SA Airlink (Pty) Ltd v South African Airways (SOC) Limited (In Business Rescue) and others [2020] JOL 49059 (SCA)

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 238/2020

In the matter between:

SA AIRLINK (PTY) LTD **APPELLANT**

and

SOUTH AFRICAN AIRWAYS (SOC) LIMITED (in Business Rescue) **FIRST RESPONDENT**

LESLIE MATUSON N.O. **SECOND RESPONDENT**

SIVIWE DONGWANA N.O. **THIRD RESPONDENT**

Neutral citation: *SA Airlink v SAA (SOC) Limited and Others* (238/2020) [2020] ZASCA 156 (30 November 2020)

Coram: MAYA P, DAMBUZA, VAN DER MERWE, MAKGOKA, and SCHIPPERS JJA

Heard: 4 September 2020

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email publication on the Supreme Court

of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 30 November 2020.

Summary: Company Law – business rescue – revenue received by first respondent shortly prior to being placed under business rescue – appellant precluded from instituting legal proceedings against first respondent (in business rescue) for recovery of such revenue without the consent of the business rescue practitioners or leave of the court – revenue a debt owed by first respondent to the appellant and not property of appellant – appeal dismissed with costs.

ORDER

On appeal from: Gauteng High Court, Johannesburg (Kathree-Setiloane J sitting as court of first instance):

The appeal is dismissed with costs, including the employment of two counsel.

JUDGMENT

Dambuza JA (Maya P, Van der Merwe, Makgoka, Schippers JJA concurring)

Introduction

[1] The issue in this appeal is whether certain moneys paid to the first respondent, South African Airways (SOC) Limited (SAA), prior to it being placed under business rescue, should be released to the appellant, South African Airlink (Pty) Limited (Airlink). Airlink appeals against an order of the Gauteng High Court, Johannesburg, (Kathree-Setiloane J) (high court), in terms of which its application for an order that the moneys in question be paid to it was dismissed. The appeal is with the leave of the high court.

Background

[2] For almost 20 years prior to 5 December 2019, Airlink and SAA conducted their businesses as air transportation providers in alliance with each other. Their relationship was founded on an Alliance Agreement which formed the framework within which several other agreements, the

operational agreements, comprising two licence agreements[1] and a Commercial Agreement, regulated their operations.

[3] Of specific relevance to this appeal were the parties' obligations under the Commercial Agreement. This agreement regulated matters such as the agreed spheres of operation, routes and flight scheduling, use by Airlink of SAA's computer software, marketing, communications, public relations and sales obligations.

[4] Under the Licensing and Commercial Agreements Airlink was granted a licence to use SAA's 'SA8 designator'[2] and related intellectual property at a basic fee and a continuing royalty of one percent of Airlink's flown revenue.[3] In terms of the Commercial Agreement, Airlink's passengers could book and pay for their flights through SAA's ticket booking and revenue collection platforms. SAA would then remit to Airlink, periodically, the moneys received for the Airlink ticket sales, less commissions and fees due to SAA, as well as levies, charges and taxes collected by SAA, for which Airlink was liable to the Civil Aviation Authorities.

[5] During each month passengers could book and pay for Airlink tickets through SAA operated systems.[4] SAA would only pay over to Airlink the

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[1] The Licence Agreement and the Licence Agreement Africa.
[2] Defined in the licencing agreement as the 'SA designator "SA"'.
[3] Clause 1 of the Commercial Agreement.
[4] Clause 6 in Appendix 3 to the Commercial Agreement provided as follows:
'**6 TICKETING**
6.1 SAA will provide customers who wish to travel on Airlink scheduled flights, ticket services at all airport and off-airport SAA worldwide ticketing locations. SAA will issue such tickets on SAA stock. Similarly Airlink will provide customers wishing to travel on SAA scheduled flights, ticket services at all airports where Airlink is not handled by SAA, all subject to the following conditions:
6.1.1 Airlink will update SAAFARI on a daily basis on all manually issued tickets, to provide a proper electronic sales report to enable SAA to account for such transactions in its general ledger. Totals of sales,

revenue received for these ticket sales on the 7th working day of the following month. Thereafter, on the 15th working day of the month, SAA would pay to Airlink the balance between the revenue paid on the 7th day and other moneys which would have been processed for the given month of operation.[5] To ameliorate the cash flow constraints that would be occasioned by Airlink whilst waiting for SAA to account and pay over moneys received by it for tickets sold in a specific month, SAA would make a prepayment to Airlink of an amount computed on an advance sales formula.[6]

[6] On 5 December 2019, SAA was placed under business rescue in terms of s 131(4)*(a)* of the Companies Act 71 of 2008 (the Act). The second and third respondents, Mr Matuson and Mr Dongwana, were appointed on 5 November 2019 and 17 November 2019, respectively, as joint business rescue practitioners for SAA as provided in s 129(3*)(b)* of the Act.

