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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REPLYING AFFIDAVIT

I, the undersigned,

STEFANIE FICK

state under oath that:

1 I am the Executive Director of the Accountability Division of the First Applicant. I am authorised to depose to this affidavit on the applicants' behalf. I am the deponent to the founding affidavit in this matter.

2 The facts in this affidavit are true, to the best of my knowledge and belief, and are within my personal knowledge, except where otherwise stated. Where I make legal submissions, I do so on the advice of the applicants' legal representatives.

3 Any statement or contention in the answering affidavit that is inconsistent with what is stated in the founding affidavit or this affidavit must be taken to be denied.

4 I will deal Ms Myeni's main arguments in her answering affidavit on a thematic basis before addressing individual paragraphs in her affidavit.

POINT *IN LIMINE*: NON-JOINDER

5 Ms Myeni has stated that she intends to raise the non-joinder of Centlec as a party to this application as a preliminary issue.

6 The applicants deny that Centlec has a direct and substantial interest in the relief sought and submit that Ms Myeni's objection is misconceived:

6.1 The relief sought in this application does not directly and substantially interfere with Centlec's rights. The interim operation of the delinquency order is a question of Ms Myeni's legal status and eligibility to serve as a

director, which only indirectly effects the companies on which she serves. The implication is that Centlec would be unable to replace her, which is absurd.

6.2 If Ms Myeni is correct that Centlec should be joined, then every time a litigant approaches a court for a declaration of delinquency, every board on which that director sits would have to be cited.

6.3 If the section 18 relief is granted, the obligation would be placed on Ms Myeni to withdraw from her position as director and deputy chair of Centlec.

6.4 It is also notable that Ms Myeni does not ask for the Jacob Zuma Foundation or any of the other companies of which she is a director to be joined in these proceedings.

7 This Court will recall that Ms Myeni has previously used similar arguments of non-joinder in an attempt to delay the trial proceedings. This Court rejected those arguments in its judgment of 2 December 2020, at paragraphs 60 to 74. A copy of that judgment is attached as **RA 1.**

8 This question of joinder will be addressed further in argument.

INTERIM ENFORCEMENT

Exceptional circumstances and irreparable harm

9 Ms Myeni wholly denies, in broad strokes, the exceptional circumstances in this matter and the irreparable harm that will be caused if she is allowed to continue serving as a director pending the finalisation of her appeals.

10 Despite this Court's judgment, based on largely uncontested evidence and Ms Myeni's own testimony, Ms Myeni persists in her denial of any misconduct or harm resulting from her actions. Instead, she maintains that in the absence of any "*finding by the court of a misappropriation of funds*" there can be no genuine prejudice to the public. This again reflects a profound misunderstanding of the fiduciary duties of directors, who are required to do far more than merely refrain from stealing public money.

11 Ms Myeni further denies the consequences of her actions for SAA and the country. Ms Myeni's lack of any contrition or insight is sufficient proof that there are exceptional circumstances that warrant interim execution.

12 Ms Myeni also seemingly denies that South Africa's investing public, taxpayers and ordinary citizens deserve the reassurance that "rogue" and "reckless" directors will be held to account and that appeal processes will not be used to evade and postpone accountability.

13 Ms Myeni further argues that in the absence of any formal complaint about her conduct at Centlec, there can be no harm in allowing her to continue to serve

as a director of this parastatal. I again submit that public trust and confidence is not served by allowing a "reckless" and "rogue" director to remain in office.

14 Ms Myeni further claims that there is no "nexus" between this case and her role at Centlec. But this ignores this Court's uncontested findings that Ms Myeni was dishonest and perjured herself on affidavit regarding, *inter alia*, her role at Centlec and the payments that she received. These findings are reflected at paragraphs 279 to 282 of this Court's judgment:

> *"[279] Ms Myeni not only proved to be dishonest in her dealings at SAA, but she has also been dishonest with this Court. This dishonesty is demonstrated by her attempts to explain her failure to appear in court at the very beginning of the trial on 7 October 2015.*
>
> *[280) In her postponement application, Ms Myeni initially claimed to have no money to travel to Court. She stated on affidavit that "I was ... unable to be present in court on the day the matter was set down for hearing as I had no means to come from Richards Bay to Pretoria." She further claimed that she was "unemployed' and that "it is not easy for me to travel from KwaZulu- Natal to Gauteng without any funding."*
>
> *[281] In that affidavit, Ms Myeni failed to disclose to this Court that she earned over R4,3 million in directors' remuneration during her time at SAA and an additional R3,45 million from her time as a director on the Mhlathuze Water Board, not to mention her undisclosed earnings from her numerous other directorships over the years. She also failed to disclose that she remains an active director of at least four companies, including her ongoing role as deputy chairperson at Centlec, a Free State parastatal, which paid her at least R274,364.00 in directors' fees in 2018. Nor did she mention that she owns a property in Richard's Bay worth at least R4,2 million. When confronted with this evidence in cross examination, Ms Myeni made no attempt to deny it.*
>
> *[282) Instead, Ms Myeni sought to offer yet another explanation for the failure to attend Court. She claimed that it was unfair to expect her to spend her own money on the litigation, in circumstances where she believed that SAA's insurers ought to have paid for her costs. This entirely contradicts her previous pleas of poverty, demonstrating that she perjured herself on affidavit. She admitted that she exercised a deliberate choice not to come to Court. Such*

dishonesty and disrespect of this Court's processes is worthy of a punitive costs order."

15 Ms Myeni's notice of application for leave to appeal is entirely silent on these findings, nor could Ms Myeni sensibly contest them as they are based squarely on her own affidavits and contradictory testimony.

16 In these circumstances, allowing Ms Myeni to continue serving on the Centlec Board and receiving substantial payments (from the public purse) – the very role and payments that she previously hid from this Court – would cause irreparable harm to the administration of justice and public trust.

17 In her answering affidavit, Ms Myeni now compounds this lack of honesty by claiming that Centlec has "*been performing well as an entity in the time that I have been part of the board*" and that "*Centlec has received unqualified audits from the Auditor General for four consecutive years while I have been on the board*" (AA paragraph 53). This could not be further from the truth.

18 Centlec has in fact received qualified audits in the last four years and is certainly not "*performing well*", by any measure. On the publicly available audit records, the Auditor General found over **R231 million** in irregular expenditure and fruitless and wasteful expenditure in this period:

18.1 This is reflected in a consolidated spreadsheet of the Auditor's General's audit opinions on Centlec, attached as **RA 2**. The applicants' legal representatives have prepared this document by combining the Auditor General's annual spreadsheets of municipal audit outcomes that are

published on its website.[1] I have reviewed the underlying spreadsheets and confirm the accuracy of the consolidated version.

18.2 As appears from this spreadsheet, in the 2018/2019 financial year, the Auditor General's audit opinion was "financially unqualified with findings", as it found that Centlec had engaged in irregular expenditure and fruitless and wasteful expenditure of over **R21.3 million**.

18.3 In the 2017/2018 audit, Centlec was "*disclaimed with findings*", with irregular expenditure and fruitless and wasteful expenditure of over **R107.93 million**. A copy of the Auditor General's audit report for this period is attached as **RA 3**.

18.4 In 2016/2017, the Auditor General's opinion was "*financially unqualified with findings*" with irregular expenditure and fruitless and wasteful expenditure of **R77.69 million**. A copy of the Auditor General's full report for this period is attached as **RA 4**. The Auditor General noted that Centlec had sustained losses of over R80 million in this period and that its liabilities exceeded its assets by over R269 million, indicating "*significant doubt on the municipal entity's ability to operate as a going concern and to meet its service delivery objectives*" (para 7).

18.5 In 2015/2016, Centlec was again marked "*financially unqualified with findings*" with irregular expenditure and fruitless and wasteful expenditure of **R25.01 million.**

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[1] Available at: https://www.agsa.co.za/Reporting/MFMAReports.aspx.

18.6 The Auditor General's website explains that the phrase "*financially unqualified with findings*" does not mean an unqualified or "clean" audit outcome. The phrase "*financially unqualified*" simply means that Centlec's financial statements contain no material misstatements, but that findings have been made of non-compliance with legislation or reporting irregularities, or both. The Auditor General's opinion of "*disclaimed with findings*" in 2017/2018 means that Centlec failed to provide any evidence on which the Auditor General could base an audit opinion and that irregularities were found. An extract from the Auditor General's website setting out this terminology is attached as **RA 5**.

19 It is also a matter of public record that Centlec has failed to hold an AGM for more than six years, since at least 2014. This is reflected in the minutes of deliberations of the National Council of Provinces on 21 August 2018 (attached as **RA 6**) and a recent news report in the Free State Weekly, dated 12 June 2020 (marked **RA 7**).

20 Once again, Ms Myeni has failed to make a full and honest disclosure of the true facts to this Court. This alone is sufficient reason to bar her from playing any further role at Centlec or any other parastatal pending the outcome of the appeals process.

21 The applicants maintain that this is indeed an exceptional matter, for all the reasons addressed in my founding affidavit and this Court's judgment.

No irreparable harm to Ms Myeni

22 The applicants maintain that Ms Myeni will suffer no genuine harm if the order sought is granted.

23 The only financial harm that Ms Myeni alleges is that she will be deprived of an income from her role as deputy-chairperson of the Centlec Board. She claims that "*[t]he income I earn from Centlec is effectively the only formal source of income I still have. The harm I shall suffer in no longer being able to earn anything is irreparable.*" (AA paragraph 70). Ms Myeni claims that she earns no other income from other directorships and expressly disavows any intention of taking on other directorships pending the finalisation of her appeal (AA paragraph 64).

24 As outlined in the founding affidavit and above, Ms Myeni previously hid her role at Centlec and her remuneration by claiming, on oath, that she was "*unemployed*", "*do[es] not earn any income*" and that she "*do[es] not hold any position of directorship that is of interest to [the applicants]*".

25 Under cross-examination, Ms Myeni then sought to downplay the remuneration that she received from Centlec, claiming that this was just a "*stipend*" and is "*a minimal amount, very minimal*". An extract from Ms Myeni's testimony on 21 February 2020 is attached, marked **RA 8**.

26 Ms Myeni's new claims, on oath, that the Centlec remuneration is critical to her livelihood, her wellbeing, and her family's financial survival is yet another self-

serving about-turn. Once again, Ms Myeni says whatever is expedient in the moment, without regard to the truth.

27 Given this pattern of evasion and dishonesty surrounding the Centlec payments, I respectfully submit that Ms Myeni's allegations be disregarded as conflicting statements that are wholly unreliable.

28 If this Court finds that Ms Myeni's loss of a self-described "*minimal amount, very minimal*" from Centlec constitutes irreparable harm that precludes any relief under section 18, then the Applicants stand by their constitutional challenge to this provision.

Ms Myeni's prospects of success on appeal are weak

29 Ms Myeni accepts that the prospects of success on appeal are a material consideration under section 18. However, she is under the mistaken impression that this Court must only look to the prospects of success in being granted leave to appeal. I am advised the Court must in fact consider the prospects of the actual appeal, which are exceedingly weak.

30 This Court made multiple findings against Ms Myeni, any one of which is enough to justify the Court's declaration of delinquency for life. Accordingly, in the unlikely event that another court would overturn some of the findings, numerous others would remain standing, and the order would be unaffected.

31 Moreover, Ms Myeni's submissions on the public importance of the matter only lend further credence to the applicants' argument that exceptional circumstances exist which warrant the ordering of interim enforcement.

IN THE ALTERNATIVE, THE CONSTITUIONAL CHALLENGE TO SECTION 18

32 Ms Myeni opposes the applicants' conditional constitutional challenge to section 18. Ms Myeni goes as far as to liken this challenge to persecution. I reject the statement, particularly in circumstances where Ms Myeni has spent years evading accountability and took every opportunity to obstruct and the delay the trial. It is precisely in circumstances such as these, where an application for leave to appeal is yet another delaying tactic, that section 18 should not be allowed to stand in the way of effective relief.

33 I persist in the submissions made in the founding affidavit that if the applicants are unable to satisfy the section 18 test, then this provision is unconstitutional to the extent that it unduly fetters this Court's discretion and deprives litigants of effective remedies. Ms Myeni has not provided any meaningful justification for this limitation of rights.

AD SERIATIM RESPONSES

34 In what follows I respond to individual paragraphs in Ms Myeni's answering affidavit, *ad seriatim*, to the extent necessary. Any allegation which is not addressed and which is inconsistent with what is set out above and in my previous affidavit must be taken to be denied.

35 **AD PARAS 1 – 4**

35.1 Save to deny that the contents of Ms Myeni's affidavit are true and correct, I note the contents of these paragraphs. I note that, at least with regard to her claims about Centlec, Ms Myeni has once again perjured herself in her answering affidavit, as I set out at paragraphs 17 - 20 above.

36 **AD PARAS 5 – 6**

36.1 I deny the allegations contained in these paragraphs for the reasons canvassed further above.

36.2 In particular, I confirm that the applicants have satisfied the requirements of section 18 and seek to challenge section 18 only insofar as there is a possibility – albeit remote – that this Court finds that Ms Myeni may suffer some irreparable harm and that this precludes relief under section 18.

37 **AD PARA 7**

37.1 I note the contents of this paragraph. The section 18 test will be addressed in argument.

38 **AD PARAS 8 – 9**

38.1 The contents of these paragraphs are admitted only to the extent that they accurately reflect the provisions of sections 18(1) of the Act.

38.2 The remaining contents of these paragraphs relating to the onus and evidentiary burden will be addressed in argument. Save as aforesaid, any allegations contained in these paragraphs are denied.

39 **AD PARAS 10 – 11**

39.1 The contents of these paragraphs are admitted only to the extent that they accurately reflect the provisions of section 18(3) of the Act.

39.2 The remaining allegations contained in these paragraphs are denied, for the reasons set out more fully above and in the founding affidavit.

39.3 For as long as Ms Myeni remains a director of any company or is capable of being appointed as a director, there remains an apprehension of irreparable harm to the public.

39.4 In this regard, I note that Ms Myeni's notice of application for leave to appeal does not specifically address many of the damning factual findings of wrongdoing and dishonesty against her in this Court's judgment, which individually and as a whole render her unfit to hold any office.

40 **AD PARAS 12 – 20**

40.1 The summation of the grounds of appeal is noted only to the extent that it accurately reflects the contents of the notice of application for leave to appeal. I further note that Ms Myeni attempts to introduce new grounds

of appeal that were never pleaded at trial and do not appear in her notice, including reliance on section 22 of the Constitution.

40.2 The further allegations contained in these paragraphs are denied.

40.3 In particular, I deny that Ms Myeni's prospects of success on appeal are "very strong" for the reasons already canvassed in the founding affidavit. As previously stated, an appeal Court would be loathe to interfere with this Court's factual findings, especially in light of the largely uncontested evidence presented by the plaintiffs and Ms Myeni's own testimony. These are all matters for argument.

41 AD PARAS 21 – 37

41.1 A significant portion of these paragraphs constitutes legal argument and will be addressed in written and oral submissions.

41.2 I deny that the life-time declaration of delinquency is "oppressive". This declaration is fully justified on the evidence.

41.3 As previously stated, I further deny that Ms Myeni or her family will suffer any irreparable harm in the circumstances. Her likening of the life time declaration of delinquency to the "death sentence" is inappropriate and disregards the opportunities for rehabilitation provided for in the Companies Act and acknowledged in this Court's judgment.

41.4 I further deny that a section 18 order would result in Ms Myeni's "*only source of income [being] prematurely taken away*". As outlined above, any version presented by Ms Myeni as to any financial harm she may

suffer must be disregarded on account of her inconsistent and dishonest statements made on oath as to the true status of her financial position.

41.5 I further deny the allegation that the applicants have relied upon "speculative inferences". The risk that Ms Myeni poses to the public has been established by the evidence led at trial and Ms Myeni's own testimony.

41.6 I further deny that the delinquency order or the relief sought under section 18 would be a violation of any constitutional rights. Any limitation is sanctioned by the Companies Act and the Superior Courts Act.

41.7 Save as aforesaid, I deny the allegations contained in these paragraphs for the reasons addressed more fully above and in the founding affidavit.

42 **AD PARA 38 – 46**

42.1 The contents of these paragraphs are again matters for legal argument.

42.2 I specifically deny that the applicants have failed to discharge the onus imposed by sections 18(1) and 18(3). The constitutional challenge is only sought in the remote likelihood that this Court finds that Ms Myeni's loss of remuneration from Centlec somehow constitutes a complete barrier to relief under section 18. If that is the case, then the applicants submit that the rigid, no-exceptions wording of section 18 imposed by the legislature is an impermissible encroachment on this Courts' inherent jurisdiction and the right of access to justice.

42.3 I further deny that this is a "*justifiable intrusion*" of section 34 of the Constitution, in accordance with section 36. The facts of this case demonstrate that it cannot be justified.

43 **AD PARAS 47 – 50**

43.1 I note that Ms Myeni does not oppose the joinder of the Ministers of Finance and Justice in respect of the constitutional challenge. However, I place on record that the Minister of Finance was already cited as a party to the action.

43.2 I deny that there is any merit to the objection of non-joinder of Centlec, for the reasons already set out further above.

