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

Case No: 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 LTD	Second Respondent
AIR CHEFS SOC LTD	Third Respondent
MINISTER OF FINANCE	Fourth Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Sixth Respondent

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FIRST RESPONDENT'S HEADS OF ARGUMENT

A. INTRODUCTION

1. These submissions are presented in respect of three applications which have been set down concurrently for relief sought:

   1.1. in terms of section 17 of the Superior Courts Act 10 of 2013 ("the Act") for leave to appeal against the decision of Honourable Tolmay J in the trial action;

1.2. in terms of section 18(1) of the Act for the executability and operation of the aforesaid decision, in spite of the application(s) for leave to appeal; and

1.3. in terms of sections 169 (read with section 167(5)) of the Constitution, to declare section 18 of the Act to be unconstitutional and invalid.

2. The relief referred to at subparagraph 1.3 above is sought in the alternative to the relief referred to at paragraph 1.2.

3. We deal with these three topics in these composite submissions, hence their relative length. The court has directed that all three issues be effectively consolidated into a single hearing.

4. Due to unforeseen circumstances, the applicant's heads were filed out of the time stipulated in the directive of this Honourable Court. If deemed necessary by the respondents, a separate condonation application will be made and argued at the hearing.

B. THE SECTION 17 APPLICATION

5. In respect of the section 17 application, the applicable and heightened test is correctly summarised in the heads of argument of the respondents.

6. These heads of argument shall expand on the grounds of appeal contained in the Notice for leave to appeal. The grounds of the appeal are mainly that the learned judge:

6.1. erred and/or misdirected herself by interpreting section 162 of the Companies Act 71 of 2008, ("the Act") to mean that the first respondent

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

6.2. having granted the first respondent *locus standi*, did not establish from the evidence led that public interest or any interest in the litigation upon which the *locus standi* of the first respondent was conferred;

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

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

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

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

7. In view of the novelty of and importance of section 162, that is in the interests of justice that these issues be decided and settled by a higher court.

8. The learned judge further erred in finding that:

8.1. the applicant's conduct fits the conduct envisaged in section 162(5)(c) where:

8.1.1. gross abuse of the position of director was not proven;

8.1.2. taking personal advantage of information obtained as director was not proven;

8.1.3. harm inflicted on the company was not proven;

8.1.4. gross negligence or wilful misconduct was not proven.

9. The version of the applicant had not been put to the witnesses of the respondents only in respect of issues outside of the pleadings while the version on issues in the pleadings had been put to all the witnesses.

10. The learned judge erred and/or misdirected herself finding that the allegation of the applicant having acted on unlawful instructions of former President Zuma was immaterial to proving the case when that was the pleaded case of the respondents.

11. The learned judge erred in disregarding crucial evidence that disproved crucial allegations made by the respondents such as:

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

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

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

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

12. The learned judge erred in accepting evidence that was denied and not proven in the trial such as:

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

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

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

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

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

16. The learned judge erred in finding that it had been argued on behalf of the applicant that the respondents were obliged to prove other causes of action

that had been pleaded. No such argument was made in oral argument or on the applicant's heads of argument.

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

18. The learned judge erred in accepting the erroneous submissions made by the respondents on the role of the applicant in the submission of Section 54 Applications by failing to distinguish the representative capacity of the applicant as chairperson of the board that is as per the Section 49 of the PFMA, the accounting authority.

19. The learned judge has created reasonable grounds of apprehension of bias in that:

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

19.1.1. The exact wording, verbatim, of the respondent's heads of argument.

19.1.2. A paraphrasing or summary of the respondent's heads of argument.

19.1.3. Consolidation of the respondent's heads of argument.

19.1.4. Appear in the same logic sequence as in the respondent's heads of argument

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

19.3. The opinions expressed in the judgment as those of the court were in effect the submissions of counsel for the respondents which have been elevated to the opinions of the learned judge.

20. The abovementioned method of judgment has been correctly criticized and discouraged by the higher courts.

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

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

22.1. A delinquency application as per Section 162 of the Companies Act 71 of 2008 by parties claiming *locus standi* Section 157(d) of the Companies Act 71 of 2008 where Section 162(c) of the Act specifically provides otherwise.

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

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

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

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

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

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

Section 162 relief - *Locus standi*

23. In the judgment on the special plea of *Locus Standi*, the learned judge states at paragraph 19:

23.1. *"On a reading of the wording of section 162 it would seem as if there is room for 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 seem 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."*[1]

24. The question of the correct interpretation of Section 162 is subsequently not addressed in the judgment after it had been deferred in the interlocutory application. It is still the case of the applicant that the Companies Act 2008, specifically excluded public interest litigants from the relief granted under Section 162.

25. The applicant still contends that this was a necessary question to be dealt with as it sets a crucial precedent given the relatively limited jurisprudence on Section 162 applications.

[1] *Outa v Myeni and Others – Interlocutory Application Judgment of 12/12/2019*

26. The Constitutional Court in *Giant Concerts CC v Rinaldo Investments*[2] states that:

26.1. "*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"*

27. Section 162 clearly distinguishes three categories of possible applicants with standing to initiate delinquency proceedings:

27.1. First Category: a company, a shareholder, director, company secretary or prescribed officer of a company, registered trade union or other representative of employees of the company.

27.2. Second Category: The commission or panel.

27.3. Third Category: Any organ of state responsible for the administration of any legislation.

28. Section 162 is ancillary to Section 69 (Ineligibility and disqualification of persons to be directors or prescribed officers). The category of applicants listed under Section 69[3] is exactly the same as those listed under Section 162(2). Section 69 does not provide for standing in the public interest.

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[2] Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others [2012] ZACC 28
[3] Henochsberg Commentary on the Companies Act, 2008 at pp 264(9)

29. Section 71 (Removal of directors) provides for the removal of directors. This section also does not provide for any standing to remove directors by persons acting in the public interest.

30. Section 165 (Derivative actions) grants no standing to persons acting in the public interest.

31. Section 20 (Validity of company actions) provides for actions that may be taken against the company under Section 20 (4) by; shareholders, directors, prescribed officers or trade union may apply to the High Court for an appropriate order to restrain company from doing anything inconsistent with the Act. There is no public interest standing granted.

32. It is again submitted that the public interest standing granted under Section 157 cannot extend to actions against directors as the Act is consistent in not providing any remedies against directors to external parties. In *Nasionale Vervoerkommissie van Suid Afrika v Salz Gossow Transport*[4], the court stated that, when interpreting certain provisions, a statute must be studied in its entirety.

33. In *South African Transport Services v Olgar*[5], the Appellate Division held that, if a provision is capable of two meanings, the meaning which is more consistent with the purpose of the legislation should be accepted.

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[4] *Nasionale Vervoerkommissie van Suid Afrika v Salz Gossow Transport (Edms) Beperk 1983 (4) SA 344*
[5] *South African Transport Services v Olgar 1986 (2) SA 684 (A)*

34. In the case of a conflict over the interpretation of Section 157, the specific provisions of Section 162 are to be preferred over the general provisions of Section 157.

35. In *Shoprite Checkers (Pty) Ltd v Ramdaw NO and Others*[6] it was argued that it was competent to review CCMA awards under Section 158(1)g of Labour Relations Act despite Section 145 providing for same. The court upheld that argument on the grounds that Section 145 provided specific remedy for reviewing specific awards. It could not be intended that such awards could similarly be reviewed under Section 158(1)(g).

36. In *Dadoo Limited v Krugersdorp Municipality*[7] it is stated that a court should strive to interpret legislation in such a manner that evasion of its provisions is prevented.

37. Thus, the correct way to apply Section157 would be to either:

    37.1. Bring application to compel the persons listed under Section 162(2) to initiate process in circumstances where such process was not being initiated.

    37.2. Apply for leave of the court to initiate delinquency process on behalf of persons listed under Section 162(2).

38. The fact that the standing of the second respondent was never challenged does not resolve the legal question that was placed before the court over

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[6] *Shoprite Checkers (Pty) Limited v Ramdaw NO and Others (DA12/00) [2000] ZALC 5*
[7] *Dadoo Limited v Krugersdorp Municipality 1920 AD 530*

whether OUTA was entitled to the relief in law, nor does it render the question moot.

39. Extraneous to the merits, the conduct of OUTA as an organization has been to run a hostile media campaign against the applicant using in part the illegitimate standing granted to it by the court. This has been extremely prejudicial to the applicant and unduly violated her constitutional rights to a good name.