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cash, credit and debtor's transactions will be faxed to the SAA Head Office on a daily basis, in a format agreed from time to time.
. . . .'

[5] This was regulated in clause 8 of the Commercial Agreement as follows:
'8 **REVENUE ACCOUNTING**
8.1 SAA will provide Revenue Accounting and Ticket Audit functions for Airlink's sales transactions. In order to allow Airlink to reconcile its revenues, SAA will provide monthly electronic transfers to Airlink on all Airlinks' Revenue Accounting and Ticketing data, including, but not limited to, ticket data, sales data, prorates data, BSP data, etc.
. . .
8.13 Payments by SAA to Airlink with respect to all Airlink tickets lifted and processed by SAA shall be made on the basis that a prepayment shall be established and made by SAA to Airlink based on the following principles:
8.13.1 . . .
8.13.2 Payment in respect of Airlink tickets flown will be paid on the 7th working day of the relevant month.
8.13.3 Payment in respect of the balance between the above and revenue that has been processed for the given month of operation will be paid over on the 15th (fifteenth) working day of the following month by direct bank deposit.
8.13.4 Earned revenues shall include Airlink's lifted coupons, MCO's and excess baggage. SAA has the right to offset from amounts paid to Airlink any amounts due to SAA.
. . . .'

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

[7] It was not in dispute that prior to being placed under business rescue SAA had received moneys for Airlink tickets sales conducted during November 2019 up to 5 December 2019.[7] On 6 December 2019, a day after being placed under business rescue, SAA transmitted to Airlink a statement of account in respect of a 'prelim[inary] payment' that was due to Airlink on 10 December 2019, that being the seventh working day in respect of the revenue received during November 2019.

[8] It appears that prior to 5 December 2019 SAA's impending business rescue or its perilous financial state had been discussed between the parties. In a letter dated 10 December 2019, headed 'Proposal regarding restructure of alliance relationship', Airlink, through its Chief Executive Officer and Managing Director, Mr Rodger Foster, referred to a proposal that Airlink had made to SAA's Board Implementation Committee on 8 November (2019), to which SAA had not responded. Having expressed concern about the risk to it as a result of SAA being placed under business rescue, Airlink gave SAA six months' notice of cancellation of the Alliance Agreements. The effective date of cancellation would be 10 June 2020.

[9] In the letter Airlink proposed that:

'. . . the franchise system be restructured as a code share agreement whereby Airlink - operated flights can still be booked through the SAA – operated SA8 system as allocated to Airlink but will also be available on the Airlink operated 4Z system.'

[7] The amounts owing were in dispute. However that is not relevant to the issues before us.

At the same time Airlink reserved its right to claim moneys due by SAA to it under the Alliance Agreement.

[10] On 11 December 2019, Airlink gave SAA seven days within which to pay the moneys accounted for in the statement of account dated 6 December 2019, failing which it would terminate the Alliance Agreements without further notice. However, on the same day Airlink revoked the summary termination. An 'Ad Hoc Agreement' was reached that the Alliance Agreements would remain in force 'until terminated in accordance with their own terms and [would] be complied with by the parties subject to the provisions of the Ad Hoc Agreement and the provisions of Chapter 6 of the Companies Act'. The main feature of the Ad Hoc Agreement was that SAA would immediately make payment to Airlink in respect of flown revenue received for the period 6 to 11 December 2019 and would, thereafter, make daily payments in respect of flown revenue received on each day from 12 December 2019. On 13 December 2019, SAA generated a statement in respect of moneys due to Airlink in respect of unflown revenue[8] for May 2018.

[11] Throughout the negotiations and the ultimate re-arrangement of their business relationship subsequent to the business rescue, SAA and Airlink disagreed on whether Airlink was entitled to payment of the November-early December 2019 ticket sales revenue (that is, the revenue received by SAA for

[8] These are moneys held by SAA in respect of air tickets whose owners had failed to present themselves for their respective flights. In this regard SAA's policy was different from Airlink's in that with SAA the customer could still re-use his or her ticket for some time after the originally booked flight, depending on the rules applicable to the ticket. If the customer failed to use the ticket within the stipulated period the money attached to the ticket would be released to revenue. In practice SAA would raise a liability once a customer failed to present him or herself but would only release the funds to Airlink after 18 months. This was so even though Airlink's rules provided that a customer had no right to re-use the ticket and the money became forfeited immediately when a customer failed to present herself.