43.3 Save as aforesaid, I deny the remaining allegations contained in these paragraphs.

44 **AD PARA 51**

44.1 The allegations contained in this paragraph are denied.

44.2 I deny that the applicants have drawn impermissible inferences. Ms Myeni's actions and the harm she caused are matters of fact, established at trial in largely uncontested evidence.

45 **AD PARAS 52 – 54**

45.1 I deny the allegations contained in these paragraphs.

45.2 In particular, I deny the allegation that Centlec has been "performing well" during Ms Myeni's tenure as a director, for the reasons addressed above.

45.3 Centlec has indeed received qualified audit opinions from the Auditor General in the last four years, as is also addressed above.

45.4 I further maintain that it is not in the public interest to have Ms Myeni continue to serve on any parastal's board, regardless of their performance, particularly in light of the serious and uncontested evidence of misconduct and dishonesty proved at trial.

46 **AD PARA 55**

46.1 I deny the allegations contained in this paragraph.

46.2 In particular, I deny that the applicants' allegation of irreparable damage to SAA is an exaggeration for the reasons already set out above and in the founding affidavit.

47 **AD PARA 56**

47.1 I deny the allegations contained in this paragraph.

47.2 As outlined further above and in the founding affidavit, the uncontested evidence led at trial and Ms Myeni's own testimony will not change on appeal.

48 **AD PARAS 57 – 58**

48.1 I deny the allegations contained in these paragraphs.

48.2 In particular, I deny the allegation that the applicants have failed to satisfy the requirements of section 18 for the reasons already canvassed further above.

49 **AD PARAS 59 – 60**

49.1 The allegations contained in these paragraphs are denied for reasons already stated further above.

49.2 As emphasised previously, Ms Myeni continues to discount the extent of damage that has been done under her reign at SAA. As a result, it is neither here nor there that no formal complaint or inquiry has been instituted into her conduct at Centlec. Her conduct to date is exceptional enough to warrant that precaution be taken to protect entities – particularly public ones like Centlec – from harm.

50 **AD PARA 61**

50.1 I deny the allegations contained in this paragraph for the reasons already canvassed further above.

51 **AD PARA 62**

51.1 Ms Myeni has not provided any evidence in support of her allegation that the companies referred to in the founding affidavit are dormant or have been deregistered. Instead, Ms Myeni's directorship at the three entities

is reflected as active in the CIPC report attached thereto as annexure FA5.

51.2 If Ms Myeni's version is accepted that the entities have indeed either been deregistered or lie dormant, then it is inexplicable why Ms Myeni refers to an attempt to remove her from these entities as a "*malicious motive*" to "*take away [her] livelihood*".

51.3 Save for the admission regarding Ms Myeni's active service at the Jacob Zuma Foundation, I deny the remainder of the allegations contained in this paragraph.

52 **AD PARAS 63 – 67**

52.1 I note Ms Myeni's statement that she "*has no intention of accepting any directorship until I have cleared my name through my appeal.*" If that is indeed her intention, she cannot genuinely claim that the section 18 order would irreparably deprive her of a livelihood or her freedom of occupation.

52.2 In any event, the Court has every reason not to trust anything that Ms Myeni says under oath. She perjured herself during the trial and again in her answering affidavit in this application.

52.3 The further allegations contained in these paragraphs are denied for reasons already canvassed further above.

52.4 In particular, I record this Court's findings in the special plea judgment – "*In this instance broader concerns of responsiveness and accountability*

are indeed at play. OUTA as a non-profit organisation whose aim is to protect taxpayers and to ensure accountability of public enterprises, not only meets the public interest requirement, but it is in my view also in the interest of justice that it be afforded the opportunity to bring the challenge". A copy of this Court's judgment in the special plea is attached as **RA 9.**

52.5 To date, Ms Myeni has failed to provide any evidence to disprove that OUTA acts in the public interest. She expressly admitted in her plea that the public has an interest in the proper management of all major public entities, as is recorded in paragraph 3 of this Court's judgment on the special plea. As such, the prospects of success in her appeal against the special plea ruling remain weak.

53 **AD PARAS 68 - 74**

53.1 The allegations contained in these paragraphs are denied for reasons already canvassed further above and in the founding affidavit.

53.2 As I have already stated, Ms Myeni cannot rely on the income she earns from Centlec as a basis for alleging irreparable harm, in circumstances where she has previously misled this Court by deliberately failing to disclose this income.

53.3 I also draw attention to Ms Myeni's vague statement that the income from Centlec "*is <u>effectively</u> the only <u>formal</u> source of income I still have*". Ms Myeni yet again fails to disclose her other sources of income, including all "informal" income used to support her lifestyle.

53.4 Once again Ms Myeni has failed to take this Court into her confidence by failing to provide a full and honest account of her financial position and sources of income. Instead, Ms Myeni is content to state that applicants do not have "*any information*" on her financial affairs, when these are matters uniquely within her knowledge which ought to be disclosed.

53.5 I further note that Ms Myeni does not disclose any information about the true extent of her financial commitments, including her monthly mortgage repayments, her monthly expenditure, the extent of her alleged financial commitments to family members, and how she has paid for these expenses in the past.

54 **AD PARAS 75 – 81**

54.1 Save for admitting the summation of the constitutional challenge to the extent that it accurately reflects the founding affidavit, I deny the allegations contained in these paragraphs for reasons already canvassed further above.

54.2 In particular, I deny that the applicants seek to revert to the repealed Rule 49(11). The applicants only seek to ensure that the Courts retain their judicial discretion in respect of all issues pertaining to the effect of their orders.

54.3 As to the manner in which section 18(3) should be remedied, this matter will be addressed further in argument.

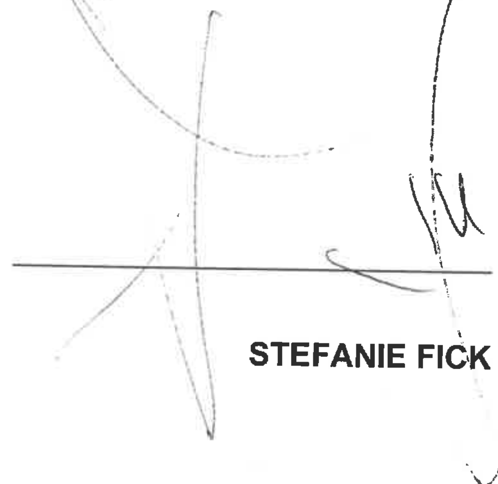
55 **AD PARAS 82 – 83**

55.1 The contents of these paragraphs are also matters for legal argument.

CONCLUSION AND COSTS

56 I pray for the relief as set out in the notice of motion in the applicants' section 18 application.

57 In light of Ms Myeni's further evasions and dishonesty in her answering affidavit, particularly in regard to Centlec, the applicants again seek an order of punitive costs, on an attorney-and-own-client scale, including the costs of three counsel.



STEFANIE FICK

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of his knowledge both true and correct. This affidavit was signed and sworn to before me at Roodepoort on this the 26th day of August 2020, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended, have been complied with.

COMMISSIONER OF OATHS

Full names: **DALE BARRATT**

COMMISSIONER OF OATHS

Address: **PRACTISING ATTORNEY RSA**

774 WATERVAL ROAD

LITTLE FALLS

Capacity: **ROODEPOORT**

RA1

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: 15996/2017

Date: 2 December 2019

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

2/12/2019 .... DATE

SIGNATURE

In the matter between:

DUDUZILE CYNTHIA MYENI **Applicant**

And

ORGANISATION UNDOING TAX ABUSE NPC **First Respondent**

SOUTH AFRICAN AIRWAYS PILOTS ASSOCIATION	**Second Respondent**
SOUTH AFRICAN AIRWAYS SOC LTD	**Third Respondent**
AIR CHEFS SOC LTD	**Fourth Respondent**
MINISTER OF FINANCE	**Fifth Respondent**

JUDGMENT

TOLMAY, J:

INTRODUCTION

[1] The Applicant brought an application in terms of Rule 28(4) of the Uniform Rules of Court to amend the plea delivered by her in this matter. She also launched an application in terms of Rule 10(3) for the Joinder of other Defendants.

[2] The applications were heard separately but the Court will deal with both applications in this judgement, but obviously under separate and distinct headings.

BACKGROUND

[3] In the main action, the Plaintiffs (Respondents) seek an order declaring the First Defendant (Applicant) to be a delinquent Director in terms of Section 162(5) of the Companies Act 71 of 2008 (Companies Act).

[4] The Respondents issued summons on 07 March 2017. On 19 June 2017 a plea was filed on her behalf, by her erstwhile Attorney, Mr Van Niekerk of ENS Africa (ENS). On 28 February 2018, the matter was allocated for trial from 07 October 2019 to 01 November 2019. ENS terminated their mandate on 29 January 2019. The formal notice of withdrawal by ENS was filed on 07 June 2019.

[5] On 29 August 2019, Applicant's present Attorneys Lugisani Mantsha Incorporated placed themselves on record, but withdrew on 20 September 2019, stating that they had no financial instructions.

[6] At the commencement of the trial on 07 October 2019, Applicant failed to appear. The matter stood down in order to afford the Applicant an opportunity to appear in Court. On 08 October 2019, Applicant's former attorney, Mr Mantsha, appeared and informed the Court that Applicant requested a postponement. The matter stood down to allow Applicant to file a properly motivated application for postponement. On 10 October 2019, the Court refused a lengthy postponement and directed that the matter would proceed from 21 October 2019 to 01 November 2019 and then again from 25 November 2019 to 06 December 2019.

[7] At the commencement of proceedings on 21 October 2019. Counsel for Applicant announced that she intended to seek further amendments to her plea in addition to those set out in a partial Rule 28 notice which was delivered on 20 October 2019, during the evening before the trial was supposed to commence. At this point the Court was also informed that the Applicant in addition wished to bring an application to join all former directors of South African Airways (SAA). In order to afford the applicant an opportunity to file those applications and any other interlocutory application. the Court again awarded an indulgence to the applicant and directed that these applications would be heard form 25 November 2019 to 6 December 2019.

ACCESS TO COURT IN TERSM OF SECTION 34

[8] Before proceeding to deal with the two applications before Court, Applicant's assertion that she had a right in terms of section 34 of the Constitution to pursue any interlocutory application in any manner she may choose to must be dealt with.

[9] This assertion is simply incorrect. Both parties are entitled to a fair hearing.[1] In **Apleni v President of South Africa**[2] the Constitutional Court held that section 34 does not say that a person is constitutionally entitled to access to Court irrespective of relevant provisions of substantive and procedural law.

[1] Giesecke & Devrient Southern Africa (Pty) Ltd v Minister of Safety & Security 2012 (2) SA 13 SCA par 24

[2] [2018] 1 ALL SA 728 (GP) at par 17.

[10] As a result access to Court will be determined by this Court in terms of the Superior Court Act No 10 of 2013, the Uniform Rules of Court and the relevant Practice manual and Directives.

THE AMENDMENT APPLICATION

[11] The Applicant's proposed amendments can be divided into three categories at this stage namely:

a) The withdrawal of admissions;

b) Elaboration on bare denials contained in the plea;

c) The introductions of objections and exceptions to the particulars of claim.

[12] The Respondents opposed the proposed amendments on the following grounds:

a) The Respondents contended that the Applicant failed to provide a full and honest explanation for these amendments, specifically with regard to the withdrawal of admissions and alleged that it demonstrated bad faith;

b) Secondly, it was alleged that Applicant failed to account for the delays in seeking these amendments, which they alleged also pointed towards bad faith;

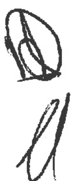
c) They alleged that the proposed amendments and withdrawal of admissions would cause substantial prejudice;

d) They lastly alleged that the proposed amendments did not raise triable issues and are irregular as they seek to introduce legal argument, evidence and exceptions disguised as amendments.

[13] In her founding affidavit Applicant stated that she was made aware of deficiencies in her pleadings by her present legal representatives.

[14] She stated that there were factual errors in a number of admissions made and that she was under the impression that her previous legal representative, Mr Van Niekerk accurately captured the essence of points discussed during consultations. Although she stated in her founding affidavit that she did not want to cast aspersions on her previous legal representative, the essence of her complaint was that he did not follow her instructions and did not explain the legal implications of the plea to her. She said that as a layperson, she did not appreciate the legal implications of how some of the admissions and denials had been framed and could not ascertain whether the plea correctly conveyed her version of events. It must be noted that the amendments seek to withdraw no less than eleven admissions previously made.

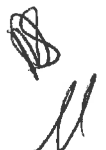
[15] She furthermore, stated that in numerous instances the plea, as it presently stands, does not comply with Rule 22 of the Uniform Rules of



Court. In particular in many instances serious allegations are made against her, indicating impropriety unlawful conduct and violations of statutory provisions, which are presently met with bare denials. She states that the admissions that she seek to withdraw are in the main corrections of factual inaccuracies and rectification of evasiveness and ambiguity in the plea. According to her the withdrawal of the admissions are not material allegations, but are merely of context and background information. She denied all allegations of bad faith and impermissible legal argument being introduced. To illustrate her good faith, she stated that she withdrew her special plea of *locus standi*. We know now however, that in the meantime the withdrawal of the special plea was retracted and will be argued after this judgement is delivered.

[16] Applicant stated that she will be severely prejudiced if not allowed to introduce the proposed amendments and that a refusal of the amendments will actually amount to a violation of the *audi alteram partem* rule and will infringe on her right to a fair hearing as envisaged in Section 34 of the Constitution and will not be in the interest of justice.

[17] She therefore sought leave to amend her papers. It must be noted that no Notice of Motion was filed in this application or the joinder application and despite an invitation by the Court to rectify this, a belated notice of motion was filed after her hearing, relating only to the joinder application. For purposes of this matter I will ignore this



procedural flaw, as one can ascertain her prayers from a perusal of the papers.

[18] The Respondent's obtained an affidavit by Applicant's erstwhile attorney in which he denied that he did not consult properly with the Applicant and that he did not follow her instructions. He stated that he could not file a Notice of Withdrawal prior to June 2019 as he was unable to determine who the applicant's new attorneys were.

[19] Mr Van Niekerk denied the allegations made by the Applicant against him and his firm, and stated that as a result of the fact that Applicant put the blame for the alleged shortcomings and errors in the plea on him and his firm, she had waived attorney and client privilege. He stated that he only disclosed information necessary to refute allegations against them and only to the extent necessary.

[20] The following statements made by him are relevant for the determination of this application. He set out the procedure that was followed in drafting the plea as follows:

a) They had several consultations and extensive correspondence with Applicant and recorded her instructions accurately and comprehensively in the plea;

b) The legal implications of specific defences advanced by her and the risks of bare denials were explained to her;

c) Applicant was requested to furnish them with paragraph by paragraph written response to the allegations made in the particulars of claim. While waiting for her response they proceeded with a draft plea based on the information at their disposal.

d) Applicant was provided with a list of questions in order to complete the first draft of the plea. They consulted with her for 3½ hours on 25 May 2017 to take instructions and afterwards updated the plea in accordance with her instructions. However the plea was still incomplete and they left her with a list of issues and questions in respect of which they required instructions. By 01 June 2017, they had not received any further instructions and drafted the plea as far as they were able to;

e) On 01 June 2017. Mr Cohen sent Applicant a WhatsApp message and stressed the urgency and need for instructions and asked for feedback on the plea;

f) On 02 and 05 June 2017, the Applicant furnished them with further documents relevant to the plea. By 06 June 2017, Applicant had still not furnished them with a complete paragraph by paragraph response to the particulars of claim. On 06 June 2017, Mr Cohen sent an email to the Applicant, stressing that it

was critical that she provided paragraph by paragraph comment to the particulars of claim, in order for them to complete her plea;

g) On 06 June 2017 and in response to Mr Cohen's email, Mr Nick Linell, who was Applicant's adviser sent an email requesting the questions and stated that he would see whether he could expedite the issue;

h) On 06 June 2017 Mr Cohen replied to the aforesaid email and sent him a list of the questions;

i) On 08 June 2017, Senior Counsel was briefed to settle the plea. A copy of the plea was sent to the Applicant the following request contained in that email is of importance:

> *"Please work your way through the attached document, together with the particulars of claim, and confirm that what is stated in the plea is correct and if anything is incorrect, please let us know".*

[21] The email reflected that the Applicant said that she did not have in her possession, or had access to, many of the documents referred to in the particulars of claim. The attorneys had served notices in terms of Rule 35 (12) and (14) but the Respondents had not replied to them. This also contributed to the difficulties they experienced in completing the plea.

[22] An extension was obtained until 19 June 2017 to deliver the plea. On 14 June 2017 they again consulted with the Applicant on the basis of the email and worked with her through the e-mail. This telephonic consultation lasted more than 3 hours and Applicant was taken to each paragraph of the particulars of claim. Her response was recorded and Senior Counsel was briefed to settle the plea.

[23] Mr Van Niekerk stated that he specifically cautioned Applicant more than once that the plea contained bare denials where more was required. He urged her to apply her mind to these so that a more comprehensive and meaningful plea could be prepared.

[24] Senior Counsel sent the plea to them on 15 June 2017 and it was in turn forwarded to Applicant and Mr Linell. They were requested to peruse it and to ensure that they agreed with the contents. Despite stressing the urgency of a response, no response was forthcoming. During the afternoon of 19 June 2017. Mr Gadidge and Mr Cohen called the Applicant to obtain a final instruction. Mr Cohen in a telephone note noted that she was indeed happy with the plea.