40. In *Lawyers for Human Rights and Another v Minister of Home Affairs and Another*[8] it is stated that *"a distinction must however be made between the subjective position of the person or organization 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 not in the public interest for proceedings to be brought in the abstract".*

41. The notion of a taxpayer acting in the public interest was categorized as an "abstract interest" in *Frothingham v Melon, Secretary of the Treasury* [9] wherein it was held that Mrs Frothingham had an abstract interest in the way in which public revenues were appropriated and further held that; it would be untenable to contend that every taxpayer had a right to challenge a law as unconstitutional because its enforcement required the expenditure of public money which was in part raised by taxation.

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[8] *Lawyers for Human Rights and Another v Minister of Home Affairs and Another 2004 (4) SA 125 (CC)*

[9] *Frothingham v Mellon, Secretary of the Treasury 262 US 447 1922*

42. In terms of section 17(1)(a)(ii), leave to appeal may be granted, notwithstanding the court's view of the prospects of success, where there are nonetheless compelling reasons why an appeal should be heard.

43. It is the applicant's contention that even on the basis on which the court found the first respondent has standing to bring delinquency proceedings under section 162, ie the considerations mentioned in *Ferreira v Levin*[10] and section 38(d) of the Constitution[11], it does not provide certainty with regard to the interpretation and application of section 157(1)(d) in section 162 applications. For example, no mention is made of which rights contained in the Bill of Rights have been allegedly infringed.

44. The court went on to state that, even if another court can find that *OUTA* has no legal standing in launching these proceedings, the second respondent *SAAPA's* legal standing is common cause as it is included in the categories mentioned in section 162(2), being an employee representative body. With respect this does not discard the fact that a proper interpretation of section 157(d) in as far as section 162 proceedings are concerned is of public importance, concerns an important question of law.

45. To the extent that any legal points will be raised for the first time on appeal, the following dictum in the SCA case of *Minister of Justice and Constitutional*

[10] *Ferreira v Levin* 2019 (3) SA at para 134
[11] Constitution of the Republic of South Africa No 108 of 1996

Development and Others v Southern African Litigation Centre and Others[12] , will be invoked:

> *"Furthermore, where the purpose of the appeal is to raise fresh arguments that have not been canvassed before the High Court, consideration must be given to whether the interests of justice favour the grant of leave to appeal. It has frequently been said by the Constitutional Court that it is undesirable for it as the highest court of appeal in South Africa to be asked to decide legal issues as a court of both first and last instance. That is equally true of this court. But there is another consideration. It is that if a point of law emerges from the undisputed facts before the court it is undesirable that the case be determined without considering that point of law. The reason is that it may lead to the case being decided on the basis of a legal error on the part of one of the parties in failing to identify and raise the point at an appropriate earlier stage. But the court must be satisfied that the point truly emerges on the papers, that the facts relevant to the legal point have been fully canvassed and that no prejudice will be occasioned to the other parties by permitting the point to be raised and argued"*

Section 162(5)(c)

46. On a proper analysis of the evidence, all the evidence revealed was differences in opinion and boardroom battles among executives over how things should have been done at SAA. It is from the biased and distorted narrative of these battles that the court has erroneously found that the

[12] *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* 2016 (3) SA 317 (SCA) at 330C-F

applicant's conduct fits that envisaged under Section 162(5)(c) of the Companies Act.

47. In *Cook v Hesber Impala (Pty) Limited and Others* where the applicant sought a declaration of delinquency on grounds which were not stipulated in section 162(5) of the Companies Act, the court warned that a declaration of delinquency can only be made in relation to one of the legislated grounds stipulated in section 162(5) of the Companies Act, and that there must be clear "evidence" of any conduct that warrants a director being declared delinquent. This in effect limited the scope for the respondents to traverse issues that did not speak to the relief competent under Section 162(5).

48. The judgment while making numerous findings against the applicant cannot isolate any individual conduct that falls within the criteria set out under Section 162(5)(c). In particular, there was no evidence, circumstantial or otherwise, that could have led the court to find that the applicant, as an individual:

48.1. grossly abused the position of director;

48.2. took personal advantage of information obtained as a director;

48.3. inflicted harm on the company;

48.4. was grossly negligent;

48.5. engaged in willful misconduct.

49. In *Companies and Intellectual Property Commission v Cresswell and Others*[13] the Western Cape High Court expanded upon the meaning to be ascribed to

[13] *Companies and Intellectual Property Commission v Cresswell and Others 921092/2015) [2017] ZAWCHC 38*

the words “gross negligence” or “wilful misconduct” within the prescripts of Section 165(5)(c)(iv)(aa). In this case, a director of a company allowed the company to carry on trading, while knowing that the company was insolvent. The director, *inter alia*, made withdrawals from the company’s bank account and also received payments from the company’s bank account into his personal account.

50. All the evidence showed was leadership tussles at SAA where the board and the executives were repeatedly at odd on how things ought to have been done on various transactions. These differences culminated in these very same executives clubbing together to testifying against their former chairperson in what is clearly a witch-hunt exercise directly targeting the applicant. The respondents’ refusal to join other board member in this case clearly demonstrates the ulterior agenda that informs the actions of the respondents.

51. While the court had a wide discretion in assessing the substantive issues of the case beyond the pleadings, the wide discretion of court was in this instance curtailed by the specific relief that may only be granted if the grounds set out under Section 162(5) are proven. Grounds extraneous to those pleaded statutory grounds could not found the basis for the declaration of delinquency against the applicant.

52. The extent to which the court has in this case departed from the pleadings is completely at odds with the principles set out in *Matambanadzo Bus Service*

v Magner[14] where it was established that a trial should not be allowed to be "free for all" with a complete disregard to the issues raised in the pleadings.

53. The evidence led and the pleaded case were completely out of sync in this case. The respondents in argument in effect abandon their own pleadings wherein they invite the court to pursue a litany of issues that were never raised in the pleadings.

The Emirates MOU – Evidence outside the pleadings

54. The deviation from the pleaded case by the respondents was extensively argued in closing and not addressed at all in the judgment.

55. In particular, it was argued in closing that the respondents failed to prove that the applicant had acted under the instructions or influence of former President Zuma as was alleged under paragraphs 85 of the particulars of claim.

56. It was argued that the entire cause of action on the Emirates MOU was anchored on the allegations made under paragraph 85 (particulars of claim) and it followed that if that particular allegation had not been proven the entire ambit of the allegations and averments that followed from paragraphs 86 to 89 cannot be sustained

57. The judgment did state a single reason as to why it made findings that disregarded this argument.

58. What the respondents argued in closing and now in the appeal is that:

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[14] *Matambanadzo Bus Service v Magner 1972 (1) SA 198 (RA) at 199H-200A*

58.1. It was the conduct of the applicant of blocking the Emirates deal that satisfies grounds of delinquency under Section 162(5)(c).

59. This allegation or averment was not pleaded. Nor is there anything in the respondents' pleaded case that alleges any misconduct by applicant beyond the singular incident that occurred on 16 June 2015.

60. For purposes of this application it is necessary to quote the respondents particulars of claim to show the discrepancy between what was pleaded and what was subsequently found by the court. The particulars for claim at paragraphs 82,83,84,85, 87 and 88 state:

60.1. [82] On or about 16 June 2015, and hours before Mr Bezuidenhout was due to sign the Emirates MOU, Ms Myeni instructed him not to sign the MOU.

60.2. [83] Ms Myeni's reason for this instruction was that President Zuma had reservations about the Emirates MOU.

60.3. [84] As a result of Ms Myeni's instruction to Mr Bezuidenhout, Mr Bezuidenhout did not sign the Emirates MOU.

60.4. [85] Ms Myeni acted on President Zuma's wishes for SAA not to conclude the Emirates MOU in circumstances where she knew, alternatively ought to have known that:

60.5. [85.1] President Zuma did not have authority to interfere in the signing of the MOU;

60.6. [85.2] The Board had expressed approval of the signing of the MOU.

60.7. [87] Ms Myeni knew, alternatively ought to have known, that:

60.8. [87.1] her adherence to the dictates of President Zuma was unlawful as he did not have authority to interfere with an operational matter such as SAA concluding the MOU;

60.9. [87.2] she was obliged to act in accordance with the Board's Resolution to adopt the Network and Fleet Plan;

60.10. [87.3] she was obliged to act in accordance with the Board's approval of the signing of the Emirates MOU;

60.11. [87.4] by following the dictate of President Zuma, she failed to exercise her independent and unfettered discretion as she was obliged to do so; and

60.12. [87.5] preventing Mr Bezuidenhout from signing the Emirates MOU would lead to the harm outlined at paragraph 86 above.

