

**IN THE MATTER BEFORE THE
BOARD OF THE COMPETITION AND
CONSUMER PROTECTION COMMISSION**

APPLICANTS:

The Competition and Consumer Protection Commission COMPLAINANT

AND

South African Airways

RESPONDENT

BEFORE:

**Commissioner Chenga Chisha
Commissioner Frederick Imasiku
Commissioner Nsangwa Ngwira
Commissioner Aubrey M. Chibumba**

**- Chairman
- Member
- Member
- Member**

DECISION

Below is a summary of the facts and findings presented by the Competition and Consumer Protection Commission ("the Commission") to the Board following investigations it carried out in the above case.

Information and Relevant Background

It was submitted that:

1. On 9th March, 2022, the Competition and Consumer Protection Commission ("the Commission") initiated a complaint against South African Airways ("the Respondent") arising from a complaint previously lodged by Ms. Tumbikani Museteka ("Ms. Museteka"). The Commission alleged that on 31st September 2021, the Respondent sold Ms. Museteka two return flight tickets from Lusaka to Cape Town via Johannesburg for herself and her relative, scheduled for 19th October 2021, at a cost of \$1, 247.56 (K20, 179.53). The Commission alleged that when Ms. Museteka went to check in for the flight on 19th October 2021, she was informed that the Respondent did not have any flight for that date as the one she had booked had been rescheduled due to low flight loads. The Commission alleged that Ms. Museteka only learned of the rescheduling of the flight when she got to the airport. The Commission alleged that Ms. Museteka

was consequently caused to purchase two direct flight tickets from Lusaka to Johannesburg from Airlink for a total of K9, 750.00 on the same day. The Commission alleged that Ms. Museteka; however, used the Respondent's flight to proceed to Cape Town from Johannesburg, and to return to Zambia as per purchased tickets. The Commission alleged that the Respondent only issued Ms. Museteka a refund of K3, 900.00, comprising a tax refund and a partial transport refund for the unused sector (i.e.; the flight from Lusaka to Johannesburg that the Respondent did not provide) on the two tickets, despite Ms. Museteka having incurred an additional cost of K9, 750.00. The Commission alleged that Ms. Museteka hence sought a refund of K5, 850.00 being the balance from the K9, 750.00 additional cost she incurred.

2. The Commission alleged that Ms. Museteka's complaint bordered on compensation as she was demanding a refund of consequential costs she incurred as a result of the Respondent's conduct. As such, she was advised to pursue compensation in the small claims court. Notwithstanding, the Commission alleged that the Respondent's conduct was unfair as it subjected passengers to additional costs that they may not be able to bare.

Legal Contravention and Assessment Tests

Legal Contravention

It was submitted that:

3. The alleged conduct appeared to be in contravention of Section 53(1) of the Competition and Consumer Protection Act No. 24 of 2010. ("the Act").

Assessment Tests

The following assessment tests were used to consider this allegation with regards to Section 53(1):

It was submitted that:

4. Whether South African Airways was an enterprise;
5. Whether there existed a "contract" or "term of a contract" between an enterprise and consumers; and
6. Whether the contract or term of the contract caused a significant imbalance in parties' rights and obligations to the detriment of consumers.

Investigations Conducted

It was submitted that:

7. The Commission had served a Notice of Investigations on the Respondent in which Ms. Museteka was the Complainant on 16th December 2021. However, after establishing that Ms. Museteka's complaint bordered on compensation, the Commission closed her case and initiated investigations into the Respondent's conduct in interest of the public. To this effect, the Commission served another Notice of Investigations and letter on the Respondent on 22nd March, 2022.¹ As part of the investigations, the Commission reviewed the Legal and Passenger Notice on the Respondent's flight tickets, and sought third party submissions from other industry players regarding what resolution they provided in an event that they were not able to provide a flight booked by passengers. The Commission also inquired from the International Air Transport Association (IATA), and the Zambia Civil Aviation Authority to find out whether there were any set remedies in such cases.

The Parties

The Commission

It was submitted that:

8. The Commission is a statutory body that was established with a unique dual mandate to protect the competition process in the Zambian economy, and to protect consumers. The Commission's head office is located on the 4th Floor of the Main Post Office in Lusaka. The Commission, as provided under Section 55(1) of the Act, may at its own initiative or on complaint made by any person, undertake an investigation if it has reasonable grounds to believe that there is, or is likely to be, a contravention of any provision of the Act.

The Respondent

It was submitted that:

9. The Respondent was South African Airways, located at Southern Sun Ridgeway, along Church Road, Lusaka. The Respondent is registered (Registration No. 219990001172) with the Patents and Companies Registration Agency (PACRA). According to Section 2 of the Act, an "enterprise," means *a firm, partnership, joint-venture, corporation, company, association and other juridical persons, which engage in commercial activities, and includes their branches, subsidiaries,*

¹ Acknowledgement of delivery of NOI dated 22nd March 2022.

affiliates or other entities, directly or indirectly, controlled by them.” Therefore, the Respondent was an enterprise as envisaged under the Act as they were a company engaged in providing aviation services to their clientele.

Review of the Respondent’s response to Ms. Museteka’s complaint

It was submitted that:

10. A review of the Respondent’s response to the complaint lodged by Ms. Tumbikani Museteka revealed that the Respondent had submitted that in an event that they could not provide a flight booked by passengers, they would rebook the passengers on their next available flight. In a case where passengers were not willing to wait for the next flight, the Respondent would accommodate them on Proflight’s aircraft serving the concerned route, and they would bear the cost. The Respondent had submitted that in an event that Proflight was not servicing the concerned route on that day, the passengers would have to book flights with other airlines at their own cost, and the Respondent would only issue tax refunds and partial transport refunds on the inconvenienced sector in accordance with the rules of calculation set by the governing body; the International Air Transport Association (IATA).
11. The Respondent had submitted that after Ms. Museteka flew to Johannesburg using Airlink, she proceeded to Cape Town and later returned to Zambia using their flight as per purchased tickets. The Respondent submitted that the only inconvenienced sector was therefore the Lusaka to Johannesburg flight. The Respondent submitted that Ms. Museteka paid block amounts for the tickets whose fare could not be broken down i.e.; from Lusaka to Johannesburg, and Johannesburg to Cape Town. The Respondent had submitted that what was issued to Ms. Museteka was hence a tax refund and a partial fare refund on the sector not travelled i.e.; Lusaka to Johannesburg.

