

2-4 Fortress Road, Rhodesfield,
Kempton Park, 1619
P.O. Box 7015, Bonaero Park,
South Africa, 1622

Tel: +27 11 921 0111
www.comair.co.za



TO: TO ALL KNOWN CREDITORS

22 June 2023

Dear Sir/Madam

COMAIR LIMITED (IN PROVISIONAL LIQUIDATION)

EXTENSION OF RULE NISI

Please find attached a copy of the application papers filed in support of the extension of the return date for your information and records.

We will report once the Court has considered the matter.

Yours faithfully

PROVISIONAL CO-LIQUIDATORS

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NUMBER: 20111/2022

In the matter between:

TRACY ANNE CAMERON N.O.

(Identity Number: 650512 0072 089)

First Applicant

KGASHANE CHRISTOPHER MONYELA N.O.

(Identity Number: 670528 5341 085)

Second Applicant

AHMED CARIM N.O.

(Identity Number: 870630 5071 080)

Third Applicant

BUHLE JEFFREY ERIC BUTHELEZI N.O.

(Identity Number: 660822 5408 081)

Fourth Applicant

and

COMAIR LIMITED

(Registration Number: 1967/006783/06)

First Respondent

AFFECTED PERSONS

Second to Eleven Thousand
Five Hundred and Forty
Third Respondents

In re:

CASE NUMBER: 2022/20111

RICHARD FERGUSON N.O.

(ID No:660605 5024 085)

First Applicant

NEIL HABLUTZEL N.O.

Second Applicant

and

COMAIR LIMITED

(Registration Number: 1967/006783/06)

First Respondent

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NOTICE OF MOTION

BE PLEASED TO TAKE NOTICE THAT application will be made to the above Honourable Court by the abovementioned Applicants on **Thursday, 29 June 2023** at 10h00 or so soon thereafter as counsel may be heard for an order in the following terms -

- 1 that the return day of the rule *nisi* granted by this Court on 14 June 2022 under the above case number and which was extended by the above Honourable Court on 26 July 2022 to 13 December 2022, and which was further extended to 30 June 2023, be again extended to Thursday, 25 January 2024;
- 2 that service of this order be effected -
 - 2.1 on the Second to Eleven Thousand Five Hundred and Forty-Third Respondents by email; and

2.2 by publication on the First Respondent's and Sechaba Trust's website;
and

3 further and/or alternative relief, as this Court deems fit.

TAKE NOTICE FURTHER THAT the affidavit of **TRACY ANNE CAMERON** and the annexures thereto will be used in support of this application.

Kindly enrol the matter for hearing accordingly.

Dated at **JOHANNESBURG** on this the **21st** day of **JUNE 2023**.



WERKSMANS ATTORNEYS

Applicants' Attorneys

The Central

96 Rivonia Road

SANDTON

Ref: Dr E Levenstein/Ms N Harduth/COMA3742.21

Tel: 011 535 8000

Email: elevenstein@werksmans.com

nharduth@werksmans.com

reddyk@werksmans.com

TO:
THE REGISTRAR OF THE ABOVE HONOURABLE COURT
JOHANNESBURG

AND TO:
THE MASTER OF THE ABOVE HONOURABLE COURT
Hollard Building
66 Marshall Street
JOHANNESBURG

Service by hand

Received copy hereof on this _____ day of _____ 2023.
Name & Surname: _____

AND TO:
COMAIR LIMITED
2 – 4 Fortress Road
Rhodesfield
Kempton Park
Gauteng
(Registered Address)

Service by Sheriff

AND TO:
EMPLOYEES OF COMAIR LIMITED
2 – 4 Fortress Road
Rhodesfield
Kempton Park
Gauteng
(Registered Address)

Service by Sheriff

AND TO:
TRADE UNIONS OF COMAIR LIMITED

NUMSA
53 Lillian Ngoyi
Newton
JHB
2000

Service by Sheriff

SOLIDARITY
Penberthy Manor
198 A Trichardts Weg
Dudley Smith Str
Parkrand
Boksburg
1470

Service by Sheriff

COMAIR PILOTS ASSOCIATION
(a division of ALPA-SA)
10 Blockhouse St
Kempton Park
1619

Service by hand

AND TO:
THE SOUTH AFRICAN REVENUE SERVICE
Megawatt Park
Maxwell Drive
SUNNINGHILL
Email: liquidations@sars.gov.za