60.13. [88] As a result of:

60.14. [88.1] failing to exercise her independence and unfettered discretion by following the unlawful dictate of President Zuma;

60.15. [88.2] disregarding the Board's approval of the Emirates MOU and;

60.16. [88.3] preventing Mr Bezuidenhout from signing the Emirates MOU;

61. There is not a single averment in these paragraphs that even suggests in the alternative that it is was general conduct of the applicant that jeopardized the Emirates MOU. The allegations specifically confine themselves to the incident

of 16 June 2015 and the allegation that the applicant was acting on instructions of President Zuma.

62. The pleaded case was that the applicant blocked the signing of Emirates MOU on 16 June 2015 because she was acting on instruction from President Zuma. Anything else that the respondents seek to rely upon does not form part of the pleadings.

63. The judgment at paragraph 127 and 128 (paragraph 253 and 254 of respondents' heads of argument) states:

63.1. [127] The question of whether Ms Myeni was indeed instructed by the then president, Mr Zuma not to allow the signing of the MOU is not determinative of the question of her alleged delinquency. Mr Bezuidenhout and Mr Meyer testified that, that was what she said, whether this instruction is emanated from Mr Zuma, we will never know. What we do know is that it was common cause that Ms Myeni gave a direct instruction not to proceed with the signing of the MOU on 16 June 2015 to the great embarrassment of not only Messrs Bezuidenhout, Meyer and Bosc but ultimately to the detriment of SAA and the whole country.

63.2. [128] Ms Myeni had no valid reason to block the signing of the Emirates MOU. She was not acting on behalf of the board in issuing such instruction and she clearly was in engaging in a frolic of her own. Whether or not Ms Myeni in fact invoked President Zuma's name could merely be of aggravation, which will not change the conclusion that there was serious misconduct on her part.

64. The court erred in stating that "*The question of whether Ms Myeni was indeed instructed by the then president, Mr Zuma not to allow the signing of the MOU is not determinative of the question of her alleged delinquency….. whether this instruction is emanated from Mr Zuma, we will never know*". If that is indeed so, then the issue ought properly to have been decided against the onus-bearing party.

65. The allegations about the applicant taking instructions from former President Zuma are the only pillar upon which the entirety of case around the Emirates MOU can stand. There are no other allegations made in the pleadings that allege any other misconduct beyond the 15 June 2016. The case the applicant had come to meet in the trial was based on the pleaded case.

66. The respondents deviated from their pleadings in the evidence they led and have totally abandoned their pleaded case even in the arguments made in the appeal.

67. It is trite that the purpose of pleadings is to define the issues in dispute not only for the judge but for the other party. The opponent must be properly informed of the case he has come to meet.[15] Thus a party has a duty to allege in his pleadings the material facts upon which he relies[16].

68. However, the judgment traverses several issues that include but are not limited to:

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[15] *Hillman Brothers Ltd v Kelly and Hingle* 1926 WLD 153
[16] *Minister of Safety and Security v Slabbert* 2010 2 All SA 474 (SCA) 475

68.1. The allegation that the applicant had personally insisted on having meetings with Emirates. (Para 54 of judgment/ Para 114,115 and 116 of heads of argument)

68.2. The allegation that applicant had not attended meetings arranged with the CEO and President of Emirates in Dubai. (Para 55 of judgment/ Para 117 and 118 of heads of argument)

68.3. The allegation that the applicant had not attended another meeting with the president of Emirates in Cape Town. (Para 58 of judgment/ Para 123 and 124 of heads of argument)

68.4. The allegation that the applicant had hired Nick Linnell as a legal advisor despite SAA having had a legal advisory panel. (Para 62 of judgment/ Para 128 of heads of argument)

68.5. The allegation that Mr Nick Linnell had raised issues on Emirates MOU seemingly on behalf of applicant. (Para 62 of judgment/ Para 128 of heads of argument)

68.6. The allegation that the applicant undertook to give a decision by 9 June 2015. (Para 63 of judgment/ Para 129 of heads of argument)

68.7. The allegation that the applicant had created an atmosphere of fear.

68.8. The allegation the applicant refused to attend a meeting with the operational review team. (Para 71 of judgment/ Para 138 of heads of argument)

68.9. The allegation that the applicant had requested Mr Bezuidenhout organize the applicant an invitation to the Paris Air Show which invitation was not honored by the applicant. (Para 76 of judgment/ Para 144 of heads of argument)

68.10. The allegation the applicant had not consulted other board members ahead of sending a text message that said “We do not approve”. (Para 81 of judgment/ Para 149 of heads of argument)

68.11. The allegation that the applicant had a history of victimizing executives who had stood in her way. (Para 83 of judgment/Para 151of heads of argument)

68.12. The allegation that the cancellation of the signing ceremony with Emirates impacted SAA’s relationship with other airlines such as Etihad and Lufthansa. (Para 85 of judgment/ Para 153 and 154 of heads of argument)

68.13. Allegations of meeting on 3 July 2015 called by the applicant with the operational review team. (Para 88 of judgment/ Para 157 and 158 of heads of argument)

68.14. Allegations that the applicant had brought an unidentified armed guard who confiscated all attendees’ mobile phones and laptops at the start of that meeting. (Para 88 of judgment/ Para 157 and 158 of heads of argument)

68.15. Allegations that the applicant had her guards to confiscate all written notes taken by attendees except those of the company secretary. (Para 88 of judgment/ Para 157 and 158 of heads of argument)

68.16. Allegations that the applicant had stated untrue facts at this meeting and had silenced Mr Bosc who had challenged the applicant.

68.17. Allegations that the applicant had brought an unidentified armed guard who confiscated all attendees' mobile phones and laptops at the start of that meeting. (Para 89 of judgment/ Para 159 of heads of argument)

68.18. Allegations that the applicant had issued further instructions to the operational review team at this meeting. (Para 90 of judgment/ Para 160 of heads of argument)

68.19. Allegations that the applicant had on 6 July 2015 stopped an attempt by Mr Bezuidenhout to circulate a round-robin resolution of the board. (Para 93 of judgment/ Para 164 of heads of argument)

68.20. Allegations that the applicant had never revoked her instruction to Mr Bezuidenhout not to sign the Emirates MOU. (Para 97 of judgment/ Para 168 and 169 of heads of argument)

68.21. The allegation that it was the duty of the applicant to ensure that incomplete agenda were carried forward into the next meeting. (Para 100 of judgment/ Para 172 of heads of argument)

68.22. The allegation that the applicant had repeatedly told the executive team that the Minister of Finance and the Minister of Transport had some

undisclosed concerns about the Emirates deal. (Para 107 of judgment/ Para 182 of heads of argument)

68.23. Allegations that the applicant had given Emirates reasons for further delays in the signing of Emirates MOU. (Para 109 of judgment/ Para 185 of heads of argument)

68.24. Allegations that the applicant had stated that National Treasury sign off was required for the signing of Emirates MOU. (Para 109 of judgment/ Para 185 of heads of argument)

68.25. Allegations that Mr Bezuidenhout had left SAA for Mango following an acrimonious exchange with the applicant. (Para 112 of judgment/ Para 188 of heads of argument)

68.26. Allegations that applicant had used a bogus whistle blower report to threaten Mr Bezuidenhout. (Para 112 of judgment/ Para 188.1 of heads of argument)

68.27. Allegations that Mr Barry Parsons resigned due to the conduct of the applicant. (Para 113 of judgment/ Para 188.2 to 188.4 of heads of argument)

69. In addition to the above stated issues that were not pleaded, the court overlooked all the failures and holes in the respondents' case that were created by the unreliable evidence of the respondents' witnesses.

70. Mr Bosc and Mr Bezuidenhout gave conflicting or inconsistent accounts of the events that unfolded on the evening of 15 June 2015. More particularly:

70.1. Mr Bosc testified that he was present when that particular call was received by Mr Bezuidenhout at around 11pm. He also testified that there had been an earlier call at around 6pm of a similar nature which call was not mentioned by Mr Bezuidenhout, who specifically testified that he only received one call.