Review of the Respondent’s Legal and Passenger Notice

It was submitted that:

12. A review of the Respondent’s legal and passenger notice that accompanied the tickets issued to passengers, revealed a clause that read *“SAA like most airlines, sometimes overbook flights. We do this because often customers holding reservations change their plans without cancelling their reservations or don’t show up for their flight. On rare occasions, more customers with confirmed reservations are present than seats available. In this instance, we first seek volunteers, willing to give up their seats in exchange for compensation and a seat on the next available flight. If there are insufficient volunteers, we will deny*

boarding customers in accordance with our company policy on boarding priority. We will also provide you with a written statement that explains our obligations and your rights as a customer of South African Airways. Customer's rights vary per country of departure and are in accordance with the applicable regulations and/or acts enforced." The terms of redress in an event that the Respondent could actually not provide a flight were; however, not stipulated.² (A copy of the Legal and Passenger Notice has been attached as annex 1)

Submissions from Industry players

It was submitted that:

13. To understand the implication/effect of failed flights on passengers/passengers' ability to engage alternative airlines, the Commission reviewed submissions made by other industry players in previously conducted investigations; **Zambia Airways Limited vs Mrs. Thandi Phiri Chanda CONS/21/12/2021/01039/LST/BM Pg. 8**. The Commission further made inquiries regarding the remedies provided in an event that they were not able to provide a flight.

Proflight Zambia

Proflight sales agents, in a telephone conversation on 31st January 2022, submitted that fares paid by passengers varied depending on seat availability. They also submitted that as more seats were sold out, the available seats became relatively more expensive.

In a telephone conversation on 5th May 2022, Proflight submitted that they placed their passengers on another airline's flight if they were not able to provide a flight. They submitted that they did not have any case in which there was no flight by another airline on which the passengers could be placed.

Ethiopian Airways

In a telephone conversation on 15th February 2022, Mr. Ababayehu Tilahun (Traffic and Sales Manager at Ethiopian Airways) submitted that flight fares were subject to change depending on when the flight was booked. He also submitted that the International Air Transport Association (IATA) also had exchange rates that were independent of the banking sector, that affected the flight fares.

² Respondent's Legal and Passenger Notice

In a telephone conversation on 5th May 2022, Mr. Abebayehu submitted that they arranged to place their passengers on another airline's flight if they had any inconvenience. He submitted that they did not have an experience where alternative flights were also unavailable; however, he submitted that the airline would issue a full refund if the client so wished.

Review of the Airlink tickets issued to Ms. Museteka

It was submitted that:

14. A review of the flight tickets issued to Ms. Museteka by Airlink revealed that Ms. Museteka paid Airlink a total of K9, 750.00 for a direct flight to Johannesburg from Lusaka, for the two tickets, on 19th October 2021.

Submissions from the International Air Transport Association (IATA)³

It was submitted that:

15. On 5th May 2022, the Commission contacted IATA to inquire whether there were any set remedies to be followed by airlines in an event that airlines failed to provide a flight. In response, IATA submitted that the inquiry was purely a commercial matter and IATA did not intervene in such matters. IATA submitted that the passengers needed to contact the customer service of the concerned airline to get further advice, or present the matter to the relevant body. IATA submitted that in the European Union, the matter could be presented to the Passenger's Rights Council. IATA submitted that the matter could be presented to a similar body if it existed in Africa.

Submissions from Zambia Airports Corporation Limited⁴

It was submitted that:

16. On 17th May 2022, the Commission contacted Zambia Airports Corporation Limited (Zambia Airports) to inquire if there were any laid down regulations of recourse to be given to passengers in an event of failed flights. In response, Zambia Airports Corporation Limited submitted that they were only a service provider, and such a matter would need direct engagement with the concerned airline.

³ Record of message Correspondence with IATA representative, Ms. Monica, on www.iata.org

⁴ Record of telephone conversation and message correspondence with Mr. Churchill

Submissions from the Civil Aviation Authority (CAA)⁵

It was submitted that:

17. In a letter dated 23rd May 2022, the Civil Aviation Authority (CAA) submitted that along with the continuing liberalization of air transport regulation, the protection, and improvement of airline passenger rights had gained greater importance. CAA submitted that a significant number of states, in recent years, had adopted regulatory measures concerning for instance, access to air travel for passengers with reduced mobility, price transparency, and obligation of the carrier toward passengers in case of flight disruption (flight cancellation, flight delay or denied boarding due to overbooking).
18. CAA submitted that at the industry level, many airlines had adopted voluntary commitments (i.e.; non-legally binding self-regulation) to clarify or improve their policies or practices with regard to certain customer services (such as fare offers, ticket refunds, denied boarding, flight delays and cancellations, baggage handling, response to complaints, and special passenger needs), often in response to public pressure and to avoid regulatory measures.
19. CAA submitted that the Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention) adopted by a diplomatic meeting of International Civil Aviation Organisation (ICAO) member states on 28th May 1999 contained some provisions granting rights to the passengers. CAA submitted that Zambia signed this convention on 28th May 1999, but was yet to be ratified and domesticated.
20. CAA submitted that the convention provided that the carrier was liable for damage sustained in case of death or bodily injury of a passenger if the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.
21. CAA submitted that the carrier would also be liable for damage sustained in case of destruction or loss of, or of damage to, checked baggage if the event which caused the damage took place during any period within which the checked baggage was in the charge of the carrier.
22. CAA submitted that the convention also mentioned that the carrier was liable for damage occasioned by delay in the carriage by air of passengers, baggage or

⁵ Letter from the Civil Aviation Authority dated 23rd May 2022.

cargo, except if the carrier could prove that he took all the measures to avoid the damage.