Service by email

AND TO:
THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION
77 Meintjies Street
The DTI Campus
Block F
Ground Floor
PRETORIA
Email: businessrescue@cipc.co.za

Service by email

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FOUNDING AFFIDAVIT

I, the undersigned,

TRACY ANNE CAMERON

do hereby make oath and say that –

- 1 I am a liquidator employed at Stowell Estate Administration Trust with its principal place of business situate at 295 Pietermaritz Street, Pietermaritzburg, 3201.
- 2 The facts herein contained are within my personal knowledge, unless indicated to the contrary, and are to the best of my belief both true and correct.

THE PARTIES

- 3 I depose to this affidavit in my capacity as one of the joint provisional liquidators of the First Respondent, and as the First Applicant in these proceedings. I bring



this application together with the Second to Fourth Applicants, in their capacities as the joint provisional liquidators (together with me) of the First Respondent.

- 4 The **Second Applicant** is **KGASHANE CHRISTOPHER MONYELA N.O.**, a liquidator with his principal place of business at 405 Moreleta Street, Silverton, Pretoria, 0184. The Second Applicant is one of the joint provisional liquidators of the First Respondent and is cited herein as such. The Second Applicant supports this Application, as is evident from his confirmatory affidavit attached hereto marked "FA1.A".

- 5 The **Third Applicant** is **AHMED CARIM N.O.**, a liquidator with his principal place of business at 1 Fehrsen Street, Brooklyn, Pretoria, 0181. The Third Applicant is also one of the joint provisional liquidators of the First Respondent and is cited herein as such. The Third Applicant supports this Application, as is evident from his confirmatory affidavit attached hereto marked "FA1.B".

- 6 The **Fourth Applicant** is **BUHLE JEFFREY ERIC BUTHELEZI N.O.**, a liquidator with his principal place of business at 19 Teebos Avenue, 1st Floor, Palm Ridge, 1488. The Fourth Applicant is one of the joint provisional liquidators of the First Respondent and is cited herein as such. The Fourth Applicant supports this Application, as is evident from his confirmatory affidavit attached hereto marked "FA1.C".



- 7 I refer to the First to Fourth Applicants collectively as the "**joint provisional liquidators**" or the "**Applicants**".
- 8 The **First Respondent** is Comair Limited (in provisional liquidation) (registration number: 1967/006783/06) (the "**Company**" or the "**First Respondent**"), a company with its registered address and principal place of business at 2 - 4 Fortress Road, Rhodesfield, Kempton Park, Gauteng. A certificate obtained from the Companies and Intellectual Property Commission (the "**CIPC**") in confirmation of the particulars and registered address of the Company is annexed hereto and marked "**FA2**".
- 9 The **Second to Eleven Thousand Five Hundred and Forty Third Respondents** (collectively referred to as the "**Affected Persons**") are the Company's affected persons, as defined in section 128 of the Companies Act, 71 of 2008 (the "**Companies Act**") and who include creditors and shareholders of the Company who voted on the Company's business rescue plan, as amended, and who have a direct legal interest in the outcome of these proceedings. The Affected Persons' known details are set out in Annexure A to the application which the Company's erstwhile Business Rescue Practitioners brought under the present case number (*Caselines page number 001-66 to 001-230*).

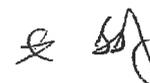


JURISDICTION

- 10 The above Honourable Court has jurisdiction in this application by virtue of the fact that the Company's registered address falls within its geographical area of jurisdiction, and the provisional liquidation order was granted by the above Honourable Court.

LOCUS STANDI

- 11 The Company was placed under provisional liquidation by order of the above Honourable Court on 14 June 2022, a copy of which is annexed hereto and marked "FA3" (the "**Provisional Liquidation Order**").
- 12 The Provisional Liquidation Order was extended by order of the above Honourable Court on 26 July 2022 until 13 December 2022, a copy of which is annexed hereto and marked "FA4" (the "**First Extension Order**").
- 13 The Provisional Liquidation Order was extended again by order of the above Honourable Court on 13 December 2022 until 30 June 2023, a copy of which is annexed hereto and marked "FA5" (the "**Second Extension Order**").
- 14 The joint provisional liquidators have *locus standi* by virtue of the fact that they have -



- 14.1 been appointed by the Master of the High Court as the Company's joint provisional liquidators as evidenced by the Master's Certificate dated 13 April 2023, a copy of which is annexed hereto marked "FA6"; and
- 14.2 extended powers, per the order dated 28 June 2022 (the "28 June 2022 Court Order"), a copy of which is annexed hereto and marked "FA7".
- 15 The above Honourable Court will note that the above orders make reference to the late Mr. Cloete Murray N.O. as one of the joint provisional liquidators of the First Respondent (specifically annexures FA4, FA5 and FA7), as these documents pre-date his passing on 18 March 2023. The Master's certificate (FA6) was issued to the Applicants thereafter.

