers' decision in the context of ***s. 70*** of the ***PFMA*** as this could only be done through a parliamentary process in terms of the ***Money Bills Amendment Procedure and Related Matters Act No. 9 of 2009***. In my view this Act would not apply to such a challenge as is clear from s. 3 thereof. Mr Unterhalter SC in turn asked by which process one had to approach Parliament and when, given the

provisions of ***s. 70 (4)*** of the ***PFMA***? There is no merit in this objection. The jurisdiction of a Court is not easily ousted, and in the given context, where Comair has challenged the legality of the particular decisions, it would have standing both in its own interests and in the interests of the public, as public money was involved.

Section 38 of the ***Constitution*** has undoubtedly been given an expansive interpretation.

See: ***Kruger vs President of the Republic of South Africa, supra at par. 23.***

31.

Costs:

Applicant contended that it had acted in its own interests herein as well as in the public interest. If it was not successful I ought not to make a costs order against it on the basis of various considerations held to be relevant in ***Biowatch Trust vs Registrar, Genetic Resources 2009 (6) SA 232 CC***. The main Respondents contended that Comair had acted mainly in its own commercial interest and had, at

least to some appreciable extent, based its cause of action on topics that had to be dealt with by Competition Law authorities. The phraseology used in the Founding Affidavit clearly indicates this to be so, but it is also perfectly obvious that considering all of the Applicant's affidavits holistically, the main thrust of the challenge was aimed at the Ministers' decision in the context of ***s. 70*** of the ***PFMA***, and the whole process involved in such decisions. This was a constitutional issue in the context of the principle of legality. This was not a spurious challenge. There was no prior judicial pronouncement on the interpretation of s. 70, and the topic is clearly in the public interest inasmuch as public funds are involved. The Applicant was entitled to raise its concerns in Court. The perpetual guarantee was given by the Ministers shortly before the application in respect of the first guarantee was to be heard. This, by necessity, involved the filing of further substantial affidavits and an analysis of the information that was before the Ministers at the time of their decision. It is my view that from an *ex post facto* point of view, the proceedings could have been curtailed substantially if all necessary information/documentation had been made available to Comair timeously and more completely, also in respect of the

specific guarantees later given to the Bank Respondents. Too many resources were spent, and too much time expanded (but not in Court) on the various financial experts, aviation experts and economists, when it ought to have been clear to all the parties that SAA was in fact insolvent, that this did not have to be debated further, and that the crux of the case was whether under those circumstances the Ministers were lawfully entitled to guarantee the loans as they did.

The views raised in these proceedings were genuine, substantive and complex. In my view Comair should not be mulcted in costs because it was unsuccessful. It penned a genuine constitutional claim. The Bank Respondents contended that Applicant ought to bear their costs. They are the “innocent parties” herein so I was told. They were joined as Respondents at a rather late stage, but there is also clear evidence that they had known about this litigation for many months. Their interest was limited to the relief sought, but issues were raised in the affidavits that went beyond that interest. They also preferred to attend the Court hearing throughout. I have weighed-up all competing interests in this context and deem it fair if no cost order is made in respect of these Respondents either.

32.

The result is therefore the following:

1. **The application is dismissed.**

2. **No order as to costs is made.**

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JUDGE H.J FABRICIUS

JUDGE OF THE GAUTENG HIGH COURT, PRETORIA DIVISION

Case no.: 13034/13

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Heard on: 5, 7, 8 & 14 May 2015

Date of Judgment: 01/06/2015 at 10:00