IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case Number: 15996/2017

In the matter between:

ORGANISATION UNDOING TAX ABUSE NPC	First Applicant
SOUTH AFRICAN AIRWAYS PILOTS' ASSOCIATION	Second Applicant

and

DUDUZILE CYNTHIA MYENI	First Respondent
SOUTH AFRICAN AIRWAYS SOC LIMITED	Second Respondent
AIRCHEFS SOC LIMITED	Third Respondent
MINISTER OF FINANCE	Fourth Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Fifth Respondent

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FILING NOTICE

DOCUMENT: FIRST RESPONDENT'S ANSWERING AFFIDAVIT.

DATED AT **JOHANNESBURG** ON THIS THE **11TH** DAY OF **AUGUST 2020**.

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MINISTER OF FINANCE	Fourth Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Fifth Respondent

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FIRST RESPONDENT'S ANSWERING AFFIDAVIT

I the undersigned

DUDUZILE CYNTHIA MYENI

do hereby make oath and say the following:

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1. I am an adult female and the Former Chairperson of the South African Airways SOC Limited (SAA), residing at 102 Kolstertkring, Meerensee, Richards Bay. I am a citizen of South Africa.

2. The facts set out below are, to the best of my knowledge, both true and correct. Save where the contrary is expressed or appears from the context, they lie within my personal knowledge.

3. I so far as I make legal submissions and draw the conclusions in the affidavit, I do so on the advice of my legal representatives, which advice I accept.

4. Before dealing with the specific allegations raised in the founding affidavit, I wish to set the scene by making some general and broad observations in respect of both the main and alternative legs of the application.

FIRST LEG: THE SECTION 18 APPLICATION

5. While the application by the applicants comes as no surprise, I submit that it is completely meritless. There exist no grounds in law that warrant or justify the relief sought by the applicants.

6. It is self-evident from the application itself in that the applicants seek in the alternative to declare the well-established legal principles established in Section 18 of the Superior Courts Act 10 of 2013 ("the **Act**") as unconstitutional to overcome the inherent weakness of their main application. It is a subliminal concession that they are not entitled to the relief they seek, as the statute currently stands.

DCM

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7. It has been authoratively determined that a section 18 application must satisfy the three statutory requirements which are explicitly mentioned in the section plus one requirement not expressly mentioned, namely prospects of success.

Exceptional circumstances

8. Section 18(1) is clear in that it states unambiguously that execution of a decision that is the subject of an application for leave to appeal or appeal is suspended pending the decision of the application or appeal unless exceptional circumstances exist. That is the incontestable default position. Like all general rules of law, there may be exceptions thereto, hence the onus on the applicants to establish, on a balance of probabilities, first and foremost exceptional circumstances. In addition thereto, the requirements of section 18(3) must also be satisfied, on the same evidentiary standard. The combined effect of this test has been correctly disclosed by our courts, including the SCA, as a "*heavy onus*".

9. The requirement of exceptional circumstances is a question of fact.

Irreparable harm

10. Section 18(3) provides that the party who applies for such relief has to show that they stand to suffer irreparable harm if such order is not granted and that the appealing party will suffer <u>no</u> irreparable harm.

11. In the present matter, these requirements cannot be met because:

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11.1. I have not been a director at South African Airways since 2017. There is nothing that such an order will do to for the benefit of the Applicants.

11.2. The current *status quo* has prevailed since 2017 and there is no harm suffered by the Applicants to date.

11.3. The *locus standi* of the First Applicant is also being appealed and thus the First Applicant's entitlement to the relief is not settled in this matter. Whether the First Applicant is even legally capable of suffering <u>any</u> harm in this matter is itself an issue on appeal.

11.4. The Applicants fail to establish a nexus between the issues in this case and my other roles which they seek to curtail through this application. Thus to me, this application continues to be another witch-hunt against me as a person instead of an application founded in legal substance and merits.

