

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

Case No: 15996/2017

In the matter between:

DUDUZILE CYNTHIA MYENI

Applicant

and

ORGANISATION UNDOING TAX ABUSE NPC

First Respondent

SOUTH AFRICAN AIRWAYS PILOTS ASSOCIATION

Second Plaintiff

SOUTH AFRICAN AIRWAYS SOC LTD

Third Respondent

AIR CHEFS SOC LTD

Fourth Respondent

MINISTER OF FINANCE

Fifth Respondent

**NOTICE OF INTERLOCUTORY APPLICATION IN TERMS OF RULE 6(11),
READ WITH SECTION 19(b)**

PLEASE TAKE NOTICE THAT at the hearing of the main application(s), being 10h00 on 19 November 2020, the abovementioned applicant intends to make an interlocutory application, in terms of Rule 6(11) of the Uniform Rules of Court, read with section 19(b) of the Superior Courts Act 10 of 2013 ("the Act") and/or section 173 of the Constitution, for an order:

1. Insofar as it may be necessary, granting condonation for the late filing of this application and/or any other departure from the normal rules;

2. Granting the applicant leave to introduce new evidence in the main application for leave to appeal brought in terms of section 17 of the Act; and/or
3. Costs to be in the main application.

PLEASE TAKE NOTICE FURTHER THAT the supporting affidavit of **Duduzile Cynthia Myeni** is annexed hereto in support of the application.

KINDLY SET THE MATTER DOWN ACCORDINGLY.

DATED at JOHANNESBURG on this the 17th day of November 2020



MABUZA ATTORNEYS

Applicant's Attorneys
1st Floor, 83 Central Street
HOUGHTON
Johannesburg
Tel: 011 483 1508
Fax: 011 728 0145
Cell: 082 561 1067
email: eric@mabuzas.co.za
Ref: Mr Eric Mabuza

**TO: THE REGISTRAR OF THE ABOVE
HONOURABLE COURT, PRETORIA**

AND TO: PANDOR ATTORNEYS
First and Second Respondents' Attorneys
15 Peter Place
Bryanston
Tel: 082 551 3784
email: rashaad@pandorlaw.co.za
C/O LEE ATTORNEYS

51 Elandslaagte Street
Hazelwood
Tel: 082 451 2142
email: lenelllee@msn.com
Ref: L Lee

Service by email

AND TO: DYASON INCORPORATED
Third and Fourth Respondents' Attorneys
134 Muckleneuk Street
Nieuw Muckleneuk
Pretoria
Ref: TP WOOD/NN/MAT85612
Tel: (012) 452 3500
Fax: (012) 452 3554
email: wood@dyason.co.za

Service by email

AND TO: THE MINISTER OF FINANCE
Fifth Respondent
40 Church Street
Pretoria

Service by email

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

Case No: 15996/2017

In the matter between:

DUDUZILE CYNTHIA MYENI

Applicant

and

ORGANISATION UNDOING TAX ABUSE NPC

First Respondent

SOUTH AFRICAN AIRWAYS PILOTS ASSOCIATION

Second Plaintiff

SOUTH AFRICAN AIRWAYS SOC LTD

Third Respondent

AIR CHEFS SOC LTD

Fourth Respondent

MINISTER OF FINANCE

Fifth Respondent

SUPPORTING AFFIDAVIT

I the undersigned

DUDZILE CYNTHIA MYENI

do hereby make oath and say the following:

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

DCM

2. The facts set out below are, to the best of my knowledge, both true and correct. Save where the contrary is expressed or appears from the context, they lie within my personal knowledge.
3. In so far as I make legal submissions and draw the conclusions in the affidavit, I do so on the advice of my legal representatives, which advice I accept.

The parties

4. The parties are as cited in the main section 17 application for leave to appeal, to which this application is interlocutory. In the main application, I am the applicant and the respondents are the Organisation Undoing Tax Abuse ("**OUTA**") and the South African Airways Pilots Association ("**SAAPTA**").
5. Depending on the context, I refer to myself in the first person as "I" or "me" or in the third person as "applicant" herein or "defendant" in the trial action.

Nature of this application

6. As foreshadowed in the notice of application to which this affidavit is attached, this is an interlocutory application for leave to introduce recently acquired evidence which is extremely relevant to the issues to be adjudicated by this Honourable Court and which it is in the interests of justice to bring to the attention of this Honourable Court.
7. The application is brought in terms of Rule 6(11), read with section 19(b) of the Superior Courts Act 10 of 2013 ("**the Act**") and/or sections 34 and 173 of the Constitution. Where necessary, the specific provisions of these rules and statutory and constitutional provisions will be discussed.