70.2. Mr Bosc's testimony was markedly different to that of Mr Bezuidenhout and Mr Meyer as he stated the following in his evidence in chief:

70.2.1.1. *"So I was not on the phone with the Chair but, Nico mentioned that the order came from the top meaning from the presidency that we cannot enter into this agreement which was a bit of a surprise to us obviously."*[17]

70.2.1.2. *"So we immediately called our counterpart at Emirates, Mr Abbas whom we mentioned before and his advisor, Mr. Farouke (Farooqi) and told them that we had a problem and I think Nico made the call and told them that we cannot go ahead with the signature because we were instructed that the presidency opposed it so then they said well, that is absolutely crazy, let us check with that."*[18]

70.2.2. Mr Bezuidenhout specifically testified that he was with Mr Meyer at time of the only call and not Mr Bosc. But upon being asked if he

[17] Record of Proceedings 05 02 2020, Page 116, Line 3 to 6
[18] Record of Proceedings 05 02 2020, Page 116, Line 9 to 15

was present when the late-night call came through[19], Mr Bosc testified as follows:

70.2.2.1. "*So the night call I was there and then in the morning I think it was not a call, it was an SMS and we all received the same SMS because the Chair was afraid that Nico would be off network or whatever so she sent an SMS saying hi Nico and Glynnis and she sent it to Wolf, to me, to Glynnis and sorry, Glynnis is Nico's wife and she was there also in the delegation on a private basis of course and, so we all received the same SMS in the morning*."[20]

70.3. Upon being asked how he knew what had been said to Mr Bezuidenhout on the call,[21] he testified as follows:

70.3.1.1. *"Because that, I was sitting next to Nico when he got the call and when he hanged up he of course told me what was the call about."*[22]

70.3.1.2. *"There was a first call on 18:00 and another call at 23:00 I recall"*[23]

70.3.2. Under cross examination Mr Bosc persisted with stating that he was present when the call came through testifying as follows:

70.3.2.1. "Yes. So I know there was different interactions and I remember there was a lot of tension, because that was the defining moment,

[19] Record of Proceedings 05 02 2020, Page 119, Line 11 to 13
[20] Record of Proceedings 05 02 2020, Page 119, Line 14 to 20
[21] Record of Proceedings 05 02 2020, Page 122, Line 6 to 7
[22] Record of Proceedings 05 02 2020, Page 122, Line 8 to 10
[23] Record of Proceedings 05 02 2020, Page 122, Line 13 to 14

my recollection is that Nico got a call, I think from the Chair, I think at 18:00 in which she said that she had instructions from the Head of State not to enter into this agreement and I think we had confirmation and then the second call at 23:00 was maybe when the Chair was complaining that we raised the matter with the President. But it was not us who raised the matter, it was probably the Emirates delegation that had access to the presidency and asked why is the President blocking that, but that was my recollection based on the elements that I could gather, was not on the phone myself on that day, it was Nico Bezuidenhout who took those phone calls."[24]

70.3.3. Mr. Bosc further testified to being present when the particular call came through in the presence of Mr Meyer and Mr Bezuidenhout's wife.[25]

70.3.4. Mr Meyer testified to being present when Mr Bezuidenhout received the call but stated that he never actually heard those specific words being spoken by the applicant when asked under cross examination.

71. The judgment at paragraph 87(156 of heads of argument) relies on the evidence of an email sent by Mr Bezuidenhout on 20 June 2015 when this email in fact disproves the case of the respondents.

[24] Record of Proceedings 06 02 2020, Page 162, Line 6 Line 19
[25] Record of Proceedings 06 02 2020, Page 162, Line 20 Line 25

71.1. In Mr Bezuidenhout's six pages long email of 20 June 2015[26] wherein he writes to the board giving a detailed chronological account of the entire history of the Emirates MOU until the events in Paris. In detailing his recollection of his exchange with the applicant, he does not state that the applicant had said it was an instruction from former President Zuma to direct him not to sign the Emirates MOU.

71.1.1. When asked why under cross examination he had no answer to this glaring omission on his part which illustrates on a balance of probabilities that the allegation is a fabrication.

71.1.2. Mr. Bezuidenhout admitted this omission stating:

71.1.2.1. *"What I do not specifically state in that one instance is that according to Ms Myeni the president had instructed her to cancel or to not proceed with the deal. I did not state that specifically in this case because that was not my intent."*[27]

71.1.2.2. *"My intent was not to try and tie the president specifically to this because it is my testimony, it is not my belief that the president in fact stood between Emirates and SAA during a transaction. I have never with my interactions with the president or on record in media ever seen the president mention the word Emirates, nor do I have any evidence that*

[26] Emirates Bundle, Vol 2, Page 164
[27] Record of Proceedings 04 02 2020, Page 126, Line 5 to 9

this was in fact an instruction from Ms Myeni, from the president."[28]

72. Mr Bosc's reply to this email states that it is "all perfectly true and documented' but he too did not correct this glaring omission on the part of Mr Bezuidenhout. He too had no answer under cross examination as to why he did not mention this glaring and material omission if it was indeed true, further lending credence to the assertion that this particular allegation is a subsequent fabrication created post the fact in an attempt to discredit the applicant.

73. Mr Meyer also had no answer as to why he did not highlight this omission on the part of Mr Bezuidenhout given that he stated that he was present when the call was received. This too further lends credence to the assertion that the allegation is indeed a falsehood created to sustain unfounded allegations that have been made against the applicant.

74. Mr Bezuidenhout's evidence as the star witness of the respondents that "*it is not my belief that the president in fact stood between Emirates and SAA during a transaction. I have never with my interactions with the president or on record in media ever seen the president mention the word Emirates, nor do I have any evidence that this was in fact an instruction from Ms Myeni, from the president",* is what collapsed the pleaded case of the respondents because it outright contradicts the main allegation made against the applicant in the papers.

[28] Record of Proceedings 04 02 2020, Page 127, Line 3 to 10

75. Mr Bezuidenhout under cross examination[29] upon being asked about the specific allegation of the applicant acting on the instruction former President Zuma, went further in contradicting the pleaded case stating:

75.1. *"my evidence is specific, it not the specific date of the 16th of July (June) not executing the MOU, it is failure to execute the MOU over a prolonged period of time. The 16th of July (June) was one date in time. Before that there was the 10th of June in, Miami at the Dyota AGM, so there were various different dates, not just the 16th in specific."*[30]

76. In a follow up question about the specific allegations made about 16 June 2015, Mr Bezuidenhout reiterated the point that it was not on 16 June 2015 that the Emirates deal was allegedly stopped as is pleaded by the Plaintiffs stating:

76.1. " I do not profess and nor am I in a position to frame the case that are coming to meet, all I can do is provide evidence in fact as they existed and the fundamental…[sic] the reason why this agreement was not executed was the critical and needed step before executing a final agreement, that being the execution of an MOU was stopped by one person and one person only on multiple times, Ms Myeni. That is my evidence in as far as the case in front of the court that is my contribution."[31]

[29] Record of Proceedings 04 02 2020, Page 15, Line 5 to 8
[30] Record of Proceedings 04 02 2020, Page 15, Line 9 to 14
[31] Record of Proceedings 04 02 2020, Page 15, Line 19 to Page 16, Line 2

77. Under cross examination Mr Bezuidenhout ultimately conceded that he had no reason to assert that the applicant had acted on instructions of former President Zuma as is alleged in the papers:

77.1. *"So as I sit here today the only two reasons I could logically put forward has now also been removed, so now honestly I have zero reason or understanding as to why Ms Myeni blocked this"*[32]

78. In re-examination, in reference to the same point about 16 June 2015:

78.1. Mr Bezuidenhout testified as follows:

78.1.1. *"It has never been my testimony and it will never be my testimony. This is a death by a thousand cuts I think is the saying, this was repeated blockages and stops."*[33]

78.2. Mr Bosc testified on the same point as follows:

78.2.1. *"No, it was not the end of it, because as you, we saw this morning, we continued to work and I continued to work very hard on trying to get this across the line, I think we saw this morning, or was it yesterday maybe, that the Chair then organised another meeting with this Executive team that she, committee that she had appointed, that infamous meeting where the pages of my notebook was ripped, it was after that event in Paris. So we tried very hard to resuscitate this deal, eventually again the Executive team gave approval of the Chair and said there is no reservation*

[32] Record of Proceedings 04 02 2020, Page 23, Line 20 to 23
[33] Record of Proceedings 05 02 2020, Page 52, Line 23 to Page 53, Line 1

and we do not see any reason why you would not enter into this deal, so what killed this deal was the fact that we lost complete credibility."[34]

78.3. Mr Bosc instead placed the blame for the failure to sign the Emirates on the board and not the chairperson when he testified as follows:

78.3.1. *"Well, it fell through the cracks of the Board, we asked the Board to examine and give formal approval for the MOU approval, but the Board did not go to the entire agenda of that particular session and they did not approve it."*[35]

79. Under cross examination Mr Meyer agreed that the executives were free to implement the MOU after the board had expressed being satisfied with it at the meeting of 10 July 2015.[36]

80. Under cross examination Mr Bezuidenhout did not persist or stick to the allegations made about former President Zuma but instead tried to create an impression of continuous attempts at blocking the signing of the MOU by the applicant all of which are contradicted and disproved by the signed minutes of 10 July 2015 approving the MOU. Mr Bezuidenhout consistently equivocated on the point effectively tailoring his evidence on the point. He stated the following under cross examination:

80.1. *"I also stated yesterday in yesterday's evidence that I did not ever in my life ever heard our previous president utter the word Emirates. So I*

[34] Record of Proceedings 06 02 2020, Page 155, Line 23 to Page 156, Line 10
[35] Record of Proceedings 06 02 2020, Page 156, Line 17 to Line 20
[36] Record of Proceedings 17 02 2020, Page 42, Line 2 to 7

cannot attest to the fact that whether or not that was an instruction received by Miss Myeni or not."[37]

80.2. *"Can I just correct that? I never said it was the president. I said that Ms Myeni said the president instructed her not to sign. I was relaying a second hand message version based on what Ms Myeni said to me she had discussed with the president"*[38]

81. As each of these witnesses widened the discrepancies in the case of the respondents, the respondents were forced to improvise a new case to salvage the original case by leading evidence on issues that were not canvassed in the pleadings.