Airlink ticket sales during the accounting period immediately preceding the commencement of business rescue). In a letter to SAA dated 17 December 2019, Airlink rejected the position adopted by the second respondent, who was the only business rescue practitioner appointed for SAA at the time, that the revenue constituted a pre-commencement debt owed by SAA and could, therefore, not be paid to Airlink. Airlink maintained that this revenue was not a 'debt owed' by SAA as envisaged in s 154(2) of the Act. Consequently, Airlink considered itself entitled to immediate payment of the moneys.

[12] On 18 December 2019, SAA provided Airlink with a reconciliation statement in relation to the November-early December flown ticket sales revenue, showing that R430 000 838.80 had been payable to Airlink for the pre-commencement period. Airlink disputed the correctness of this amount. On 17 January 2020, Airlink launched an urgent application against SAA in the high court seeking to recover the November-early December revenue, the amount set forth in the 18 December 2019 statement of account and the unflown revenue.

The high court proceedings

[13] As forewarned in the correspondence that preceded the high court application, the relief sought by Airlink was premised on SAA having held the claimed revenue as an agent of Airlink. The argument was that in relation to ticket sales and revenue collection, the business relationship between SAA and Airlink was that of agency, because SAA had an obligation to pay the funds to Airlink after deduction of commission, royalties and service charges.

[14] The high court rejected Airlink's agency argument. It found no evidence to support the contention that the funds belonged to Airlink and were held by SAA on behalf of Airlink. That court also found that in terms of Clause 12.2 of the Commercial Agreement, agency was expressly excluded from the business relationship between SAA and Airlink, except where the Alliance Agreement specifically provided for it. The court concluded that the relationship between the parties was rather that of debtor and creditor. It further held that Airlink had not made out any case for the lifting of the moratorium imposed under s 133(1) of the Act on legal proceedings against companies placed under business rescue.

Issues on appeal

[15] Airlink's appeal was grounded on the same three issues that it had raised with SAA in its pre-litigation correspondence. First, that SAA held the revenue received for Airlink ticket sales as the latter's agent and therefore it was Airlink's own money. Secondly, that even if the revenue was a debt owed by SAA, such debt arose only after commencement of the business rescue and thus could not be compromised in terms of s 154(2) of the Act. Thirdly, that because (subsequent to commencement of business rescue) SAA had elected to abide by the Alliance Agreement, it was not open to it to raise the s 133 moratorium as a defence to a claim for performance of its contractual obligations.

Discussion

[16] The starting point is the position articulated in s 133(1) of the Act which imposes a moratorium on legal proceedings against companies during business rescue. The section also sets out the limited circumstances in which

that moratorium may be lifted and legal proceedings, may be brought or persisted with against a company which is under business rescue. The section provides:

'133 General moratorium on legal proceedings against company-

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

(a) with the written permission of the practitioner;

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

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

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

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

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

[17] In its application before the high court Airlink accepted that once SAA was placed under business rescue on 5 December 2019, no legal proceedings could be initiated against it. To this extent, in prayer 2 of its notice of motion it sought the leave of court, as provided in s 133(1)*(b)*, to enforce its claim against SAA. However, it went on to assert the reasons why the moratorium did not apply in respect of the claimed revenue. It therefore did not lay any basis for leave to institute the proceedings.

[18] Clearly, the general moratorium on legal proceedings imposed in terms of s 133(1) becomes applicable immediately on commencement of business rescue and endures until business rescue ceases. The intention of the provision

is to cast the net as wide as possible in order to include any conceivable type of action against the company which is under business rescue.[9] The moratorium is necessary for the effectiveness of the business rescue procedure. As this court held in *Cloete Murray and Another*:[10]

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

[19] Legal proceedings may therefore be brought against a company under business rescue only in the circumstances set out in s 133(1)*(a)*-*(f)* of the Act. The moratorium is applicable in respect of all legal proceedings against a company in business rescue. A distinction between pre- and post-commencement causes is irrelevant to the moratorium.[11]

[20] The factors relevant in determining whether it is appropriate to lift the moratorium are case specific. However, as Boruchowitz J held in *Arendse and Others v Van der Merwe and Another NNO*, regard will always be had to the following:

'(a) The effect that the grant or refusal of leave would have on the applicants' rights as opposed to other affected persons and relevant stakeholders; (b) the impact that the proposed legal proceedings would have on the wellbeing of the company and its ability to regain its financial health; and (c) whether the grant of leave would be inimical to the object

[9] PM Meskin and JA Kunst *Insolvency Law* (1994) para 18.6.
[10] *Murray NO and Another v FirstRand Bank Ltd t/a Wesbank* [2015] ZASCA 39; 2015 (3) SA 438 (SCA) para 14.
[11] To this extent, this court in *Shamla Chetty t/a Nationwide Electrical v Hart NO and Another* [2015] ZASCA 112; 2015 (6) SA 424 (SCA) para 35 has held that the term 'legal proceedings' applies even to proceedings before arbitral tribunals and that such proceedings may only be brought with the consent of a business rescue practitioner or with the leave of court.

and purpose of business rescue proceedings as set out in sections 7*(k)* and 128*(b)* of the Act'.[12]

[21] Airlink's stance in the court a quo and in this Court was that s 133(1) is inapplicable in this case. Its application therefore fell to be dismissed on this ground alone. Nevertheless, I shall proceed to consider briefly the grounds on which Airlink relied in its attempt to evade the moratorium.

The agency argument

[22] Airlink contended that the revenue in question was not a debt as provided in s 154(2) of the Act. That section provides:

'154 Discharge of debts and claims:

(1) . . .

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

The essence of Airlink's argument in this regard was that when SAA sold Airlink tickets it did so as Airlink's agent. Therefore, the proceeds of such sales belonged to Airlink and SAA only held them on behalf of Airlink. It was therefore not claiming a 'debt' as envisaged in s 154(2) of the Act. Instead, the revenue claimed was Airlink's property which SAA was holding unlawfully.

[12] *Arendse and Others v Van der Merwe NO And Another* [2016] ZAGPJHC 292 (GJ); 2016 (6) SA 490 (GJ) para 28 as cited in Meskin*;* supra note 9 at 18.6.

[23] This contention is unsustainable. As the high court highlighted, clause 12.2 of the Commercial Agreement excluded agency in the relationship between SAA and Airlink. The clause stated:

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

[24] The question is whether there were any contractual provisions that expressly provided that the relationship between the parties was one of agency. The high watermark of Airlink's contention in this regard was the provision in the Commercial Agreement which provided that SAA would be entitled to a sales commission similar to that earned by travel agents in respect of Airlink ticket sales transacted on SAA platforms.[13] It suffices to say that this provision clearly did not expressly provide for agency. This is borne out by the context of the agreements between the parties. Nothing in the relationship between SAA and Airlink resembled agency. SAA never acted as a 'representative' of Airlink. The high court was correct in describing the nature of the business relationship between SAA and Airlink as that of mutual support. Clause 7 of the Commercial Agreement provided that for the duration of the agreements SAA and Airlink would provide each other with the support

[13] Clause 6.1.4 of Appendix 3 provided that : 'AIRLINK will be entitled to normal sales commission for the sales made on SAA schedules services at any airport stations or office handled by AIRLINK, similar to a travel agent. Similarly, SAA will be entitled to any sales commission for the sales made on the AIRLINK scheduled services at any airport stations or office handled by SAA, similar to a travel agent.' Further, clause 8 in the same appendix provided as follows, in part:
'8.17 On all tickets flown on Airlink flights, Airlink will pay SAA the actual agents commission paid on the tickets relative to the flown Revenue that accrues to Airlink.
8.18 SAA will pay Airlink any sales commission due on sales made on behalf of SAA in the offices of Airlink. Similarly, Airlink will pay SAA any commission due on sales due made on behalf of Airlinkin SAA offices.'

set out in the appendices to that contract on the terms and conditions set out therein.

[25] The high court also correctly had regard to the fact that SAA had no obligation to deposit the revenue received in respect of Airlink tickets sales in a separate bank account and to hold it in trust, as Airlink's property or on its behalf. There was no evidence that SAA dealt with revenue received for Airlink's ticket sales differently from the manner in which it dealt with its own moneys. On the contrary, the evidence showed that the revenue was held by SAA's bankers on behalf of SAA together with all its other revenue. For these reasons the contention by Airlink that the ticket sales revenue was not a debt owed to must fail.

Was the debt a pre or post business rescue debt?