[25] As a result ENS Attorneys denied that there were a number of factual errors, that the plea was not canvassed with her and that she was unaware of the legal implications pertaining to the content of the plea. The relevant emails and telephone note were attached to the papers.

[26] In her reply Applicant denied that she waived her privilege and stated that her new legal representatives were entitled to give her different advice. She also denied that her legal representatives were informed of respondent's legal representatives intention to consult with her previous legal representative and that no proof of communication was attached and that it was improbable that they would have agreed to it. She stated that Respondent's Attorneys acted unethically, and are guilty of gross professional misconduct. She repeated these allegations against ENS Attorneys.

[27] Regarding the allegation that Respondent's attorney did not inform Applicant's attorney of their intention to consult with Mr Van Niekerk's , attached to the papers before me was a letter addressed to applicant's Attorneys dated 16 October 2019 in which in paragraph 3, Mr Pandor, the Attorney for Respondents state *inter alia* as follows:

> "*We also notify you that we would like to consult with Mr Van Niekerk in this regard and that in any event we propose to subpoena him to testify in this regard at the trial*".

[28] No reference was made to this letter in the reply, yet Mr Buthelezi persisted with the allegation that they were not informed. If for one reason or the other Applicant's legal representatives did not receive the letter, I would have expected an affidavit by them attesting to that fact, or even an oral submission that they did not receive the letter. Under

the circumstances the Applicant and her Counsel's submission in this regard seems to be incorrect. If her representatives decided not to respond they did it at their own peril.

[29] The Applicant also did not deal at all with the factual allegations made by Mr Van Niekerk. She merely claimed that he acted unethically by breaching her right to privilege. I therefore must accept that Mr Van Niekerk's allegations stand uncontested.

ATTORNEY AND CLIENT PRIVILEGE

[30] Before dealing with the amendments it is appropriate to consider whether there is any merit in Applicant's argument that Mr Van Niekerk acted unethically by providing an affidavit in the context of this case.

[31] Our Courts have on various occasions held that "*when a client alleges a breach of duty by the Attorney, the privilege is waived as to all communications relevant to that issue*".[3]

[32] In *Tandwa*[4], the Supreme Court of Appeal applied this principle in circumstances where a party accused his former advocate of incompetence. The Court held that the advocate was fully entitled to submit an affidavit in response to these allegations, as privilege had been imputably waived. This conclusion was explained as follows:

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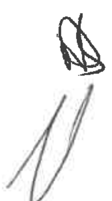
[3] *S v Tandwa and Others* [2007] ZASCA 342008 (1) SACR 613 (SCA) at paras 18 – 20. *S v Boesman* 1990 (2) SACR 389 (E) 394G-H.

[4] Twanda supra

'[18] *Since accused 1 has nowhere expressly consented, the admissibility of his advocate's affidavit depends on whether he waived his right to legal professional privilege. In* Peacock v SA Eagle Insurance Co Ltd *and* Harksen v Attorney-General Cape, *the courts drew a distinction between implied and imputed waiver of legal professional privilege. Implied waiver occurs (by analogy with contract law principles) when the holder of the privilege with full knowledge of it so behaves that it can objectively be concluded that the privilege was intentionally abandoned. Imputed waiver occurs where – regardless of the holder's intention – fairness requires that the court conclude that the privilege was abandoned. Implied waiver entails an objective inference that the privilege was actually abandoned; imputed waiver proceeds from fairness, regardless of actual abandonment.*

[19] In propounding a doctrine of imputed waiver (which may also be termed fictive or deemed waiver), the judge in Peacock and Harksen drew on a passage from Wigmore, much-cited in our courts, that enjoins 'fairness and consistency' in inferring the extent of an implied waiver of attorney/client privilege. Wigmore in the same paragraph goes on to conclude that it is a 'fair canon of decision' that 'when a client alleges a breach of duty by the attorney, the privilege is waived as to all communications relevant to that issue'.

[20] The canon seems to us to be clearly right. Where an accused charges a legal representative with incompetence or neglect giving rise to a fair trial violation, it seems to us most sensible to talk of imputed waiver rather than to cast around to find an actual waiver. Even without an express or implied waiver, fair evaluation of



the allegations will always require that a waiver be imputed to the extent of obtaining the impugned legal representative's response to them. Rightly therefore, counsel on appeal accepted that the advocate's affidavit was admissible in assessing the accused's claims."[5]

[33] In *Tandwa*[6], the SCA approved of the High Court's judgment in *S v Boesman*[7]. There the Court admitted evidence from advocates who were accused of making admissions in error. It was held as follows in *Boesman*:

> *"[W]here, as has happened in this case, the accused have elected to give evidence concerning the instructions given by them to their counsel, and where they seek to withdraw admissions made by their counsel on their behalf on the ground that their counsel acted contrary to their instructions in making the admissions, they have waived the privilege attaching to the communications made by them to their counsel in that regard, and the element of fairness referred to in the passage in Wigmore, quoted by Rumpff JA in Wagner's case, requires that the State should be allowed to call the counsel concerned to give evidence concerning such communications.*[8]"

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[5] *Tandwa supra* par 18-20
[6] Twanda par 18 – 20
[7] *Boesman supra*
[8] *Boesman* 394G-H

[34] In the light of the allegations made in her affidavit against her previous legal representatives, I am of the view that the conduct of the Applicant amounted to an imputed waiver of privilege by the Applicant and that Mr Van Niekerk was entitled to file an affidavit. He clearly limited the contents of his affidavit to the allegations that he did not obtain instructions from her in drafting the plea. In the light of the facts the application to strike out his affidavit is denied. I am of the view that Ms Steinberg's submission that the Applicant could not on the one hand accuse her former Attorney of failing to follow her instructions, but on the other hand attempt to suppress evidence to the contrary, was correct.

PRINCIPLES REGARDING AMENDMENTS

[35] This Court has a discretion to refuse or grant amendments under Rule 28 of the Uniform Rules, but it is a discretion that must be exercised on proper principles.[9] These principles were summarised by the Constitutional Court in *Affordable Medicines Trust and Others v Minister of Health and Others*[10]:

> *"[9] … [A]mendments will always be allowed unless the amendment is* mala fide *(made in bad faith) or unless the amendment will cause an injustice to the other side which cannot be cured by an appropriate order for costs, or 'unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed*[11]*'."*

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[9] *Caxton Ltd and Others v Reeva Forman (Pty) Ltd and Another* 1990 (3) SA 547 (A) at 565 (Caxton)

[10] *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) (Affordable Medicines).

[11] *Affordable Medicines* par 9.

[36] The courts have further emphasised that proposed amendments must raise a triable issue that is sufficiently important to justify the prejudice and costs to the other parties and the Court[12].

[37] Applicant as a result bears the onus to prove that the amendments were made in good faith, will not result in injustice or prejudice to the plaintiffs and that any prejudice could be cured by a suitable costs order. The Applicant must also show that the proposed amendment raise triable issues of sufficient importance to justify possible prejudice.

[38] The withdrawal of admissions requires special scrutiny. While the test to be applied is the same as for other amendments, it is far more difficult to satisfy this test. In *President Versekeringsmaatskappy Bpk v Moodley*[13] this Court explained this as follows.

> *"The approach is the same [as for other admissions], but the withdrawal of an admission is usually more difficult to achieve because (i) it involves a change of front which requires full explanation to convince the court of the bona fides thereof, and (ii) it is more likely to prejudice the other party, who had by the admission been led to believe that he need not prove the relevant fact and might, for that reason, have omitted to gather the necessary evidence[14]."*

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[12] *Caxton* at 565, citing De Villiers JP in *Krogman v Van Reenen* 1926 OPD 191 at 195.

[13] *President Versekeringsmaatskappy Bpk v Moodley* 1964 (4) SA 109 (T) at 110H–111A (Moodley).

[14] *Moodley* at 110H-111A.

[39] As a result it is required of a defendant to provide a full and honest explanation of the circumstances surrounding the making of an admission and the reasons for seeking its withdrawal[15]

[40] In this instance the Applicant's only real explanation for withdrawing the admissions were the alleged failures of her previous attorneys to consult properly and obtain instructions. It is clear from what was stated above that her attorneys did consult and did follow her instructions. In her replying affidavit she made no attempt to respond to Mr Van Niekerk's allegations and as a result they presently stand largely uncontradicted.

[41] In *Bellairs v Hodnett*,[16] the Appellate Division emphasised that the withdrawal of admissions requires "*a satisfactory explanation of the circumstances in which the admission was made and the reasons for now seeking to withdraw it.*" If no satisfactory explanation is provided, that is the end of the matter.[17]

[42] It is not enough for an applicant merely to assert that an admission was made in error. The error must be fully explained to satisfy the court that

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[15] *Bellairs v Hodnett and Another* 1978 (1) SA 1109 (A) at 1150. (Bellairs) *Northern Mounted Rifles v O Callaghan* 1909 TS 174. *Frenkel, Wise & Co Ltd v Cuthbert* 1946 CPD 735.
[16] Bellairs at 1150F–H.
[17] *Frenkel, Wise and Co Ltd v Cuthbert; Cuthbert v Frenkel, Wise and Co Ltd* 1946 CPD 735 at 749: "*[T]he enquiry into whether or not the application to amend is bona fide – in other words, whether a satisfactory explanation has been given – is the first enquiry and, if it is found that the applicant for the amendment does not clear this hurdle, there is no need to consider the second leg of prejudice.*"

the attempted withdrawal of the admission was made in good faith, rather than simply to secure a tactical advantage.[18]

[43] The Applicant sought to withdraw no less than eleven admissions. These admissions relate to factual and not legal issues. Applicant should have been able to identify and correct these admissions when perusing her plea after the consultations with ENS attorneys.

[44] Applicant stated that she was unaware of the legal implications of these admissions and that her new legal representatives were entitled to give her different advice as to what should have been admitted. Different legal representatives may indeed give different advice, but that cannot imply that a litigant may not be bound by pleadings drafted on her instruction and after proper consultation. If a litigant seeks to blame their legal representatives for errors a full explanation must be given as to why no blame should be attributed to herself.

[45] In *Saloojee and Another NNO v Minister of Community Development*[19], the following is stated:

> *"There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations ad misericordiam should not be allowed to become an invitation to*

[18] *Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 632 (D) at 640 and the cases cited therein.
[19] *Saloojee and Another, NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 141 (Saloojee).

laxity ... If he relies upon the ineptitude or remissness of his own attorney, he should at least explain that none of it is to be imputed to himself. That has not been done in this case[20]."

[46] In the context of this matter Applicant failed to give a reasonable explanation for the withdrawal of the admissions. She is by all accounts not merely an average layperson but a businesswoman with vast experience in the corporate world and served on the boards of many companies. It is inconceivable that she did not have the necessary capacity to consider and comprehend the plea and the admissions made therein, especially in the light of the fact that they related to factual allegations.

[47] The Respondents in opposing the amendments also raised the issue of the applicant's failure to explain the undue delay in moving for the amendments. In this regard note must be taken of the fact that her plea was filed in June 2017, about two and a half years ago.

[48] The case law is clear that unexplained delays are indeed relevant in assessing whether amendments are sought in good faith and whether this will prejudice the other side[21]. In *Zarug v Parvathie NO*[22] it was

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[20] *Saloojee* at 141.

[21] *Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 632 (D) at 640.

[22] *Zarug v Parvathie NO* 1962 (3) SA 872 (D) at 876C, approved in this Division in GMF Kontrakteurs (Edms) Bpk And Another v Pretoria City Council 1978 (2) SA 219 (T) (Zarug)

held that: "*if the application for amendment is not timeously made, some reasonably satisfactory account must be given for the delay*[23]."

[49] Apart from her allegation that it was only when her current legal representatives appraised the papers that she understood the alleged shortcomings, no other explanation was given.

[50] The Respondents importantly raised the issue of prejudice in their opposition to the application for amendment and said that the prejudice they would suffer cannot be cured by an appropriate cost order. Even though the authorities state that in the absence of a satisfactory explanation the court need not consider prejudice. I deem it appropriate to deal with this aspect.

[51] Respondents stated that the proposed amendments go to material issues which would require them to re do substantial portions of their trial preparation, to reconsult witnesses and to gather fresh evidence.

[52] The following was raised in their heads of arguments pertaining to prejudice. Applicant's proposed amendments go to material issues which would require the Respondents to redo a substantial portion of their trial preparation, to reopen consultations with key witnesses, and to gather fresh evidence. This was illustrated in the heads of argument with reference to different transactions.

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[23] *Zarug* at 222

a) On the BNP deal, Applicant's sought to retract admissions regarding the flawed procurement process. By seeking to place the entire procurement process into dispute, Applicant would force the Respondents to subpoena further evidence, find new witnesses who can establish that the proper processes were not followed, and call expert witnesses to testify on the requirements of proper procurement in these circumstances. This, they contend, is a minefield of factual and legal issues, which will substantially prolong the trial and will force the respondents to incur substantial new costs which were never anticipated.

b) In respect of the Airbus / Pembroke deal, Applicant had previously admitted that on 27 May 2013 the Board resolved to finance ten aircraft through Pembroke Capital and that the Board did not at any time overturn this resolution. This is, according to them significant, as it demonstrated that Applicant's letter to the Minister in June 2013 was incorrect in claiming that the Board had resolved to finance only two aircraft. Applicant now seeks to withdraw these admissions in their entirety and even goes so far as to place the Board resolution of 27 May 2013 in dispute. This too, according to Respondent will require the Respondents to subpoena further documents and call further witnesses who can authenticate the relevant board resolutions and minutes.

c) In respect of the Airbus Swap Transaction, Applicant seeks to withdraw her admissions that there was no Board approval or ministerial approval for the insertion of a middleman at the time that she wrote to the Airbus CEO in September 2015. She now seeks to change her version entirely by claiming that there was Board and Ministerial approval at the time for the insertion of a middleman. This too, Respondents allege will require them to gather further evidence and to interview new witnesses to determine precisely what the Board had decided at the time.

[53] The Respondents pointed out that neither of the Plaintiffs are for profit companies. As far as First Respondent is concerned it relies on contributions of citizens to enable litigations. Furthermore Applicant on her own version is unemployed and suffers from financial constraints and will not be able to satisfy any cost order that maybe granted against her.

[54] In any event if evidence is led or provided by the Applicant during the trial that clearly contradicts admissions made by her in her plea, nothing will prevent her legal representatives to approach the Court at that point for an amendment based on the evidence and the Court may then reconsider such an application at that point. It must be noted that at this point no evidence in support of the withdrawal of the admissions were provided.

[55] The further objection against the proposed amendments were that it constitutes an impermissible attempt to introduce exceptions, objections and legal argument as well as evidence. It was argued that the bulk of the proposed amendments do not raise triable issues.

[56] Applicant did indeed seek to introduce exceptions and technical objections to the particulars of claim, accusing Respondents *inter alia* of failing to plead a cause of action. If she wished to raise these objections, she was required to file an exception, applications to strike out or notices of an irregular step before filing her plea[24]. She cannot use amendment procedure to introduce exceptions and objections[25], she accused the Respondent of fact.

[57] She also sought to use the proposed amendment to plead evidence and to advance argument. This is also impermissible[26].

[58] The way in which the Applicant went about to plead, went far beyond stating her case, it amounts to the pleading of evidence and as a result these amendments do not comply with the rules and cannot be granted.

[59] In conclusion the application for amendment cannot be granted.

[24] Uniform Rules 23, 30, 30A

[25] *Beinash v Wixley* 1997 (3) SA 721 (SCA) at 734 *"It can be said in general terms ... that an abuse of process takes place where the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective. ..."*

[26] Rule 18(4): (4) *"Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto."*

JOINDER APPLICATION

[60] The Applicant filed a further application in terms of Rule 10(3) to join some 28 other Directors of SAA.

[61] Applicant claimed that the other Directors must be joined because the issues in dispute stem in part from actions and resolutions of the Board. As a result she sought to join all the board members that served with her at SAA during her tenure, on the basis that they acted as a collective and as a result they could be sued on substantially the same questions of facts and law.

[62] Rule 10(3) reads as follows:

> *"Several defendants may be sued in one action either jointly, jointly and severally, separately or in the alternative, whenever the question arising between them or any of them and the plaintiff or any of the plaintiffs depends upon the determination of substantially the same question of law or fact which, if such defendants were sued separately, would arise in each separate action."*

[63] Although there is doubt that the Applicant's reliance in Rule 10(3) is legally competent, as this rule permits a plaintiff to join several co-defendants on grounds of convenience where the claim raises

substantially the same questions of law and fact. In the common law a defendant's right to join other parties are narrowly confined.[27]

[64] However, for purposes of this application the Court will approach the matter on the basis of non-joinder. Non-joinder arises where another party has a direct and substantial interest in the matter, which is determined by the relief that is sought. A party can only be said to have a direct and substantial interest in the matter if the relief cannot be sustained and carried into effect without prejudicing their interests.[28]

[65] In *Amalgamated Engineering Union*,[29] the Appellate Division explained further that "*[t]he question of joinder should ... not depend on the nature of the subject-matter of the suit ... but... on the manner in which, and the extent to which, the Court's order may affect the interests of third parties.*"

[66] This means that the relief is decisive, not the facts or issues in dispute. Even where a Court may be called on to make findings that are adverse to another party this does not establish grounds for non-joinder if the relief sought does not adversely impact on that party's interests.[30]

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[27] *Burger v Rand Water Board & Another* 2007 (1) SA 30 SCA par 7.