23. CAA submitted that ICAO had also developed guidance material in such areas as conditions of carriage, fare guarantee, baggage, tariff disclosure, denied boarding and code sharing. CAA submitted that the guidance could among others, be found in the policy and Guidance Material on the Economic Regulation of International Air Transport (Doc 9587).
24. CAA submitted that on the occasion of the Sixth Worldwide Air Transport Conference (Montreal, 18 to 22 March 2013), ICAO developed, after consultation with States, the Core Principles on Consumer Protection. These were designed as guidance for States and concerned industry stakeholders in dealing with consumer protection matters.
25. CAA submitted that with regard to African Civil Aviation Commission (AFCAC) Regulations on Consumer Protection implemented article 9.6 of the Yamoussoukro Decision (YD) which protected the consumers of air transport services against unfair treatment in the provision of air services and it provides for a basis for compensation to the consumer for breach of the rights of the consumer by air transport service providers, and a mechanism for the consumers to seek redress.
26. CAA submitted that pursuant to Section 154 of the Civil Aviation Act No. 5 of 2016, CAA promulgated the Zambia Civil Aviation Requirements (ZCARs) Part 25 on Protection of consumers of Air Transport Services.

Review of the Civil Aviation Act No. 5 of 2016

It was submitted that:

27. A review of Section 154 of the Civil Aviation Act No. 5 of 2016 quoted by CAA in their submissions revealed that the quoted Section read "*The Director-General shall promulgate the Zambia Civil Aviation Requirements (ZCARs).*"

Review of the Zambia Civil Aviation Requirements (ZCARs) Part 25 on Protection of consumers of Air Transport Services⁶

It was submitted that:

⁶ Zambia Civil Authority Requirements 2021

28. A review of the Zambia Civil Aviation Requirements Part 25 on Protection of consumers of Air Transport Services revealed that paragraph 25.3.6 headed "Cancellation of Flight" read as follows;

a) *In case of cancellation of a flight,*

1. *Where the decision to cancel the flight is taken less than 24 hours before the scheduled departure of the flight in question and the passengers at the airport, or where the passenger on a connecting flight may have begun the earlier part of his/her flight before the decision to cancel the flight and may only know of the cancellation on arrival at the airport, the airline shall:*

i. *inform the passengers of the specific reasons for the cancellation and, inform them of their rights under this provision including but not limited to:*

a) *Right to cancel their booking in accordance*

b) *Right to be re-routed or offered an alternative means of transport, where convenient to the passenger in question, and*

c) *Right to compensation.*

ii. *Offer refreshments including water, soft drinks, confectioneries or snacks;*

iii. *Right to two international telephone calls, SMS or e-mails.*

2. *Where the decision to cancel is taken at least 24 hours before the flight the airline shall immediately contact passengers affected by the decision, offer them the option not to travel to the airport if they have not already set off and advise them of their rights under this provision including but not limited to:*

i. *Right to cancel their booking*

ii. *Right to be re-routed or offered an alternative means of transport, where convenient to the passenger in question, and*

iii. *Right to compensation.*

b) *When passengers are informed of the cancellation, an explanation shall be given concerning possible alternative transport which may include but not be limited to travel on the same airline but on a different date or time whether or not from the same airport, travel on another airline from the same airport on a different date or time whether or not from the same airport, travel on another mode of transport, where reasonable and convenient to the passenger.*

c) *Passengers shall have the right to compensation by the airline for a cancelled flight unless:*

1. *They are informed of the cancellation between two weeks and seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than two hours before the scheduled time of*

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departure and to reach their final destination less than four hours after the scheduled time of arrival; or

2. They are informed of the cancellation less than seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than one hour before the scheduled time of departure and to reach their final destination less than two hours after the scheduled time of arrival.

d) An airline shall not be obliged to pay compensation in accordance with 25.6.2, if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.

e) The burden of proof concerning the questions as to whether and when the passenger was informed of the cancellation of the flight or of the alleged extraordinary circumstances shall rest with the airline.

29. Paragraph 25.5.1 headed "RIGHT TO REIMBURSEMENT" read;

a) When reference is made in these Requirements to the right of the passenger to reimbursement, reimbursement shall be made within thirty (30) days for the full cost of the ticket at the price at which it was bought for:

1. The part or parts of the journey not made, and

2. The part or parts already made if the flight is no longer serving any purpose in relation to the passenger's original travel plan, together with, when relevant, a return flight to the first point of departure, at the earliest opportunity.

b) The reimbursement shall be paid in the form in which the ticket or tour package was purchased.

30. Paragraph 25.5.2 headed "RE-ROUTING" read;

a) Where an airline decides to re-route a passenger, the passenger shall be entitled to:

1. Reimbursement within thirty (30) days of the full cost of the ticket at the price at which it was bought, for the part or parts of the journey not made, and for the part or parts already made if the flight is no longer serving any

purpose in relation to the passenger's original travel plan, together with, when relevant,

2. A return flight to the first point of departure, at the earliest opportunity and accommodation;

b) Either re-routing, under comparable transport conditions, to their final destination at the earliest opportunity and accommodated; or at a later date at the passenger's convenience, subject to availability of seats.

c) Where a town, city or region is served by several airports, and an airline offers a passenger a flight to an airport alternative to that for which the booking was made, the airline shall bear the cost of transferring the passenger from that alternative airport either to that for which the booking was made, or to another close-by destination agreed with the passenger.