11.5. I have exercised my constitutional right to appeal the decision of the court against me which right I am advised is most paramount and sacrosanct in the justice system of our country. It is guaranteed in section 34 of the Constitution. The Applicants exercised their section 34 legal rights in bringing a case against me, likewise I am entitled to pursue all my legal rights in pursuing the appeal. It is now my turn to be the Applicant. The rights and protection that Section 18 affords me are in no way a subservient class of rights that are to be abrogated at the whims of the Applicant.

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11.6. As will be demonstrated in the analysis set out below, it is incontestable that I will suffer at least some harm if there is deviation from the default position in this particular matter.

Prospects of success

12. The Applicants have seen fit to retraverse chapter and verse of their version in the main trial proceedings, as well as the comments and findings of the court, which are the very subject of the intended appeal.

13. No useful purpose can be served in likewise regurgitating the defences raised in such proceedings and in my application for leave to appeal. The only possible relevance of the Applicants' averments is in respect of the issue of the prospects of success, which will also be fully debated in the parallel but separate section 17 application. To the extent that the issue also arises in the section 18 application, I now address it briefly.

14. My grounds of appeal can be summarised as follows:

14.1. The declaration of delinquency was erroneous and based on the incorrect findings of fact and application of the law;

14.2. There is no system of individual delinquency in respect of collective board decisions;

14.3. The egregious punishment in the form of a lifetime ban is exceedingly excessive and induces a sense of shock;

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14.4. The punishment or penalty is in breach of my constitutional rights, including my rights in terms of section 22 of the Constitution, read with sections 9 and 10 thereof.

15. Insofar as it may be useful as a reference point for this Honourable Court or in any subsequent appeals, I annex hereto marked "**DCM1**" a copy of my application for leave to appeal in terms of section 17 of the Act.

16. In any event, the prospects of success on appeal are very strong on the basis of the grounds outlined above.

17. There is also a strong case to be made for the proposition that leave to appeal should be granted due to the obvious public importance of the issues, not only to the parties themselves but also to the public in general.

18. The novelty of the area of law in question is also an important consideration which must not only weigh in favour of granting leave but that such leave ought properly to be granted to the Supreme Court of Appeal.

19. Given the weighty constitutional questions raised by both sides, which have necessitated the joinder of the Ministers of Justice and Finance, this matter is also clearly destined to the Constitutional Court, irrespective of the outcome at this stage.

20. In all the circumstances, it cannot be gainsaid that the prospects of success are good, both in respect of the section 17 application and the intended appeal itself.

Analysis of the section as a whole

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21. The section must be assessed purposively, holistically and put in its proper historical context.

22. The wide ambit of the protections afforded to me by section 18 can be no better illustrated than by the provisions of section 18(4), which I am advised has no known match in any other legislation. That section provides the triple-barrelled protection of (a) an automatic appeal, (b) on an extremely urgent basis, and (c) the automatic suspension of the decision.

23. Incidentally, the Applicants do not attack the constitutionality of section 18(4) despite the fact that it is equally an expression of the extent to which the legislature seeks to protect the rights of a prospective and/or actual appellant.

24. Section 18(4)(ii) provides that I have an automatic appeal to the next highest court against the decision of the court if granted and Section 18(4)(iv) provides that the order will be automatically suspended pending the outcome of the appeal. In essence this application could create a trial within a trial that will over burden the court unnecessarily.

25. I am advised that the purpose of Section 18 is to prevent irreparable harm to an appellant. The irreparable harm I stand to suffer is already inherent in the fact that I am currently appealing a life time declaration of delinquency which if not granted shall permanently impair my ability to support myself and my family. Any premature execution of such an oppressive order only stands to exacerbate the irreparable harm against me. It will render any rights I might restore from a successful appeal to be meaningless and hollow.

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26. It is the corporate law equivalent of a life sentence, if not the death sentence. These are exceptional circumstances in favour of granting me the protection of section 18, not removing them as the Applicants would want this Honourable Court to do.