[28] *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 653 (Amalgamated Engineering); *Gordon v Department of Health, Kwazulu-Natal* 2008 (6) SA 522 (SCA) at para 9; *Absa Bank Ltd v Naude NO* 2016 (6) SA 540 (SCA) at para 10.

[29] *Amalgamated Engineering* at 657.

[30] *Gordon v Department of Health, Kwazulu-Natal* 2008 (6) SA 522 (SCA) at para 10; *Judicial Service Commission and Another V Cape Bar Council And Another* 2013 (1) SA 170 (SCA) at paras 15 – 17.

[67] In this instance the Respondents seek relief only against the Applicant and not against the other Board Members[31]. The relief claimed therefore does not impact on the other director them at all and as a result they do not have a direct and substantial interest in this matter.

[68] That does not mean that they may not be called as witnesses and that their evidence may be determinative of the success of the Respondents claims against the Applicant.

[69] The other directors do not have a direct and substantial interest in the relief sought even if the evidence ultimately reveals that they were complicit in any unlawful conduct that may be proved.

[70] In any event a Plaintiff is entitled to choose their defendant from a group of wrongdoers.[32]

[71] It would furthermore seem that the delinquency claim against the other directors have prescribed in terms of sec 162(2)(a) of the Companies Act, which provides that a delinquency claim must be brought within 24 months after the director vacated his/her position.

[31] *Amalgamated Engineering* at 653; *Gordon v Department of Health, Kwazulu-Natal* 2008 (6) SA 522 (SCA) at para 9, *Absa Bank Ltd v Naude NO* 2016 (6) SA 540 (SCA) at para 10.
[32] Harms, Civil Procedure in the Superior Courts, Last Updated February 2019 564 at B10.2 *Parekh v Shah Jehan Cinemas (Pty) Ltd and Others* 1982 (3) SA 618 D.

[72] As a result of all the facts set out above the joinder cannot succeed.

COSTS

[73] The parties agreed that the costs of the two applications will be argued and determined at the hearing of the special plea

ORDER

[74] I make following order:

1) **The application for Amendment in terms of Rule 28(4) is dismissed;**

2) **The application for Joinder in terms of Rule 10 (3) is dismissed.**

R G TOLMAY
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DATE OF HEARING: 25 & 26 NOVEMBER 2019

DATE OF JUDGMENT: 2 DECEMBER 2019

ATTORNEY FOR APPLICANT: **LUGISANI MANTSHA INC**

ADVOCATE FOR APPLICANT: **ADV. B BUTHELEZI**

ATTORNEY FOR RESPONDENT: **PANDOR ATTORNEYS**

ADVOCATE FOR RESPONDENT:

ADV. C STEINBERG, C McCONNACHIE AND N KAKAZA

RA2

AUDITOR GENERAL'S AUDIT OUTCOMES - 2015-2019

Number	Municipality	Province	Auditee type	Municipal district	Audit outcomes			Unauthorised, irregular as well as fruitless and wasteful expenditure		
					Audit opinion	Performance reports	Compliance with legislation	Unauthorised expenditure (Amount R)	Irregular expenditure (Amount R)	Fruitless and wasteful expenditure (Amount R)
2018/2019										
43	Centlec	FS	ME	Mangaung		R	R	-	12,5m	8,8m
2017/2018										
230	Centlec	FS	ME	Mangaung		R	R	-	107,1m	0,83m
2016/2017										
620	Centlec	FS	ME	Mangaung		R	R	-	77,4m	0,29m
2015/2016										
105	Centlec	FS	ME	Mangaung		R	R	-	24,8m	0,21m

LEGEND

Legend (audit outcomes)	Unqualified with no findings	Unqualified with findings	Qualified with findings	Adverse with findings	Disclaimed with findings
Findings	Addressed (A)	New (N)	Repeat (R)		
Expenditure	Improved	Regressed			

ME = municipal entity

RA3

REPORT

OF AUDITOR GENERAL

Report of the auditor-general to the Free State Legislature and council of the parent municipality on CENTLEC (SOC) Limited

Report on the audit of the financial statements

Disclaimer of opinion

1. I was engaged to audit the financial statements of CENTLEC SOC Limited set out on pages 113 to 249, which comprise the statement of financial position as at 30 June 2018, the statement of financial performance, statement of changes in net assets, cash flow statement and the statement of comparison of budget and actual amounts for the year then ended, as well as the notes to the financial statements, including a summary of significant accounting policies.

2. I do not express an opinion on the financial statements of the municipal entity. Because of the significance of the matters described in the basis for disclaimer of opinion section of this auditor's report, I was unable to obtain sufficient appropriate audit evidence to provide a basis for an audit opinion on these financial statements.

Basis for disclaimer of opinion

Share capital and shareholder debt

3. I was unable to obtain sufficient appropriate audit evidence for share capital. In preparing the annual financial statements the municipal entity implemented the debt and funding arrangements as contained in the settlement agreement entered into between the municipal entity and Mangaung Metropolitan Municipality (the shareholder), dated 28 June 2018. Due to uncertainty relating to the status of this agreement and whether the shareholder is in agreement therewith we are unable to confirm that the equity investment of the shareholder as well as the intercompany debt and transactions are fairly reflected in the financial statements. Because of the uncertainty we cannot confirm that the share capital reflects the approved investment of the shareholder or whether it constitutes non-current and current liabilities. I was unable to confirm the share capital by alternative means. Consequently, I was unable to determine whether any adjustment was necessary to share capital stated at R1 714 784 887 in the statement of financial position.

4. The settlement agreement also regulates the intercompany transactions and dividend obligations to the shareholder and consequently I was also unable to obtain sufficient appropriate audit evidence to confirm other income from street lighting to the value of R96 713 252 as disclosed in note 23 to the financial statements, the value of the dividend distribution of R310 504 319 as disclosed in note 38 to the financial statements, the value of dividends declared and not paid that is part of payables from exchange transactions as disclosed in note 16 to the financial statements and the related party disclosures in note 46 to the financial statements. I was unable to confirm these amounts by alternative means and to determine whether any adjustments were necessary to these accounts and disclosures. In addition, the municipal entity did not provide for any interest that would be due on the intercompany debt. or the contingencies related to intercompany transactions under dispute between the two parties. There is a consequential impact of these uncertainties on the surplus for the period, accumulated surplus, the taxation expense and the value of the deferred tax as disclosed in note 11 to the financial statements.

Material uncertainty relating to going concern

5. I draw attention to the matter below. My opinion is not modified in respect of this matter.

6. Note 45 to the financial statements indicates that there is a material uncertainty relating to the council resolution taken by the shareholder on the settlement agreement, as also indicated in the paragraphs on the basis for disclaimer of opinion above, which may, depending on the outcome of the matter, impact the financial sustainability of the municipal entity. This matter indicate that a material uncertainty exists that may cast significant doubt on the municipal entity's ability to continue as a going concern.

Emphasis of matters

7. I draw attention to the matters below. My opinion is not modified in respect of these matters.

Irregular expenditure

8. As disclosed in note 49 to the financial statements, irregular expenditure of R98 009 614 (2017: R2 359 746) was incurred, mainly due to the over spending of the budget of the municipal entity and non-compliance with SCM requirements.

Material impairments

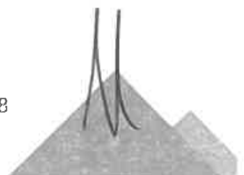
9. As disclosed in note 4 to the financial statements, consumer receivables from exchange transactions were impaired by R232 785 202 (2017: R218 015 600).

Material losses

10. As disclosed in note 50 to the financial statements, material electricity distribution losses of R137 789 865 (2017: R162 586 611) were incurred, which represents 9,30% (2017: 10,87%) of total electricity purchased. This was mainly due to technical losses, errors, negligence, theft, tampering and connections which form part of illegal consumption and faulty meters.

Restatement of corresponding figures

11. As disclosed in note 43 to the financial statements, the corresponding figures for 30 June 2017 were restated as a result of errors in the financial statements of the municipal entity at, and for the year ended, 30 June 2018.



Other matters

12. I draw attention to the matters below. My opinion is not modified in respect of these matters.

Unaudited disclosure notes

13. In terms of section 125(2)(e) of the Municipal Finance Management Act of South Africa, 2003 (Act No. 56 of 2003) (MFMA) the municipal entity is required to disclose particulars of non-compliance with the MFMA in the financial statements. This disclosure requirement did not form part of the audit of the financial statements and accordingly I do not express an opinion thereon.

Unaudited supplementary information

14. The appropriation statement set out on pages 139 to 140 does not form part of the financial statements and is presented as additional information. I have not audited these schedules and, accordingly, I do not express an opinion thereon.

Responsibilities of the accounting officer for the financial statements

15. The accounting officer is responsible for the preparation and fair presentation of the financial statements in accordance with the South African Standards of Generally Recognised Accounting Practice (SA Standards of GRAP) and the requirements of the MFMA and the Companies Act, 2008 (Act No. 71 of 2008) and for such internal control as the accounting officer determines is necessary to enable the preparation of financial statements that are free from material misstatement, whether due to fraud or error.

16. In preparing the financial statements, the accounting officer is responsible for assessing the CENTLEC SOC Limited's ability to continue as a going concern, disclosing, as applicable, matters relating to going concern and using the going concern basis of accounting unless the appropriate governance structure either intends to liquidate the municipal entity or to cease operations, or has no realistic alternative but to do so.

Auditor-general's responsibilities for the audit of the financial statements

17. My responsibility is to conduct an audit of the financial statements in accordance with the International Standards on Auditing and to issue an auditor's report. However, because of the matters described in the basis for disclaimer of opinion section of this auditor's report, I was unable to obtain sufficient appropriate audit evidence to provide a basis for an audit opinion on these financial statements.

18. I am independent of the municipality in accordance with the International Ethics Standards Board for Accountants' *Code of ethics for professional accountants* (IESBA code) and the ethical requirements that are relevant to my audit of the financial statements in South Africa. I have fulfilled my other ethical responsibilities in accordance with these requirements and the IESBA code.

Report on the audit of the annual performance report

Introduction and scope

19. In accordance with the Public Audit Act of South Africa, 2004 (Act No. 25 of 2004) (PAA) and the general notice issued in terms thereof I have a responsibility to report material findings on the reported performance information against predetermined objectives for selected key performance areas (KPAs) presented in the annual performance report. I was engaged to perform procedures to raise findings but not to gather evidence to express assurance.

20. I was engaged to evaluate the usefulness and reliability of the reported performance information in accordance with the criteria developed from the performance management and reporting framework, as defined in the general notice, for the following selected KPAs presented in the annual performance report of the municipal entity for the year ended 30 June 2018:

KPA	Pages in the annual performance report
Programme 5 – Engineering wires	69 – 76
Programme 6 – Engineering retail	77 – 83

21. The material findings in respect of the usefulness and reliability of the selected programmes are as follows:

Programme 5 – Engineering wires

95% expenditure on the allocated budget excluding public connection by 30 June 2018

22. I was unable to obtain sufficient appropriate evidence that clearly defined the predetermined source information, evidence and method of collection to be used when measuring the actual achievement for the indicator. This was due to a lack of formal standard operating procedures or documented system descriptions. I was unable to test whether the indicator was well-defined by alternative means.

95% expenditure on the allocated budget by 30 June 2018

23. I was unable to obtain sufficient appropriate evidence that clearly defined the predetermined source information, evidence and method of collection to be used when measuring the actual achievement for the indicator. This was due to a lack of formal standard operating procedures or documented system descriptions. I was unable to test whether the indicator was well-defined by alternative means.

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Install and complete the number of public connections applications received and paid for this financial year by 30 June 2018

24. I identified material misstatements in the performance achievement target, *install and complete the number of public connections applications received and paid for this financial year by 30 June 2018*. The matter occurred due to management including invalid installations paid for in the previous year, as achievement in the current year.

Complaints received regarding single fault street lights to be handled and completed within three (3) days and area faults within five (5) days of receipt

25. I was unable to obtain sufficient appropriate audit evidence for the reported achievement of target listed below. This was due to limitations placed on the scope of my work because of unreliable processes and documentation to support the dates when complaints were logged and when they were handled and completed. I was unable to confirm the reported achievement by alternative means. Consequently, I was unable to determine whether any adjustments were required to the achievement in the annual performance report.

Planned Target	Reported achievement
Complaints received regarding single fault to be handled and completed within three (3) days of receipt	Received = 3 096 Resolved = 1 657 Achieved = 54%
Complaints received regarding street lights to be handled and completed within five (5) days of receipt	Received = 416 Resolved = 320 Achieved = 77%

Programme 6 – Engineering retail

Replacement of prepaid and bulk meters in accordance with the meter maintenance plan as stipulated by the meter policy during 2017-18

26. I was unable to obtain sufficient appropriate audit evidence for the reported achievement of the target, *Replacement of 5 000 prepaid (and 50 bulk meters) in accordance with the meter maintenance plan as stipulated by the meter policy by 30 June 2018*. This was due to limitations placed on the scope of my work because of unreliable processes and documentation for the first two quarters of the financial year. I was unable to confirm the reported achievement by alternative means. Consequently, I was unable to determine whether any adjustments were required to the achievement of 1 968 as reported in the annual performance report.

Inspection of pre-paid meters and meter boxes to perform preventative maintenance during 2017-18

27. I was unable to obtain sufficient appropriate audit evidence for the reported achievement of the targets listed below. This was due to limitations placed on the scope of my work because management did not maintain adequate documentation in support of the reported achievements or adequate systems of recording the achievements in the first two quarters of the financial year. I was unable to confirm the reported achievement by alternative means. Consequently, I was unable to determine whether any adjustments were required to the reported achievements in the annual performance report.

Planned Target	Reported achievement
Complete 46 000 pre-paid meter audits by 30 June 2018	32 446
Complete 10 906 meter boxes audits by 30 June 2018	9 975

Other matters

28. I draw attention to the matters below.

Achievement of planned targets

29. Refer to the annual performance report on pages 129 for information on the achievement of planned targets for the year. This information should be considered in the context of the material findings on the usefulness and reliability of the reported performance information in paragraphs xx to xx of this report.

Report on the audit of compliance with legislation

Introduction and scope

30. In accordance with the PAA and the general notice issued in terms thereof, I have a responsibility to report material findings on the compliance of the municipal entity with specific matters in key legislation. I performed procedures to identify findings but not to gather evidence to express assurance.

31. The material findings on compliance with specific matters in key legislations are as follows:

Annual financial statements

32. The financial statements submitted for auditing were not prepared in all material respects in accordance with the requirements of section 122(1) of the MFMA. Material misstatements of non-current assets, current liabilities, reserves, revenue, expenditure and disclosure items identified by the auditors in the submitted financial statements were subsequently corrected, but the supporting records that could not be provided resulted in the financial statements receiving a disclaimer of opinion.

Expenditure management

33. Money owed by the municipal entity was not always paid within 30 days, as required by section 99(2)(b) of the MFMA.

34. Reasonable steps were not taken to prevent irregular expenditure of R98 009 614 as disclosed in note 50 to the annual financial statements, as required by section 95(d) of the MFMA. The majority of the

irregular expenditure was caused by overspending of the approved budget and non-compliance with SCM regulations.

35. Expenditure was incurred in excess of the approved budget, in contravention of section 87(8) of the MFMA.

36. Due to the uncertainty with regards to the settlement agreement as explained in the basis for disclaimer opinion paragraphs above we could not determine that distributions were made pursuant to an existing legal obligation of the company or with authorisation by the board, as required by section 46(1)(a) of the Companies Act.

37. Distributions were made without resolutions by the board acknowledging that it had applied solvency and liquidity tests and reasonably concluded that the company would satisfy the solvency and liquidity test immediately after completing the proposed distributions, as required by section 46(1)(c) of the Companies Act.

Procurement and contract management

38. Some of the goods and services of a transaction value above R200 000 were procured without inviting competitive bids, as required by SCM regulation 19(a).

Internal control deficiencies

39. I considered internal control relevant to my audit of the financial statements, reported performance information and compliance with applicable legislation; however, my objective was not to express any form of assurance on it. The matters reported below are limited to the significant internal control deficiencies that resulted in the basis for the disclaimer of opinion, the findings on the annual performance report and the findings on compliance with legislation included in this report.

40. Disputes between the municipal entity and its shareholder adversely affected the reliability of the financial statements and the leadership of the two entities did not ensure that the relationship is effectively managed. The management of the shareholder created uncertainty with regards to the validity of the settlement agreement signed between the two parties on 28 June 2018. Throughout the process of discussion and resolution of the matter management of the shareholder was not consistent in their views and was unable to make a clear decision on the implementation of the agreement. The uncertainty gave rise to the disclaimer of the audit opinion.

41. Continued instability at management level in the municipal entity, including the level of executive management, contributed to the lack of adequate monitoring and effective performance management systems, processes and procedures had not been developed and implemented, which caused the reliability of performance reporting being insufficient.

