COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA
Case no. 92/IR/Oct00

In the matter between

Nationwide Airlines (Proprietary) Limited

Nationwide Air Charter (Proprietary) Limited

Nationwide Aircraft Maintenance (Proprietary) Limited

Nationwide Aircraft Support (Proprietary) Limited **Applicants**

and

South African Airways (Proprietary) Limited **First Respondent**

South African Express Airways (Proprietary) Limited **Second Respondent**

South African Airlink (Proprietary) Limited **Third Respondent**

DECISION ON APPLICATION FOR INTERIM RELIEF IN TERMS OF SECTION 59

INTRODUCTION

South Africa's airline industry has experienced a sharp escalation in operating costs recently. Between August and November this year jet fuel prices have increased by 56% from their July level. At the same time the rand-dollar exchange rate has changed unfavorably. The applicants say these escalations in their costs have forced them to upwardly adjust their prices over this period. The respondents, who are their competitors, did not. The applicants claim, that based on the respondents' own figures their (the respondents) costs ought to have increased by at least 20% over this period. The applicants contend that the respondents' passivity in the face of rising costs

amounts to predatory pricing and request us to order the respondents to increase the prices of certain classes of their tickets by 20%. They also allege that the respondents are engaged in two other prohibited practices of an exclusionary nature. The first of these practices relates to agreements, which the respondents have with travel agents to provide them with override commissions and other incentives. The second is that they allege the respondents are engaged in an unlawful campaign to recruit their pilots. They seek cease and desist orders in relation to the latter two practices.

We have decided that the applicants have failed to establish their claim in terms of section 59 and have declined to grant them interim relief. Our reasons appear more fully below.

PART A - BACKGROUND

1. PROCEDURE

This application for interim relief is brought by Nationwide Airlines against South African Airways (SAA), South African Express (SAX) and SA Airlink (SAL). The application is in pursuance of a complaint which was lodged with the Competition Commission on 13 October 2000. This complaint was accepted by the Commission on 17 October 2000. On 31 October 2000, the Applicants filed an application with the Tribunal seeking various orders in terms of Section 59, pending an outcome of the Commission's investigation. On 1 November 2000, the Applicants filed a supplementary Notice of Motion requesting, in terms of Rule 28(5) of the Tribunal Rules, that the Tribunal shorten the time periods required for the filing of papers and hearing of the interim relief proceedings. In consultation with the parties the requisite time periods were shortened. The pre-hearing conference was held on 7 December 2000 and the hearing on 13 December 2000.

II. THE PARTIES

The Applicants are the Nationwide Airlines Group comprising Nationwide Airlines (Proprietary) Limited, Nationwide Air Charter (Proprietary) Limited, Nationwide Aircraft Maintenance (Proprietary) Limited and Nationwide Aircraft Support (Proprietary) Limited (the "Applicants" or "Nationwide"). Nationwide Airlines makes this application on behalf of the Group.

Nationwide has been operating its scheduled passenger service since 1995, when it decided to expand upon its existing express parcel air cargo, passenger and executive charter operations and introduce a scheduled passenger carrier service in the South

African domestic market. Nationwide has since then established itself as a competing domestic carrier, providing services throughout the South African market. Nationwide currently operates scheduled passenger services on the primary routes from Johannesburg to Durban, Cape Town and George. It also operates non-scheduled flights to Zimbabwe, Mozambique, Mombasa, various destinations in West Africa, and, on occasion, ad hoc services to Paris and Vienna.

The first respondent is South African Airways (Pty) Ltd, (the "first respondent" or "SAA"), who operate a domestic and international passenger and cargo scheduled airline. SAA was incorporated on 1 April 1999. Its major shareholders are Transnet Limited, which holds 75% of the entire issued share capital, S. Airlines Europe BV, which holds 20% and the South African Airways Employee Share Trust which holds 5%.

The second respondent is South African Express Airways (Proprietary) Limited ("SAX") (the "second respondent") who operates a domestic and cargo scheduled airline only. SAX is controlled by Transnet, who holds 76.01% of its issued share capital and Thebe Investment Corporation Limited, who holds 23.99% thereof.

The third respondent is South African Airlink (Proprietary) Limited ("SAL"). The present shareholders of SAL are Osprey Airline Investments (Proprietary) Limited who hold 45.9% of the entire issued share capital, Rodger Arnold Foster, who holds a 19.35% shareholding, Barrie James Webb, who holds 19.35% thereof and SAA, whose shareholding amounts to 10% of the entire issued share capital.

III. THE COMPLAINT

Nationwide bases its application for relief against SAA on various alleged restrictive practices outlawed by the Act:

a. The first category of restrictive practices is set out in section 8(d)(iv) and prohibits a firm from abusing its dominant position by:

   "selling goods or services below their marginal or average variable cost"

   Nationwide alleged that SAA's failure to increase their air fares on the relevant three city-city routes in accordance with fuel price increases since August 2000, as well as their failure to adjust their prices to offset the depreciation of the Rand against the US Dollar, was tantamount to pricing below their marginal or average variable cost on these routes.

b. The second category of abuse in terms of 8(d)(i) prohibits a dominant firm from engaging in exclusionary acts, more specifically:

"requiring or inducing a supplier or customer not to deal with a competitor"

Nationwide referred to certain "preferred-carrier" agreements SAA had concluded with certain travel agents, insofar as they are a supplier of services to an airline, which essentially provided the agents with certain loyalty rebates and performance-related commissions (in accordance with pre-determined growth targets), thereby inducing such travel agents to channel business to SAA to the exclusion of Nationwide.

c. Alternatively to paragraph (b) above, Nationwide relied on section 5(1) of the Act which proscribes restrictive practices in a vertical relationship, more particularly:

"Any agreement between parties in a vertical relationship is prohibited if it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement can prove that any technological, efficiency or other pro-competitive gain resulting from that agreement outweighed that effect."