27. In their attempt to establish exceptional circumstances the applicants rely on speculative inferences that they seek to frame as factual. The sum total of what they assert seeks to suggest that I am the one that has "*single-handedly*" caused the current well-known problems that SAA is facing. I am advised that this goes nowhere near establishing exceptional circumstances as defined in law. There is a prescribed manner, different from gossip, in which courts draw inferences. It was well-established in the case of *R v Blom*, which sets out the well-known two cardinal rules of logic. I am advised that it will be argued that the reasoning of the Applicants falls far short of that test.

28. The Applicants also claim public interest as constituting exceptional circumstances. The public interest claimed by the applicants is also the subject of appeal and the Applicants' reliance thereon is in itself tenuous.

29. I am advised that the establishment of exceptional circumstances for purposes of Section 18 is a factual finding and not a discretionary or legal one. None of what the applicants rely upon factually establishes exceptional circumstances. It is for this reason that the applicants seek to have Section 18 of the Superior Courts Act declared unconstitutional. The applicants are fully aware that they have not made out a case that establishes exceptional circumstances and now seek to amend legislation to suit their cause. Legal

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conclusions cannot constitute exceptional circumstances within the meaning of that phrase in section 18.

30. The Applicants place a lot of reliance on issues that have emanated from the judgment that have no bearing on whether the relief they seek should be granted or not. I am advised that the prospects of success in the appeal do not constitute exceptional circumstances as is required under Section 18. The issue of the prospects of success is an additional requirement which has been defined by our courts in their interpretation of the section. Needless to say, all the points from the judgment that the Applicants rely upon are the subject of appeal and it would be most premature and presumptuous for the Applicant's to act as if those points have already prevailed in the appeal. The approach would defeat the very purpose of the section 18 super protection.

31. In a nutshell and even in the very unlikely event that the Applicants could somehow prove exceptional circumstances, irreparable harm to them and even good prospects of success on appeal, all of which is denied, it is impossible on the current facts to prove that I will suffer no irreparable harm if my only source of income is prematurely taken away in spite of the protections afforded to me by section 18 and section 22 of the Constitution.

32. Section 22 of the Constitution provides that:

> "*Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law*" (my emphasis).

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33. The abovementioned right to free economic activity, read with section 34 of the Constitution, will obviously be *prima facie* violated if the application is granted.

34. The law as it stands no longer provides for a balancing act in respect of the harm but now requires, correctly, that the Applicants must show that no harm, however small, will be suffered by me.

35. On the current facts, such a conclusion cannot be justifiably and sustainably reached by this Honourable Court. Even the Applicants cannot, with a straight face, aver that neither I nor my defendants will suffer any harm in the circumstances.

36. The section 18 application must fail on this basis alone.

37. I now turn to deal with the alternative constitutional challenge, which has been raised to cater for the inevitable dismissal of the section 18 application.

SECOND LEG: CONSTITUTIONAL CHALLENGE OF SECTION 18 OF THE ACT

38. The challenge on the constitutionality of Section 18 is without merit. I am advised that the peremptory terms of Section18(1) and 18(3) serve a peremptory purpose by design. The assertion by the Applicants the court's discretion is curtailed by these provisions is unfounded and wholly misplaced.

39. I am advised that what Section 18 has done is to narrow the discretion to exceptional circumstances. The Applicants err in stating that the court does not have a discretion at all.

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40. The Applicants' case is founded on their failure to discharge the onus set under Section 18(1) and 18(3). Changing the law to lower the legal hurdle for the Applicants is in no way justified in the circumstances. The Applicants effectively seek to re-enact the now repealed Rule 49(11) out of the frustration they have in failing to discharge the onus in Section 18 in a particular case. This is a sign of extreme desperation to pursue their vendetta against me. Legislation cannot be changed to persecute one person. This was possible in the apartheid era, as exemplified by the well-known "*Sobukwe clause*" of that era. In the current constitutional dispensation, laws must necessarily be of general application, otherwise they will be in violation of the rule of law.

41. The discretion of the court is fully provided for in both Sections 18(1) and 18(3). As with all other discretionary decisions, if not exercised judicially, then the remedy of an appeal is available to both parties.