42. Documentation processes and internal controls as it relates to the collection, verification and reporting of performance achievements are not effective. Lack of formalised processes and systems results in a weak control environment which negatively impacts the reliability of performance reporting. Management was slow to respond to issues identified in the audit of the previous financial year and as a result did not address all the weaknesses that were previously identified and reported.

43. The financial statements were not adequately reviewed for accuracy prior to submission for auditing, resulting in material corrections having to be made.

Auditor - General

Bloemfontein

30 November 2018

AUDITOR-GENERAL
SOUTH AFRICA

Auditing to build public confidence

Report of the auditor-general to the Free State Legislature and council of the parent municipality on Centlec (SOC) Limited

Report on the audit of the financial statements

Opinion

1. I have audited the financial statements of the Centlec (SOC) Limited set out on pages 106 to 214, which comprise the statement of financial position as at 30 June 2017, statement of financial performance, statement of changes in net assets, cash flow statement and statement of comparison of budget and actual amounts for the year then ended, as well as the notes to the financial statements, including a summary of significant accounting policies.

2. In my opinion, the financial statements present fairly, in all material respects, the financial position of the Centlec (SOC) Limited as at 30 June 2017, and its financial performance and cash flows for the year then ended in accordance with the South African Standards of Generally Recognised Accounting Practice (SA Standards of GRAP) and the requirements of the Municipal Finance Management Act of South Africa, 2003 (Act No. 56 of 2003) (MFMA), and the Companies Act, 2008 (Act No. 71 of 2008).

Basis for opinion

3. Iconducted my audit in accordance with the International Standards on Auditing (ISAs). My responsibilities under those standards are further described in the auditor-general's responsibilities for the audit of the financial statements section of my report.

4. I am independent of the municipal entity in accordance with the International Ethics Standards Board for Accountants' *Code of ethics for professional accountants* (IESBA code) and the ethical requirements that are relevant to my audit in South Africa. I have fulfilled my other ethical responsibilities in accordance with these requirements and the IESBA code.

5. I believe that the audit evidence I have obtained is sufficient and appropriate to provide a basis for my opinion.

Material uncertainty related to going concern

6. I draw attention to the matter below. My opinion is not modified in respect of this matter:

7. Note 46 in the financial statements, indicates that the municipal entity incurred a net loss of R80 162 486 during the year ended 30 June 2017 and, as of that date, the municipal entity's current liabilities exceeded its current assets by R269 746 848. These conditions, along with other matters as set forth in note 46, indicate the existence of a material uncertainty that may cast significant doubt on the municipal entity's ability to operate as a going concern and to meet its service delivery objectives.

Emphasis of matters

8. I draw attention to the matters below. My opinion is not modified in respect of these matters.

Irregular expenditure

9. As disclosed in note 51 to the financial statements, irregular expenditure of R77 354 959 (2016: R24 754 940) was incurred, mainly due to the over spending (non-cash flow items) of the budget of the municipal entity.

Restatement of corresponding figures

10. As disclosed in note 44 to the financial statements, the corresponding figures for 30 June 2016 have been restated as a result of errors in the financial statements of the municipal entity at, and for the year ended, 30 June 2017.

Material impairments

11. As disclosed in note 4 to the financial statements, consumer receivables from exchange transactions were impaired by R218 015 600 (2016: R233 951 453).

Material losses

12. As disclosed in note 52 to the financial statements, material electricity losses to the amount of R162 586 611 (2015-16: R180 249 104) were incurred, which represents 10,77% (2015-16: 13,23%) of total electricity purchased.

13. Technical losses amounted to R120 806 572 (2015-16: R108 970 164) and were due to the wires (copper or aluminium) being used to distribute electricity that have a certain resistance and, as a result, there is a certain portion of electricity that is lost due to distribution.

14. Non-technical losses amounted to R41 780 039 (2015-16: R71 278 940) and were due to, among others, the result of administrative and technical errors, negligence, theft of electricity, tampering with meters and connections which form part of illegal consumption and faulty meters.

Other matters

15. I draw attention to the matters below. My opinion is not modified in respect of these matters.

Unaudited disclosure notes

15. In terms of section 125(2)(e) of the MFMA, the municipal entity is required to disclose particulars of non-compliance with the MFMA in the financial statements. This disclosure requirement did not form part of the audit of the financial statements and accordingly I do not express an opinion thereon.

Unaudited supplementary information

16. The appropriation statement set out on pages xx to xx does not form part of the financial statements and is presented as additional information. I have not audited this statement and, accordingly, I do not express an opinion on it.

Other reports by the Companies Act

17. As part of our audit of the financial statements for the year ended 30 June 2017, I have read the directors' report, the audit committee's report and the company secretary's certificate for the purpose of identifying whether there are material inconsistencies between these reports and the audited financial statements. These reports are the responsibility of the respective preparers. Based on reading these reports I have not identified material inconsistencies between the reports and the audited financial statements. I have not audited the reports and accordingly do not express an opinion on them.

Responsibilities of the accounting officer for the financial statements

19. The accounting officer is responsible for the preparation and fair presentation of the financial statements in accordance with SA Standards of GRAP and the requirements of the MFMA and the Companies Act for such internal control as the accounting officer determines is necessary to enable the preparation of financial statements that are free from material misstatement, whether due to fraud or error.

20. In preparing the financial statements, the accounting officer is responsible for assessing the Centlec (SOC) Limited's ability to continue as a going concern, disclosing, as applicable, matters relating to going concern and using the going concern basis of accounting unless the intention is to liquidate the municipal entity or cease operations, or there is no realistic alternative but to do so.

Auditor-general's responsibilities for the audit of the financial statements

21. My objectives are to obtain reasonable assurance about whether the financial statements as a whole are free from material misstatement, whether due to fraud or error, and to issue an auditor's report that includes my opinion. Reasonable assurance is a high level of assurance, but is not a guarantee that an audit conducted in accordance with the ISAs will always detect a material misstatement when it exists. Misstatements can arise from fraud or error and are considered material if, individually or in aggregate, they could reasonably be expected to influence the economic decisions of users taken on the basis of these financial statements.

22. A further description of my responsibilities for the audit of the financial statements is included in the annexure to the auditor's report.

Report on the audit of the annual performance report

Introduction and scope

23. In accordance with the Public Audit Act of South Africa, 2004 (Act No. 25 of 2004) (PAA) and the general notice issued in terms thereof, I have a responsibility to report material findings on the reported performance information against predetermined objectives for selected programmes presented in the annual performance report. I performed procedures to identify findings but not to gather evidence to express assurance.

24. My procedures address the reported performance information, which must be based on the approved performance planning documents of the municipal entity. I have not evaluated the completeness and appropriateness of the performance indicators included in the planning documents. My procedures also did not extend to any disclosures or assertions relating to planned performance strategies and information in respect of future periods that may be included as part of the reported performance information. Accordingly, my findings do not extend to these matters.

25. I evaluated the usefulness and reliability of the reported performance information in accordance with the criteria developed from the performance management and reporting framework, as defined in the general notice, for the following selected programmes presented in the annual performance report of the municipal entity for the year ended 30 June 2017:

Programmes	Pages in the annual performance report
Programme 5 – Engineering wires	59 – 62
Programme 6 – Engineering retail	63 – 65

26. I performed procedures to determine whether the reported performance information was consistent with the approved performance planning documents. I performed further procedures to determine whether the indicators and related targets were measurable and relevant, and assessed the reliability of the reported performance information to determine whether it was valid, accurate and complete.

27. The material findings in respect of the usefulness and reliability of the selected programmes are as follows:

Programme 5 – Engineering wires

Complaints were received regarding single fault lights to be handled and completed within three days and area faults within five days of receipt

28. I was unable to obtain sufficient appropriate audit evidence for the reported achievement of targets listed below. This was due to the unavailability of supporting documentation. I was unable to confirm the reported achievement by alternative means. Consequently, I was unable to determine whether any adjustments were required to the reported achievements.

Planned target	Reported achievement
Ninety per cent of the complaints received regarding single street fault lights to be handled and completed within three days of receipt during 2016-17	67,34%
Ninety per cent of the complaints received regarding area street fault lights to be handled and completed within five days of receipt during 2016-17	64,00%

Programme 6 – Engineering retail

Generate four quarterly reports with details of opening and closing times in relation to signed agreements

29. I was unable to obtain sufficient appropriate evidence that clearly defined the predetermined source information, evidence and method of collection to be used when measuring the actual achievement for the indicator, as required by the Framework for managing programme performance information (FMPPI). This was due to a lack of formal standard operating procedures or documented system descriptions. I was unable to test whether the indicator was well defined by alternative means.

Ensure that 100% of tokens collected by registered indigents in the MMM area receive free basic electricity on a monthly basis throughout 2016-17

30. I was unable to obtain sufficient appropriate audit evidence for the reported achievement of target: Ensure that 90% of tokens collected by registered indigents in the MMM area receive free basic electricity on a monthly basis throughout 2016-17. This was due to the unavailability of supporting documentation. I was unable to confirm the reported achievement by alternative means. Consequently, I was unable to determine whether any adjustments were required to the reported achievement of 87,43% FBE collection of registered indigents for the year under review.

Other matters

31. I draw attention to the matters below.

Achievement of planned targets

32. Refer to the annual performance report on pages 40 to 69 for information on the achievement of planned targets for the year and explanations provided for the underachievement of a significant number of targets. This information should be considered in the context of the material findings on the usefulness and reliability of the reported performance information in paragraphs [28, 29 and 30] of this report.

Adjustment of material misstatements

33. I identified material misstatements in the annual performance report submitted for auditing. These material misstatements were on the reported performance information of Programme 5 – Engineering wires. As management subsequently corrected only some of the misstatements, I raised material findings on the reliability of the reported performance information. Those that were not corrected are reported above.

Report on audit of compliance with legislation

Introduction and scope

34. In accordance with the PAA and the general notice issued in terms thereof, I have a responsibility to report material findings on the compliance of the municipal entity with specific matters in key legislation. I performed procedures to identify findings but not to gather evidence to express assurance.

35. The material findings in respect of the compliance criteria for the applicable subject matters are as follows:

Annual financial statements

36. The financial statements submitted for auditing were not prepared in all material respects in accordance with the requirements of section 122 of the MFMA. Material misstatements of expenditure and disclosure items identified by the auditors in the submitted financial statement were subsequently corrected and/or the supporting records were provided subsequently, resulting in the financial statements receiving an unqualified audit opinion.

Expenditure management

37. Money owed by the municipal entity was not always paid within 30 days, as required by section 99(2)(b) of the MFMA.

38. Reasonable steps were not taken to prevent irregular expenditure, as required by section 95(d) of the MFMA.

Consequence management

39. I was unable to obtain sufficient appropriate audit evidence that the municipal entity properly investigated matters surrounding allegations of financial misconduct laid against officials of the municipal entity as required by section 172(3)(a) of the MFMA.

Other information

40. The accounting officer is responsible for the other information. The other information comprises the information included in the annual report, which includes the director's report, the audit committee's report and the company secretary's certificate as required by the Companies Act. The other information does not include the financial statements, the auditor's report thereon and those selected programmes presented in the annual performance report that have been specifically reported on in the auditor's report.

41. My opinion on the financial statements and findings on the reported performance information and compliance with legislation do not cover the other information and I do not express an audit opinion or any form of assurance conclusion thereon.

    In connection with my audit, my responsibility is to read the other information and, in doing so, consider whether the other information is materially inconsistent with the financial statements and the selected programmes presented in the annual performance report, or my knowledge obtained in the audit, or otherwise appears to be materially misstated. I have nothing to report in this regard.

Internal control deficiencies

42. I considered internal control relevant to my audit of the financial statements, reported performance information and compliance with applicable legislation; however, my objective was not to express any form of assurance thereon. The matters reported below are limited to the significant internal control deficiencies that resulted in the findings on the annual performance report and the findings on compliance with legislation included in this report.

43. Instability at executive management level contributed to the fact that monitoring and effective performance management systems, processes and procedures had not been adequately developed and implemented, which caused the reliability of performance reporting being insufficient.

44. The financial statements were not adequately reviewed for accuracy prior to submission for auditing, resulting in material corrections having to be made.

Other reports

45. I draw attention to the following engagements conducted by various parties that had, or could have, an impact on the matters reported in the municipal entity's financial statements, reported performance information, compliance with applicable legislation and other related matters. These reports did not form part of my opinion on the financial statements or my findings on the reported performance information or compliance with legislation.

46. An external investigation into inadequate consultancy services provided to the municipal entity was still in progress at year-end, which covers the period from August 2005 to July 2010.

47. An independent consultant is investigating allegations of the possible financial misconduct by a senior official at the request of the municipal entity, which covers the period December 2016 to 30 June 2017. These proceedings are currently in progress.

Auditor-General

Bloemfontein

30 November 2017

AUDITOR-GENERAL
SOUTH AFRICA

Auditing to build public confidence

Annexure – Auditor-general's responsibility for the audit

1. As part of an audit in accordance with the ISAs, I exercise professional judgement and maintain professional scepticism throughout my audit of the financial statements, and the procedures performed on reported performance information for selected programmes and on the municipal entity's compliance with respect to the selected subject matters.

Financial statements

2. In addition to my responsibility for the audit of the financial statements as described in the auditor's report, I also:

   - identify and assess the risks of material misstatement of the financial statements whether due to fraud or error, design and perform audit procedures responsive to those risks, and obtain audit evidence that is sufficient and appropriate to provide a basis for my opinion. The risk of not detecting a material misstatement resulting from fraud is higher than for one resulting from error, as fraud may involve collusion, forgery, intentional omissions, misrepresentations, or the override of internal control.
   - obtain an understanding of internal control relevant to the audit in order to design audit procedures that are appropriate in the circumstances, but not for the purpose of expressing an opinion on the effectiveness of the municipal entity's internal control.
   - evaluate the appropriateness of accounting policies used and the reasonableness of accounting estimates and related disclosures made by the board of directors, which constitutes the accounting authority.
   - conclude on the appropriateness of the board of directors, which constitutes the accounting authority's use of the going concern basis of accounting in the preparation of the financial statements. I also conclude, based on the audit evidence obtained, whether a material uncertainty exists related to events or conditions that may cast significant doubt on Centlec (SOC) Limited's ability to continue as a going concern. If I conclude that a material uncertainty exists, I am required to draw attention in my auditor's report to the related disclosures in the financial statements about the material uncertainty or, if such disclosures are inadequate, to modify the opinion on the financial statements. My conclusions are based on the information available to me at the date of the auditor's report. However, future events or conditions may cause a municipal entity to cease to continue as a going concern.
   - evaluate the overall presentation, structure and content of the financial statements, including the disclosures, and whether the financial statements represent the underlying transactions and events in a manner that achieves fair presentation.

Communication with those charged with governance

3. I communicate with the accounting officer regarding, among other matters, the planned scope and timing of the audit and significant audit findings, including any significant deficiencies in internal control that I identify during my audit.

4. I also confirm to the accounting officer that I have complied with relevant ethical requirements regarding independence, and communicate all relationships and other matters that may reasonably be thought to have a bearing on my independence and here applicable, related safeguards.

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AUDITOR-GENERAL
SOUTH AFRICA

Auditing to build public confidence

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Audit Terminology | AGSA

Audit terminology

THE THREE ASPECTS WE AUDIT

The audit of financial statements

The financial statements submitted for auditing must be free from material misstatements. ***Misstatements*** refer to incorrect or omitted information in the financial statements. Examples include the incorrect or incomplete classification of transactions, or incorrect values placed on assets, liabilities or financial obligations and commitments.

The objective of an audit of financial statements is to express an audit opinion on whether the financial statements fairly present the financial position of auditees at financial year-end and the results of their operations for that financial year.

We can express one of the following audit opinions:

1. **CLEAN AUDIT OUTCOME:**
   The financial statements are free from material misstatements (in other words, a financially unqualified audit opinion) and there are no material findings on reporting on performance objectives or non-compliance with legislation.
2. **FINANCIALLY UNQUALIFIED AUDIT OPINION:**
   The financial statements contain no material misstatements. Unless we express a clean audit outcome, findings have been raised on either reporting on predetermined objectives or non-compliance with legislation, or both these aspects.
3. **QUALIFIED AUDIT OPINION:**
   The financial statements contain material misstatements in specific amounts, or there is insufficient evidence for us to conclude that specific amounts included in the financial statements are not materially misstated.
4. **ADVERSE AUDIT OPINION:**
   The financial statements contain material misstatements that are not confined to specific amounts, or the misstatements represent a substantial portion of the financial statements.
5. **DISCLAIMER OF AUDIT OPINION:**
   The auditee provided insufficient evidence in the form of documentation on which to base an audit opinion. The lack of sufficient evidence is not confined to specific amounts, or represents a substantial portion of the information contained in the financial statements.

Apart from auditing the financial statements, our ***other reporting responsibilities*** include auditing auditees' reporting on their predetermined objectives and auditing auditees' compliance with legislation.

The audit of reporting on predetermined objectives

Legislation requires auditees to report against their predetermined objectives and to submit such annual performance reports for auditing. The objective of our audit of predetermined objectives is to determine whether the reported performance against auditees' predetermined objectives in the annual performance report is useful and reliable in all material respects, based on predetermined criteria. This means that the reported performance information must be valid, accurate and complete.