NATURE OF APPLICATION

- 16 This is an application for an order in the following terms -
- 16.1 that the rule *nisi* per the Second Extension Order (FA5), calling upon Respondents cited herein and all interested persons to show cause, if any, why -
- 16.1.1 the Company should not be finally wound up; and
- 16.1.2 the costs of this Application should not be costs in the winding up,



be extended to Thursday, 25 January 2024;

16.2 that service of the order sought in this Application be effected -

16.2.1 on the Affected Persons by email; and

16.2.2 by publication on the First Respondent's website and Sechaba Trust's website,

in line with the relief that was granted to the Applicants in the orders annexed as Provisional Liquidation Order (FA3), the First Extension Order (FA4), the Second Extension Order (FA5) and the 28 June 2022 Court Order (FA7).

SUBSTITUTED SERVICE

17 The above Honourable Court has, in terms of the Provisional Liquidation Order (FA3), permitted service on Affected Persons, as defined in section 128 of the Companies Act and who would include the Creditors, to be effected by substituted service by email.

18 The joint provisional liquidators for reasons previously advanced, seek similar leave from the above Honourable Court in respect of the service on Affected Persons of the further extension order sought in this Application.

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- 19 The joint provisional liquidators would face severe logistical and financial hurdles in attempting to serve the order sought, if granted, on the Affected Persons, some Eleven Thousand Five Hundred and Forty-Three Persons, should substituted service not be permitted.
- 20 I say this because the physical addresses of only a few, but not all the Affected Persons are known. These details are not available to the Applicants.
- 21 The Affected Persons, in the course of the First Respondent's business rescue proceedings, have received service of all notices and Status Reports per email and by publication on the Company's website, as contemplated in the Companies Act. The Affected Persons have also, in the course of the First Respondent's provisional liquidation proceedings, received communications from the Applicants per email.
- 22 Thus, the only viable alternative is to seek the above Honourable Court's leave to allow substituted service of the order sought, if granted, on the Affected Persons.
- 23 Against this backdrop, we seek the above Honourable Court's leave to authorise substituted service of the order sought, on the Affected Persons, as follows -
- 23.1 on the Affected Persons by email; and

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23.2 by publication on the First Respondent's website and on Sechaba's website, Sechaba being the office which is responsible for the day-to-day administration of the First Respondent's insolvent estate,

in line with the relief that was granted to the Second to Fourth Applicants in the 28 June 2022 Court Order (FA7) and subsequent extension orders.

PROVISIONAL LIQUIDATION PROCEEDINGS

- 24 The Provisional Liquidation Order was served in terms of section 346A of the Companies Act 61 of 1973, as amended, and as directed by the above Honourable Court. The service affidavit appears at Caselines page number 074-10 to 074-11.
- 25 The First Extension Order was published as directed by the Court. The service affidavit appears at Caselines page number 077-37 to 077-50.
- 26 The Second Extension Order was published as directed by the above Honourable Court. A service affidavit is annexed hereto and marked "FA8".
- 27 I bring to the above Honourable Court's attention that in terms of the Second Extension Order, the return date ordered by the Honourable Justice Windell was 30 June 2023 however, when attempting to enrol the matter on the unopposed motion roll for that date, the Applicants' legal representatives, Werksmans Attorneys, were advised by the Registrar in the Unopposed Motion



Office of the above Honourable Court that there is no unopposed motion court that will be able to hear the matter on Friday, 30 June 2023.