42. No proper legal basis has been advanced for a reversion to the pre-2010 position or even the common-law position, which was consciously altered by the legislature.

43. Section 34 guarantees fairness and equality of arms. This is related to section 9 of the Constitution, the so-called equality clause.

44. The heavy onus introduced by section 18 is consistent with the need to protect the section 34 rights of an appellant. There is accordingly no violation of any fundamental rights of any person which is caused by the section.

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45. In the unlikely event that it is found that the section infringes or limits any fundamental rights, which is denied, then it is a justifiable intrusion into the rights of the respondent in an appeal in terms of the provisions of section 36 of the Constitution. The constitutional challenge is accordingly doomed to fail, just like the section 18 application.

46. I turn now to deal *ad seriatim* with the allegations contained in the founding affidavit. Any allegations not specifically dealt with must be regarded as having been denied insofar as they are in conflict with my version as asserted herein and/or in the main proceedings and/or in the application for leave to appeal in relation to which this section 18 application has been brought.

AD PARAGRAPHS 1 to 10

47. The contents of these paragraphs are noted and the descriptions of the parties are admitted.

48. It is denied that the facts are true and correct.

49. I do not challenge the joinder of the two Ministers in respect of the constitutional challenge.

50. I do however hereby give notice that I will raise at the hearing, as a preliminary objection or point *in limine*, the Applicants' glaring and fatal failure to join Centlec in the entire application as a party to these proceedings, despite its clear and substantial interest in terms of the applicable rules. The Applicants are therefore called upon to address this

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point of non-joinder in their replying affidavit. Further argument in this regard will be advanced at the hearing of the application.

AD PARAGRAPHS 11 to 13

51. The contents of these paragraph are denied. In particular, it is denied that I caused any irreparable harm to SAA. The Applicants have only elevated their opinions and inferences drawn to be findings of the court in these paragraphs.

AD PARAGRAPHS 14 to 19

52. The contents of these paragraphs are denied. I am a non-executive director at Centlec and have no role in its daily management. My involvement is confined to board meetings and other sub committees that in total require my attendance an average of six times a year.

53. In addition, Centlec has been performing well as an entity in the time I have been a part of the board. Centlec has received unqualified audits from the Auditor General for four consecutive years while I have been on the board.

54. There is no nexus or parallel to any of the issues I have dealt with in SAA and Centlec. Thus, the allegation that my presence on the Centlec board while I appeal the court's judgment poses a threat to Centlec is unfounded. Centlec clearly does not share that view. If Centlec was a co-applicant or duly joined in the proceedings in any manner, it would be a different matter.

AD PARAGRAPH 20

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55. The contents of this paragraph are denied. The clearly exaggerated allegations of irreparable harm single-handedly caused by me to the SAA and the South African economy are denied.

AD PARAGRAPHS 21 to 58

56. The contents of these paragraphs are denied. These paragraphs are the version of the Applicants which I have sought leave to appeal as I do not accept them as correct.

AD PARAGRAPHS 59 to 60

57. It is denied that the Applicants satisfy the requirements of Section 18. The Applicants fall short of satisfying any of the three requirements of Section 18. They do not meet or satisfy a single one of the requirements.

58. I am advised that for purposes of Section 18 the test for what constitutes exceptional circumstances was first established in Incubeta Holdings (Pty) Limited v Ellis[1] and subsequently endorsed by the Supreme Court of Appeal and the Constitutional Court. The Applicants fail to meet the applicable test.

AD PARAGRAPHS 62 to 71

59. The contents of these paragraphs are denied. This is in essence where the entire application completely falls apart in that the Applicants fails to make out a case for what constitutes exceptional circumstances.

60. The Applicants fail to state factual grounds that show actual harm they stand to suffer should execution of the order be stayed by the appeal. There exists

[1] Incubeta Holdings (Pty) Ltd v Ellis 2014 (3) SA 189 (GJ)

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no real predicament that stands to be addressed by the order. There is currently no complaint or inquiry into my conduct at Centlec that would make an application of this nature a necessary intervention to apprehend harm to Centlec.