82. Yet despite all the above concessions and contradictions the court at paragraph 129 of the judgment (paragraph 258 of heads of argument) finds the following:

82.1. "Mr Bezuidenhout's testimony was undeniably credible and reliable. His testimony was corroborated by Mr Meyer…"

83. It is also erroneous for the judgment to state at paragraph 115 that *"very little of the evidence led by the respondents was disputed or contradicted*" when the record is replete with such contradictions.

[37] Record of Proceedings 04 02 2020, Page 110, Line 4 to 8
[38] Record of Proceedings 04 02 2020, Page 158, Line 9 to 13

84. The court erred and misdirected itself materially in simply adopting the whole argument of the respondents as its judgment has given a judgment that totally does not deal with the pleaded case of the respondents.

85. Reading the judgment, one does not find a single line wherein the court looks into these discrepancies and concessions by the witnesses. These were argued at length in closing, but the court does not give a single reason as to why it neither accepted or rejected those submissions. This too constitutes a serious misdirection.

86. The judgment is thus not founded on the averments made to support any of the final prayers.

87. This section also seeks to demonstrate that the declaration of delinquency by the court was based on factual evidence which does not meet the requirements of section 162(5)(c) Companies Act 71 of 2008 ("the Companies Act") and reliance thereon by the court was wholly misplaced.

88. As a result, the declaration of delinquency was erroneous and based on the incorrect findings of fact and application of the law. The finding of delinquency by the court based on the facts below did not satisfy the requirements of section 162(5)(c) which provide that:

> *"(5) A court must make an order declaring a person to be a delinquent director if the person-*
> *(c) while a director –*
> *88.1.grossly abused the position of director;*
> *88.2.took personal advantage of information or an opportunity, contrary to section 76(2)(a)*

88.3.intentionally, or by gross negligence, inflicted harm upon the company or a subsidiary of the company contrary to section 76(2)(a);

88.4.acted in a manner –

(aa) that amounted to gross negligence, wilful misconduct or breach of trust in relation to the performance of the director's functions within, and duties to, the company or,

(bb) *contemplated in section 77(3)(a), (b) or (c)*"

89. It is common cause that the non-binding memorandum of understanding (MOU) for the Emirates deal did not require a board resolution or the board chairman's approval in terms of the law or the internal governance policies of South African Airways ("SAA") in particular the Delegation of Authority Framework [39].

90. The proposal for the Emirates deal which required the MOU came to the fore in January of 2015 and the executive out of volition and under no obligation decided to advise the board of the said proposal and kept the board appraised of the same. This was not done with the intention of seeking and obtaining board approval as this was not required for concluding the MOU.[40] The power to conclude the MOU vested with the executive and not with the board and certainly not with the board chairman.

91. Due to its non-binding nature, the MOU merely paved a way or was a catalyst for negotiations between SAA and Emirates to take place with regard to the proposed code sharing arrangement between the two entities[41]. Therefore, it

[39] Judgment page 26 para [48, 49 and 50]
[40] Judgment page 26 para [50]
[41] Judgment page 52 para [122]

follows that the negotiations could either succeed leading to a binding contract being concluded or the negotiations could fail in which event no binding contract would be concluded.

92. A board resolution in respect of the Emirates deal or code sharing arrangement would only be required after the negotiations and at a stage where Emirates and SAA would be in a position to conclude a binding agreement for the said deal. Since no board resolution was required, the executive of SAA possessed powers as conferred by the delegated levels of authority of SAA to conclude the MOU without board approval or ratification.

93. It is baffling why Mr Bosc and Ms Mpshe who both testified on behalf of the respondents, would regard the approval of the Network Fleet Plan by the board on 2 April 2015 to have also included the approval for the executive and management to pursue an enhanced code-sharing arrangement, an approval which in their own version was not required at that stage of the discussions or for the MOU to be concluded[42]. No approval was obtained from the board for such discussions to commence as was not required.

94. It was the duty of and within the authority of the executive of SAA to conclude the MOU. The executive had numerous opportunities to do so long before the signing ceremony that was arranged to take place in Paris on 16 June 2015, which the respondents' witnesses claim to have been sabotaged by the applicant.[43]

[42] Judgment page 27 para [53]
[43] Judgment page 28 para [55]; page 29 para [58], page 33 para [70]

95. It is not apparent from the evidence presented what the fixation by the executive was to obtain the chairman's or board resolution for the conclusion of the MOU when in fact the executive did not require such approval in order to continue negotiations with Emirates as the MOU would be non-binding and no adverse consequences would flow from it either for the executives or the company. The response given in cross examination was insubstantial[44].

96. From the above facts which are extracted from the judgment, it is difficult to comprehend how the court based on such facts, having applied the law came to a conclusion that the applicant deserves to be declared a delinquent director for the subsistence of her lifetime and that her conduct fell within the requirements set out in section 162(5) (c).

97. It is submitted that there was no duty to be discharged by the applicant, the applicant was under no obligation to conclude an MOU in terms of the law of the company policies or to discharge any duty in as far as the Emirates deal was concerned. The action to be taken was required from the executive and they failed to execute such duty. Instead as a justification for their failure to act when they were under an obligation to do so and when it was within their power to do so as prescribed officers as set out in the Companies Act and the Delegated Authorities Framework, they chose to hide behind the applicant.

98. In the case of *Cook v Hesber Impala (Pty) Limited and others* [2016] JOL 36194 (GJ), the High Court warned that a declaration of delinquency can only be made in relation to one of the legislated grounds stipulated in section 162 of the Companies Act, and that there must be clear "evidence" of any conduct

[44] Judgment page 37 para [83]

that warrants a director being declared delinquent. The finding that the applicant was an unreliable or credible witness, is irrelevant for the purposes of proving the conduct required in section 162 to declare a director delinquent.

99. It is apparent from the evidence advanced at trial which the court relied on that, the executive abdicated their responsibility to conclude the MOU, and conveniently shifted the blame for their own lack of competence to the applicant, when in fact nothing in law prevented them from carrying out their duties.

100. Furthermore, the minutes of the board meeting held on 10 July 2015 recorded a confirmation from the board that it was satisfied with the non-binding MOU. It is a mystery why the executive of the company considered this not to be sufficient or good enough to proceed and conclude the MOU. It is also quite concerning that the executive would place so much reliance on the message by the applicant on 16 June 2015 which was before the 10 July 2015 board meeting and insist on waiting for the applicant to revoke the message of 16 June 2015.[45]

101. Therefore, with regard to the Emirates deal the court failed to establish that the applicant's conduct fits the conduct envisaged in section 162(5)(c) of the Companies Act.

102. In *Msimang v Katuliiba,*[46] the court commented that in the determination of the terms gross negligence and wilful misconduct in the context of section 162(5)(c) of the Act, a court must have regard to the conduct of the directors

[45] Judgment page 42 [para 96 and 97]
[46] *Msimang v Katuliiba* 2012 JDR 2391 (GSJ) para 39

in the performance of their duties as directors of the company in terms of the company's memorandum of incorporation and the statutory framework. In *Druker*, the court approved of this approach[47].

The Airbus swap transaction

103. It was argued on behalf of the applicant that all the allegations made in the particulars of claim were legally flawed as the respondents failed to recognize the representative capacity of the applicant as chairperson of the board and failed to distinguish actions of the applicant in her role as chairperson of the board and that in her role as an individual board member.