[26] As I have said, Airlink argued in the alternative that the debt became owing after the commencement of the business rescue proceedings. It presumably intended to rely thereon that the debt could not be compromised in the business rescue plan to be approved and that the provisions of s 154(2) would not bar the claim during business rescue. However, when the application was launched no business rescue plan had been published, let alone voted on.

[27] This contention is untenable for the further reason that once SAA received the funds for Airlink ticket sales an obligation immediately arose for it to account in respect thereof to Airlink on the agreed date. In this way, on receipt thereof the funds became a debt owed by SAA to Airlink which would be due for payment as per agreement between the parties.

[28] Airlink's argument that, because the accounting statement in relation to the November revenue was only generated on 6 December 2019, a day after the commencement of business rescue, the revenue was a post-commencement debt, was misconceived. It was submitted on Airlink's behalf that SAA's debt to Airlink only arose when the statement was rendered and the debt became enforceable at the instance of the creditor. For this contention, Airlink relied, among other authorities, on *Eravin Construction CC v Bekker NO and Others*.[14] This reliance was misplaced.

[29] In *Eravin* a business plan had been approved and implemented and this court was concerned with whether certain payments made by a company in liquidation to Eravin, which had since been placed under business rescue, were void dispositions and therefore recoverable from Eravin in terms of s 341(2) of the Companies Act 61 of 1973. The payment was made on 21 October 2010 and, being void, its repayment was immediately owed by *Eravin* whose business rescue commenced on 26 September 2012. It was in this context that this Court considered the meaning of 'debt owed' within the context of s 154(2) of the Act and held that the payment (being the debt owed), could not be recovered, as it was owed prior to 26 September 2012. This Court then distinguished between moneys 'payable' and moneys 'owed', and held that:

'[Section 341(2)] states expressly that a disposition in the terms contemplated by it "shall be void". The recipient has no right, on this account, to retain it. Consequently, it owes a debt to the body which made the prohibited disposition, and that debt is owed as soon as the disposition was received.'

[14] *Eravin Construction CC v Bekker NO and Others* [2016] ZASCA 30; 2016 (6) SA 589 (SCA) para 21.

Eravin is therefore no authority for Airlink's contention that the revenue received by SAA could only be owed when it became due for payment.

[30] Equally unsupportive of Airlink's case are two other decisions on which it relied, namely, *Trinity Asset Management (Pty) Ltd v Grindstone Investments*[15] and *Standard Bank of South Africa Ltd v Miracle Mile Investments 67 (Pty) Ltd and Another*.[16] There, the Constitutional Court and this Court, respectively, were not concerned with the question of when a debt became owed. The issue in both decisions was when a debt became due and payable for determination of prescription.

SAA's election to abide by the pre-business rescue agreements.

[31] Airlink contended that SAA was bound by its election to abide by the Alliance Agreement and was therefore precluded from seeking refuge under s 133(1). There is no merit in this contention. On Airlink's case SAA was in breach of the Alliance Agreements by refusing to pay the money in question. Therefore an election to abide by the agreement was not open to it. [17] The option would only be open to Airlink as the innocent party. It is, in any event, not correct that SAA had opted to abide by the terms of the original Alliance Agreements. As stated earlier, after the commencement of business rescue SAA and Airlink concluded an ad hoc agreement in terms of which SAA would remit to Airlink, on a daily basis, the moneys received in respect of Airlink's ticket sales after the start of business rescue. This was an interim arrangement designed to limit the adverse impact of SAA's business rescue

[15] *Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty)* Ltd [2017] ZACC 32; 2018 (1) SA 94 (CC).
[16] *Standard Bank of South Africa Ltd v Miracle Mile Investments 67 (Pty) Ltd and Another* [2016] ZASCA 91; 2017 (1) SA 185 (SCA).
[17] G B Bradfield *Christie's Law of Contract in South Africa* 7 ed (2016) at 639.

on Airlink. Its terms differed materially from the terms of the Alliance Agreements and the Commercial Agreement.

[32] For all these reasons Airlink's appeal must fail. Consequently:
The appeal is dismissed with costs, including the costs of two counsel.

N DAMBUZA
JUDGE OF APPEAL

Appearances:

For Appellant:	A R Bhana SC (with him J P V McNally SC and L M Spiller)
Instructed by:	Webber Wentzel Attorneys, Johannesburg Symington & De Kok, Bloemfontein
For the First Respondent:	J M Suttner SC (with him J E Smit)
Instructed by:	Edward Nathan Sonnenbergs, Johannesburg Matsepes Inc. Bloemfontein.