Since the 2005-06 financial year, we have been phasing in the auditing of predetermined objectives and explaining to leaders within all spheres of government the importance of lending credibility to published service delivery information through the auditing thereof. Since the 2009-10 financial year, we have included a separate audit conclusion, based on the results of the audit on predetermined objectives, in management reports. However, these conclusions have not yet been elevated to the level of the audit report.

The audit of compliance with legislation

Legislation sets out the activities that auditees are charged with in serving the citizens and stipulate any limits or restrictions on such activities, the overall objectives to be achieved, and how due process rights of individual citizens are to be protected. Auditees are subject to legislation such as the Municipal Finance Management Act and the Municipal Systems Act, of which the objectives are proper financial management and performance management, transparency, accountability, stewardship and good governance.

The Public Audit Act requires us to audit compliance with legislation applicable to financial matters, financial management and other related matters each year. Material instances of non-compliance are reported in the audit report. To enhance accountability, auditees must identify and fully disclose any unauthorised, irregular as well as fruitless and wasteful expenditure incurred. In most part, such expenditure is incurred as a result of non-compliance with legislation.

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RA 6

PMG PARLIAMENTARY MONITORING GROUP

IDP, LED & NDP: Mangaung & eThekwini Metropolitan Municipality briefing

NCOP Finance

21 August 2018

Chairperson: Mr C De Beer (ANC, Northern Cape)

Meeting Summary

***Documents handed out:** Research document by the Committee researcher (to Members only)*

National Treasury reported that matters impacting on audit opinion included non-compliance with Supply Chain Management processes and poor management of indigent registers. Fiscal risks related to service delivery included declines in water revenue, unfunded mandates, and the unresolved conflict between eThekwini metro and the Ingonyama Trust. The financial health of eThekwini was improved but still fragile. Irregular and unauthorised expenditure was increasing. The metro was dealing pro-actively with the water crisis. Budget assumptions were credible, and budget alignment to the Integrated Development Plan and Built Environment Project Planning had been verified. Cash flow was sustainable over the Medium-Term Revenue and Expenditure Framework, but cash reserves were deteriorating. The collection rate was high, despite a declining trend. Irregular expenditure was increasing. The financial health of Mangaung was very fragile, and service delivery was in decline. Budget assumptions were not realistic, and revenue forecasts were not achievable. The political leadership had absolved its responsibility with regard to the budget/Integrated Development Plan process. The huge operating deficit projected over the Medium-Term Revenue and Expenditure Framework was not sustainable, the budget was not funded, and Capex funding from own sources was not sustainable.

The eThekwini vision was that it would be the most caring and liveable city in Africa by 2030. Strategic priorities were the creation of sustainable livelihoods, and developing a financially sustainable, safe and accessible city. Challenges to urban transformation were that it was a low-income, low-density and segregated city. Built Environment Project Planning spatial targets recognised the need for economic growth and integration, and resources were directed towards marginalised areas. There were partnerships with the private sector to make the metro more responsive to consumer issues. Integrated Development Plan priorities included the creation of a quality living environment through the provision of engineering, building and built environment infrastructure. The Integrated Public Transport Network project would facilitate equality of access to opportunity. Human settlement challenges included invasion and occupation of unsuitable land. The metro was ranked as the top SA city with the highest quality of living for the fourth consecutive year by Mercer's Quality of Living Survey.

In discussion, there were remarks and questions about alternative revenue streams; cash flow; revenue collection; city planning capacity; adequacy of National Treasury oversight; Information Technology investment; irregular and unauthorised expenditure; the Ingonyama Trust; land invasion; challenges of low density; indigence, and water demand.

Mangaung was elevated to metropolitan municipality status in 2011. It had the smallest population of all the metros, and covered the largest area. The metro invested R2.6 billion on repairs and maintenance of infrastructure assets over the last 10 years. There was a commitment to eradicate the sanitation backlog. There were a number of projects to address water demand management. Informal settlement upgrading was achieved through in situ upgrading, with relocation only resorted to where development was not feasible. Former unbalanced spatial settlement patterns were to be restructured. Universal access to electricity was to be achieved in 2019. There were projects for area and street lighting to curb crime. Infrastructure construction towards Integrated Public Transport Network was ongoing, and would go "live" in 2019/20. The objective was to build more inclusive communities with access to schools, sports facilities and business opportunities.

In discussion, there were remarks and questions about administrative capacity; the indigent register; the lack of a transport system; vacancy turnaround times; the regressed audit outcome; the CENTLEC board, and the establishment of a financial misconduct board. It was asked if it had been a mistake to grant metro status to Mangaung. The Chairperson appealed to National Treasury to provide better training to officials.

Meeting report

Introduction by the Chairperson

The Chairperson announced that the Mangaung and eThekwini metros would be presenting on the day, with an introduction by National Treasury. Members received a research document, compiled by the Committee Researcher. Engagement with the metros had started with Gauteng. The City of Cape town was engaged the year before, and in the current year there had already been an engagement with Nelson Mandela Bay metro. Engagements were to monitor good governance, sound financial management, value for money and effective spending, and accountability. Tax payer money was being spent. He wished Muslims a blessed Eid Mubarak. No apologies were received.

Briefing by the National Treasury on 2017/18 budget performance of eThekwini and Mangaung metros

The briefing was presented by Mr Sifiso Mabaso, Senior Economist, and Mr Jordan Maja, Director: Local Budget Government Analysis. The financial position at year-ending June 2017, audit outcomes and service delivery performance for Mangaung and eThekwini was placed alongside those of the other six metros. Common matters impacting on audit opinion were, inter alia, non-compliance with Supply Chain Management (SCM) processes and poor management of indigent registers. Fiscal risks related to service delivery included declines in water revenue, unfunded mandates, and the unresolved conflict between eThekwini metro and Ingonyama Trust. The financial health of eThekwini was improved but still fragile. Irregular and unauthorised expenditure was increasing. The City was dealing pro-actively with the water crisis. Budget assumptions were credible, and budget alignment to the Integrated Development Plan (IDP) and Built Environment Project Planning (BEPP) had been verified. Cash flow was sustainable over the Medium-Term revenue and Expenditure Framework (MTREF), but cash reserves were deteriorating. The collection rate was high, despite a declining trend. Irregular expenditure was increasing. The financial health of Mangaung was very fragile, and service delivery was in decline. Budget assumptions were not realistic, and revenue forecasts were not achievable. The political leadership had absolved its responsibility with regard to the budget/IDP process. The huge operating deficit projected over the MTREF was not sustainable, the budget was not funded, and Capex funding from own sources was not sustainable.

Briefing by the eThekwini metro on 2017/18 budget performance
The briefing was presented by Mr Sipho Nzuza, City Manager, Mr Adrian Peters, Chief Strategic Officer, and Mr Krish Kumar, CFO. The eThekwini vision was that it would be the most caring and liveable city in Africa by 2030. Strategic priorities were the creation of sustainable livelihoods, and developing a financially sustainable, safe and accessible city. Challenges to urban transformation were that it was a low-income, low-density and segregated city. BEPP spatial targets recognised the need for economic growth and integration, and resources were directed towards marginalised areas. There were partnerships with the private sector to make the metro more responsive to customer issues. IDP priorities included the creation of a quality living environment through the provision of engineering, building and built environment infrastructure. The Integrated Public Transport Network (IPTN) project would facilitate equality of access to opportunity. Human settlement challenges included invasion and occupation of unsuitable and environmentally sensitive land. The metro was ranked as the top SA city with the highest quality of life for the fourth consecutive year by the Mercer's Quality of Living Survey.

Discussion
Ms T Motara (ANC, Gauteng) noted that the metro had asked for assistance through other revenue streams. She asked that some of those be proposed. It was mentioned that cash flow was under pressure. She referred to revenue collection. She asked about plans to increase revenue collection, and what was meant when it was said that it was wished that municipalities could be run like SARS. She reminded the metro that it was a legal entity, and could resort to collection mechanisms. She asked if the metro was qualified for city planning, and if its planning was integrated with National Treasury (NT). She opined that NT had a desk top approach to oversight. There was no insistence on compliance at ground level. Things only looked good on paper. NT was responsible for oversight to assist municipalities. Municipalities had to look at IT as an investment. Human error caused leakage in the system and led to irregular expenditure. To install IT infrastructure could be costly at first, but would pay dividends. It assisted Limpopo when it was coming out of administration.

The Chairperson remarked that there was oversight on the ground at OR Tambo district municipality.

Mr O Terblanche (DA, Western Cape) commended on NT and the metro. The briefings were informative and instructive. What was missing was a clear path outlined to get to the 2030 objective. The two presentations were not speaking to each other. The metro had to give a master plan. There was no vision statement. NT referred to increasing unauthorised and irregular expenditure on slide 17. The metro did not touch on irregular expenditure.

Mr M Monakedi (ANC, Free State) commended the municipality for hard work. Plans had to be aligned to provincial and national priorities. The metro had to try to live up to its plans. He disagreed with Mr Terblanche. He believed that there were tangible and concrete projects to achieve the 2030 vision. It seemed that the metro was reluctant to delve deeper into the Ingonyama Trust matter. He asked what could be proposed, in relation to the medium to long term. It seemed that NT was too ready to excuse municipalities from irregular expenditure. NT was not taking it seriously. It could be addressed in a next interaction. He asked how the invasion of land by Umkhonto we Sizwe (MK) veterans was to be resolved.

The Chairperson emphasised that the Select Committee would take a hard line on irregular, unauthorised and fruitless and wasteful expenditure. One only had to look at what was said in the SONA and the Budget speech. A difficult Medium-Term Budget Policy Statement (MTBPS) was headed for. Economic growth had to be enhanced. Municipalities had to report on Local Economic Development (LED) and IDP.

Mr L Nzimande (ANC, KZN) commended the metro on a good effort. He asked about the terminology that referred to low density in the townships, and asked if that meant that there was space available, but limited settlement. Detail had to be provided. He asked what was meant by township hubs, whether that meant that people would be contained in Apartheid style locations, without there being integration. It was said that NT advised on free basic services, and that it was based on property values, with the limit being R250 000. The NCOP visited eThekwini, and people would report that they inherited a house worth R600 000 from a deceased family member, but they themselves were indigent, they were not rich. He asked what the plan would be in such a situation.
It was mentioned that the fiscus could shift the building of the Smithfield dam further into the future. As it was, eThekwini was taking water from the province, and yet there was an expressed need for another dam. Parliament was asked to intervene. He asked how a conservation and water demand plan tallied with the cry for the commissioning of a dam.

The Chairperson remarked that the golden rule was that one could not spend money one did not have, else the bank manager would call and ask what one was up to.

Mr Kumar replied on revenue streams, that application was made to NT, with support in principle from the Financial and Fiscal Commission (FFC) for business tax. Clarity would be given in future. On cash flow, that deficit had not been incurred. The surplus for 2016/17 and the current year was R2 billion. The City Manager had referred to the deterioration of the cash position, as own funds were used to cover Capex. There was an impact on own resources, due to the state of the economy. The metro budgeted to borrow R1 billion, the eventual sum was R700 million. The collection rate shifted by 1.5 % from 2015/16 to 2016/17. He was of the opinion that the metro could benefit from the same tax policy and ways to recover debt that SARS followed. Local government could not make use of garnishing orders or tax clearance certificates.

In response to Ms Motara about NT oversight, NT oversight was good. Good governance and financial management were due to NT oversight. There was benchmarking, and Municipal Regulations and Standard Chart of Accounts (MSCOA) issues were brought into play. There was zero tolerance for error and no favours were granted. The metro often fought with NT, and NT reports could be brutal and unkind. But NT set an example that could be looked up to, to uphold good governance.
IT investment was desirable, as the metro wanted to integrate customer relations management. The metro wanted complete billing, and smart meters. A business case had to be provided, and there had to be a grant of some sort. MSCOA was a tremendous system, but the pace had to be slowed down. Section 71 reports told the whole story with regard to the sufficiency of NT oversight. He had served with the World Bank in terms of how other cities could be assisted, and he had been throughout SA and various parts of the world from India to Brazil, and many parts of the developing world, and had never seen anything that could be compared what the metro had in terms of section 71 reporting. It showed what could be achieved through good governance and reporting.
Irregular expenditure amounted to R514 million, but it had to be borne in mind that all except R128 million was taken up by a single item of R385 million, where no valid tax clearance certificate was submitted. All people accountable had to get to root causes, and do the necessary, and report on that. There was monthly reporting on irregular expenditure. The metro had to await the outcome of the commission into Ingonyama Trust, and respect the outcome. The Trust had compelling arguments why it should not be taxed, and the metro wanted wall to wall taxation, and wanted to know how to manage land parcels. NT claimed that the indigent package was too generous, but there were child headed households, and the metro wanted to support vulnerable communities. Indigence was costly, and difficult to maintain and manage.

The Chairperson asked Mr Kumar how long he had been CFO.

Mr Kumar replied that he had been with the same city for 38 years, and had been CFO for 19 years.

Mr Musa Mbhele, Head, City Planning, replied to Ms Motara, that there were indeed qualified city planners, one of them being himself. There was a commitment to dismantle Apartheid city planning. The Mayor and the Provincial Legislature were leading engagement with the Ingonyama Trust board about the land tenure system. The matter that had to be resolved was the power of the traditional authority to allocate land. The depth of traditional authority had to be probed. The metro would return to the Select Committee about the matter.

He answered Mr Nzimande about what was meant by low density in the townships. It was not only in the townships where density was too low to support economic activity. High density supported business. Most post-Apartheid cities did radial planning, but the eThekwini municipal area was too large, reticulation of services was hard to achieve.

Concerning township hubs, the metro wanted to concentrate on investment zones that benefited during Apartheid. The question was how to draw in townships and rural areas. All economic sectors had to be represented in conclaves of high economic development. Townships and developed areas had to be linked.

Ms Zandile Gumede, Mayor, replied on water conservation and the proposed new dam. Alternatives were re-use, desalination, and water conservation. New infrastructure was seen as a last resort. Water conservation was not enough to delay the need. The metro could only survive until 2025.

The Chairperson thanked the Mayor and her team. The implications of decisions made by Council had to be considered. For implementation by officials, expertise was needed.
He introduced Mangaung metro with the observation that Mangaung was a rural metro compared to eThekwini, which remark was greeted by a loud murmur and some laughter. He qualified the remark by saying that the Free State was a rural province, which was greeted by a similar mild uproar.

Briefing by Mangaung metro on 2017/18 budget performance
The briefing was presented by Mr Tankiso Mea, City Manager. Mangaung Metro, was elevated in 2011 from a category B local municipality to a category A metropolitan municipality. The metro comprised of some smaller towns and extensive rural areas, had the smallest population of all metros, and covered the largest geographical area. The city invested more than R2.6 billion on repairs and maintenance of infrastructure assets over the preceding 10 years. The metro was committed to eradicate the sanitation backlog. A number of projects were implemented as part of water demand management. Informal settlement upgrading would be through in situ upgrading and relocation only where development would not be feasible. Former unbalanced spatial settlement patterns would be restructured. Universal access to electricity was aimed at for 2019. Projects for area and street lighting were implemented to curb crime. Infrastructure construction for IPTN was ongoing, and the project would go live during the 2019/20 financial year. The metro was committed to building more inclusive communities with access to schools, sporting facilities and business opportunities.

Discussion
The Chairperson referred to expenditure ceilings. The admiration had to take care not to waste money that could be used for the advancement of people.

Mr Shabangu thanked both the NT and the Metro. He had an interest in the Free State, as he represented that province. The water board that set the tariffs was an entity of the metro, planning had to be done together. The metro was not justified to complain that tariffs were raised without its knowledge. In the Free State, only Thaba 'Nchu was tribal land. The province paid the chiefs well. He referred to a lack of administrative capacity. If there were qualified officials, the question was why there was such a mess. SA was a water scarce country. Mangaung water losses amounted to 34.8 percent, and electricity losses were 10.77 percent.
He asked about a remedy or mechanism to curb maladministration. Poor management of the indigent register led to problems with revenue collection. Tender processes were the sole responsibility of the administration.
He asked why there was political interference in tendering.
Mangaung had no metro police. It could be asked how it dealt with crime without a metro police force. Establishing such a force was a means of job creation. The unemployment rate was 40.7 percent. He asked how unemployment would be dealt with.
There was no effective transport system in the city.
He asked how spillages and potholes were dealt with. He asked when the inherited infrastructure would be removed. It was claimed that inherited infrastructure would be removed, but it had to be borne in mind that there had been no infrastructure at all in the past. People were still using buckets.

Mr Terblanche asked NT about non-compliance with procurement outcomes. Service delivery targets were not achieved, SCM processes were not adhered to, and credit control procedures were not in place. Overtime depleted resources. Service delivery was in decline.

Mr M Monakedi (ANC, Limpopo) asked about turnaround time for vacancies. The acting CFO had been in office for four months. The previous CFO must have given one-month's notice, there was enough time to fill the position. NT had to pick up on that. He asked what caused the challenge of a long turnaround time for vacancies. 81 percent of the budget was funded through grants. He asked if it had been a mistake to declare Mangaung a metro. He asked how many municipalities were established to form part of the metro, and what had become of the district of which Mangaung was a part. The metro had to put its foot down about overtime protests. When workers marched and burned properties down, the metro had to take the lead. He asked why the audit outcome had regressed from unqualified to qualified. The municipality was losing staff. There had to be exit intervention, also to understand why people were leaving.