Nationwide contended that insofar as the agreements concluded by SAA with the various travel agents had the effect of substantially preventing or lessening competition, they should be cancelled.

d. Finally Nationwide relied on the general exclusionary provision under section 8 (c) prohibiting a dominant firm from:

"engaging in an exclusionary act, other than an act listed in paragraph (d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain."

Nationwide averred that SAA's alleged conduct in soliciting and employing a number of the Applicants' staff, specifically Boeing 737 pilots, amounted to an anti-competitive exclusionary act by a dominant carrier.

The nature of the relief being sought under section 60(1)(a) is to order SAA to refrain from committing the aforementioned acts or practices, pending an investigation by the Competition Commission and possible referral to the Competition Tribunal for adjudication. Specifically, Nationwide sought an order ordering SAA to:

1. cease and desist from the practice of granting travel agents, their employees or particular groupings of travel agents, loyalty and special rebates, discounts and all other forms of reward which require or induce such persons to channel

business to the Respondents;[1] and

2. to declare null and void all agreements and arrangements currently in force in support of such practice; and

3. upwardly adjust their airfare prices (published and unpublished) on the Johannesburg-Cape Town, Johannesburg-Durban and Johannesburg-George routes by a percentage that is in line with the cumulative cost increases experienced since August 2000 as outlined in paragraphs 37,38,39 of the Founding Affidavit;[2] and

4. cease and desist from the practice of soliciting and offering employment to Nationwide's pilots and in particular, its Boeing 737 Captains.

PART B – ASSESSMENT

I. REQUIREMENTS FOR INTERIM RELIEF

Nationwide seeks relief in terms of section 59 of the Act. Section 59(1) states that:

"At any time, whether or not a hearing has commenced into an alleged prohibited practice, a person referred to in section 44 may apply to the Competition Tribunal for an interim order in respect of that alleged practice, and the Tribunal may grant such an order if:-

a) there is evidence that a prohibited practice has occurred;

b) an interim order is reasonably necessary to:-

i) prevent serious, irreparable damage to that person; or
(ii) to prevent the purposes of this Act being frustrated;

(c) the respondent has been given a reasonable opportunity to be heard, having regard to the urgency of the proceedings; and

(d) the balance of convenience favour the granting of the order."

We must now examine whether Nationwide's claim meets the requirements of section 59.

1 Subsequently amended, see page 21.
2 Subsequently amended, see page 20.

II. SECTION 59(1)(A) IS THERE EVIDENCE THAT A PROHIBITED PRACTICE HAS OCCURRED?

Section 59(1)(a) requires *"evidence"* of a prohibited practice.

Nationwide has alleged that SAA has perpetrated three different prohibited practices. We will now examine each one in turn.

1. Alleged contravention of section 8(d)(iv), alternatively section 8(c) (Predatory Pricing)

1.1 Are the respondents dominant in the relevant market?

In order to succeed under this section, a complainant needs to show that the respondent is:-

1. a dominant firm in the manner contemplated in section 7; and
2. that it has abused its dominance in the manner contemplated in section 8.

We must therefore first establish whether the respondents are dominant firms. A firm is not dominant in a vacuum, it is dominant *in relation to* a relevant market. Nationwide originally contended that the relevant market was the domestic South African air travel market and that SAA had 45% of this market. (See Notice of Motion paragraph 4 page 3 of the Record). SAA then in its answer agreed that this was the relevant market but alleged that their share amounted to only 43%. (See page 49 of the Record). The significance of the 45% threshold is to be found in the provisions of section 7 which states,

> *7. A firm is dominant in a market if-*
>
> *a) it has at least 45% of that market*
>
> *b) it has at least 35%, but less than 45%, of that market, unless it can show that it does not have market power; or*
>
> *c) it has less than 35% of that market, but has market power.*

If Nationwide has established that SAA has 45% or more of the market, dominance is presumed without further evidence of the existence or absence of market power being required.

The second and third respondents have on their version 13% and 11% respectively of the domestic air travel market. Nationwide has included them as respondents alleging

that they form part of the same control structure as the first respondent, SAA and that hence the market shares of all three respondents should be combined which would give them a market share in excess of 45%. Be that as it may, by the time it came to its reply Nationwide contended that the relevant market was not the domestic air market, but was instead the relevant city to city parings. (See Bricknell replying affidavit para 4.3 – 4.4 pg 196 of the Record).

Nationwide has identified three routes or city pairs as the relevant markets. These are the Johannesburg-Cape Town, Johannesburg-Durban and the Johannesburg-George routes.

Nationwide alleges that SAA is predating by pricing below average variable cost on these three routes. In the logic of predation, consumers of air travel services on these routes will ultimately be forced to pay supra-competitive prices as SAA move, in the wake of successful predation, to recoup the losses incurred during the period in which price was held below average variable cost. When prices rise in the newly concentrated post-predation market the consumers of services on this route will, naturally, not be able to substitute another route. For this reason these three routes are then the relevant markets.

As other international cases show the use of city-to-city parings as the relevant market is the conventional approach in antitrust cases in the airline industry.

To determine whether a scheduled route does constitute a separate market, the European Court of Justice stated in Case 66/86 Ahmed Saeed Flugreisen (1989) ECR 803 paragraph 40*:*

> *" The test to be employed is whether the scheduled flight on a particular route can be distinguished from the possible alternatives by virtue of specific characteristics as a result of which it is not interchangeable with those alternatives and is affected only to an insignificant degree by competition with them."*

Similarly, in Virgin/British Airways, OJL 30/1 of 14 February 2000, at para 42, the Commission applied this test to determine that BA flights were sold on a variety of product markets for air transport to and from the UK, depending on the needs of passengers and the alternative modes of transport available.

We accordingly find that the three city-to-city pairs constitute the relevant market for the purpose of the predatory pricing complaint.

We now turn to the question of whether Nationwide has established that SAA is dominant in these markets.