AD PARAGRAPHS 72 to 74

61. All the allegations made in these paragraphs are denied in as far as they seek to impugn anything that I have done at SAA. The other allegations of irreparable harm caused to SAA are also denied.

AD PARAGRAPH 75

62. I admit that I still serve on the Jacob Zuma Foundation. The other entities are either deregistered companies or companies that are dormant and no harm can possibly be visited on any person by my continued holding of those directorships pending the outcome of the appeal. To remove me from those directorships can only serve to satisfy the malicious motives of the Applicants to take away my livelihood.

AD PARAGRAPHS 76 to 79

63. The contents of these paragraphs are denied as if specifically traversed. The Applicants keep repeating the appealed allegations and findings against me. The applicants persist with allegations of damage to the public purse where there is not a single finding by the court of a misappropriation of funds by me.

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64. Concerns that I will take up other board positions in other public entities are also unfounded. I have no intention of accepting any directorships until I have cleared my name through my appeal.

65. The Applicants again claim to be acting in the public interest. This claim is one of the subjects of the intended appeal.

66. The judgment is also curiously silent on how this public interest was established despite the judgment given on the Standing Special Plea having said it would give reasons on how the standing of the First Applicant was established in the final judgment.

67. The issue of public interest remains inconclusive in this case and cannot be used as a ground to sustain this application in the absence of the reasons for the relevant ruling.

AD PARAGRAPHS 80 to 90

68. The Applicants correctly concede that I will suffer reputational harm but are incorrect in stating that this reputational harm is reparable.

69. I have a constitutional right to dignity and a good name. The court cannot perpetuate a violation of my rights unduly. My rights to work and to pursue my chosen occupation incorporate my rights to dignity and self-worth, including the principles of *ubuntu*.

70. The Applicants also correctly concede that I stand to lose my ability to earn a living. The income I earn from Centlec is effectively the only formal source of

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income I still have. The harm I shall suffer in no longer being able to earn anything is irreparable.

71. More importantly, the Applicants seek, without any justification, to limit and infringe my constitutional rights guaranteed in section 22 of the Constitution.

72. The Applicants glibly make conclusions on the state of my financial affairs without any information. They do not know the size of the family I support nor do they know the extent of my financial responsibilities to my family.

73. Despite supporting three children of my own, I support my elderly and sickly mother and siblings' families, including feeding and educating young children. Without my support, all their livelihoods are in jeopardy. I am also obviously dependent on the relevant income for my own personal upkeep and livelihood. The removal thereof will be harmful to me and my dependents.

74. The Applicants correctly state that I live in a mortgaged property. The applicants however fail to admit the obvious irreparable harm that I and my family stand to suffer if I lose my home and become homeless. The court is not told what alternative accommodation I will have if I am rendered homeless in the period between now and the finalisation of the appeal or appeals, a process which will take years.

AD PARAGRAPHS 97 to 117

75. Although clumsily articulated, the most generous reading of the pleaded basis for the constitutional attack is targeted at three headings, namely:

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75.1. The absence of a "*discretion to relax or deviate from the requirements of exceptional circumstances*";

75.2. The requirement that "*interim enforcement must not cause (the respondent) any irreparable harm*"; and

75.3. "*section 18 is unconstitutional because it unduly fetters this court's discretion on a decidedly judicial issue of the effect of court orders pending an appeal process*".

76. In addition, it is alleged that, presumably for the abovementioned reasons, section 18 infringes:

76.1. section 34 of the Constitution;

76.2. the principle of separation of powers; and

76.3. "*several other constitutional rights*" which "*may include*" the rights to property, dignity, physical and psychological integrity, freedom of expression, the environment and (even) life.

77. Although it is not specifically cited, the Applicants also seem to place some indirect reliance on section 173 of the Constitution.