- 28 Accordingly, Werksmans Attorneys addressed a letter to the Honourable Deputy Judge President requesting a directive and were advised by the Honourable Deputy Judge President that the rule *nisi* should be enrolled for hearing on the unopposed motion roll on Thursday, 29 June 2023, on notice to all interested parties, in order to extend the rule *nisi* to an appropriate date. Copies of the letters addressed to Honourable Deputy Judge President on 12 June 2023 by Werksmans Attorneys and the Honourable Deputy Judge President's response dated 12 June 2023 are annexed hereto marked "FA9.1" and "FA9.2". A confirmatory affidavit deposed to by Kerisha Reddy of Werksmans Attorneys is also annexed hereto marked "FA9.3".
- 29 This Application will be served on the Respondents by substituted service as directed by the Honourable Deputy Judge President in his letter dated 12 June 2023 (FA9.2). A service affidavit confirming that this Application was served on the Respondents by substituted service and in accordance with the directive issued by the Honourable Deputy Judge President will be made available to the above Honourable Court at the hearing of this Application.

REASONS FOR SEEKING A FURTHER EXTENSION

- 30 The joint provisional liquidators are in the process of dealing with prospective offers for various assets of the Company and which include, *inter alia*, the



domestic air services licenses, aircraft operators' certificate and intellectual property owned by the Company - including the Kulula brand - that it holds.

- 31 The joint provisional liquidators and interested parties are in the process of concluding various confidential memoranda of understanding and sale agreements in respect of advancing these transactions. At this stage, the terms of such transactions and the identities of the various interested parties are confidential.
- 32 It is furthermore, at this stage, the intention of the joint provisional liquidators to conclude certain of these transactions, should they materialise, and if possible, by way of a compromise in terms of section 155 of the Companies Act (the "**Compromise**"). Once binding offers have been received, these offers will have to be presented to the Company's creditors or respective classes of Creditors, or the Master of the High Court, Johannesburg (the "**Master**"), as the case may be. The Second to Fourth Applicants and I will conclude transactions based on instructions received at a meeting/s of creditors or class/es of creditors, or with the written permission of the Master, as the case may be. Again, if a section 155 process is required, such procedure will be invoked by the Second to Fourth Applicants and me.
- 33 Thereafter, given the transaction values expected, various statutory and regulatory approvals will have to be sought, including the South African Civil Aviation Authority and Competition Commission approval. Clearly, these processes will take time.



- 34 One of the issues also being attended to is the renewal of the Company's Aircraft Operator's Certificate ("AOC"). The AOC allows the Company, to conduct commercial airline operations in terms of the South African Civil Aviation Regulations of 2011.
- 35 The AOC expired on 30 April 2023, however prior to the expiry of the AOC, application was made for its renewal. The joint provisional liquidators have, through their appointed agents, been engaging with the South African Civil Aviation Authority (the "SACAA") who have expressed their support, subject to what is stated below in relation to the licenses, for the renewal of the AOC. A copy of the AOC, which expired on 30 April 2023, is annexed hereto marked "FA10".
- 36 The Company's Air Service Licenses (issued under the Air Service Licenses Act, 115 of 1990 (the "Air Services Licenses Act")), annexed hereto marked "FA11", are required for the First Respondent to be issued with an AOC.
- 37 The Company's International License has been cancelled. In a letter dated August 2022, the Air Services Licensing Council (the "Council") unlawfully suspended the Company's Domestic Licenses.
- 38 An urgent application was instituted in September 2022 in terms of section 25 of the Air Services Licensing Act to set aside the decision of the Council to suspend the domestic licenses on the basis that the decision was unlawful, irregular and improper. On 21 April 2023, judgment was handed down in the

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High Court of South Africa, Gauteng Division and the Company's appeal, in terms of section 25 of the Air Services Licensing Act, was upheld and the Council's suspension of the Company's Domestic Licences NO67D and SO66D was set aside.

- 39 The Council addressed correspondence to the Company on 8 May 2023 wherein it, *inter alia*, confirmed the upliftment of the suspension of the Company's domestic licences NO67D and SO66D. A copy of the letter from the Council is attached marked "FA12".
- 40 The AOC and the Air Service Licenses are the most valuable unsecured assets of the Company and may therefore hold the greatest possibility of realizing a dividend for the Company's concurrent creditors.
- 41 The AOC and the Air Service Licenses will be central to any Compromise proposed.
- 42 In addition to what is set out above, the Applicants are of the view that a further extension of the *rule nisi* will not be prejudicial to the employees of the Company. The provisional liquidators are actively engaging with organised labour and non-represented employees in a consultative process with a view to discuss and agree on the following -
- 42.1 approaching the above Honourable Court for declaratory relief authorising the provisional liquidators to consult with and pay the

Company's employees preferential severance pay in terms of section 98A, as read with section 38 of the Insolvency Act, 24 of 1936, before the expiration of the 45 day period after the appointment of a final liquidator; and

42.2 process the preferential severance pay as aforesaid,

as evinced by the correspondence annexed hereto as "FA13".