Nationwide in its reply evidenced its claim by putting up data establishing that SAA's seat capacity on the routes in question exceeds 45% of total seat capacity on these routes.[3] Nationwide submitted two schedules setting out SAA's seating capacity for each of the three routes on two selected days, as a percentage of the total market, both in relation to that of Comair and itself. This schedule is reproduced below:

On Friday 24/11/00:

Route	SAA	Nationwide	Comair
JNB-CPT	59%	13%	28%
JNB-DBN	62%	15%	22%
JNB-GRG	77%	24%	

On Monday 27/11/00:

Route	SAA	Nationwide	Comair
JNB-CPT	64%	10%	26%
JNB-DBN	63%	10%	27%
JNB-GRG	68%	32%	

SAA points out that seat capacity data are not identical to passengers' conveyance data, the ultimate test of market share. We should add that *total* seat capacity shares may differ from seat capacity shares in the lower fare classes. This latter is the market segment in which the complainant principally competes and accordingly one may expect that its share of seat capacity in these fare classes may be somewhat higher than its share of total seat capacity.

We should also note that SAA has not itself presented data contesting the allegation of dominance in the three relevant markets. SAA had ample opportunity to do so as the

3 The complainant arranged at the last minute – during the hearing in fact – for the Airports Company of South Africa to submit data that, Nationwide allege, would have conclusively established SAA's dominance. However ACSA insisted that this information be made available only to the Tribunal and not to the parties and we have accordingly decided not to admit this information to the record.

Tribunal had allowed both parties to file supplementary affidavits. It has contented itself with presenting data for the domestic air travel market which, it concludes, establishes that SAA has a 43% market share. It is not clear why if SAA has data on total domestic market share, they do not have data on city-to-city routes. We suspect they do and their reluctance to disclose their data on the routes but to instead rely on a methodological quibble only strengthens Nationwide's contention that they enjoy more than 45% of these routes. It is not unknown in competition analysis to utilize a surrogate for sales in calculating market share where actual sales are not known.[4] For instance in Virgin/British Airways, OJL 30/1 of 14 February 2000, at paragraph 90, the Commission, in evaluating BA's dominance in the market for air travel services, analysed its position on the UK markets for air travel. The Commission identified a combination of factors that lead to the conclusion that BA enjoyed a dominant position in the market for air travel one of which was to examine how many slots BA held at airports as the extract below demonstrates:

> "BA's dominance arises from its position on the UK markets for air travel. …BA's position on the markets for air transport is reinforced by the substantial portion of the slots it holds in the relevant *airports and by the system of grandfathering that currently exists for their reallocation. This system, hampers new entries and reinforces the position of well-established airlines…for example in winter 1998 BA held 38% of the weekly slots available at Heathrow."*

What further strengthens Nationwide's contention is that SAA's domestic market share figure of 43% is very close to the threshold of 45%. Even if the seat capacity figures exaggerate SAA's actual share they are all sufficiently well above the 45% figure to suggest that SAA is dominant on all three routes is established by reason of the presumption contained in section 7(1)(a). Even if SAA's market share is below this figure of 45% the onus in terms of section 7(b) is on it to rebut the inference of market power[5]. Nothing in the record on the history of pricing and of SAA's strategic maneuvering since 1998 suggests that it had done this. For this reason, it is also unnecessary for us to decide whether the respondents constitute a single controlled entity and hence their market shares be combined as we find SAA dominant based solely on its share of the relevant market.

We conclude then that Nationwide has established that SAA is dominant in the three relevant markets for the purpose of the claim of predatory conduct.

1.2 Is there evidence of abuse?

We must then go on to consider the question of whether an abuse or prohibited practice

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4 In the Tribunal case of Nasmedia and Paarl Post Web Printers (Pty) Ltd, 65/LM/May00, the Commission and Tribunal, because sales figures were not available, utilized another statistical proxy.

5 This is because on its on version it has less than 45% but at least 35%.

has been established, in terms of section 59(1)(a).

The restrictive practice alleged here is commonly referred to as 'predatory pricing'. Predatory pricing or 'predation' is a term of art in competition law and economics and its meaning is precisely captured in Section 8(d)(iv) of the Act which prohibits dominant firms from engaging in the practice of 'selling goods or services below their marginal or average variable cost'[6]. This price-cost relation must be established for a predatory pricing charge to be sustained in terms of this section. Once this relationship is established an anti-competitive act is presumed and the respondent then has the burden of showing that there are "*technological, efficiency or other pro-competitive, gains which outweigh the anti-competitive effect of its act."*

By way of example a respondent could explain that its conduct is justified in order to meet the competition, introduce new products or get rid of obsolete stock.[7]

In this respect section 8(d)(iv) assists a complainant with the aid of the presumption. The logic of the presumption is that once a firm is pricing below these costs its behavior is prima facie either unlawful or irrational and the onus should shift to the firm to explain which it is. Economists would no doubt regard this presumption with caution given the scepticism that exists in the literature around predation. They would indeed argue that something in addition to evidence of below cost pricing must be shown before a finding of predation can be sustained.[8] We however must enforce a statute and not academic opinion and we cannot add a qualification to a section, which the legislature did not seek to impose. Nevertheless we also do not favour an approach that completely ignores the caution the literature and international case law suggest we adopt with such cases. Our approach is to limit the scope of this subsection by critically construing any evidence when considering a complaint of predation under this section. Unless the record shows unequivocally that a respondent is pricing below the prescribed cost levels the Tribunal should not make a finding under section 8(d)(iv) but consider the complaint in terms of section 8(c).

What then is the difference in proof between these sections? Section 8(c) is the residual category or "catch all" of abuse practices. Unlike section 8(d) where a closed list of abuses is catalogued this section is non-specific and flexible. The crucial difference is

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6 This test is known as the Areeda-Turner test. The test itself is subject to some controversy. See Bishop and Walker "Economics of EC Competition Law" pg 130.