31. Paragraph 25.5.3 headed "RIGHT TO COMPENSATION" read thus;

a) Where reference is made to this Requirement to the passenger's right to compensation, other than compensation pursuant to the Warsaw Convention or Montreal Convention as applicable in the State Party, passengers shall receive compensation amounting to:

1. USD 250 for all flights with an estimated duration of 3 hours or less for the entire flight;

2. USD 400 for all flights with an estimated duration between 3 hours and 6 hours for the entire flight;

3. USD 600 for all flights with an estimated duration of more than 6 hours for the entire flight.

b) In determining the duration of the flight, the basis shall be the last destination at which the denial of boarding or cancellation will delay the passenger's arrival after the scheduled time and shall include all scheduled stop over, transit or any other scheduled break in the flight.

c) When passengers are offered re-routing to their final destination on an alternative flight pursuant to 25.5.2, the airline may reduce the compensation provided for in paragraph 1 by 50% if the arrival time does not exceed the scheduled arrival time of the flight originally booked

1. by two hours, in respect of all flights of 3 hour duration or less; or

2. *by three hours, in respect of flights lasting between 3 and 6 hours; or by four hours, in respect of all flights in excess of 6 hours,*

d) *The compensation shall be paid in the form in which the ticket or tour package was purchased.*

Submissions to the Commission's report

It was submitted that:

32. After approval of the preliminary report, the report was sent to the Respondent on 2nd June 2022. In a letter dated 28th June 2022, the Respondent submitted that Ms. Museteka made a flight reservation to travel to Cape Town on their online portal www.flysaa.com. The Respondent submitted that when a customer booked and paid for a ticket online, there were mandatory fields to be completed so that the airline was able to send messages or updates regarding their trip which was done by automated notifications. The Respondent submitted that in the case of Ms. Musetetaka, they were still investigating what could have transpired as she informed them that there was no schedule change notification sent to her as per standard practice for online bookings. The Respondent submitted that this was what caused Ms. Museteka to show up at the Airport only to find no flight as per her ticket. The Respondent submitted that they would share the outcome of their investigations once they had been concluded by their head office in Johannesburg. The Respondent submitted that they were committed to customer service and experience, and that in an event of service failure or irregular operations (IROPs), they took care of their customer's needs. The Respondent submitted that in the case of Ms. Museteka, a refund of the unused tickets was an option. The Respondent submitted that they had since refunded Ms. Museteka the unused portion of the tickets and the additional cost she incurred in purchasing other tickets on another airline. The Respondent submitted that the Commission's report made them realise that there might be existing gaps in their system that required a detailed investigation into the matter. The Respondent requested a period of six (6) weeks within which to conduct investigations and revert with a comprehensive report of their findings.⁷

Submissions from Ms. Museteka⁸

It was submitted that:

⁷ Letter from the Respondent dated 28th June 2022.

⁸ Record of telephone conversation with Ms. Museteka on 29th June 2022.

33. In a telephone conversation on 29th June 2022, Ms. Museteka submitted that she had been issued a refund of the extra K5, 850.00 that she incurred in booking in booking a flight with Airlink.

Relevant Findings

It was submitted that:

34. The Commission found that on 1st September 2021, Ms. Museteka purchased two flight tickets from the Respondent for a Lusaka-Cape Town via Johannesburg flight, at \$1, 247.56 (K20, 179.53). The Commission found that the tickets indicated that the flight was scheduled for 19th October 2021.⁹
35. The Commission found that when Ms. Museteka went to board the flight on 19th October 2021, she was informed that the flight had been rescheduled due to low flight loads. The Commission found that Ms. Museteka consequently purchased two direct flight tickets to Johannesburg from Airlink for a total of K9, 750.00¹⁰ on the date of the flight. The Commission established that Ms. Museteka however, used the Respondent's flight to proceed to Cape Town from Johannesburg, and to return to Zambia.
36. The Commission established that Ms. Museteka was issued a refund of K3, 900.00, comprising a tax refund and partial transport refund on the Lusaka-Johannesburg sector that she did not utilise.
37. The Commission found that in an event of a failed flight, the Respondent booked passengers on their next available flight. The Commission found that in an event that passengers could not wait for the Respondent's next flight, the Respondent would accommodate the passengers on a flight operated by Proflight Zambia (Proflight), as the Respondent had such an understanding with Proflight.
38. The Commission found that in an event that Proflight was not servicing the concerned route on that day, the passengers would have to purchase flight tickets from other airlines, at their own cost, and the Respondent would only refund the inconvenienced sector (Lusaka to Johannesburg in the case at hand).
39. The Commission found that the aviation industry was characterized by price discrimination. Passengers paid different fares for the same flight, depending on seat availability, prevailing exchange rates (set by IATA), and the time the flight ticket was purchased. The Commission found that flight fares were cheaper the

⁹ Complainant's flight tickets dated 31st September 2021.

¹⁰ Flight tickets from Airlink dated 19th April 2021.

further away the flight date was from the date the ticket was purchased, and became relatively more expensive the closer the date of purchase was to the flight date.

40. The Commission found that despite the Respondent having submitted that the refund issued to Ms. Museteka was determined in accordance with calculations and rules set by IATA, IATA submitted that they did not intervene in remedies to be given to clients for cancelled flights, and clients had to engage the customer service of the concerned airline or present the matter to the relevant body.
41. The Commission found that as per Zambia Civil Aviation Requirements, passengers were entitled to compensation in an event that a flight was cancelled.¹¹
42. The Commission found that the Respondent issued Ms. Museteka a refund of the additional K5, 850.00 she incurred on booking a flight with Airlink, after they were served the Commission's preliminary report.

Previous cases involving the Respondent

It was submitted that:

43. A review of the Respondent's case file held with the Commission revealed that there was no case in which the Respondent was previously fined for breach of Section 53(1) of the Act.

