

Established 1900

Cape Town

Mr Mohammed Sizwe  
Chairperson of the Regulating Committee  
Established in terms of Section 11 of the Air Traffic &  
Navigation Services Company Act  
**ATTENTION: MR MOHAMED SIZWE**

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Your reference

Our reference

Date

ABS/KL

05 May 2005

Dear Sir

**REVISED ATNS TARIFF STRUCTURE**

A copy of our previous letter and representations to the Air Traffic and Navigation Services Company (ATNS) was directed to you on 31 March 2005. To date we have had no response from you. Although we have received a response from ATNS we have been constrained to conclude from their conduct of the matter that they are shielding you from our clients and their criticism of the air traffic service charges published in Notices 2982 (31 December 2004) and 501 of 2005. We briefly summarise our clients' criticism below and respectfully request your urgent reply.

ATNS is an organ of state with broad powers to conduct economic activities, including the act of raising the fees which are now in question. Section 81 of the Competition Act 89 of 1998 binds the State and prohibits the abuse of the dominance of ATNS which arises from the vesting in the company of exclusive control over national aviation infrastructure, air traffic service and charges. The Constitution requires the powers vested under Act 45 of 1993 ("the ATNS Act") to be exercised by ATNS in the public interest.

General aviation constitute part of the public and general aviation (GA) is part of the public interest. In particular it is in the public interest that alternative access to air space exists other than via airliners and that GA is not constrained by economic inefficiencies of the ATNS to use this air space in a manner which creates safety risks. (The last mentioned was dealt with in our client's previous representation to you.)

The CEO of ATNS, Wrenelle Stander, has publicly acknowledged that the policy behind the tariff increases involves deterring potential users, viz. general aviation, and reducing the existing costs subsidisation of lighter aircraft by heavier aircraft.

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The ATNS Act specifically enjoins the company not to engage in restrictive practices as defined in section 1 of the Act 96 of 1979 (which was repealed by Act 89 of 1998). That is by driving out charters and professional aircraft operators so as to maintain a predetermined operating profit of ATNS. Section 5 expressly prohibits undue discrimination against other users or categories of users of the above infrastructure or services. (See our client's previous representation.)

GA is a significant category of user and an interested party. Consultation processes required of both ATNS and the Committee under the Act are not a formality but are intended to prevent restrictive practices, unconstitutional use of national assets and the creation of safety risks to the public. As users of the infrastructure and services in question our clients do not believe that the price determination process is leading to efficient pricing.

The policy of ATNS involves driving part or all of GA out of the air or preventing GA to compete for customers with large airlines. Alternatively the profit margins of ATNS are being put before the public interest which their provision is supposed to satisfy.

GA cross subsidises heavier aircraft by providing training to a plethora of pilots who become employed and fully trained by SAA and other international airlines as a result. By increasing tariffs irrationally (as appears from our previous representation) ATNS places such training beyond the reach of previously disadvantaged persons thereby frustrating black empowerment.

There was never any genuine consultation with the GA as a whole prior to the publication of the increased price on 31 December 2004. To the extent that any consultation took place at all the persons consulted were not made aware of the nature and extent of the increases. The Notice number 501 of 2005, which purported to have been issued after "further consultation" with the users concerned, was even more far fetched. Even at this stage our clients are being prevented from determining for themselves the price capping methodology.

Soemaya Boomgaard, whom my clients have been instructed to deal with exclusively, has refused to provide them with the mathematical basis relied upon by ATNS and the permission granted by the Regulating Committee with specific reference to the X-factor capping mechanism.

In the circumstances it is apparent that the Committee is facilitating an abuse of ATNS's prominence. It goes without saying that this is contrary to the public interest and unconstitutional.

Accordingly we await your urgent reply by Wednesday 11 May 2005. Presently we intend no more than to achieve a moratorium on the price structures imposed, pending proper consultation in order to satisfy the public interest. Failing this we will be constrained to look to our other constitutional remedies as a matter of urgency.

Yours faithfully

strb **SMITH TABATA BUCHANAN BOYES**



**A B SMIEDT**