The Chairperson remarked that the metro had to be decisive when dealing with protests.

Ms Sarah Mlamleli, Mayor, replied that the metro had indeed put its foot down. There were tensions on account of actions taken. Cameras were used at the burning of the city hall to see what had happened. Staff learnership and internships had to be augmented. When it was elevated to a metro, the city inherited small municipalities like Naledi, De Wetsdorp, Wepener and Van Stadensrust, which had to be integrated. Those were small towns without budgets that were not viable. Unfunded mandates were crippling the metro.

The Gariep pipeline was started in 2004, and was then priced at R2 billion. The Metro had to compete with Water and Sanitation, and the NT only came in at the end of the day. It was agreed that Water and Sanitation would implement, but the price had escalated to R8 billion, and the Department did not have money.

There were seven land parcels that the metro wanted to develop, with infrastructure already delivered. There was still no light at the end of the tunnel. The metro was visited by the Portfolio Committees of Appropriation and Water and Sanitation. The current price tag was R8 billion. She deemed it necessary that it become a Public Private Partnership (PPP) project, as the seven land parcels, including the airport, could not be without water. The Department of Water and Sanitation confirmed to the Portfolio Committee Chairpersons that there was no money. 67000 VIP latrines had to be eradicated. The lesson to be learnt from KZN was that there had to be public/private partnership. Credit control and financial recovery had turned into a war for her. She did some introspection before calling NT in. She did an introduction, and called NT, the provincial Cooperative Governance and Traditional Affairs (CoGTA), the office of the Premier and the Provincial Treasury. She did not want to employ consultants. There were metro officials who worked from eight to five, five days a week, who could produce documents, when the CoGTA Minister visited. All political parties agreed to work together to implement plans. Performance agreements were informed by audit and recovery plans.

She answered on the decrease in service delivery, that a situation was inherited where the former council wanted a bond of R5 billion. The bond was not approved, but projects were retained. When the current administration arrived, it found that there had been overspending. Ten infrastructure contractors were employed for bucket eradication, and the metro had to borrow R500 million, half of which was used to pay them.

The Chairperson remarked that the South African Local Government Association (SALGA) claimed that there were workshops where people were instructed. When problems were inherited, as the Mayor had indicated, people had to know how to do differently to correct matters. He appealed to the NT that when people left workshops they had to understand how to perform their duties. People could be given assignments, so that they could go back to their offices to implement what they had been trained to do.

Mr Mea replied that Bloem Water was an entity of the Water and Sanitation national department. It was not a metro entity. CENTLEC, the electricity entity, worked well with the traditional authority. Qualification of officials had to be discussed. There was an attitude problem among people below the top layer. The engineering services HOD could touch on water losses. Money had to be provided for a condition assessment survey that dealt with infrastructure. Most of the budget had to go to water demand.

He answered about the establishment of a metro police force, that crime was under control, through SAPS campaigns.
Attention to spillages and potholes were ongoing, with R50 million to go to repairs and maintenance.

Staff turnaround was linked to the operational budget decrease. The metro had to slow down on appointments. Targets were

corrected to be in line with the downward adjustment of the budget. Money was removed from some of the targets. Credit control went along with cost containment. It had not been wrong to declare Mangaung a metro, but there was a lack of resources to help the small municipalities. Personnel was inherited from the small towns. Criminal cases were lodged with the SAPS after the burning of the City hall. The metro could not produce documentation for the instalment of water meters, and there was as yet no agreement with the Office of the Auditor General (A)G about the way forward. There was exit intervention to learn lessons about reasons for resignations.

Ms Mlamleli replied that an application was submitted for the establishment of a metro police force. A response from the National Commissioner was awaited. She reported to Council about the board of CENTLEC, the electricity entity. The board wanted to call an AGM without consulting the mother board, which was Mangaung. She asked for reports of AGM meetings from 2014 to date. It was found that there had been no AGM meetings since 2014, and performance had never been assessed. Some members had been on the board for terms of 3, 5, 7 or 11 years. Council disbanded the board, and six months were granted for the appointment of a new board.

The Chairperson advised that there had to be expertise on the board. R1 billion was owed by provincial departments to the metro. There were structures in each province chaired by senior members of provincial treasuries, which could zoom in on monies owed. Municipal managers and CFOs could be called. It was operative in the Northern Cape. The NT could also zoom in on that, as part of oversight.

Ms Mlamli replied that she sat on the Presidential Infrastructure Coordinating Forum. When money was owed by government, water and electricity was switched off, even in the office of the Provincial Treasury, and the office of the Premier. There was an uproar, the metro was not protected. Calls were received from national departments, and even, she suspected, from the Treasury. Yet they sat down and paid at least an amount and made commitments. The metro needed assistance. Electricity was switched off at the Provincial Treasury offices, and the MEC called to reprimand the metro. The metro wanted assistance and support from the NCOP and the NA. She had told those who complained that they had to pay up, before discussion could start.

The Chairperson advised that the MECs of Finance and CoGTA be engaged. In terms of section 154 of the Constitution, national and provincial departments had to assist local government. The AG was assisted by the Public Audit Amendment Bill, to assist councils with irregular and fruitless and wasteful expenditure. The NT had issued a directive that financial misconduct boards be established to deal with cases of transgression against the Municipal Finance Management Act (MFMA). He asked if the metro had established a financial misconduct board.

The Mayor replied that it would be done. It had to be elevated to the Mayoral Committee. Only officials had been contacted. It had to be brought to the Mayoral Committee, so that it could be known how to proceed.

Mr Shabangu asked if MyCiti would be established.

Ms Mlamli replied that an Integrated Public Transport Network was being established. It was dealt with in the report. Initial phases were completed, and there was zooming in on Thaba Nchu and Botshabelo.

Mr Mlondolozi Ndlovu, HOD, Engineering Services, replied that implementation of IPTN had commenced in 2014. The metro cooperated with the Department of Transport. The metro would go live in 2020. Work was done with the taxi associations and bus companies, with meetings on a monthly basis. Some infrastructure was already in place. There was a main busway, and the bus depot was reconstructed.

The Chairperson told the Mayor that he could see that she was passionate. It was clear that there were plans in place. The NCOP would visit the Free State in the following week, and she could then put issues on the table.

The Chairperson adjourned the meeting.

Centlec board 'illegal'

- Only four members remain
- Fails to call for AGMs
- Utility, metro mum on Mokhesi
- Calls for disband ignored

By: Ramosidi Matekane

Embattled chairman of the board of Centlec in the Free State, Tim Mokhesi has been running the show at the entity utility for more than nine years in a row without the mandatory annual general meetings over the last six years.

Centlec is the electricity distribution public utility of the Mangaung Metropolitan Municipality (MMM) servicing areas under the jurisdiction of Mangaung, Kopanong, Naledi, Mantsopa and Mohokare Municipalities.

AGMs are held to elect new members of the board or to receive reports on the progress at utilities. This is where minutes of past AGMs must be presented and approved, financial statement interrogated, ratification of the board's decisions, as well as election of new directors of the board.

Investigations by the *Free State Weekly* have revealed that none of the above happened at Centlec in the past six years, by extension rendering the board led by Mokhesi 'illegal' as it does not have the required public and shareholder mandate which can only be sourced through holding an AGM, prompting critics to deem the board illegitimate.

Together with the board's non-executive member Kenosi Moroka, Mokhesi has served the structure for more than nine years since it was first established in 2003. Moroka first served since 2007.

The duo's stay flies in the face of the KingIV dictates, which among others, guide corporate governance of public entities.

Board members are only allowed to serve more than nine years in office on the grounds that they are assessed yearly for ascertaining objective judgment and having no interest position or bias in decision making.

In addition, four members of the board of Centlec have since resigned, leaving it limping and operating with only four members against the legally required number of eight.

The remaining members of the board are also alleged to interfere in the procurement and administrative functions of Centlec, even where the authority lies with the office of the Chief Executive Officer (CEO), Mgoqi.

According to minutes of a meeting of the Mangaung Metro dated 2 August 2018 - which the *Free State Weekly* are in possession of - an unanimous decision was taken by the council backing a motion by the executive mayor Olly Mlamleli, who proposed that the board of Centlec be disbanded.

The leaked document point to Mlamleli having cried foul over the composition of the board of Centlec, its terms of directorship, independence of the directors, as well as the relationship between the board of directors and the metro, the sole shareholder at Centlec.

Questions sent by the newspaper to the offices of Mokhesi, Mlamleli and Centlec remained unanswered at the time of going to print last night.

The Free State Weekly had sought to establish reasons why the unanimously upheld resolution of the council to dissolve the board remains hanging and not implemented.

It also sought to determine if the independence of the remaining board at Centlec, as well as its performance, has been assessed since taking office for more than nine years.

The paper also sought to establish if the four remaining members of the board constitute a quorum and if operating with four members is legal or even permissible by law.

Sources close to Centlec also claimed Mokhesi allegedly showed disdain to the MMM when he unilaterally advertised the position of CEO without first consulting with the municipality, which has the sole prerogative to appoint officials at the power utility.

According to the documents, there was only one request received by Mangaung from Centlec to host an AGM since 2014, a meeting which did not materialise.

Allegations that the company secretary at Centlec, Thabo Malgas's appointment to the position was conflicted as a result of his apparent relationship with one of the members of the board at the organisation also went untested due to the non-responsive posture taken by Centlec and its board.

The Free State Weekly further asked Centlec if Malgas was the most qualified and eligible candidate for the position among all the applicants.

Neither Centlec or the MMM, could confirm or deny if Mokhesi, who is currently a subject of criminal investigation by the Directorate of Priority Crimes Investigation (Hawks) in relation to his role in the R225 million controversial asbestos audit contract of 2014, is still fit to hold office.

A recent damning report by public protector Advocate Busisiwe Mkhwebane has recommended that several senior officials at the department of housing, notably Mokhesi who is the head of department, be thoroughly investigated for their role in the contract.

The multi-million rand contract was for the removal of deadly asbestos roofs from houses, mainly in black communities, in the Free State in 2014.

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 15966/17

DATE: 2020/02/21

In the matter between

ORGANISATION UNDOING TAX ABUSE NPC & ANOTHER — Applicant

and

DUDUZILE CYNTHIA MYENI & 3 OTHERS — Respondent

BEFORE THE HONOURABLE MS JUSTICE TOLMAY

ON BEHALF OF THE APPLICANT : ADV STEYNBERG

ON BEHALF OF THE RESPONDENT : ADV BUTHELEZI

INTERPRETER : N/A

inlexso
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argument, I think she has answered ...

MS STEYNBERG: I am moving on. End of last year, at, it is page 39 or was it paragraph 39, we are in the postponement answering affidavit, oh, it is page 95 to 96, paragraph 39. So ...

COURT: I might have, is it page 95 ...?

MS STEYNBERG: 95 to 96.

COURT: Alright, thank you.

MS STEYNBERG: Paragraph 39, the deponent says: In this
10 regard I confirm that Sentlec's website shows that Ms Myeni is currently the deputy chairperson of a board, I attach a screenshot of the webpage. And that screenshot is on page 146. So in fact, Ms Myeni, in October last year you were the deputy chairperson of Sentlec?

MS MYENI: Yes.

MS STEYNBERG: Are you saying that is unpaid>

MS MYENI: M'Lady, I still need to explain the same thing, I still say to this court, I am unemployed.

MS STEYNBERG: I asked you if that was unpaid, can you just
20 answer me?

MS MYENI: Sorry?

MS STEYNBERG: I asked you if being the deputy chairperson of Sentlec is paid or unpaid.

MS MYENI: It is paid.

MS STEYNBERG: So how does that make you unemployed?

MS MYENI: This is a, M'Lady, can I explain the difference, that is why I stated, that is why, M'Lady, I stated categorically that I am unemployed, I do not have means. This is per the meeting, when you sit, when there is a meeting, but also relying on the R12 000 that you earn per meeting is different to spend the R12 000 to come to stay in Gauteng for five weeks.

MS STEYNBERG: Ms Myeni, it is just not true that you were unemployed. You earned R296 880, just from Sentlec last year, on your version I am unemployed, I also just charge by

10 the hour.

MS MYENI: I think this, the version that I stated, M'Lady, it remains, I am unemployed. Employment means you are guaranteed of an income every month.

COURT: So are you saying you are unemployed, but you earn money?

MS MYENI: M'Lady, this is a minimal amount, very minimal, it would cost me, in fact it would cost the same amount for three or four days, this amount per month, to come and stay here for five days.

20 MS STEYNBERG: But you told the court you are unemployed and ou did not have any money.

MS MYENI: This is not employment, M'Lady, being a director, I was never employed by South African Airways, M'Lady, I think we need to get into the discussion properly in this one, maybe I should explain, well when I, I was at South African Airways, I

was not employed by South African Airways ...

COURT: Did you get paid by them?

MS MYENI: ... I was a director, sorry, I was a non-executive director at South African Airways and you get paid a stipend for being in that particular board, because you have got to travel, you have got to stay, if you have an accommodation, that is required, but it is called stipend.

COURT: What did you get paid, if you say it is a stipend, how much is it?

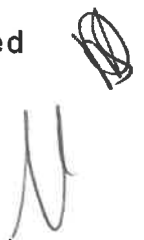
10 MS MYENI: Which one?

COURT: At the SAA, as a non-executive board member.

MS MYENI: It is on public reports, it is on the websites, I cannot remember ...

MS STEYNBERG: Let me remind you, I have got it with me. This is on page 93 and 94, paragraph 43: During her tenure at SAA Ms Myeni earned substantial director's remuneration in excess of R4.3m. In the 2016/2017 financial year alone Ms Myeni earned nearly R1m from SAA and Air Chefs, an SAA subsidiary. The following table reflects her director's

20 remuneration for each of the years that she was a director of SAA and Air Chefs. The figures do not include other benefits, free flights and incentives she may have received. And there is the breakdown, in 2016/2017 you earned close to a million rand, between SAA and Air Chefs. In 2015/2016 you earned over a million rand. Do you still say that you are unemployed



and unable to afford to come to court?

MS MYENI: The case started in 2017, M'Lady, this case started in 2017, all the costs of this case ought to have been covered by South African Airways, as a director of South African Airways I have never been told by anyone, including the shareholder and the cabinet, that getting into a state owned enterprise means you will pay for any expense if you get into a situation like OUTA taking me to court, alone, for decisions that we did as a collective, not a decision that was
10 done by Dudu Myeni. The counsel is raising pertinent issues, which I fully understand on her side, if then it meant going to serve South African Airways on behalf of this country, as I did, I was going to be individually charged as Dudu Myeni, I would then raise that issue and say, I am sorry, I am not taking this appointment that I applied for.

I was told that there is a director's liability insurance and whatever I earned was what I was there to do, to spend my time, to spend the expertise or to use the expertise I had to discharge all the responsibilities that were required of me as a
20 director, but I am targeted alone for the decisions that the board, not Dudu, the board, made.

COURT: I understand that point, I however have some difficulty understanding how you could call the payment, as a board director, in that amount a stipend. If we, at what the average South African earns, who is unemployed and with so

many unemployed people. I have difficulty with the use of the word stipend, because stipend, as I understand it, means a very small amount, that is my difficulty with that. I understand your answer that you expected of the insurance to cover this, I just have difficulty with the use of the word of a stipend, under these circumstances.

MS MYENI: I hear you, M'Lady and I fully agree with the sentiment of yours, M'Lady, but it is not me that has termed the board fees, the non-executive directors fees as they are

10 called stipend, it is not something that I coined or I established, but I hear and I respect what M'Lady's understanding of a stipend is. But also here I also, before this court I say, being employed and being a director is totally different.

MS STEYNBERG: Before M'Lady asked her question, what you said, us I understood it, is that it is correct, you did earn millions of rands at SAA, but you did not think it was fair that you should have spent that in coming to court, is that right, did I hear you correctly?

20 MS MYENI: M'Lady, currently I am not employed ...

MS STEYNBERG: I must ask you to answer my question, my question is this, I urge you to say, it is true, you earned all that money, but because you thought the insurance should cover you, you were not prepared to spend that money to come to court, is that true?

RA9

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: 15996/2017

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/~~NO~~
(3) REVISED

12/12/2019. ....
DATE SIGNATURE

In the matter between:

ORGANISATION UNDOING TAX ABUSE NPC — **FIRST PLAINTIFF**

SOUTH AFRICAN AIRWAYS PILOTS ASSOCIATION — **SECOND PLAINTIFF**

and

DUDUZILE CYNTHIA MYENI **FIRST DEFENDANT**

SOUTH AFRICAN AIRWAYS SOC LTD **SECOND DEFENDANT**

AIR CHEFS SOC LTD **THIRD DEFENDANT**

MINISTER OF FINANCE **FOURTH DEFENDANT**

JUDGMENT- SPECIAL PLEA

TOLMAY, J:

[1] The First Plaintiff (OUTA) and Second Plaintiff (SAAPA) issued summons against the Defendants in which the Plaintiffs seek an order that the First Defendant (Ms Myeni) be declared a delinquent director in terms of section 162(2) of the Companies Act 71 of 2008 (the Act). OUTA also seeks leave in terms of section 157(1)(d) of the Act to pursue this action.