7 See Bishop & Walker,op cit, pg30 "Also there is a range of benign reasons why prices might be below variable costs. These include promotional pricing, using spare capacity in an economic downturn, learning by doing, product obsolescence and so on."

8 One should not of course exaggerate the potential problem. The literature suggests that establishing cases where a firm has priced below these levels is rare because of the difficulties with rigorously analyzing another firm's costs. See Bishop & Walker,op cit, pg 30 " First the implicit assumption that average variable costs are easy to measure is dubious." The authors then refer to the AKZO case cited below as an example of the kind of " arcane debate about what constitutes a variable cost".

that under 8(c) the onus is on the complainant to establish that the anti-competitive nature of the act *"outweighs the technological, efficiency or other pro-competitive gain."*

The burden on the complainant in a complaint of predatory behavior is higher under this section therefore than under section 8(d)(iv). On the other hand the complainant is not bound to follow the prescribed cost formula suggested in 8(d)(iv). In other words if a complainant, relying on section 8(c), can show that a respondents costs are below some other appropriate measure of costs not mentioned in the section it may prevail provided it adduces additional evidence of predation beyond mere evidence of costs[9]. To determine what that should be we need to examine the phenomenon of predatory pricing and then examine some of the approaches taken in other jurisdictions.

Viewed in isolation selling below cost for a sustained period is simply tantamount to commercial suicide. Such a strategy then must, perforce, be predicated on a calculation by the alleged predator that it will be able both to survive a sustained period of pricing its product below cost and, moreover, that this period will be succeeded by one in which the successful predator will be able to price *above* cost, that is, monopolistically, in order to recoup, indeed over-compensate for, the losses sustained in the period of predation.[10] For these reasons predation is proscribed only in respect of dominant firms. Non-dominant firms would not be able to mount a predatory attack on a more powerful competitor – they generally do not have the resources to mount such an attack and because they generally cannot expect to eliminate their more powerful competitor they cannot reasonably expect to recoup their losses in the post-predation period.

In short, predation is a monopolization strategy and, for that reason, it must be vigorously opposed by the competition authorities. However, it must be adjudicated with extreme caution because the likelihood of judicial error is considerable and the costs of error are impressive. Missing a genuine case of predation will likely lead to the elimination of a viable competitor and give rise to monopoly. On the other hand, 'over-deterrence' can also lead to problems. In the first place, over-deterrance may create a disincentive for firms to pass on any efficiency gains to consumers lest lower prices be construed as predation. Secondly, over-deterrance can lead to confusing robust competitive practices with predation. The result is the competition authority penalizing and thus imposing disincentives on precisely those pro-competitive practices that it is mandated to promote. There is a thin line between predation and robust competition.

The Supreme Court in the United States has observed that:

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9 The U.S. courts do not adopt as we do in section 8(d)(iv) a standard for what an appropriate level of costs should be. In *Brooke Group Ltd* the courts refer to "prices above a relevant measure of costs". See judgement pg 2588.

10 As explained later, in the context of predation, recoupment may not always take place because there may be other strategic benefits to a predatory firm.

> "*To hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result."* Brooke Group Ltd. V. Brown & Williamson Tobacco Corporation 509 US 209 (1993)

The approach in the United States, as evidenced from the Brooke Group case is that two elements must be proved to establish predatory pricing:

> "*First, a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs… The second prerequisite….is a demonstration that the competitor had a reasonable prospect [in a primary line Robinson-Patman case], or, under S2 of the Sherman Act*[11]*, a dangerous probability, of recouping its investment in below-cost prices…"*

The approach taken in European case law seems to be that where anything less than pricing below average variable cost is established, the European competition authorities will find abuse where it is established that the dominant firm's strategy is to eliminate a competitor.

In the leading European case on predatory pricing, AKZO Chemie BV v EC Commission [1991] ECR I-3359 at para. 71-72, AKZO was found guilty of an attempt to drive ECS, a rival competitor, out of the flour-additives market in the UK and Ireland[12]. The European Court of Justice considered the *cost* and *strategy* of the dominant firm, and developed the following test:

> *"Price below average variable cost … by means of which a dominant undertaking seeks to eliminate a competitor must be regarded as abusive. A dominant undertaking has no interest in applying such prices except that of eliminating competitors so as to enable it subsequently to raise its prices by taking advantage of its monopolistic position, since each sale generates a loss, namely the total amount of the fixed costs… and, at least part of the variable costs relating to the unit produced.*
>
> *Moreover prices below average total costs, that is to say, fixed costs plus variable costs, but above average variable costs, must be regarded as abusive if they are determined as part of a plan for eliminating a competitor…"*[13]

11 S2 of the Sherman Act states: "Every person who shall monopolize , or attempt to monopolize , or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce amoung the several States, or with foreign nations, shall be deemed guilty of a felony."

12 Competition Law of the European Community, 3rd Edition, Van Bael, Bellis, at page 593.

13 This case was decided on the basis of Article 82 (previously Article 86) of the Treaty of

When it comes to recoupment, the European approach differs to that in US law. In the case of Tetra Pak II 1997 4 CMLR 662 the Court of Justice has held that the prospect of recouping losses is not a prerequisite for establishing predatory pricing.

> "Furthermore, it would not be appropriate, in the circumstances of the present case, to require in addition proof that Tetra Pak had a realistic chance of recouping its losses. It must be possible to penalize predatory pricing whenever there is a risk that competitors will be eliminated. The Court of First Instance found, at paragraphs 151 and 191 of its judgement, that there was such a risk in this case. The aim pursued, which is to maintain undistorted competition, rules out waiting until such a strategy lead to the actual elimination of competitors."[14]

Although the EU and US approaches differ some common strands exist. Firstly there must be evidence of below cost pricing although neither adopt a formulaic approach as to what that should be. Secondly both require some additional evidence beyond that of pricing below an appropriate measure of costs. In the U.S. this relates to evidence of likely recoupment. In the EU this is left vague and the requirement in AKZO is evidence of a *plan to eliminate a competitor*.