Analysis of Conduct

It was submitted that:

44. In analysing the case for possible violation of Section 53(1) of the Act, the following assessment tests were used:

Whether South African Airways Limited was an enterprise

It was submitted that:

45. Refer to paragraph 9 of the report.

¹¹ Zambia Civil Aviation Requirements

Whether there existed a “contract” or “term of a contract” between an enterprise and consumers

It was submitted that:

46. According to Black Law’s Dictionary, contract is defined as “*An agreement, upon sufficient consideration, to do or not to do a particular thing.*”¹² Further, according to the Sales of Goods Act (1892), a contract would have the following elements: Intention to contract; Offer; Acceptance; Consideration; Agreement; and Capacity to contract. In this case, it can be said that an agreement to provide a flight at a particular price was implied whenever passengers made flight bookings. Further, as submitted by the Respondent, there existed a term to the contract that required passengers to purchase flight tickets from alternative airlines at their own cost if the Respondent could not provide the flight and Proflight was not servicing the concerned route.
47. Section 2 of the Act defines a consumer as “*any person who purchases or offers to purchase goods or services otherwise than for the purpose of re-sale, but does not include a person who purchases goods or services for the purpose of using the goods or services in the production and manufacture of any other goods for sale, or the provision of another service for remuneration.*”¹³ In this regard, passengers that consumed the aviation services provided by the Respondent could be characterized as consumers as they paid for a service (air transport) for their personal benefit. Therefore, a contract was established between an enterprise and a consumer whenever a passenger booked a flight.

Whether the term of the contract that required passengers to purchase tickets from alternative airlines at their own cost, caused a significant imbalance in the parties’ rights and obligations to the detriment of consumers

It was submitted that:

48. Imbalance means *a lack of a fair or correct balance between two things, which results in problems or unfairness*¹⁴. In order for the courts to determine whether a term or terms of a contract are unfair, the courts will consider two things; firstly, if the term has been incorporated into the contract, secondly if the clause covered the loss in question¹⁵. Enterprises are generally expected to be fair and open in their dealings with clients. Openness requires that the terms should be

¹² Black’s law Dictionary, 4th Edition, p394

¹³ Competition and Consumer Protection Act No. 24 of 2010

¹⁴ Longman Dictionary of Contemporary English, Page 810

¹⁵ Olley v Marlborough Court Ltd [1949] retrieved from

<https://www.open.edu/openlearn/ocw/mod/oucontent/view.php?id=25556&printable=1> on 24th February, 2020.

expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the customer. Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer's necessity, indigence, and lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position or any other factors.

49. In considering if the unfair term or terms have been incorporated into the contract, the general rule is that the term must be brought to the attention of the contracting party before or at the time the contract was made. However, if the term was not brought to their attention, it cannot be said that they had accepted the term and therefore the term will not be part of the agreement between the parties. In ***Olley V. Marlborough Court (1949 CA)***, the claimant booked in at the reception desk of a hotel and only, subsequently, on entering her room, did she discover behind the door a notice which claimed to exclude the hotel's liability for guests' property. The Court of Appeal held that the notice was not incorporated in the contract, since it was not displayed at a spot visible to claimant before she made the contract. On the other hand, in the case of ***L'Estrange V Graucob (1934) 2 KB 394*** the Court of Appeals held that in signing the order form she was bound by all the terms contained in the form irrespective of whether she had read the form or not consequently her claim was unsuccessful.
50. In the case at hand, the Commission found that in an event that the Respondent was not able to provide a booked flight on any particular day, the Respondent would rebook the inconvenienced passengers on their next available flight. However, if the passengers were not willing to wait for next flight, the Respondent would accommodate the passengers on a flight operated by Proflight as they had a partnership with them. In an event that Proflight was not servicing the concerned route on that particular day, the passengers would have to purchase tickets from other airlines at their own cost, and the Respondent would only issue a partial refund that comprised unused taxes and a partial fare for the inconvenienced sector. The Commission found that the Respondent claimed that the refund was made in accordance with rules set by IATA; however, an inquiry from IATA revealed that IATA did not intervene in remedial measures in cases of failed flights. Notwithstanding, the terms of recourse as submitted by the Respondent, in an event of a failed flight, were not stipulated in the legal and passenger notices that accompanied the tickets issued to the Complainant, and the Respondent failed to disclose how the partial refund issued to Ms. Museteka was calculated. Therefore, as in the case of ***Olley V. Marlborough Court (1949 CA)***, the terms of recourse as submitted by the Respondent could not be said to have been part of the contract as they were not brought to the Complainant's attention.

51. Further, the Commission found that the aviation industry was characterized by price discrimination. Passengers paid different fares for the same flight, depending on seat availability, prevailing exchange rate (set by IATA), and the time the flight ticket was purchased. The Commission found that flight fares were cheaper the further away the flight date was from the date the ticket was purchased, and became relatively more expensive the closer the date of purchase was to the flight date.
52. In consideration of the foregoing, the Commission determined that the Respondent's remedy of last resort subjected passengers to additional unexpected costs as flight fares were more expensive as the flight date drew nearer. Further, fluctuating exchange rates set by IATA, presented another risk of additional cost on the passengers, as the IATA exchange rates may have risen, making it more burdensome for passengers to purchase tickets from other airlines. The Commission further determined that the partial refund issued to passengers for the inconvenienced sector in case of return flights, was not fair as it could generally not cover the additional costs the passengers would incur resulting from the failed flight. For example, in the case of Ms. Tumbikani Museteka who had paid \$1,247.56 (K20,179.53) for two return tickets; from Lusaka to Cape Town via Johannesburg and back, the Respondent issued her a total refund of K3, 900.00 only, being the unused taxes and partial transport refund for the inconvenienced sector, after the Respondent failed to provide the flight from Lusaka to Johannesburg. However, Ms. Museteka had to purchase tickets from another airline as she could not wait for the Respondent's next available flight, and Proflight, which the Respondent engaged in such instances, was not servicing that route on that day. Ms. Tumbikani Museteka consequently purchased two tickets from Airlink for a total of K9,750.00. As such, Ms. Tumbikani Museteka incurred a net additional expense of K5,850.00 due to the Respondent's failure to provide the flight. The Commission also found that the refund was not made immediately in order to facilitate the passengers' purchase of another ticket from another airline. The Commission hence determined that there was a significant imbalance in the rights exercised by the Respondent and the passengers that ultimately resulted in detriment to the passengers as they would be left stranded in an event that they had no capacity to purchase another ticket from alternative airlines. The Commission thus concluded that the Respondent's remedy of last resort was unfair.
53. The Commission also inferred that the Respondent deliberately failed to arrange for an available airline to accommodate Ms. Museteka as evidenced by the fact that Ms. Museteka was able to find an available flight (Airlink) which she proceeded to use on the inconvenienced sector. The Commission determined that the Respondent could have borne the cost of Ms. Museteka's flight with