104. This was in particular reference to all correspondence of the board which the respondents repeatedly attributed to the applicant not the board as a whole.

105. The judgment is completely silent on this point. The judgment neither accepts or rejects this argument. Evidence in the trial specifically confirmed this but the court has not engaged with this crucial point at all.

106. In opposing this appeal, the respondents again have no answer to this point.

107. Ms Halstead testified on this issue as follows:

107.1. *"Generally she would write as a representative- as the chairperson of the board, representing the views of the board"*[48]

[47] *Cape Empowerment Trust Limited v Druker* 2013 JDR 1360 (WCC) para 84
[48] Record of Proceedings 13 02 2020, Page 28, Line 2 to 4

107.2. *"So when you ask me the question about whether the board members, when she writes, she writes only as the chairperson. Usually she writing on behalf of the board"*[49]

107.3. *"Well based on the information that I have…and like for instance where there are substantiated board decisions that are indicating what the board has decided but the letters certainly appear to be - she appears to be communicating on behalf of the board as a collective."*[50]

108. It was argued that all the allegations in the pleadings and the arguments of the respondents reflected a fundamental misunderstanding of the PFMA in that they fail to understand the definition "Accounting Authority" in the PFMA.

109. It was argued that this misunderstanding of the PFMA led the respondents to labor under the erroneous understanding that accounting authority refers to the chairperson when in fact the accounting authority is the board.

110. Section 49 (2)(a) of the Public Finance Management Act (PFMA) defines the Accounting Authority of a public entity as:

110.1. [2] If the public entity-

110.1.1. (a) has a board or other controlling body, that board or controlling body is the accounting authority for that entity;

[49] Record of Proceedings 13 02 2020, Page 31, Line 17 to 20
[50] Record of Proceedings 13 02 2020, Page 34, Line 21 to Page 35, Line 3

111. It was argued that the failure of by respondents to draw this crucial distinction was fatal to their case in its entirety. The judgment is silent on why this argument bore no merits.

112. This erroneous misunderstanding starts at the denied paragraph 119 of the particulars of claim wherein it is stated:

112.1. *"The Swap Transaction could not, however, be executed until Ms Myeni signed the execution documents mentioned in paragraph 116 above."*

113. It was argued that the evidence led clearly demonstrated that such authority vested with the board and not with the chairperson. Even if the chairperson had signed the documents, such signature could not singularly give effect to the required approval. Equally, even if the chairperson had refused to sign such documents, the board could have given such approval on a simple majority vote that could not be overturned by the chairperson.

114. Thus, the assertion that approval was contingent of the chairperson's approval is flawed both in law and in fact. The same is applicable for the allegation made at paragraph 120. All the evidence in this regard clearly illustrated that it was a board decision and not the chairperson on her own.

115. The chairperson had no powers to act individually in this regard nor was there any evidence led to suggest that the chairperson singularly frustrated or impeded the attempts of the board to grant such approval. Consequently, all the allegations made against the applicant are from the flawed premise that presupposes that the chairperson of the board individually had the powers of an executive office bearer like a CEO or CFO to execute the documents when

in fact her powers as chairperson were non-executive and were at all times contingent on collective board processes and decisions.

116. The allegation made at paragraph 121 about the letter sent to Airbus on 29 September 2015 was also not proven to be a misrepresentation of the intention or decision of the board. This submission is corroborated by:

116.1. The email of the Company Secretary of 3 October 2015[51] to Airbus wherein she stated that *"The Board has opted to engage an African aircraft leasing company which will provide the financing for the A330's"*

116.2. The minutes of the meeting of 29 September 2015[52] wherein it stated that under the heading Local Aircraft Leasing Company: *"the board requested Management to direct members to individuals or institutions which could unlock opportunities for SAA*".

116.3. The email of Mr Tony Dixon of 7 October 2015[53] where in the last paragraph he states the following:

116.3.1. "... *I understand that if we were to find local funders at an acceptable cost we can extricate ourselves from the lease with Airbus – we just need to make sure that this is properly included in the concluding agreement."*

[51] Airbus Bundle, Vol 3, Page 196E
[52] Airbus Bundle, Vol 3, Page 178
[53] Airbus Bundle, Vol 3, Page 191

116.3.2. The only objection Mr Tony Dixon is on record to have made was against the appointment of a transaction advisor and not a local leasing entity.

116.4. Minister Nene's letter to the chairperson of 3 November 2015[54] wherein he states as follows at paragraph 7:

116.4.1. "*I note that SAA is reviewing the transaction and, based on our meeting on 2 November 2015, I understand that the Board is considering a local leasing company or an outright purchase.*"

117. Again, the court in adopting the whole argument of the respondents as its judgment has given a judgment that has an erroneous reading of the PFMA.

118. The allegation made about the amendment of the Section 54 application also stands to be dismissed in that it is also on the flawed premise that the applicant submitted a Section 54 application amendment in her capacity as chairperson.

119. The respondents in opposing this allegation deliberately ignore the provisions of the PFMA that define the roles in the submission of Section 54 applications. The respondents persist with their erroneous understanding of who or what constitutes an accounting authority.

120. The basis the respondents now rely upon in the appeal is that the applicant signed the cover letter of the application. This point was argued in closing and the respondents do not have answer to that point.

[54] Airbus Bundle, Vol 4, Page 221.1

121. The judgment is silent on this issue and yet it was argued quite comprehensively in closing.

122. Sections 54 (1) and 2 of the PFMA provide as follows:

122.1. [54] Information to be submitted by accounting authorities:

122.1.1. (1) The accounting authority of a public entity must submit to the relevant treasury or the Auditor-General such information, returns, documents, explanations and motivations as may be prescribed or as the relevant treasury or the Auditor General may require.

122.1.2. (2) Before a public entity concludes any of the following transactions, the accounting authority for the public entity must promptly and in writing inform the relevant treasury of the transaction and submit relevant particulars if the transaction to its executive authority for approval of the transaction;

123. Section 54 read with Section 49 of the PFMA, makes it clear that there exists no provision or scope whatsoever for the submission Section 54 applications by anybody else but the accounting authority.

124. Section 49(2)(b) of the PFMA makes provision for a public entity that does not have a controlling body to have the chief executive officer or person in charge of the public entity to serve as the accounting authority. This section finds no applicability in this case as SAA is a public entity with a board and was all material times a public entity with a board as contemplated by Section 49(2)(1) of the PFMA.

125. It was the evidence of Mr Bezuidenhout when asked about a letter to the Minister of Finance signed by the Chairperson 13 February 2013 that:

125.1. *"it was signed by the Chairperson, it was edited and written by myself"*[55]

125.2. *"it was signed by her and it was common practice, please bear in mind that the SAA Chairperson is in theory meant to be a non-executive person, so therefore it would be customary for all Chairpersons of the all companies, private or public that often letters and reports would be generated by their executives and to the extent that protocol calls for it to be submitted to a shareholder by the office of the Chairperson would then, of that company would then evaluate the substance of the letter in front of him or her and then sign that letter if it carries their concurrence and then submit it through to the shareholder. There is a very specific protocol in state owned companies that a CEO of a state owned company cannot communicate to a minister. A CEO of a state owned company can communicate to a Director General, the Chairperson of the Board would communicate to the shareholder and the substance of that communication would often case be drawn from the executives as it was in this case"*[56]

125.3. *"…it is a letter from the Chairperson to the Minister. It was a letter authored by myself, reviewed to the satisfaction of the Chairperson of the SAA Board as indicated by her signature being attached thereto."*[57]

[55] Record of Proceedings 04 02 2020, Page 6, Line 4 to 5
[56] Record of Proceedings 04 02 2020, Page 6, Line 20 to Page 7 Line 11
[57] Record of Proceedings 04 02 2020, Page 7, Line 14 to Line 18

126. Section 54(1) and Section 54(2) of the PFMA clearly states that Section 54 applications are only submitted by the accounting authority of a public entity.

127. The chairperson of SAA is not the accounting authority of SAA and thus no Section 54 application or amendment would have been accepted or considered by National Treasury or any Minister if it was not submitted by the accounting authority of SAA. Thus the denied allegation made at paragraph 132 of the particulars about the applicant submitting an amended Section 54 application is not only legally misguided but erroneous in its conception.

128. It was argued that a chairperson of public entity cannot submit Section 54 application and the respondents' allegations to that effect are erroneous and untrue.

129. It was argued that all the allegations that follow at paragraph 133 of the particulars that attribute the Section 54 application to the applicant and not the board itself could not be sustained as the premise under which they were made was flawed. The chairperson is, as the evidence has shown, a signatory to a Section 54 application and not an initiator. The initiator is the executive and only the accounting authority is authorized under Section 54 to submit Section 54 applications.