- 43 In addition, in February 2023, the First Respondent launched a claim against The Boeing Company ("Boeing") in the United States of America (the "USA") for breaches of contract, good faith and fair dealing, fraudulent inducement, fraudulent concealment, fraudulent misrepresentation, and negligent misrepresentation. The claim relates to the purchase of certain Boeing Max Aircrafts that had been purchased by the First Respondent, some years ago. This matter is currently pending before the Federal Court in Seattle, Washington.
- 44 On 3 April 2023, Boeing filed a motion to dismiss the First Respondent's non-contractual claims. In the main claim, Boeing seeks the dismissal of the First Respondent fraud claims, as well as alleging that the First Respondent has failed to plead its case with the specificity required.
- 45 The First Respondent filed its response to the motion to dismiss on Monday, 22 May 2023. The opposition to the motion to dismiss was filed partially under seal (confidential basis) on the grounds that it contains quotes from confidential

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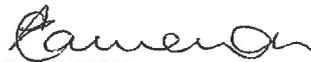
documents that have sensitive contractual terms. The First Respondent opposed the motion to dismiss on various grounds and on the basis that the claim, as pleaded, sufficiently satisfies the standard required at this stage of proceedings. The First Respondent further argues that the Washington Federal Court has previously rejected Boeing's arguments that it has made in similar cases, and as such, the Court should deny Boeing's motion to dismiss.

- 46 Boeing filed its reply brief to First Respondent's opposition brief on Monday, 12 June 2023. The First Respondent awaits the decision of the Washington Federal Court and in respect of Boeing's motion to dismiss. However, if the motion is granted in any part, the First Respondent may be given an opportunity to amend its claims. If so, Boeing may then file another motion to dismiss the amended complaint.
- 47 In the interim, the First Respondent will be proceeding with discovery requests. This will take the form of written requests for evidence between the parties. Clearly, the USA litigation is ongoing and will take some time to conclude.
- 48 Importantly, and following a lengthy process, the New York Bankruptcy Court has recognised the Applicants as the First Respondent's legal foreign representatives in the United States of America. A copy of that Court's order is annexed marked "FA14". It took approximately 7 months for the Applicants to be granted the recognition order (which was opposed by Boeing). Should the First Respondent be placed in final liquidation, with other liquidators being finally appointed, then a further submission would have to be made to the New York Bankruptcy Court in

which event, the aforementioned litigation against Boeing will likely be pended until the further submission to have the other liquidators recognised as First Respondent's legal foreign representatives in the USA has been dealt with by New York Bankruptcy Court.

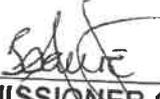
49 In the circumstances, the Second to Fourth Applicants and I request that the *rule nisi* that was granted on 14 June 2022 in terms of the Provisional Liquidation Order and which was extended in terms of the First Extension Order to 13 December 2022 and was extended again in terms of the Second Extension Order to 30 June 2023, be further extended to 25 January 2024, in order to afford time to complete or at least advance the process for a potential sales process as described above. The Applicants believe that it will be in the best interests of the general body of creditors, and perhaps even other Affected Persons, for this process to be pursued.



TRACY ANNE CAMERON

I certify that this affidavit was signed and sworn to before me at Pietermaritzburg on this the 21st day of **JUNE 2023** by the deponent who acknowledged that she knows and understands the contents of this affidavit, has no objection to taking this oath, considers this oath to be binding on her conscience and uttered the following words: 'I swear that the contents of this affidavit are both true and correct, so help me God.'





COMMISSIONER OF OATHS

Name: **BRETT DEANE FAURÉ**
Address: **COMMISSIONER OF OATHS**
ASSOCIATE GENERAL
Capacity: **ACCOUNTANT OF SOUTH AFRICA**
(SAICA)
22 RIDGE ROAD, SCOTTSVILLE
PIETERMARITZBURG, 3201



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