

26 FEBRUARY 2013

1. Objective (required outcome of the Comair action)

- 1) Government will provide funding to SAA only after consultation with all affected stakeholders (per the PAJA)
- 2) Any funding is in accordance with government's Domestic Aviation Transport Policy.

This is NOT:

- 1) A challenge to stop all funding of SAA
- 2) A proposal to privatize, or challenge the shareholding of SAA
- 3) An attempt to shut down SAA

2. Underlying problem

For as long as government provides funding to SAA, it can continue to operate in an anti-competitive and non-commercial manner in the domestic market.

3. Implication

Non-commercial behaviour by SAA in the form of excessive capacity and pricing at below cost causes market distortion. This results in competing, private sector airlines, being unable to earn reasonable profits to allow them to cover operating costs, replace aircraft, provide a return to shareholders, and ultimately remain in business.

#### 4. Government funding of SAA to date

		Rands
Pre 2007	Prior to transfer of SAA to DPE in 2007	13,635,000,000
March 2007	Solvency guarantee – fully drawn down	1,300,000,000
March 2008	Funding of B747-400 retirement	1,549,000,000
March 2008	Labour restructuring grant	653,000,000
Sept 2009	Going concern guarantee – not drawn down R1,6bn	
Oct 2012	Guarantee	5,000,000,000
Dec 2012	Emergency loan	550,000,000
	TOTAL	22,687,000,000

SAA losses since deregulation in 1991	R	bn
SAA cash as at 31 March 2010	R3,4	bn
Cash burnt in year to 31 March 2011	(R1,2)	bn
Cash burnt in year to 31 March 2012	(R2,3)	bn
SAA cash as at 31 March 2012	(R0,033)	bn overdraft

#### 5. Domestic Air Transport Policy (DATP) (custodian: Department of Transport)

- Designed to effect the deregulation of the domestic market in 1990 and encourage private airline participation

##### a. 1990 DATP – key principles:

- Safety through quality operators
- Economic decisions should be left to competitive forces to resolve
- Users interests should be considered
- All participants should be treated equally regarding : entry into the market, capacity, fares, routes, exit from the market, government contracts, financial support, reciprocal privileges, the rendering of uneconomical services, the strategic value of aircraft, etc

b. 1991 Addendum to DATP

- SAA must operate autonomously and on a commercial basis.
- SAA must be prevented to use profits made on its international services to subsidise its domestic services.
- SAA will not enjoy any privileges in terms of any legislation or any other practices as a result of it being a Government enterprise.
- Government will not guarantee new loans to SAA or any other airline with Government interest, whilst private airlines have to borrow at their own risk.

c. 1996 White Paper on National Transport

- Confirmed the DATP of 1990 and its principles
- Identified the following strategic objectives:
  - Civil aviation policies should encourage participation in the aviation industry by creating an environment where investors can realise adequate returns on their investment
  - Economic decisions should, as far as possible, be subject to general competitive principles applicable to all industries, with a view to maximizing consumer choice and needs satisfaction.

d. 1996 Department of Transport Airlift Strategy

“...Government is well aware that the issue of inappropriate state funding has been the subject of intense discussion in a number of fora, including the ICAO [the International Civil Aviation Organisation] 5th World Wide Conference of March 2003. ...

In this context, Government has already adopted a number of measures to address the economic and commercial stability and sustainability of SAA within the context of our own air services policy. Inter alia, these include the transfer of SAA out of Transnet by end of 2006. Consistent with the White Paper on National Transport Policy, 1996, the current unbundling of SAA from Transnet should ensure equal treatment of all participants in the air transport market as well as ensuring that SAA operates efficiently, effectively and on a sound commercial basis whilst positioning itself to taking up opportunities in the liberalising African skies as well as generally servicing the global market.”

6. Comair legal challenge to the funding of SAA by government – basis of the legal challenge and the matrix of legislation

Overriding principles of the Domestic Air Transport Policy				
			Public Finances Management Act (PFMA)	Promotion of Administrative Justice Act (PAJA)
<b>Constitution</b>	S1(c) Rule of law -organs of state can exercise only those powers conferred lawfully on them. -Exercise of all public power must be rational	S7(2) Bill of Rights -state must take proactive measures to effect the fundamental rights a) S9(1) the right to equality -equal treatment of all airlines by Government in accordance with the DATP. b) S22 right to choose ones trade -effect of SAA funding is of interfering in and prejudicing the industry without a legal basis. c) S33 right to lawful, reasonable and procedurally fair administrative action	S213 Appropriation of funds from National Revenue, &S218 Conditions for granting a guarantee.  Per S70 of the PFMA the SAA funding does not meet the criteria of a guarantee and therefor is in breach of S213 and S218 of the Constitution, as it did not follow the necessary Parliamentary appropriation procedures.	S33 right to lawful, reasonable and procedurally fair administrative action  -S6(2)(h) unreasonable, as it was in breach of legislation, the Constitution and DATP. -S6(2)(f)ii irrational, as a rational shareholder would not continue to fund a loss making business with no reasonable return on investment. -in breach of Comair’s legitimate expectations that Government would adhere to the DATP
<b>SAA Act</b>			Read with S6 and S7 of the SAA Act, a guarantee can only be issued to promote the objectives of SAA, which only covers SAA operating in a commercial manner, and not as a reactive bail-out to losses	
			Fruitless and wasteful expenditure – both in terms of such losses identified by the auditors, and well as incurring expenditure not in line with its commercial objective.	
			Failure to have regard to relevant considerations -the funding breached other legislation and policy, and appears unrecoverable.	