[2] OUTA in its particulars of claim stated that it has legal standing for the declaration of Ms Myeni as a delinquent director in terms of section 162(2) of the Act. OUTA based its standing on the public interest

element, which it submits arises from its primary objectives, which include a) the protection and advancement of the Constitution, as well as the promotion of effective, protocol and enforceable taxation policies, which are free from corruption and b) the proper management of all major public entities.

[3] In par 18 of the particulars of claim the Plaintiffs alleged that South African Airways (SAA) is a major public entity under Schedule 2 of the Public Finance Management Act 1 of 1999 and that the public has an interest in the proper management of all major public entities and was the recipient of a shareholder guarantee loan of R19.1 billion issued by the state at the date of the summons. These allegations are admitted in the plea.

[4] In par 21 and prayer (a) of the particulars of claim OUTA seeks leave of the Court in terms of sec 157(1)(d) of the Act to bring this action in the public interest. In the plea it is alleged that OUTA required the leave of the Court before it instituted the action.

[5] A special plea was raised that OUTA does not have *locus standi* in terms of the Act and it was submitted that the claims against Ms Myeni should be dismissed for this reason alone.

[6] In an affidavit requesting postponement Ms Myeni initially abandoned this special plea, but later retracted it, and as a result it was decided

that the special plea would be argued and determined prior to the commencement of the trial.

[7] The special plea and the reliance on section 157(1)(d) of the Act, which extends standing in company law requires an investigation into what is required of a litigant to obtain leave from a Court based on public interest.

[8] Mr Buthelezi argued that OUTA should have obtained the leave of the Court prior to instituting action and that in any event OUTA is not entitled to the relief envisaged in section 162(2) of the Act, as it does not fall under any of the categories of persons or entities mentioned therein. Ms Steinberg conceded that the leave of the Court is indeed required and that it was sought, but submitted that such leave could be obtained at any time prior to the commencement of the trial. She pointed out that SAAPA's standing is not in dispute, that the Plaintiffs share the same legal representatives and that irrespective of the Court's ruling on the special plea, SAAPA will in any event proceed with the action. She further argued that no additional costs will be incurred due to OUTA being a co-litigant in the action and even if the Court may find that OUTA is not entitled to the relief sought, SAAPA will unquestionably be entitled to the relief, if it succeeds in proving its claim.

[9] Ms Steinberg pointed out that in the plea filed it was admitted that SAA is a major public entity and that the public has an interest in its proper management, by making this admission, Ms Myeni had actually already admitted to the public interest element. She therefore submitted that the question of OUTA's standing is actually academic. Despite the attractiveness of this argument, I deem it appropriate to investigate the merits of the argument raised on behalf of Ms Myeni.

[10] The determination of the issue before Court requires a contextual investigation, which should start with the purpose and scope of the Act and how it differs from the historical position. In the past there was a distinctly different approach applied in commercial law than in constitutional law, however the amendment of the Act changed all that.

[11] The purposes of the Act set out a new vantage point from which company law should be approached. Significantly the Act is brought within the purview of our constitutional dispensation. This is revealed in the Act. The Act sets out its purposes as follows:

> "7. The purposes of this Act are to— (a) promote compliance with the Bill of Rights as provided for in the Constitution, in the application of company law;
> (a) ...
> (b) ...
> (i)
> (ii)
> (iii) encouraging transparency and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation;
> (c) ...
> (d) ...

(e) continue to provide for the creation and use of companies, in a manner that enhances the economic welfare of South Africa as a partner within the global economy;"

[12] There is accordingly no question that the Act has significantly broadened and enhanced the scope of the Act in order to ensure that it meets constitutional muster.

[13] In my view, Chapter 7 of the Act and specifically section 157(1)(d) envisages that a broader group of litigants should be awarded standing to approach the Court, if they meet the requirement of representing a public interest and if the Court grants the required leave.

[14] Chapter 7 of the Act's heading is "Remedies and enforcement" and section 156 to 184 falls under this chapter. The relevant part of Section 156 reads as follows:

> "Alternative procedures for addressing complaints or securing rights
> 156. A person referred to in section 157(1) may seek to address an alleged contravention of this Act, or to enforce any provision of, or right in terms of this Act, a company's Memorandum of Incorporation or rules, or a transaction or agreement contemplated in this Act, the company's Memorandum of Incorporation or rules, by—
> (a) ...
> (b) ...
> (c) applying for appropriate relief to the division of the High Court that has jurisdiction over the matter; or...
> (d) ..."

[15] The relevant part of section 157 reads as follows:

> "Extended standing to apply for remedies
> 157. (1) When, in terms of this Act, an application can be made to, or a matter can be brought before, a court, the Companies Tribunal, the Panel or the Commission, the right to make the application or bring the matter may be exercised by a person—
> (a) ...

(b) ...
(c) ...;
(d) acting in the public interest, with leave of the court. "

[16] In order to better understand the impact and context of the extended standing referred to in section 157, the contents of section 157(3) is also of importance this reads as follows:

> "(3) For greater certainty, nothing in this section creates a right of any person to commence any legal proceedings contemplated in section 165(1), other than—
> (a) on behalf of a person entitled to make a demand in terms of section 165(2); and
> (b) in the manner set out in section 165."

[17] The wording of section 156, read with section 157(1) seems to grant a person who qualifies under section 157, the right to approach the Court to address any alleged contravention of the Act or to enforce any provision or right in terms of the Act, except for a right as envisaged in section 165.

[18] The Plaintiffs seek relief in terms of section 162 (2) to declare Ms Myeni a delinquent director. This section reads as follows:

> "162 (2) A company, a shareholder, director, company secretary or prescribed officer of a company, a registered trade union that represents employees of the company or another representative of the employees of a company may apply to a court for an order declaring a person delinquent or under probation if—
> (a) the person is a director of that company or, within the 24 months immediately preceding the application, was a director of that company; and
> (b) any of the circumstances contemplated in—
> (i) subsection (5)(a) to (c) apply, in the case of an application for a declaration of delinquency; or
> (ii) subsections (7)(a) and (8) apply, in the case of an application for probation."

[19] On a reading of the wording of section 162 it would seem as if there is room for an interpretation that OUTA might be excluded from the categories referred to in section 162 and therefore not entitled to the relief envisaged therein, but this section must be read in the context of chapter 7 and specifically with sections 156 and 157, which seems to indicate the contrary. However for purposes of this judgment I am of the view that this Court need not interpret the wording of these sections nor venture into the merits and decide at this point whether OUTA will ultimately be entitled to the relief claimed in terms of section 162. This should in my view only be dealt with at the trial.

[20] The Act is silent on when leave needs to be sought in terms of section 157(1)(d), neither is the procedure that should be followed to obtain such leave prescribed.

[21] In the *Minister of Environmental Affairs v Recycling and Economic Development Initiative of South Africa NPC*[1] it was held that leave to proceed in terms of section 157(1)(d) can be granted at the hearing of the matter, without the need for a prior application. In that case, the respondents argued that the Minister of Environmental Affairs could not rely on section 157(1)(d) in bringing urgent provisional liquidation proceedings, as the Minister had not obtained leave before instituting proceedings. The respondents in that case further relied on case law

[1] 2018 (3) SA 604 (WCC) (*REDISA*).

dealing with class actions in civil claims, which requires a certification process prior to the institution of class action litigation.[2]

[22] The Court distinguished class action proceedings from public interest standing under section 157(1)(d). It was held that the leave requirement under section 157(1)(d) is a flexible, context-sensitive requirement.

> *"In action proceedings, which are usually more delayed than proceedings on motion..., as in this case, the exigencies of the matter would dictate whether the court can ascertain on the papers whether relief should be granted without a special application, or whether a separate substantive application should be brought to determine whether the matter should be certified in order to grant extended standing..."*[3]

[23] The Court held that it was sufficient that the Minister made out a case of public interest standing in the papers filed in the main application. A separate, prior application for leave was not necessary. The SCA[4] subsequently overturned the aforementioned judgment on other grounds, but did not take issue with this proposition.

[24] Relying on *REDISA* SCA, the authors of Henochsberg summarise the position as follows[5]:

> *"If a Court can, on the papers (whether in action or motion proceedings) decide whether relief should be granted, a separate application for certification to grant extended standing should not be required... This*

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[2] *Children Resources Centre Trust & Others v Pioneer Food (Pty) Ltd* 2013 (2) SA 89 (CC), *Mukaddam v Pioneer Foods & Others 2013* (5) SA 89 (CC).

[3] *Supra* par 189 p651.

[4] *Recycling and Economic Development Initiative of South Africa NPC v Minister of Environmental Affairs* 2019 3 SA 251 (SCA) (*REDISA* SCA).

[5] Henochsberg *Commentary on the Companies Act 2008* at pp560 (14A) -560 (14B).Prior to this in *Giant Concerts CC v Rinaldo Investments (Pty) Ltd* it was also held that the question of standing should be determined *in limine*.

case is not a class action, where a much more controlled method of certification is required."

[25] In my view, logic dictates as supported by *REDISA* and *REDISA SCA* that this issue must be determined prior to the commencement of the trial. Ms Steinberg tendered during argument to launch a separate application to clarify this aspect, if required to do so. Mr Buthelezi, correctly in my view, indicated that he was satisfied that the Court could determine this matter by way of the special plea. How leave should be obtained i.e by way of application, a point *in limine* or a special plea should be determined by the circumstances of each case. In this instance I am of the view that in the light of the allegations made in the particulars of claim, read with the special plea and admissions made in the plea, this Court can determine this aspect by way of a special plea, and there exist no requirement that leave should have been obtained prior to the institution of the action.

[26] In *Giant Concerts CC v Rinaldo Investments (Pty) Ltd*[6] where the Court dealt with an own interest litigant in terms of section 38(a) of the Constitution, it was held that a party should show that her rights or interests were directly affected by the challenged conduct. The following that was stated is of importance:

"[32] And in determining Giant's standing, we must assume that its complaints about the lawfulness of the transaction are correct. This is because in determining a litigant's standing, a court must, as a matter of logic, assume that the challenge the litigant seeks to bring is justified. As Hoexter explains:

[6] 2013 (3) BCLR par 32-34 p261 & 262 (*Giant's*).

"The issue of standing is divorced from the substance of the case. It is therefore a question to be decided in limine [at the outset], before the merits are considered."

[33] The separation of the merits from the question of standing has two implications for the own-interest litigant. First, it signals that the nature of the interest that confers standing on the own-interest litigant is insulated from the merits of the challenge he or she seeks to bring. An own-interest litigant does not acquire standing from the invalidity of the challenged decision or law, but from the effect it will have on his or her interest or potential interest.

[34] .. As the Supreme Court of Appeal pointed out, standing determines solely whether *this* particular litigant is entitled to mount the challenge: a successful challenge to a public decision can be brought only if "the right remedy is sought by the right person in the right proceedings". To this observation one must add that the interests of justice under the Constitution may require courts to be hesitant to depose of cases on standing alone where broader concerns of accountability and responsiveness may require investigation and determination of the merits. By corollary, there may be cases where the interests of justice or the public interest might compel a court to scrutinise action even If the applicant's standing is questionable. When the public interest cries out for relief, an applicant should not fail merely for acting in his or her interest."[7]

[27] In the *REDISA* SCA, it was held that public interest standing under section 157(1)(d) requires similar considerations to public interest standing under the Constitution. It held:

"in Ferreira v Levin the Constitutional Court set out the criteria for evaluating whether an applicant should be given leave to act in the 'public interest'. In the context of this case the evaluation includes considering: (i) the nature of the allegations advanced as to why the public interest is implicated; (ii) the relevant provisions of the 2008 Act, which provide the context of the allegations; (iii) the provisions of the 2008 Act for addressing such allegations; (iv) whether there [are] other reasonable and effective ways in which the challenge may be brought; and (v) the range of persons or groups have had to present evidence and argument to the court."[8]

[28] Section 38(d) of the Constitution grants anyone acting in the public interest the right to approach a Court if a right in terms of the Bill of Rights has been infringed. Section 157(1)(d) of the Act extended the

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[7] *Ibid.*

[8] 2019 (3) SA 251 (SCA) at par 134.

same standing in company law to a litigant acting in the public interest. In *Giant's* it was held that standing determines solely whether this particular litigant has the standing to mount the challenge.

[29] *Giant's* emphasised that the interests of justice under the Constitution may require Courts to be hesitant to dispose of cases on standing alone. In this instance broader concerns of responsiveness and accountability are indeed at play. OUTA as a non-profit organisation whose aim is to protect taxpayers and to ensure accountability of public enterprises, not only meet the public interest requirement, but it is in my view also in the interest of justice that it be afforded the opportunity to bring the challenge. *Giant's* seem to say that broader considerations of accountability and responsiveness should apply to determine standing. In this regard OUTA, represents a public interest in the presentation and outcome of the matter, despite potentially failing to prove that it is entitled to the relief sought, especially in the light of the fact that SAAPA will be entitled to the relief, if it succeeds in proving its case. In this regard there may at least be one plaintiff who will be entitled to the relief.

[30] In *Ferreira v Levin No & Others; Vryenhoek & Others v Powell No & Others*[9] the following was said regarding the public interest element, (at that stage still with reference to the interim Constitution).

> " [234] ... Factors relevant to determining whether a person is genuinely acting in the public interest will include considerations such as: whether

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[9] 1996 (1) SA 984 CC at par 234.

there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the Court and the opportunity that those persons or groups have had to present evidence and argument to the Court. These factors will need to be considered in the light of the facts and circumstances of each case."

[31] In *Lawyers for Human Rights and Another v Minister of Home Affairs and Another*[10] the following that was further said regarding the public interest element supports this court's view:

"[18] The issue is always whether a person or organisation acts genuinely in the public interest. A distinction must however be made between the subjective position of the person or organisation claiming to act in the public interest on the one hand, and whether it is, objectively speaking, in the public interest for the particular proceedings to be brought. It is ordinarily not in the public interest for proceedings to be brought in the abstract. But this is not an invariable principle. There may be circumstances in which it will be in the public interest to bring proceedings even if there is no live case. The factors set out by O'Regan J help to determine this question. The list of relevant factors is not closed. I would add that the degree of vulnerability of the people affected, the nature of the right said to be infringed, as well as the consequences of the infringement of the right are also important in the analysis."

[32] OUTA, representing taxpayers who partly foot the bill of SAA through paying their taxes must have an interest in how a company like SAA is run. The public has an interest in who is appointed as directors and if such directors fail in their duties, to hold them to account. It is also importantly in the interests of justice that the public interest is both advanced and protected due to the nature of SAA as a state owned company. It is important to note that in *Lawyers for Human Rights* it was envisaged that it may be in the public interest to proceed even if there is no live case. This informs and supports my view that even if in the end OUTA is ultimately denied the remedy envisaged in section

[10] 2004 (4) SA 125 CC at par 18.

162(2) it retains its standing as a representative of the public who has an interest in the presentation and outcome of the case.

[33] In my view OUTA did prove its standing in terms of section 157(1)(d), and should be awarded the opportunity to pursue its claim, in any event their involvement will not result in any significant, if any, increase in costs, as they are represented by the same legal representatives and their case and that of SAAPA is based on exactly the same facts and even the same particulars of claim. Consequently the same witnesses will probably be called to prove the case. If in the end, OUTA's presence is found to have unjustifiably inflated the costs, the Court could deal with that issue at the end of the hearing.

[34] In light of all the facts, I am of the view that the special plea should be dismissed and OUTA should be granted leave to bring the action in terms of section 157(1)(d) of the Act together with SAAPA.

COSTS

[35] The parties agreed that the costs occasioned by the postponements and the applications for amendment and joinder should be dealt with in this judgment.

[36] The matter stood down initially due to Ms Myeni's absence and then again to afford her an opportunity to bring a substantive application for

postponement. Although she was not granted a lengthy postponement, she was afforded some time to consult and prepare her interlocutory applications. As she sought an indulgence and did not offer a satisfactory explanation why she did not launch these applications timeously, I am of the view that she should pay the wasted costs occasioned by the delay in the matter.

[37] Regarding the applications for joinder, amendment and the special plea, I cannot see any reason why this Court should deviate from the principle that the unsuccessful litigant should pay the costs. I am however not of the view that any punitive costs orders should be awarded at this point, nor should the Court at this point order that the costs be immediately taxable and/or payable, the taxation should be left in the discretion of the taxing master.

The following order is made:

1. **The special plea is dismissed;**

2. **First Plaintiff is granted leave in terms of section 157(1)(d) of the Companies Act 71 of 2008 to proceed with the action.**

3. **First Defendant is ordered to pay the wasted costs occasioned by the postponement and**

4. **First Defendant is ordered to pay the costs of the amendment and joinder applications, as well as the costs of the special plea.**

R G TOLMAY
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DATE OF HEARING: 2 DECEMBER 2019

DATE OF JUDGMENT: 12 DECEMBER 2019

ATTORNEY FOR APPLICANT: **LUGISANI MANTSHA INC**

ADVOCATE FOR APPLICANT:

ADV. B BUTHELEZI

ATTORNEY FOR RESPONDENT: **PANDOR ATTORNEYS**

ADVOCATE FOR RESPONDENT:

ADV. C STEINBERG, C &

McCONNACHIE AND N KAKAZA