78. Finally, the Applicants express a desire to revert back to the repealed Rule 49(11).

79. In respect of remedy, the Applicants leave it in the court's discretion as to whether the declaration of unconstitutionality should be suspended for an unspecified "*appropriate period*".

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80. Furthermore, the Applicants propose a "*reading-in*" of the additional wording provided in the table in paragraph 101 of the founding affidavit. In effect, a new section 18(3) is proposed. Elsewhere the Applicants also call for a reading down.

81. I am advised that none of the abovementioned grounds, including the alleged violation of rights, hold any water. Legal argument in support of that submission will be advanced at the hearing.

CONCLUSION

82. In respect of both legs of the application, reliance will be placed on the historical evolution of the section, as well as the pronouncements of our courts in respect of the applicable principles, ranging from the High Courts, the SCA and the Constitutional Court. The Labour Court has also commented on the impugned section.

83. For example, the following was instructively said by Fourie AJA in the SCA in University of Free State v Afriforum and Another 2018 (3) SA 428 (SCA), at paragraph [10], explaining the evolution of section 18:

> *"It is further apparent that the requirements introduced by ss 18(1) and (3) are more onerous than those of the common law. Apart from the requirement of 'exceptional circumstances' in s 8(1), s 8(3) requires the applicant 'in addition' to prove on a balance of probabilities that he or she '<u>will</u>' suffer irreparable harm if the order is not made, and that the other party '<u>will not</u>' suffer irreparable harm if the order is not made. The application of rule 49(11) required a weighing-up of the potentiality irreparable harm or prejudice being sustained by the respective parties and where there was a potentiality of harm or prejudice to both of the*

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parties, a weighing-up of the balance of hardship or convenience, as the case may be, was required. Section 18(3), however, has introduced a higher threshold, namely proof on a balance of probabilities that the applicant will suffer irreparable harm if the order is not granted and conversely that the respondent will not, if the order is granted" (emphasis added).

84. In all the circumstances, I pray that it may please the above Honourable Court to grant an order:

84.1. dismissing the application for interim enforcement in terms of section 18 of the Act;

84.2. dismissing the application, pleaded in the alternative, to declare section 18 of the Act unconstitutional; and

84.3. ordering the Applicants to pay the costs of the application, including the costs of two counsel.

DEPONENT

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn before me at R/Bay on this the 11 day of **AUGUST** 2020, the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS

SOUTH AFRICAN POLICE SERVICE
FINANCIAL SERVICE
2020 -06- 11
RICHARDS BAY
KWAZULU NATAL

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

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MINISTER OF FINANCE	Fifth Respondent

NOTICE OF APPLICATION FOR LEAVE TO APPEAL

PLEASE TAKE NOTICE THAT the applicant hereby makes application for leave to appeal to the Supreme Court of Appeal, alternatively a full bench of the Gauteng

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Division of the High Court against the judgment of the Honourable Judge RG Tolmay handed down on 27 May 2020, in terms of which the learned judge ordered that:

1. The applicant is declared a delinquent director in terms of section 162(5) of the Companies Act.

2. This declaration of delinquency is to subsist for the remainder of the applicant's lifetime, subject to provisions of sections 162(11) and (12) of the Companies Act.

3. The applicant is directed to pay the costs of this action on an attorney and client scale, including the costs of three counsel.

4. This judgment and the evidence led is referred to the NPA for their consideration and determination of whether an investigation regarding possible criminal conduct should follow.

PLEASE TAKE NOTICE FURTHER that the grounds upon which leave to appeal is sought are that the court erred in the following respects:

Section 17(1)(a)(i)

There are reasonable prospects that an appeal would have success based on the following grounds:

1. Having regard for the principles set out in *Shoprite Checkers (Pty) Ltd v Ramdaw NO and Others* (DA12/00) [2000] ZALC 5, the learned judge, with respect:

   1.1. Misdirected herself by interpreting section 162 of the Companies Act 71 of 2008, ("the Act") to mean that the first respondent has *locus standi*

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to bring application in terms of section 162 when Section 162(2) of the Act specifically provides for the parties that have *locus standi* for the relief sought and if the relief were to be granted as per Section 157(d) of the Act it can only be granted by the leave of the court.

