

SAA loses lawsuit, must pay R104.6m

By [Franny Rabkin](#)

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A court has ordered national carrier South African Airways (SAA) to pay R104.6m plus interest to Nationwide Airlines for anticompetitive conduct. It is another financial blow for the cash-strapped airline and it might face a further court bill as a similar claim by Kulula's owner, Comair, for R1bn is pending in the high court. The claim is the first damages suit to be brought based on a finding of anticompetitive conduct by the Competition Tribunal.



Adrian Pingstone via <https://commons.wikimedia.org/wiki/File:South.african.b747-400.zs-sax arp.jpg> Wikimedia Commo

Nationwide, now in liquidation, brought the action after the tribunal found in 2010 that SAA had abused its dominant position in the market to divert customers from competitors. Nationwide's claim was for R171.5m in damages, plus interest calculated from 2010 - a total of about R325m.

SAA found guilty of diverting customers from competitors

In granting the claim, High Court in Johannesburg Judge Caroline Nicholls said she agreed with the Competition Tribunal and the Competition Appeal Court that SAA's abuse of its dominant position - from 2001 to 2005 - was "the major cause of the decrease in volume of Nationwide's passengers".

SAA had argued that Nationwide's loss of profits was the result of public perceptions of an aging and unsafe fleet.

Nicholls said the competition authorities acknowledged the shortcomings in Nationwide's safety record but had still found that commission agreements between SAA and travel agents diverted customers away from competitors - a "prohibited practice" under the Competition Act. "Those are findings which cannot be faulted but, in any event, to which this court is bound," said the judge.

Quantify amount of damages to be paid

A major part of Nicholls's judgment focused on how to quantify the amount of damages to be paid - an exercise with "numerous variables to be taken into consideration", she said. Essentially, the court had to compare how Nationwide performed versus how it would have performed if SAA had not abused its market position.

Arguments presented by experts on both sides - on which economic models should be used and which variables should be considered - yielded very different amounts.

After a detailed assessment, Nicholls, for the most part, agreed with Nationwide's expert witness. However, she adjusted the amount downwards to take into account a strike at SAA in July 2005 and made a 25% deduction for "contingencies". This was to take into account that the tribunal and Competition Appeal Court had found that most of the abuse was felt in the travel agent sector. But there was a portion, based on direct sales to the public and internet sales, that was unaffected by the anticompetitive conduct.

Although the Competition Act says interest on damages claims should be calculated from the date the tribunal issues a certificate of anticompetitive conduct, Nicholls ordered interest payable from the date of judgment. If this were to be found to be an error, it would mean a significantly larger bill for SAA.

Source: Business Day

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