Airlink just as they would have done had Proflight services been available. Further, the Commission also found that the Zambia Civil Aviation Requirements gave passengers a right to compensation in an event of cancelled/delayed flights; however, the Respondent's conditions ruled out the possibility of compensation in such events, thereby depriving passengers of their right.

Board Deliberation

54. Having considered the facts, submissions, and evidence in this case, the Board resolves that the Respondent's remedy of last resort in an event of a failed flight, was unfair to consumers as it subjected them to more expenses that would not be covered by the Respondent, and would leave the consumers stranded if the consumers did not have capacity to pay for another ticket from alternative airlines.

Board Determination

55. The facts and evidence of this case have shown that the Respondent engaged in unfair trading practices, hence was in violation of Section 53(1) of the Act.

Board Directive

56. The Board hereby directs that:
- i. The Respondent revises the terms of the final remedy offered within thirty (30) days of receipt of the Board Decision in accordance with Section 5(d) of the Act. In revising the terms, the Respondent should consider;
 - a. Covering all extra expenses incurred by the passengers in booking tickets from alternative airlines when they fail to provide a flight;
 - b. Issuing a full refund of the money paid to allow the passengers to replan their journeys if the passengers so wish.
 - c. Arrange for any alternative available flight for passengers rather than restrict alternatives to Proflight.
 - ii. The Respondent stipulates the modes of recourse and how the refunds are calculated, in the legal and passenger notices issued to passengers, and submits the same for the Commission's review within (10) days of receipt of the Board Decision.

Board Decision on Allegations of Unfair Trading Practices against South African Airways by the Competition and Consumer Protection Commission

- iii. The Respondent submits the report of their findings once concluded as per their submission, for the Commission's consideration.

Note: Any party aggrieved with this order or directive may, within thirty (30) days of receiving this order or direction, appeal to the Competition and Consumer Protection Tribunal.

Dated this 9th Day of August 2022.



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Chairman

Competition and Consumer Protection Commission

Board Decision on Allegations of Unfair Trading Practices against South African Airways by the Competition and Consumer Protection Commission

ELECTRONIC TICKET REMARKS

Don't wait in line, check-in online.

South African Airways is pleased to offer our online check-in service, a simpler smarter and faster way to check in. Select or change your seat, and print your boarding pass between 24 hours and 3 hours prior to flight departure.

CANCEL NOTICE

For changes to your travel plans, please contact the South African Airways office nearest to you. Please note that all changes and cancellations to this ticket must abide by the fare rule.

PAYMENT DETAILS

Fare Calculation: LUN SA X/JNB SA CPT115.00SA X/JNB SA
 LUN115.00NUC230.00END ROE1.000000
 Form of payment: CC VI XXXXXXXXXXXXX7650
 XXXX 407724
 Endorsements: VALID ON SA ONLY /PLUS

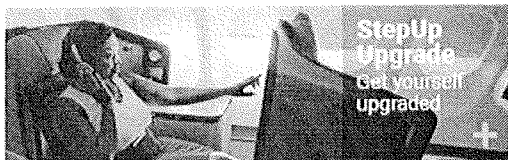
FARE DETAILS

Fare:	USD 230.00
Taxes:	USD 10.00H2
	USD 25.00JI
	USD 1.88K2
	USD 5.00QJ
	USD 10.00RM
	USD 5.40EV
	USD 4.50UM
	USD 13.00WC
	USD 29.00ZA
Carrier Imposed Fees:	USD 290.00YR
Total Amount:	USD 623.78

RECEIPT REMARKS

If your itinerary includes flights operated by airlines other than South African Airways, on the same ticket as your South African Airways flights, different baggage rules may apply for these sectors. If your flight originates with another carrier, additional baggage fees may apply.

The carriage of certain hazardous materials, like aerosols, fireworks, and flammable liquids, aboard the aircraft is forbidden. If you do not understand these restrictions, further information may be obtained from your airline.



LEGAL AND PASSENGER NOTICES

ELECTRONIC TICKET

Take Note

On some services we have arrangements with other carriers known as Codeshare Carriers. This means that even if you have a reservation with us and hold a ticket where our name or airline designator code (SA) is indicated as the carrier, another carrier may operate the aircraft. In such cases the operating carrier's regulations and baggage rules will apply.

Special Assistance

Travelling should always be a pleasure, and we go out of our way to make sure that anybody with special travel needs feels particularly cared for. SAA offers thoughtful services for travellers who require our special assistance. Many of these services need to be booked in advance. For further information, details of services offered or any other queries, contact your nearest South African Airways Office.

South African Travel Requirements for Minors

New requirements introduced by the South African Home Affairs Department, specify that all minors (children under 18 years) who are South African Passport holders are required to produce, in addition to their passport, an Unabridged Birth Certificate which shows the details of both parents for all

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international travel to and from South Africa. Travellers will be asked to produce the required documentation at check-in for each flight.

For full details please visit the Department of Home Affairs website.

