

SOUTH AFRICA / JUDGMENT

Competition Commission and Another v SA Airlink (Pty) Ltd (CR280Feb18/SUB026Jun23) [2023] ZACT 37 (5 July 2023)

[2023] ZACT 37

COURT

Competition Tribunal

BEFORE

T Ngcukaitobi, I Valodia, AW Wessels

CASE / FILE NUMBER

CR280Feb18/SUB026Jun23

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: CR280Feb18/SUB026Jun23

In the matter between:

THE COMPETITION COMMISSION First

Applicant

MILES VAN DER MOLEN Second

Applicant

And

SA AIRLINK (PTY) LTD Respondent

Panel: T Ngcukaitobi (Presiding Member)

I Valodia (Tribunal Member)

AW Wessels (Tribunal Member)

Heard on: 04 July 2023

Decided on: 05 July 2023

ORDER AND BRIEF REASONS

In the application to set aside a Summons issued at the instance of SA Airlink (Pty) Ltd on 23 May 2023, for the production of documentation

by Mr Miles van der Molen, the Competition Tribunal makes the following Order and records the following Brief Reasons in relation

to the documentation sought and recorded in Schedule 1 ("the Schedule") of the Tribunal Summons:

1. The Tribunal records that SA Airlink no longer persists with the following items, listed in the Schedule:
 - 1.1. Item 1: the Commission states that the documents do not exist in the form in which they are sought in the summons. While Mr van der Molen could potentially compile the information from other sources including third parties, it would be unduly burdensome to undertake the exercise, hence disproportionate to require the production of these items at this stage.
 - 1.2. Items 2,3 and 4: Mr van der Molen's Confirmatory Affidavit to the Commission's Replying Affidavit confirms that these items do not exist. This allegation is accepted by SA Airlink.
 - 1.3. Items 5.1 and 5.2: Mr van der Molen has provided the information sought.
 - 1.4. Item 5.4: Mr van der Molen shall, by no later than 7 July 2023, furnish an affidavit confirming that these documents do not exist. There is no longer a dispute between the parties in regard to these documents.
2. Item 5.3: The submission of SA Airlink is that it has been unfairly accused by Mr van der Molen at paragraph 24 of his witness statement where the following appears "[we] recently launched CPT - KIM against SA Air/ink and the incumbent responded by decreasing pricing and increasing gauge of aircraft on the route." The Commission states that the above allegation has been withdrawn by Mr van der Molen. An amended witness statement shall be delivered by no later than 7 July 2023. The Tribunal's view is that in light of the withdrawal, the documents sought are not relevant. In any event, Counsel for SA Airlink stated that this data is available from third parties. The Tribunal accordingly declines to enforce compliance with paragraph 5.3 of the summons.
3. This order does not limit the rights of SA Airlink to cross-examine Mr van der Molen on any aspect of his original or amended witness statement. The Commission is entitled to object to any question raised in cross-examination. The Tribunal shall make the appropriate rulings during the course of the hearing.
4. There is no order as to costs.

Presiding Member

Adv. Tembeka Ngcukaitobi SC

Concurring: Prof. Imraan Valodia and Mr Andreas Wessels

Date: 05 July 2023

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