130. No evidence was led to the effect that the applicant had misrepresented the Section 54 application to be that of the accounting authority when it wasn't or submitted a Section 54 application contrary to what is permitted in the PFMA.

131. The only dispute raised by some of the witnesses was about the quality and comprehensiveness of the amended Section 54 application and not the

process followed in its submission. There was no evidence led on the irregular status of the amended Section 54 application nor was there any evidence led on how the applicant as the chairperson, acted irregularly in the process of submitting the amended Section 54 application.

132. It was argued that it was not in her sphere of competence of the chairperson to be fully conversant on the technical and granular aspects of a Section 54 application that had been duly prepared by the executive. Ms Halstead confirmed this rational and testified that:

132.1. *"Look I agree with you that in the normal circumstances it would have been the management that would have prepared the information."*[58]

133. *"I would say that they most likely generally it is the management that prepare documents and submit it to the board. Having sat on some of the boards of SOE's the boards generally apply their minds and they make amendments to those submissions before they come to us."*[59]

Arguments of the respondents

134. The respondents in making out the case as to why the courts findings cannot be challenged, quote a number of paragraphs from the judgment. All the passages as they rely upon are in truth their own words and not that of the court. These paragraphs are:

134.1. Paragraph 238 which is paragraph 277 of heads.

134.2. Paragraph 262 which is paragraph 473 of heads.

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[58] Record of Proceedings 13 02 2020, Page 16, Line 23 to 25
[59] Record of Proceedings 13 02 2020, Page 17, Line 19 to 23

134.3. Paragraph 263 which is paragraph 475 and 476 of heads.

134.4. Paragraph 232 which is paragraph 58 of heads.

134.5. Paragraph 132 which is paragraph 276 of heads.

134.6. Paragraph 127 which is paragraph 253 of heads.

134.7. Paragraph 128 which is paragraph 254 of heads.

134.8. Paragraph 130 which is paragraph 265 and 266 of heads.

134.9. Paragraph 131 which is paragraph 274 of heads.

134.10. Paragraph 155 which is paragraph 440 of heads.

134.11. Paragraph 68 which is paragraph 133 of heads.

134.12. Paragraph 238 which is paragraph 277 of heads.

Apprehension of bias

135. As illustrated in numerous examples above, what was expected to be an impartial and objective judgment of the court isn't anything close to that.

136. The respondents argue that the material part of the judgment is only at paragraphs 231 to 285 yet it is only 10 paragraphs (18%) out of 54 that can be said to be the court's own words.

137. The judgment as a whole only has 21 paragraphs (7%) out of 285 paragraphs that can be said to be the court's own words. In the circumstances this is a classic case of judicial plagiarism.

138. The problems presented by the current situation is that in copying the entire judgment of the respondents, the court has ended up not dealing with crucial legal questions and evidence that are central to the issues. The gaps as

highlighted in this submission demonstrate the lack of impartiality in how the court has dealt with the matter. Justice has not been served in this instance.

139. The problems inherent in this practice were highlighted in the Canadian authority of *Cojocaru v British Columbia Women's Hospital & Health Centre* where the British Columbia Court of Appeals overturned a trial court's judgment on the grounds that the reasons for the judgment could not be taken to represent the trial judge's analysis of the issues or the trial judges reasoning for the conclusions.

140. In that case, the trial judge had copied 321 of the 368 paragraphs stating the reasons for its opinion nearly verbatim from the respondents' final written submissions. An entire 84 of the 105 pages of the judgment were what the appeal court termed "*wholesale, uncritical reproduction of the respondents' written submissions*".

141. While the Supreme Court of Canada[60] subsequently found that the wholesale copying of respondents' submissions was not necessarily sufficient to overcome the presumption of judicial integrity and impartiality.

142. None of the grounds advanced by the respondents to suggest that this requirement has been met can hold in this instance when one takes into consideration the entirety of the trial since it began in October 2019.

143. The manner in which the court dealt with the applicant in absentia and her counsel thereafter can lead a reasonable person to conclude that the judge

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[60] *Cojocaru v British Columbia Women's Hospital & Health Care Centre* 2013 SCC 30; [2013] S.C.R. 357

did not put its mind to the evidence and issues. The basis of making these submissions is that:

143.1. Upon appointing counsel to represent the applicant, the court only granted a one-week postponement for new counsel to prepare for a trial that the other side had spent more than two years preparing for. This while the court was aware that the applicant had only one counsel while the respondents had a team of three.

143.2. A reading of the record of all the interlocutory applications that occurred at the start of the trial, the record reflects that the applicant's counsel was continuously interrupted by the court on almost every submission while the counsel for the respondents would argue uninterrupted for most of her submissions.

143.3. This continued into the trial where the court would frequently interrupt cross examination and come to the defense of witnesses.

143.4. The extent to which the judge descended into the arena was fitting of the conduct that the Supreme Court of Appeal in *City of Johannesburg Metropolitan Council v Ngobeni*[61] criticized Spilg J' participation as active participation in proceedings constituting a third record.

144. In the *Stuttafords* case,[62] the Constitutional Court sounded alarm bells regarding the possibility that "*the extensive use of counsel's heads could lead to a perception of bias*". While the question did not squarely arise in that case,

[61] *City of Johannesburg Metropolitan Council v Ngobeni* (314/110 [2012] ZASCA 55
[62] *Stuttafords Stores v Salt of the Earth Creations* 2011 (1) SA 267 (CC) at paragraphs [11] and [12]

the open court expressed the hope that judges would heed the relevant wise words of Corbett CJ, delivered to new judges under the then new constitutional dispensation. The court went on to express its hope that *"the necessity of deciding the issue in future should not arise*". The present matter is demonstration that the optimism of the Constitutional Court in that regard might have been misplaced or premature.

145. This issue arises for determination in this matter, not merely as a stand-alone ground of appeal but also as an additional compelling reason why the appeal should be heard.

Sanction: The Life-Ban

146. The learned judge also erred in imposing the onerous sanction of a life-ban on the applicant never to hold the position of company director for the remainder of her natural life.

147. Not only is such a sanction unprecedented and unwarranted in the circumstances, but it also clearly induces a sense of shock and is "*disturbingly inappropriate*", to borrow from the criminal law of punishment and sentencing. These factors automatically entitle the appeal court to interfere on the grounds of misdirection.

148. The sanction also constitutes a *prima facie* violation of the applicant's rights as enshrined in section 22 of the Constitution, which provides that:

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

149. This immediately raises the question whether the sanction represents a justifiable limitation in terms of section 36 of the Constitution. If not, it must be set aside as being inconsistent with the Constitution.

150. Again, this must be viewed both as a ground of appeal and a compelling reason for granting leave to appeal in terms of section 17(1)(a)(i) and section 17(1)(a)(ii) of the Act, respectively.

151. In our respectful submission, the mere fact that the applicant is entitled to apply to court for the lifting of the life-ban upon the satisfaction of the stipulated statutory requirements does not detract from the undue severity of the sanction. It is cold comfort.

152. The referral of the matter to the NPA also smacks of the unnecessary exposure of the applicant to further punishment on top of the life-ban. This may result in double jeopardy or double punishment.

153. The appeal court will also generally be entitled to interfere on the basis of item 10 of the criteria set out in the leading case of *Dhlumayo*,[63] namely that:

> "*(T)here may be a misdirection on the fact by the trial judge where the reasons are either on their face unsatisfactory or where the record shows them to be such; there may be such misdirection also where, though the reasons as far as they go are satisfactory, he (sic) is shown to have overlooked other facts or probabilities*".

[63] *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 705-706

154. In the totality of the circumstances, leave to appeal ought properly to be granted to the Supreme Court of Appeal, given the weight and complexity of the grounds of appeal, alternatively to the Full Bench.

C. THE SECTION 18 APPLICATION

155. Again, the test is correctly summarised at paragraphs 54 and 55 of the heads of argument of the respondents. In respect of the overlapping element of prospects of success, we rely on the discussion in respect of the section 17 application. It can safely be asserted that by cross reference to what is stated above, there are reasonable prospects of success in the context of resisting the section 18 application. We therefore now only deal with the three statutory requirements.

No exceptional circumstances

156. To ground the existence of exceptional circumstances on the speculative basis that the Emirates deal "*could have changed SAA's fate*" is baseless and a sweeping generalisation devoid of any substance. So is the consequential leap in logic to the effect that the applicant "*caused incalculable damage to SAA and irreparable harm to the country*".