1.2. Having granted the first respondent *locus standi*, failed to establish from the evidence led that public interest or any interest in the litigation upon which the *locus standi* of the first respondent was conferred.

1.3. Did not address the issue of the *locus standi* of the first respondent but effectively rendered the issue as moot in that the second respondent's *locus standi* was not in dispute. This however could not be considered moot as it set precedent and becomes authority for:

1.3.1. the interpretation of Section 157(d) of the Companies Act 71 of 2008;

1.3.2. the expansion of the closed category of parties granted standing under Section 162(2) of the Companies Act 71 of 2008

1.4. Erred in finding that the respondents did not have a legal duty to join the rest of the directors of the company in the circumstances.

1.5. In view of the novelty and importance of section 162, it is in any event in the interests of justice that this issue be decided and settled by a higher court.

2. The learned judge erred in finding that:

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2.1. The applicant's conduct fits the conduct envisaged in Section 162(5)(c) where:

2.1.1. Gross abuse of the position of director was not proven.

2.1.2. Taking personal advantage of information obtained as director was not proven.

2.1.3. Harm inflicted on the company was not proven.

2.1.4. Gross negligence or wilful misconduct was not proven.

3. The learned judge erred in finding that:

3.1. The version of the applicant had not been put to the witnesses of the respondents in circumstances where the respondents had led evidence on issues outside of the pleadings while the version on the relevant issues in the pleadings had been put to all the witnesses who had testified to them.

4. The learned judge erred and/or misdirected herself in finding that the allegation of the applicant having acted on unlawful instructions of former President Zuma was immaterial to proving the case when that was the pleaded case of the respondents. Even if such instructions had been given, which is denied, the fact of the matter is that, at all material times hereto, President Zuma was the highest-ranking representative of the shareholder.

5. The learned judge erred in disregarding crucial evidence that disproved crucial allegations made by the respondents, including that:

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5.1. The board minutes of 10 July 2015 signed by the applicant wherein the board expressed its support of the Emirates MOU.

5.2. The letter written by the Company Secretary to Airbus on 3 October 2015 wherein a decision of the board is confirmed as a board decision and not that of the applicant.

5.3. The testimony of Avril Halstead wherein she stated that the applicant had been in continuous communication with Finance Minister Gordhan on 21 December 2015 and was one of three board members who passed the resolution of the Swap Transaction as directed by the Minister.

5.4. The testimony of Nico Bezuidenhout wherein he stated that it was the norm within the organisation for letters to be drafted by the executive on behalf of the chairperson.

6. The learned judge erred in accepting evidence that was denied in the pleadings and not proven in the trial, including that:

6.1. The allegation that the applicant had attended a meeting with Airbus accompanied by a person from a company called Quartile Capital.

6.2. The letter written to the board that the applicant denied any knowledge of and had clearly shown the language and format to be inconsistent with all the correspondence of the applicant.

7. The learned judge erred and/or misdirected herself in making favourable credibility findings in respect of a number of witnesses where the record clearly demonstrates multiple contradictions and inconsistencies in their evidence.

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8. The learned judge erred in finding that the applicant had attempted to unilaterally renegotiate the Swap Transaction when no such evidence had been proven at the trial. The evidence was clearly that Dr Tambi and Ms Kwinana had been the ones leading the negotiations with Airbus.

9. The learned judge erred in finding that the evidence of Mr Meyer had been supported by correspondence presented at the trial.

10. The learned judge erred in finding that it had been argued on behalf of the applicant and the respondents were obliged to prove other causes of action that had been pleaded when no such argument was in fact made in oral argument or in the applicant's heads of argument.

11. The learned judge erred in accepting the erroneous submissions made by the respondents on the role of the applicant in the submission of Section 54 applications by failing to distinguish between the representative capacity of the applicant as chairperson of the board that is as per the Section 49 of the PFMA, the accounting authority and her individual capacity as a director.