In our view, the correct approach to a predatory pricing claim under section 8(c) is a two fold test.

First the complainant must establish that the respondent is pricing below cost for a sustained period. This price-cost relationship need not be the one referred to in 8(d)(iv) but should have some support in the literature as an appropriate measure of costs. Secondly there must be some additional evidence of predation. We do not wish to be prescriptive as to what this should be, but evidence of recoupment would meet this second test.

Rome which states that "Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States:

Such abuse, may, in particular, consist in:

a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
b) limiting production, markets or technical development to the prejudice of consumers;
c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

14 The European approach, as exemplified in this quote, may err in too easily finding predation and protecting competitors from the hazards of the market place.

We would prefer not to insist on recoupment as a requirement as do the U.S. courts. For instance a firm operating in multimarkets may use predation as a form of investment in a reputation for being a tough competitor. Thus a predation strategy in market A would send a message to its competitors not only in market A, but also in markets C, D and E. Predation here has a broader strategic value beyond any recoupment it may attain in market A.[15]

We must now examine whether Nationwide has established evidence of a prohibited practice that meets either the standard in 8(d)(iv) or the test we have proposed above in terms of section 8(c).

Before examining Nationwide's arguments through the lenses provided by these tests we must comment upon a highly unusual aspect of this case, a feature which, if anything, demands greater vigilance from a competition authority called upon to support an allegation of predation. Predatory pricing generally, indeed, in the scholarly literature and case law, invariably, takes the form of a cut in prices by the alleged predator. In this case Nationwide alleges that the predation takes the form of a failure on the part of SAA to *increase* the price of its product, its airfares, in the wake of an increase in the price of a key input, namely jet fuel, an increase exacerbated by the recent sharp depreciation of the local currency relative to the US Dollar, the currency in which fuel prices are denominated.

We agree with Nationwide that from a strict accounting perspective the effect of this 'omission' to increase output prices in the wake of an increase in the price of an input, may be identical to a proactive cut in the output price in the face of stable input prices. However, we cannot accept that these are identical from a competition perspective. We are extremely reluctant to signal that a 'failure' to pass on input price increases to final consumers will be construed as anti-competitive. Indeed it is precisely an increase in the price of an input that frequently triggers the search for pro-competitive strategies in downstream markets where competition prevents a simple pass-through of the increase to consumers. We would want to reward those firms who, as a result of their efficiency, are able to absorb price increases of their inputs without passing them onto their consumers.

The scant evidence provided by Nationwide does not assist their case. SAA has submitted evidence that establishes that, in the relevant period, its revenues on the routes in question exceed its operating costs. While Nationwide has suggested that the designated operating costs are not a true reflection of average variable costs this

15 See Albert A Foer in Antirust Law and Economics Review 1998 pg 71.Also Simon and Walker op cit pg 125-8. The authors state that the fact that there have been virtually no new airline start ups in the United States in the recent past, at least raises the possibility that the major airlines have built up a reputation for predation that successfully deters new entry.(pg 128)

argument has not been substantiated. There is no evidence that SAA is pricing below marginal cost so this alternate leg to 8(d)(iv) need not be considered.

Nationwide's case is further weakened by the fact that SAA has put up several plausible explanations for its ability to absorb the rise in the price of petrol. These are:

- Firstly, SAA points out that it has increased the price of its fares by an average of 22% in the period between November 1999 and July 2000 - admittedly the period immediately preceding the recent sharp petrol price increase and currency depreciation. Moreover, SAA points out that it has announced an average 8,7% fare increase scheduled to take effect from the 2nd January 2001. We should note that this may conflict with the requirement that the alleged predation should be 'sustained' – the period in which SAA has maintained stable fares in the face of the alleged increase in its costs is of a limited duration. Hence even if certain of their fares are set below average variable cost, the limited duration for which this is applicable may constitute a rational and legal short-term commercial strategy.

- Secondly, SAA has made much of the efficiencies introduced by its management over the past 2-3 years, efficiencies which, SAA argues, have enabled it to absorb the recent cost increases while maintaining profitability. These claims have not been countered by Nationwide.

- Thirdly, and a particularly pertinent aspect of its cost reducing strategy, has been SAA's apparently successful decision to hedge against an increase in fuel prices and a currency depreciation. Nationwide accurately characterize the hedge as similar in effect to an insurance policy but then argue that this should not be construed as a strategy that has lowered the effective price of petrol. This argument is, frankly, incomprehensible. Given the importance of fuel prices, and given the volatility of commodity markets and of international currency markets, this strikes us as a commercially prudent and far-sighted strategy on the part of SAA. It would, in the face of this cost reducing strategy, a strategy that has enabled it to absorb the price increases, be intolerable to oblige the company to increase its fares, thereby penalizing its customers by denying them the benefits of the successful hedging strategy.

Nationwide contended that SAA had not increased its fares since 31 July 2000 and in fact had reduced its fares in respect of the Johannesburg-Cape Town route in two fare classes in October and November 2000. SAA replied that such decreases were in response to price reduction by Comair. Over the relevant period, September-October 2000 it does seem that SAA has reduced its prices in the Y (full economy) and K classes. However, Comair seem to have done the same in respect of the K class only,

not the Y class. This would suggest that SAA and Comair's prices have dropped in respect of the K class only. However one cannot know which of the two competitors, Comair or SAA, reduced their prices first. (see pgs 350-351 of record). SAA's contention that it reduced prices to meet the competition must in the absence of rebutting evidence be accepted.

Having failed to establish that the SAA is pricing below marginal or average variable cost, the predatory pricing charge falls to be dismissed under section 8(d)(iv). In its heads of argument Nationwide's representatives concede as much, but seek to rely on circumstantial evidence. We fail to find such evidence in the record. Similarly, Nationwide has failed to establish evidence that satisfies either of the tests referred to above for the purpose of 8(c)[16]. On this count as well the complaint fails.