Passport and Visa Information

Passport, visa and health requirements can vary according to your country of citizenship and your destination. It is your responsibility as a traveller to ensure you have the correct documents. Please check the requirements with the consulate or embassy of all countries on your itinerary. Failure to comply with visa and/or passport requirements may result in denied boarding. SAA is not responsible for any losses or inconvenience incurred as a result.

Domestic and International Check-In Information

Check-in travel requirements

At check-in, it is required that all travellers provide proof of identification in order to receive their boarding pass. Customers may use their valid RSA Identity Document or Passport (International travel) as proof of identification. **The same documentation must be present at the boarding gate.**

Check-in times:

Please make sure you check-in before these times:

Flights within South Africa : 90 minutes prior to departure

International flights : 2.5 hours prior to departure

Flights to the USA : 3 hours prior to departure. Travellers must please note that additional U.S. TSA (Transportation Security Administration) controls are applied upon boarding, in addition to Airport Security processes.

Flight check-in closure times

Check-in for domestic flights closes 40 minutes prior to flight departure for all flights departing from OR Tambo International Airport, Cape Town, Durban, Port Elizabeth and East London. Check-in for regional and international flights closes 50 minutes prior to flight departure for all travel classes. Check-in for flights from Johannesburg to Luanda (LAD), Lagos (LOS) and Kinshasa (FIH), Sao Paulo (GRU) closes 1 hour prior to flight departure. Check-in for flights from New York (JFK) and Washington (IAD) closes 1 hour prior to flight departure. Check-in for flights departing from Lagos closes 2 hours prior to flight departure.

Flight check-in closure times for flights between Cape Town and Durban

Our flights between Cape Town (CPT) and Durban (DUR) are operated by Mango. The recommended check-in time is between 1 1/2 hours and 2 hours prior to departure. Check-in and acceptance of baggage closes 40 minutes prior to departure.

Boarding gate closure times for flights between Cape Town and Durban operated by our partner airline Mango.

Boarding gate closure times (SAA operated flights)

Boarding for all flights begins at least 45 minutes before the scheduled time of departure, with gates closing 15 minutes prior to departure on domestic flights, and 20 minutes for international flights.

Travellers need to please allow enough time to pass through Immigration and Security. High traffic at peak times may be experienced so please allow more than 1 hour before departure time to pass through security.

Travellers who fail to present themselves at the boarding gate before the stipulated time for closure will be denied travel without compensation. In such instances the ticket/fare rules will be applied. Boarding times may vary across our network. Please check your boarding pass carefully.

Flight-boarding calls at O R Tambo International Airport

Flight boarding calls and name calls for passengers outstanding at the boarding gates is no longer permitted. We encourage all customers to check their boarding passes and/or the flight information display boards for all flight updates and to exercise vigilance and responsibility in ensuring arrival at the boarding gates as per the prescribed times.

Oversold Flights

SAA, like most airlines, sometimes overbook flights. We do this because often customers holding confirmed reservations change their plans without cancelling their reservation or don't turn up for their flight. On rare occasions, more customers with confirmed reservations are present than seats available. In this instance, we first seek volunteers, willing to give up their seats in exchange for compensation and a seat on the next available flight. If there are insufficient volunteers, we will deny boarding customers in accordance with our company policy on boarding priority. We will also provide you with a written statement that explains our obligations and your rights as a customer of South African Airways. Customer's rights vary per country of departure and are in accordance with the applicable regulations and/or acts enforced.

Standard Cabin Baggage Allowance

Your hand baggage allowance depends on the class you are flying in, so please be aware of the restrictions.

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Class of Travel | Max Weight Per Piece | Max Dimensions Per Piece
Business | Two pieces: 8kg (18lb) | each 56cm (L) 36cm (W) 23cm (H)
Economy | One piece not exceeding 8kg (18lb) | 56cm (L) 36cm (W) 23cm (H)

Please note: If your hand baggage does not conform to the size specified, you may be denied entry into the departure area or sent back to check-in.

- All hand baggage must be of a size that fits under the seat in front of you or in one of the overhead lockers.
- Hand baggage must not obstruct emergency exits or aisles.
- One (1) Small personal (e.g. small purse, small laptop case) is also allowed.

Remember to remove any lithium ion batteries and valuables from cabin baggage if it is removed from the cabin for hold stowage.

Larger laptop bags and standard/bulkier briefcases will NOT be considered a personal item and will count as a normal piece of cabin baggage, which may not exceed one piece in economy and two in Business (subject to dimension & weight restrictions).

Checked Baggage Allowance

As a guide, we have provided our standard checked baggage allowances, although there are exceptions based upon certain routes and ticket class. We therefore advise you to also check our baggage allowances and exceptions on www.flysaa.com.

SAA assesses baggage by number of pieces rather than their weight, although weight restrictions do apply.

1. For flights to and from the USA, the free checked baggage allowance per person in Business class is 2 pieces (max 70lbs/32kg & 62"/158cm ea.) The free checked baggage allowance per person in Economy class is 2 pieces (max 50lbs/23kg & 62"/158cm ea.)

For detailed baggage information, as well as other ancillary fees, and restrictions, please visit our [baggage & optional service fees page](#).

2. For all other SAA operated flights, the free checked baggage allowance per person in Business class is 2 pieces (max 70lbs/32kg & 62"/158cm ea.) The free checked baggage allowance per person in Economy class is 1 piece (max 50lbs/23kg & 62"/158cm ea.) There are exceptions to our Baggage Policy. Please visit www.flysaa.com for more information.

3. Infants not occupying a seat are allowed one (1) checked bag (max 50lbs/23kg) and one (1) car seat and a collapsible buggy or collapsible pram. For further information, please visit our [Travelling with infants page](#).

4. SAA Voyager Platinum, Platinum Elect & Lifetime Platinum & SAA Gold, Gold Elect Member & Star Alliance Gold Member on SAA operated flights plus any Star Alliance – operated flights: 1 extra piece based on the allowance of the respective class (weight or piece), as part of the free allowance.