157. The mere regurgitation of the version of the respondents in the trial, which is the basis of the decision, cannot provide exceptional circumstances.

158. The section 18 application must fail on the non-fulfilment of this gateway requirement alone.

No irreparable harm to applicants

159. The applicant's continued participation in the board of Centlec is not harmful to the public or to Centlec, let alone irreparably so. The perceived harm is speculative and unproven.

160. Neither is the debate about the Auditor-General's comments on Centlec relevant to the activities of the applicant as an individual director and alleged irreparable harm relevant to the present section 18 application. There is simply no nexus between the two things.

161. The heightened duties in respect of organs of state operate in favour of the applicant in that an indirect removal from the Centlec board would in the circumstances be irrational, procedurally unfair and therefore unconstitutional.

Some irreparable harm to Ms Myeni

162. On the admitted facts, this is perhaps the most impossible requirement for the respondents to fulfil.

163. It is common cause that Ms Myeni earns some remuneration from her directorship at Centlec. It is not disputed that such remuneration is a significant part of her livelihood and of those who are her dependants.

164. If the relief sought is granted, she would lose this important source of her living.

165. It is accordingly absurd for the respondents to even assert that any court of law can make a finding that Ms Myeni will suffer no irreparable harm if this source of her living is removed for the next estimated two to three years while

the appeal processes will be underway, most probably until the highest court in the land.

166. The stillborn attempt by the respondents to turn this simple test into a question of credibility rather than the objective and obvious facts must be rejected out of hand.

167. It is clearly the realisation that this requirement is insurmountable on the present facts that the respondents now seek to challenge the constitutionality of the section, a topic to which we now turn.

D. THE CONSTITUTIONAL CHALLENGE

168. Despite protestations to the contrary, the constitutional challenge is premised on the nostalgic desire to revert to the pre-2010 situation, which was ruled by the repealed Rule 49(1) and the common-law position as articulated in the then leading case of *South Cape Corporation*.[64]

169. It should be obvious that the legislature took a conscious decision to afford further protections to a litigant who wishes to exercise his or her right of appeal, which flows directly from the rights set out in section 34 of the Constitution.

170. Accordingly, far from being repugnant to section 34 of the Constitution or a limitation of the rights contained therein, section 18 is complementary thereto.

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[64] *South Cape Corporation (Pty) Limited v Engineering Management Services (Pty) Limited* 1977 (3) SA 534

It is the desired reversion to the common-law position which would constitute an infringement of the section 34 rights.

171. The discretion, the return of which the respondents seek, was itself anchored on the common-law discretion of the courts. The latter no longer exists as it is itself subsumed under section 173 of the Constitution. The scope of the discretion has also changed and has been suitably narrowed.

172. The mere fact that the provisions of sections 18(1) and 18(3) are more onerous than the previous position, which is conceded, does not automatically imply that these provisions are unconstitutional. That is a *non sequitur*.

The alleged removal of the judicial discretion

173. While it is readily conceded that the judicial discretion has been narrowed within constitutional bounds, we respectfully dispute the submission of the respondents that it has been *"removed entirely*" or in a manner which is inconsistent with section 34 of the Constitution.

174. The Full Court of this Division[65] had this to say about the nature of the discretion under section 18, per Fabricius J:

> "*… section 18 has introduced a new dimension to these types of proceedings by requiring first that the discretion may be exercised only if the conditions precedent of 'exceptional circumstances' and actual irreparable harm to one party and no harm to the other are proven. It is now incumbent upon an applicant seeking leave to execute pending an appeal to prove, on a balance of probabilities, that it will suffer irreparable harm if leave to execute is not granted and that the other party will not*

[65] *Swart and Another v Cash Crusaders Southern Africa (Pty) Limited* 2018 (6) SA 287 (GP) at paragraph [4]

suffer irreparable harm if the court so orders. Once the jurisdictional facts are established, the court may exercise its wide discretion to grant leave to execute, or not to grant leave" (emphasis added).

175. There is therefore no validity to the claim that the discretion of the court has been "*entirely removed*".

The separation of powers argument

176. There is no separation of powers issue in this application. It is contrived.

177. The narrowing of the discretion as explained above does not represent the unwarranted encroachment of the legislature into the judicial terrain in an unconstitutional or irrational manner.

178. Similarly, there is no undue interference with the powers of the courts set out in sections165 and 173 of the Constitution.

179. The absurdity of the respondents' claim in this regard can best be illustrated by their failure to attack the constitutionality of section 18(4)(ii), which was clearly designed to further reinforce the extension of the protections granted to the unsuccessful but appealing party. At face value, those provisions are even more draconian than sections 18(1) and 18(3), in that they accord to the appealing party a right to automatic appeal on an extremely urgent basis, which is arguably unprecedented in our procedural law.

180. It would therefore make no sense to strike down sections 18(1) and 18(3) while leaving section 18(4)(ii) intact. The constitutionality or otherwise of the impugned legislation must be viewed holistically and not to suit the specific inconveniences of a litigant in a particular case.

181. The Constitutional Court[66] has also given some indirect endorsement of section 18(3) and described it as one which "*serves to regulate the interim position between litigants from the time when such an order is made until the final judgment is handed down*". The final judgment refers to all subsequent appeals.

E. CONCLUSION

182. In the totality of the circumstances and due to the fact that the constitutional challenge is so patently devoid of merit, we do not address the issue of remedy any further than what has already been stated in the answering affidavit.

183. In the premises, we submit that it may please this Honourable Court to grant relief:

183.1. granting leave to appeal in terms of section 17 of the Act;

183.2. dismissing the application to execute;

183.3. dismissing the constitutional challenge to sections 18(1) and 18(3) of the Act; and

183.4. awarding costs in favour of the applicant.

DC MPOFU SC

BN BUTHELEZI

N KEKANA

Chambers, Sandton
25 September 2020

[66] *Department of Transport v Tasima (Pty) Limited* 2018 (9) BCLW 1067 (CC) at paragraph [56]

LIST OF AUTHORITIES

1. *Acting National Director of Public Prosecution v Democratic Alliance* Unreported GP case no 19577/09 dated 24 June at para 25
2. *Cape Empowerment Trust Limited v Druker* 2013 JDR 1360 (WCC)
3. *City of Johannesburg Metropolitan Council v Ngobeni* (314/110 [2012] ZASCA 55
4. *Cojocaru v British Columbia Women's Hospital & Health Centre* 2013 SCC 30; [2013] S.C.R. 357
5. *Companies and Intellectual Property Commission v Cresswell and Others 921092/2015) [2017] ZAWCHC 38*
6. *Cook v Hesber Impala (Pty) Limited and Others* [2016] JOL 36194 (GJ)
7. *Dadoo Limited v Krugersdorp Municipality 1920 AD 530*
8. *Department of Transport v Tasima (Pty) Limited* 2018 (9) BCLW 1067 (CC)
9. *Ferreira v Levin* 2019 (3) SA
10. *Frothingham v Mellon, Secretary of the Treasury 262 US 447 1922*
11. *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others [2012] ZACC 28*
12. *Hillman Brothers Ltd v Kelly and Hingle* 1926 WLD 153
13. *Lawyers for Human Rights and Another v Minister of Home Affairs and Another 2004 (4) SA 125 (CC)*
14. *Matambanadzo Bus Service v Magner 1972 (1) SA 198 (RA) at 199H-200A*
15. *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* 2016 (3) SA 317 (SCA)
16. *Minister of Safety and Security v Slabbert* 2010 2 All SA 474 (SCA)
17. *Mont Chevaux Trust* Unreported LCC case no LCC14R/2014 dated 3 November 2014
18. *Msimang v Katuliiba* 2012 JDR 2391 (GSJ)

19. *Nasionale Vervoerkommissie van Suid Afrika v Salz Gossow Transport (Edms) Beperk 1983 (4) SA 344*

20. *Outa v Myeni and Others – Interlocutory Application Judgment of 12/12/2019*

21. *R v Dhlumayo and Another* 1948 (2) SA 677 (A)

22. *South African Transport Service v Olgar 1986 (2) SA 684 (A)*

23. *South Cape Corporation (Pty) Limited v Engineering Management Services (Pty) Limited* 1977 (3) SA 534

24. *Stuttafords Stores v Salt of the Earth Creations* 2011 (1) SA 267 (CC)

25. *Swart and Another v Cash Crusaders Southern Africa (Pty) Limited* 2018 (6) SA 287 (GP)

PUBLICATIONS

1. Constitution of the Republic of South Africa No 108 of 1996

2. *Henochsberg Commentary on the Companies Act, 2008*