2. Alleged contravention of section 8(d)(i) and/or section 5(1) (agreements with travel agents)

2.1 Relevant Market

We now turn to the allegation that SAA has, in violation of Section 5(1), entered into anti-competitive vertical agreements with travel agents which substantially lessen competition. Alternatively, that it has abused its dominant position by entering into agreements with certain travel arrangements in violation of section 8(d)(i) proscribing conduct by a dominant firm that has the effect of 'requiring or inducing supplier or customer to not deal with a competitor'. In respect of both these claims too, a necessary prerequisite is establishing the relevant market in which competition is 'prevented or lessened' (Section 5) or in which an abuse is perpetrated (Section 8 read with Section 7).

The complainants drew our attention to similar agreements between British Airways and travel agents in the United Kingdom. Here, in finding for the complainant, Virgin Airways, the European Commission prefaced its analysis of the agreements complained of by an analysis of the market for 'air travel agency services in the United Kingdom' and it then proceeded to find that the respondent, British Airways, was dominant in this market. Certainly BA's dominance in the relevant market – the market for air travel agency services – derived from its dominance of the market for air travel services in and from the UK.

16 Nationwide contended that SAA was anticipating Nationwide ceasing operations in January 2001, therefore its proposed January increase on the Johannesburg-Cape Town route of between 4% and 9%, effective only after the peak festive season, was evidence of possible recoupment by SAA. However, these figures in no way approximate the 20% price increase Nationwide are requesting us to order.

We should not be surprised to find that, on a similar analysis, SAA too was a dominant purchaser in the market for air travel agency services in South Africa. However the complainant has not made its case and, though we may go to the limits of our inquisitorial powers, this cannot extend to the panel of the Tribunal making the case for the complainants. It is a case, even at the interim stage, that cannot be based on assumption and supposition alone. Nowhere are we told what proportion of airline tickets are purchased through travel agents as opposed to direct purchase from the respective airlines themselves – that is, can the services of travel agents be substituted for by other channels for purchasing air tickets? Clearly airlines all over the world are attempting through internet sales to limit the role of the 'middleman' or travel agent. Nor are we told how many travel agents are party to the allegedly restrictive agreements with SAA and what proportion of travel agency ticket sales they represent. In short we are not provided with the market analysis necessary to underpin the claimants case on the alleged restrictive practices. This analysis is required both in respect of section 8(d)(i) and section 5(1).

We accordingly are of the view that this claim falls to be dismissed because of the complainant's failure to identify the relevant market.

2.2 The alleged restrictive practice

We do not have direct evidence of the alleged prohibited practice. Nationwide ask us to infer this from a letter from a travel agent, Sure, which refers inter alia to aspects of the scheme.(See Record page 230). We do not have the contract in question before us nor do we know if the letter adequately or indeed accurately sets out the terms of the agreement that we are expected to void. This kind of evidence where we are expected to draw inferences from a third party's documents as to what the prohibited practice is, is not acceptable to us.

We find accordingly that there is insufficient evidence as to the terms of the prohibited practice alleged to be perpetrated between the respondents and the travel agents.

3. Alleged contravention of section 8(c), alternatively section 8(d)(iv) (Recruitment of staff)

3.1 Relevant Market

If the allegations pertaining to SAA's alleged poaching of Nationwide staff, in particular its Boeing 737 pilots, and those regarding the allegedly anti-competitive impact of SAA's various arrangements with travel agents had been invoked merely to evidence SAA's general predatory intent, that is, simply as part of the evidence to sustain a charge

under 8(d)(iv), then we would have no need to enquire further into the question of the relevant market.

However, these alleged actions on the part of SAA are presented in order to establish a violation of section 8(c).(See Record page 4 para 9 and page 25 para 15) In their heads of argument Nationwide rely on both 8(c) and 8(d)(iv).(See Heads of argument page 24)

We will for this reason consider the allegations under section 8(c) first.

Nationwide alleges that SAA has sought to induce key staff, notably its Boeing Captains, to leave its employ in preference for employment with the first respondent, South African Airways. In its replying affidavit (page 203), Nationwide alleges that since February 2000, 7 pilots have joined the employ of SAA, of which 4 are captains on B737's. SAA contends that of the 60 pilots employed by SAA since February 2000 only 10% thereof were previously employed by Nationwide. (at page 87 of the record). Nationwide expressed concern that such highly-trained captains were not being utilized on command positions on the aircraft for which they had been trained, but instead they were being used as relief pilots on Boeing 747's, indicating sinister intentions on behalf of SAA, who could just as easily have sourced relief pilots from the pool of unemployed pilots within the SA market place. SAA maintains that Nationwide's staff had not received the required training on their aircraft. Its policy toward all new recruits is that they fly as relief pilots initially, prior to flying independently. (See record page 88).

Nevertheless Nationwide alleges that this conduct when assessed in the context of SAA's cumulative pattern of behaviour constitutes an exclusionary act that contravenes the provisions of Section 8(c), which proscribes any exclusionary act that cannot be shown to have countervailing efficiency gains.

The markets relevant for the purposes of establishing predation – the three city pairs referred to above have no necessary bearing on these allegations, that is, they are not necessarily the markets relevant to an assessment of these alleged restrictive practices. The fact is that we are presented with little evidence that would allow us to determine markets relevant to the restrictive practices allegedly perpetrated under these sections of the act.