General

No single item of checked baggage may exceed 32kg (70lb). Carriage of baggage is subject to space availability and any applicable aircraft weight restrictions, which vary. Baggage exceeding the specified allowance may need to be accommodated on a later flight.

For interline and codeshare flights, the free checked baggage allowance and excess baggage charges of the airlines operating those flights may differ from SAA's baggage policy. Stopovers during a trip may result in different baggage allowances for the flights either side of the stopover. Same day connections are not treated as stopovers and as such will have a uniform baggage allowance across all flights.

Special baggage liability limitations for US travel: For domestic travel wholly between US points, federal rules require any limit on a carrier's baggage liability to be at least US\$3300.00 per passenger, or the amount currently mandated by 14 CFR 254.5.

Hazardous Material Notification

Enhanced Security Screening - Liquids, aerosols and gels (International flights only)

Enhanced security measures apply to and from South Africa. Similar or more restrictive measures may apply for other countries. If you want to take liquids, aerosols or gels through the screening point, make sure:

- each item is 100ml or less and do not exceed 1 litre in total.
- all items fit comfortably in a transparent re-sealable 1 litre plastic bag;
- only 1 bag per person is allowed.

Exceptions

Prescription and non-prescription medicines and baby products that you need for the flight but please note:

- proof of need may be required, and
- additional security checks may be performed.

The following items if carried must be placed in your checked baggage:

- all knives, sharp objects or cutting implements of any kind and any length, whether of metal or other material (including, but not limited to paper knives, carpet knives, box cutters, letter openers, scissors of any kind, tradesman's tools, screwdrivers, and darts).
- sporting goods (including, without limitation, sporting bats, billiards/snooker/pool cues, catapults)

If these items are carried in your cabin baggage or on your person you will be required to surrender the item/s at the security screening point and it will not be returned to you.

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Firearms and Ammunition may NOT be carried within checked baggage. Such items must be declared at the time of check-in and handed via the appropriate process as directed by the Customer Services Staff. Handling fees on domestic and certain international flights may apply.

Dangerous Goods: For safety reasons, dangerous articles must not be packed in checked or cabin baggage. Prohibited articles include but are not limited to: compressed gases, corrosives, explosives, flammable liquids and solids, radioactive materials, oxidising materials, poisons, infectious substances, and briefcases with installed alarm devices.

For the latest details on dangerous goods, visit www.flysaa.com.

Electronic Cigarettes (e-cigarettes)

The use of electronic, simulated smoking materials including cigarettes, pipes and cigars, is prohibited on all SAA flights. However, they are permitted in your cabin baggage for all SAA/ SAA connecting flights. In the event of cabin baggage being removed and placed in the cargo compartment, you are requested to remove all Lithium Ion batteries from the cabin baggage and carry on board the aircraft.

Assistance With Your Booking

For assistance with flight changes, meal requests, seat reservations, delayed flights etc, please contact us in South Africa by email Reservationsjob@flysaa.com, or give us a call on +27 11 978 1111 or 0861 606 006 (sharecall in SA only), or contact your local SAA office.

Conditions of Carriage

Carriage is subject to South African Airways' Condition of Carriage. South African Airways is not liable for any changes of the transmitted data undertaken by you or a third party. No liability can be accepted for the accuracy of the information included in this document.

Please note that all flight times are local times.

Notice

The Montreal Convention or the Warsaw Convention may be applicable to your journey and these Conventions govern and may limit the liability of air carriers for death or bodily injury, for loss of or damage to baggage, and for delay.

Where the Montreal Convention applies, the limits of liability are as follows:

1. There are no financial limits in respect of death or bodily injury.
2. In respect of destruction, loss of, or damage or delay to baggage, 1,131 Special Drawing Rights (approximately EUR 1,200; US \$1,800) per passenger in most cases.
3. For damage occasioned by delay to your journey, 4,684 Special Drawing Rights (approximately EUR 5,000; US \$7,500) per passenger in most cases.

Where the Warsaw Convention system applies, the following limits of liability may apply:

1. 16,600 Special Drawing Rights (approximately EUR 20,000; US \$20,000) in respect of death or bodily injury if The Hague Protocol to the Convention applies, or 6,300 Special Drawing Rights (approximately EUR 10,000; US \$10,000) if only the Warsaw Convention applies. Many carriers have voluntarily waived these limits in their entirety, and US regulations require that, for journeys to, from or with an agreed stopping place in the US, the limit may not be less than US \$75,000.
2. 17 Special Drawing Rights (approximately EUR 20; US \$20) per kg for loss of or damage or delay to checked baggage, and 332 Special Drawing Rights (approximately EUR 400; US \$400) for unchecked baggage.
3. The carrier may also be liable for damage occasioned by delay.

Further information may be obtained from the carrier as to the limits applicable to your journey. If your journey involves carriage by different carriers, you should contact each carrier for information on the applicable limits of liability.

Regardless of which Convention applies to your journey, you may benefit from a higher limit of liability for loss of, damage or delay to baggage by making at check-in a special declaration of the value of your baggage and paying any supplementary fee that may apply. Alternatively, if the value of your baggage exceeds the applicable limit of liability, you should fully insure it before you travel.

Time limit for action: Any action in court to claim damages must be brought within two years from the date of arrival of the aircraft, or from the date on which the aircraft ought to have arrived. **Baggage claims:** Written notice to the carrier must be made within 7 days of the receipt of checked baggage in the case of damage, and, in the case of delay, within 21 days from the date on which it was placed at the disposal of the passenger.

Data Protection Notice

Your personal data will be processed in accordance with SAA's and all partner carrier's privacy policy. This is available on flysaa.com or from the carrier directly. You should read this documentation, which applies to your booking and specifies, for example, how your personal data is collected, stored, used, disclosed and transferred.

Disclaimer

The information in this e-mail is confidential and is legally privileged. It is intended solely for the addressee. If this e-mail is not intended for you,