12. The learned judge has created reasonable grounds of apprehension of bias and/or failure to apply an independent mind, more particularly in that:

    12.1. The judgment is effectively a carbon copy of the respondents' heads of argument where at least 265 of the 285 paragraphs including the orders of the judgment are either:

        12.1.1. The exact wording, verbatim, of the respondents' heads of argument.

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12.1.2. A paraphrasing or summary of the respondents' heads of argument.

12.1.3. Consolidation of the respondents' heads of argument.

12.1.4. Appear and flow in the same logic sequence as in the respondents' heads of argument

12.2. The judgment does not consider or give reasons as to why the court rejects any submission or argument made for the applicant.

12.3. The opinions expressed in the judgment as those of the court were in effect the submissions of counsel for the respondents which have been merely elevated in status into the opinions of the learned judge.

13. The abovementioned method of judgment has been correctly criticised and discouraged by the higher courts.

14. The learned judge erred in imposing such a harsh penalty on the applicant, which permanently affects her livelihood.

Section 17(1)(a)(ii)

15. A number of aspects of this case have not been the subject of judicial consideration by South African Courts with the result that there are compelling reasons why the appeal should be heard as understood within the meaning of Section 17(1)(a)(ii) of the Superior Courts Act 10 of 2013. These aspects *inter alia* include:

15.1. A delinquency application as per Section 162 of the Companies Act 71 of 2008 by parties claiming *locus standi* Section 157(d) of the

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Companies Act 71 of 2008 where Section 162(c) of the Act specifically provides otherwise.

15.2. The respondents led evidence that sought to prove a different case from the pleadings. The court in tandem relied extensively on issues that fell outside the pleadings in deciding the case.

15.3. The interpretation and application of Section 54 read with Section 49 of the Public Finance Management Act 1 of 1999 in as far as defining the powers and role of the Accounting Authority as defined in the Act.

15.4. An order referring the judgment for criminal investigation and prosecution where there is no finding or evidence led on criminal conduct.

15.5. A finding that other board members be included in the investigation by the National Prosecuting Authority where the court had refused a joinder application of other directors where that application had been founded on the grounds that other directors had a direct interest in the litigation.

15.6. Adverse findings on the evidence and plea of the applicant where the court dismissed an application to amend pleadings at the start of the trial with punitive costs.

15.7. There exist grounds of reasonable apprehension of bias in the judgment as a whole that a fair minded and reasonable observer can be led to have a reasonable apprehension of bias by the court in delivering its judgment.

15.8. The harshness of the lifetime ban on the applicant and the implications thereof on her rights in terms of section 22 of the Constitution.

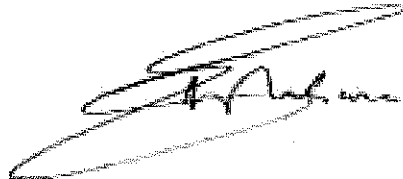
Section 17(1)(c)

16. The learned judge erred in finding that the applicant had drafted and submitted PFMA Section 54 applications when as per the definitions set out in at Section 49 and Section 54 of the PFMA it is only the Accounting Authority that has the legal capacity to submit such application. This issue was pertinently raised in argument but is not addressed in any part of the judgment.

PLEASE TAKE NOTICE FURTHER that the applicant hereby reserves the right to supplement the grounds of this application before the hearing.

KINDLY SET THE MATTER DOWN ACCORDINGLY.

DATED AT **JOHANNESBURG** ON THIS THE **18TH** DAY OF **JUNE 2020**.



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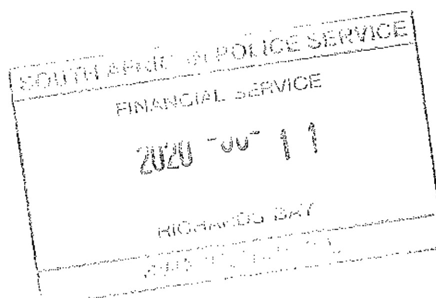

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