Hence, at a cursory glance, the market relevant to the charge under 8(c), SAA's alleged poaching of Nationwide's staff, in particular its Boeing 737 pilots, appears to be the market in which operators of air travel services hire staff, to wit pilots, for the purpose of providing this service. We are told next to nothing about this market. Pilots, presumably of varying degrees of qualification and experience, are hired by a myriad of organizations and individuals – scheduled airlines, charter operators, the military, private companies and individuals. However, we have not been provided with the

information that would allow us to make a meaningful determination of this market. For example. we are not told whether we are meant to regard the market in which the services of 'Boeing Captains' are hired as a market separate to that in which other pilots are hired – are 'Boeing Captains' substitutable by 'Airbus Captains' or 'executive jet captains', that is, are these pilots all part of the relevant market? We are not told.

The only information with respect to the market in which the services of pilots are hired is provided by Nationwide when it alleges that there are many unemployed pilots available in South Africa. However, this snippet of unsubstantiated (though unchallenged) evidence suggests that, even if SAA was employing Nationwide's pilots, this does not preclude Nationwide or any other purchasers of these services from recruiting suitably qualified personnel in the open market either because there are ample 'Boeing Captains' available or because the market for these services is significantly wider than 'Boeing Captains'.

In any event this is supposition on our part. Nationwide has not succeeded, indeed has not attempted, to define the relevant market, a necessary prerequisite to establishing dominance in terms of Section 7, and, in turn, a necessary prerequisite for establishing an abuse of dominance in terms of Section 8.

3.2 The alleged restrictive practice

Notwithstanding that the essential prerequisite of establishing the relevant market has not been met, we should, again, point to other defects in the application, defects sufficient to dismiss the application even if the relevant market and dominance therein had been successfully established.

We are asked to remedy this alleged restrictive practice by ordering SAA to cease and desist from the practice of soliciting and offering employment to the complainant's pilots. We are effectively being asked to suppress competition in the labour market for pilots on the allegation that it is part of a general predatory attack designed to lessen competition in a related, though unspecified, market. Support for this far reaching remedy is sought in the judgment by Van Dijkhorst in the case of Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd 1981 (2) SA 173 (T).

In this case the court held that enticing an employee away from a competitor does not amount to unlawful competition where the aim was to benefit one's business. Van Dijkhorst J went on to state at 200F:

> "*Is it unfair competition to induce an employee to terminate his contract of employment lawfully? Put differently, can it be unlawful conduct to exhort someone to do something lawfully? This proposition falls strange on the ear. I In our competitive economy it is normal for employers to bid for their labour, the*

> *price of which is subject to the law of supply and demand. As long as the employee is free to leave others are entitled to offer him better terms of employment. The fact that the loss of the employee might cause damage to the employer is incidental and irrelevant…This does not mean that should a businessman systematically induce his competitor's employees to leave, his conduct would necessarily be lawful. In my view, public policy would dictate that, where the aim in inducing a competitor's employees to terminate their employment is not to benefit from their services but to cripple or eliminate the business competitor, this action be branded as unlawful competition."*

Applying this test to the facts the court found that Pikkewyn Ghwano, who had enticed employees of Atlas, a competitor, to join it, had not engaged in unlawful competition since their intention in doing so had been to gain market share. The court found that the fact that Pikkewyn Ghwano's conduct had an adverse effect on the business of Atlas was incidental and irrelevant since the aim was legitimate. Damages were however granted against Pikkewyn Ghwano's two managers, previous employees of Atlas, for breach of a fiduciary duty to Atlas for enticing other employees to join Pikkewyn Ghwano while they were still employed by Pikkewyn Ghwano as directors.

It is difficult to see how the finding of the court in this case supports Nationwide's argument. The court's finding in that case that there was a breach of fiduciary duty where a director of a company induces the company's employees to join a competitor is clearly of no consequence to the instant case. Secondly, SAA has been able to demonstrate that the former Nationwide pilots it has employed are being used to its benefit.

The inapplicability of common law provisions of unlawful competition to a case of predatory pricing is illustrated as well in the case of Brooke Group which we referred to above where the court held at page 12, relying on Hunt v Crumboch, 325 US 821, L. Ed. 1954 (1945):

> *"Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws; those laws do not create a federal law of unfair competition or "purport to afford remedies for all torts committed by or against persons engaged in interstate commerce."*

In so far as the allegations are meant to constitute an independent and separate allegation under section 8(d)(iv) we fail to understand them at all given the wording of 8(d)(iv) which as we have seen above relates solely to pricing below marginal or average variable cost. If as we have indicated above they are intended to strengthen a claim under 8d iv of predatory pricing the evidence of recruitment of pilots is superfluous and unnecessary. If the evidence is intended to bolster the predatory pricing claim under section 8(c) and not intended as a separate act of abuse itself it also fails for the

reasons we have given above that there is nothing to indicate that the conduct is anticompetitive.

Conclusion

In conclusion, insofar as Nationwide has not sufficiently proven that a prohibited practice has in fact occurred, either under sections 8(d)(iv), 8(c), 8(d)(i), 5(1), it is the Tribunal's decision that the claim in terms of section 59(1)(a) must fail.

III. SECTION 59(1)(b) IS AN INTERIM ORDER REASONABLY NECESSARY TO PREVENT SERIOUS IRREPARABLE DAMAGE

It is necessary however to comment on the remedies sought by Nationwide if only to point out that even if predation had been successfully identified they have asked for remedies which we could not have provided.

A claimant needs to show that there is a rational link between the harm alleged and the order sought in order to establish the requirement of "reasonably necessary" set out in section 59(1)(b).We will examine the relief sought in relation to the three alleged prohibited practices outlined above.

1. Predatory Pricing

Nationwide have asked that we order a price increase equivalent to the increase in costs occasioned by the fuel price increase and currency depreciation. When, in the course of the hearing, it was pointed out that each of the respondents had been differently affected by the cost increases and that these differed from the effect on Nationwide and that, hence, there was no uniform standard to which the order could adhere, Nationwide amended their prayer for relief from that contained in their Notice of Motion so that it now reads:

> "*The respondents upwardly adjust their air fares published and unpublished on the Johannesburg Cape Town, Johannesburg Durban, Johannesburg George and return routes by an amount which represents twenty percent (20%) of such fares as they were on the 2nd of October 2000 which fares will include all classes below and up to and including the full economy fares.*"

Although SAA objected to the amendment, coming as it did at the eleventh hour, we

have decided to allow the amendment.

The relief sought, however, will not remedy the alleged harm Nationwide is suffering. Should the order as requested be granted, and SAA are ordered to increase their airfares in accordance with the above, it will not reverse the harm already alleged to be suffered by Nationwide. They conceded in argument that the bulk of the harm may have already been suffered for the initial phase of the holiday period. However they argued that this should not dissuade us from making an order increasing prices in respect of the remaining period. They contended that they were currently and would continue to suffer harm in respect of the remainder of the holiday period. Nevertheless, the fact remains that by now (mid December) most leisure class travellers have already booked their seats. This reduces extensively the effectiveness of the relief. Even if we accept that there are many still who have not booked flights, they would not necessarily change to Nationwide, they may prefer to fly Comair, or even elect to travel by train or by car. Accordingly there is an insufficient nexus between the alleged harm suffered and the redress which is sought.

Secondly, whilst in the appropriate circumstances the Tribunal might grant an order which elevates prices, we would only do so if a complainant could establish a compelling and rational connection between the harm experienced as a result of the predation and the relief sought. We would be extremely cautious before granting such a remedy, which might reverse active competition in the market place. Nor are we convinced that the alternate case for relief in terms of section 59(1)(b)(ii), which requires evidence that the purposes of the Act have been frustrated, has been made out. In the present case, granting the proposed remedy might itself frustrate the purposes of the Act.[17]

The defects in the relief sought have not been cured by the amendments proposed during the hearings, rather they have highlighted the fact that Nationwide too, at the eleventh hour, saw the difficulty, the remedial action has not removed the cause of complaint. Nationwide assume that because SAA's costs have increased by approximately 20% its prices should increase by the same amount for them not to be predatory. This assumption may have simple arithmetical elegance but is not an

17 Ordering a predator to raise prices is not the only remedy in predatory pricing cases. Damages and administrative fines would also be possible, although not in an interim relief application. Note that in our law damages can only be awarded by a civil court following a finding by the Tribunal (section 65(6)). An administrative fine could be imposed in a final relief hearing for a contravention of section 8(d)(iv), but note only for a repetition of the conduct if the finding is made in terms of section 8(c). (See section 61(1)(a)-(b) of the Act). Academic writers have suggested another novel remedy. They recommend that a predatory firm be ordered to maintain its prices at the predated level for a period to prevent the possibility of recoupment regardless of whether the rival has been forced to exit the market. (See Bishop and Walker op cit pg 132 and Foer op cit). Foer, who writes on the problem of predation in the US airline industry, recommends, as a Department of Transport policy proposal, that if a major carrier drops prices in response to the announcement of a new entry, that the carrier be obliged to maintain its prices for a specified number of seats for a period of two years without regard to whether the entrant remains in the market. (See Foer op cit at page 75-76)

inevitable one from an economic point of view. The relationship between the two increments need not be equivalent, indeed what it should be is a matter for evidence. As there was no evidence on this point, we find the nature of the relief sought has not been justified.

2. Orders relating to the Travel agents.

In relation to the travel agents we are asked, on scant evidence, to declare long standing agreements 'null and void'. SAA points out that the interests of the travel agents party to these alleged agreements are directly affected by the order sought and that, accordingly, they should have been joined in the application. Secondly it complains that the orders sought are vague. What conduct, it asks, must "be ceased and desisted from"? Again, Nationwide sought to amend its prayers during the hearing to cure these difficulties. The amended order now reads:

> 'The first respondent shall immediately bring to an end the operation of all systems of commission and other incentives with travel agents from which it purchases its travel agency services in South Africa which by rewarding loyalty from the travel agents and by discriminating between travel agents had the object and effectively excluding or limiting the applicants from competing on the three routes which are set out here."

We have again allowed this amendment despite SAA's objections. It is not clear, however, that the amended prayer overcomes any of the criticisms. Indeed it is in some respects vaguer than it was before.[18]

3. Recruitment of the Pilots

SAA criticized this order which seeks not just to prohibit solicitation but also the offering of employment to Nationwide's pilots. This type of relief is far wider than the alleged anticompetitive conduct which as we understand it related to solicitation. An order on these terms is again inappropriate.

Apart from the absence of a link between the relief sought and the harm alleged, all the orders referred to above suffer from the problem that they are vague and ambiguous.

As the Competition Appeal Court has pointed out in the case of Glaxo Wellcome (Pty) Ltd & Others and Terblanche & Others Case No: 04/CAC/Oct00 as per Davis JP,at page 16:

> *"When the Tribunal grants an order which is different from that contained in a notice of motion great care should be given to its meaning and purport and further there should be no inherent linguistic difficulty for the parties being able to*

18 SAA had other criticism of the orders but we need not consider them in view of our decision.

comply therewith. The consequence of non-compliance with such an order can be serious in that non-compliance can be visited with severe penalties.

For these reasons I find that on the ground of review for vagueness and ambiguity, there is a clear basis for applicants to approach this Court for a stay."

Giving effect to such an order as we have in this case would no doubt be grounds for review on the basis of the order being objectionable.

It is therefore the finding of the Tribunal that the claim must also fail in terms of section 59(1)(b) insofar as the applicants have failed to establish that the orders sought are reasonably necessary to prevent serious, irreparable damage to them.

PART C - ORDER

1. During the hearing Nationwide abandoned its case against the third respondents but still proceeded against the first and second respondents. The application against these two parties is dismissed.
2. The applicants jointly and severally are liable to the respondents for costs.
3. Costs of two legal representatives are allowed. The fees of the second representative must not exceed one half of the first.

_____ _____

Norman Manoim **Dated**

David Lewis and Diane Terblanche concurred