72 DCM

BRIEF BACKGROUND AND CONTEXT

8. The application for leave to appeal, together with two other applications brought in the alternative to each other and pertaining to section 18 of the Act, has been set down for 19 and 20 November 2020 by the direction of this Honourable court.
9. The pleadings have closed in respect of all the above main applications and the parties have exchanged their heads of argument, subject to leave having been granted to file supplementary heads and/or amendments to the existing heads of argument.
10. The notice of application for leave to appeal forms part of the record and will accordingly not be attached again. Suffice to highlight that the principal grounds of appeal include the following issues:
 - 10.1. The *locus standi* of OUTA;
 - 10.2. Non-joinder of other SAA directors; and
 - 10.3. Various topics pertaining to the merits of the relevant trial action.
11. The grounds of the application are broadly based on sections 17(1)(a)(i) and 17(1)(a)(ii) of the Act. The section 17(1)(a)(ii) grounds relate to compelling reasons, including the common-cause national and public interest implications of the matter and the unprecedented and harsh sanctions of a life-ban and/or referral to the National Prosecuting Authority (NPA) for criminal investigation against the applicant. It is common cause that the issues raised in this matter are intertwined with other important processes, notably the ongoing Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud

FL DCM.

in the Public Sector including Organs of State chaired by Zondo DCJ (and commonly referred to as "**the Zondo Commission**").

12. During the week of 2 to 7 November 2020, the Zondo Commission was specifically scheduled to deal with the issue of SAA, including issues related to the present litigation before this Honourable Court. In that regard:

12.1. On or about 4 and 5 November 2020, I was called to appear before the Zondo Commission *inter alia* in respect of the issues dealt with in the present matter, which I did.

12.2. Incidentally, thereafter, on Saturday 7 November 2020, the Zondo Commission recalled the next witness, namely Mrs Yakhe Kwinana ("**Mrs Kwinana**"), a chartered accountant, who served as a non-executive board member under my chairmanship.

13. For obvious reasons, I made a point of watching the testimony of Mrs Kwinana.

The evidence sought to be introduced

14. I may pause to mention that I am in possession of the transcript evidence of the whole of Mrs Kwinana's evidence on 7 November 2020. The evidence was also broadcast live on all three national television news networks. I am in the process of also obtaining the relevant video evidence.

15. Upon even a cursory glance of the testimony of Mrs Kwinana, it will be gleaned and observed that she made certain remarks which are of direct relevance to me and the present matter, including that:

TL DCM

- 15.1. she (Mrs Kwinana) had held a meeting with OUTA starting in August 2016, shortly after her resignation as an SAA director;
 - 15.2. the meetings specifically concerned the decision by OUTA not to join Mrs Kwinana in the action to declare me as a delinquent director, which was apparently the initial decision or intention of OUTA;
 - 15.3. but for the undisclosed meetings, Mrs Kwinana would most likely have been joined as a defendant;
 - 15.4. in the process, OUTA recorded the meetings electronically without her knowledge and/or permission;
 - 15.5. she never made the claims attributed to her by OUTA and directed against me and/or my son;
 - 15.6. in her view, the information was subsequently falsified or doctored in the "editing" process;
16. I am in possession of the full transcript of Mrs Kwinana's evidence of 7 November 2020. As it is bulky, I will only submit or upload it if the court so directs. The respondents are also free to access the transcript from the website of the Zondo Commission. For present purposes, I will annex the relevant portion of the transcript, which contains, *inter alia*, the following statements:
- 16.1. Mrs Kwinana: "*The reason why I wanted to meet them ... That was the reason why I went there*";
 - 16.2. Adv Hofmeyr: "*Then I would like to put it to you that you went to OUTA with an intention to try and avoid being one of the defendants in the delinquent director application that they were considering bringing and*

TL DCM

you said something false to them about Ms Myeni to try and put yourself in a good light to avoid that, what is your response?"

17. The relevant portion is annexed hereto marked "**DMA1**" to "**DMA17**", being pages 220 to 237 of the transcript.
18. It is undeniable that the above evidence is relevant to and will have a large bearing on some of the key issues raised in the present application for leave to appeal and indeed the envisaged appeal itself, more particularly:
 - 18.1. in relation to the issue of OUTA's *locus standi*, whether:
 - 18.1.1. but for the involvement of OUTA, the outcome of the trial action might have been different;
 - 18.1.2. the public interest can properly be represented by a party which is guilty of a material non-disclosure to the court and potential abuse of the court process. Also, whether OUTA selectively, in targeting me in the application for delinquency, was indeed serving the public interest or its own narrow political interests;
 - 18.1.3. OUTA is guilty of illegally obtaining evidence which was possibly used in the trial action; and/or
 - 18.1.4. insofar as Mrs Kwinana has disputed the truthfulness of OUTA's version of events, and did so under oath, any credence can be given on any other evidence emanating from OUTA;
 - 18.2. in relation to the issue of the non-joinder of the other relevant non-executive directors, whether:

TL DCM

- 18.2.1. any other non-executive director and/or executive or employee might have been engaged by OUTA in a similarly unlawful and/or questionable manner;
 - 18.2.2. the lawfulness of the engagement with Mrs Kwinana with specific reference to the topics of possible extortion, blackmail and/or illegally obtained evidence, to mention a few; and/or
 - 18.2.3. in the circumstances, it was in the public interest or not to exclude Mrs Kwinana from the action, including any other non-executive directors;
- 18.3. in relation to the merits, whether:
- 18.3.1. the involvement, calling and/or joinder of Mrs Kwinana and/or others may have changed the complexion of the evidence;
 - 18.3.2. the exclusion of the illegally obtained evidence could have any major impact on the outcome;
 - 18.3.3. what role did other non-executive directors really play in the key issues pertaining to the Airbus swap deal and/or the Emirates deal.
19. The above list is not exhaustive but it is sufficient to make the point for present purposes.
20. I therefore seek to introduce the evidence of Mrs Kwinana's testimony at the Zondo Commission as I believe that it supports a number of points raised in the leave to appeal application, which include:

TLDCM

- 20.1. the learned judge erred in not granting the joinder application; and
- 20.2. OUTA's claim to act in the public interest is disingenuous given that they acted selectively in deciding against whom to launch delinquency proceedings.
21. As evidenced by Mrs Kwinana's evidence at the Zondo Commission, OUTA did not make a full disclosure to the court in the joinder application as to why they were refusing to join Kwinana.
22. There is no escaping the conclusion that OUTA had struck some sort of deal with Mrs Kwinana which OUTA sought to hold Mrs Kwinana to by ensuring that she did not testify as a defence witness in the trial.
23. The existence and exact content of the OUTA–Kwinana deal was not disclosed to the court when there was a positive duty to do so. In fact, it was actively concealed. When the issue of the non-joinder of, *inter alios*, Mrs Kwinana was mentioned, pertinently all sorts of reasons were advanced by the plaintiffs in their heads of argument, including the absurd submission that the other direct and substantial interest in the matter and even that the claims against the co-directors had prescribed.
24. However and tellingly, the defendants did make the following major concession, which demonstrates the materiality of the new evidence: "*if this court found that the plaintiffs could not institute a delinquency action against Ms Myeni without joining her co-directors, the current action could not proceed*" (at paragraph 85 of the OUTA heads of argument).

25. Similarly, the new evidence shows clearly that the ground raised by the plaintiff in respect of the *locus standi* objection, that OUTA was acting in the public interest, was false. It could never be in the public interest to single out one person full knowing that there were other qualifying persons and that the decision to exclude them was based on illegally obtained evidence which is false. In fact, the public interest would demand that all those who should be declared delinquent directors be so declared, in order to save the public from them. OUTA was in fact motivated by their own narrow and selfish political or other agendas, which were undisclosed to the court.
26. Lastly and regarding the merits, the evidence was clearly that Dr Tambi and Mrs Kwinana had been the persons leading the negotiations with Airbus. The court and the defendants deserved to know why, despite this, they were spared from the delinquency action.
27. Given all the above and the overall context in which the present application takes place, the public interest and the rights of the applicant, it is clearly in the interests of justice that the court should exercise its inherent jurisdiction in favour of admitting the new evidence and taking it into account in the adjudication of the application for leave to appeal and/or also possibly the section 18 application as well. I am advised that further legal argument will be advanced at the hearing in this regard.
28. Insofar as the application is based on section 19(b) of the Act or the principles akin thereto, I am advised that legal principles that have been established in our law to determine the adducing of further evidence require that I establish the following:

TL DCM

- 28.1. Reasons why the evidence was not led at the trial;
- 28.2. *Prima facie* likelihood of the truth of the evidence; and
- 28.3. Evidence should be materially relevant to the outcome of the trial.

Reasons why the evidence was not led at the trial

- 29. I only became aware of OUTA and Mrs Kwinana's negotiations and subsequent pact on 7 November 2020 during her testimony at the Zondo Commission.
- 30. Were it not for this testimony, I still would not know anything about it. Thus, I could not have led any evidence about OUTA entering into secret negotiations with other SAA directors over their exclusion from the delinquency application as defendants.

***Prima facie* likelihood of the truth of the evidence**

- 31. I have good reason to believe that this evidence is true as exhibits of the transcripts of the meetings held between Mrs Kwinana and OUTA were handed up as exhibits at the Zondo Commission. I unfortunately have not been able to obtain these transcripts ahead of deposing to this affidavit. I have tasked my attorneys to leave no stone unturned in the further investigation of this issue.

Evidence should be materially relevant to the outcome of the trial

- 32. The issues of relevance and materiality have been sufficiently advanced hereinabove.

TL DCM

33. In the event that it is found that section 19 does not apply, which is denied, the court may in any event entertain it in terms of section 173 of the Constitution.
34. Considered as a whole, the circumstances of this case are very special and exceptional warranting the exercise of the court's discretion in favour of granting the application.

DEMAND, COSTS AND/OR CONDONATION

35. The evidence was first seen by me on or about Saturday 7 November 2020. At that point, it will be recalled that the court had sent a letter dated 6 November 2020 to the legal representatives indicating that the matter would be heard on Wednesday 11 November 2020. I was advised thereof on Saturday morning and I gave instructions for my legal team to intervene and obtain the more suitable possible date of 19 November 2020. After my own considerations of the implications of Mrs Kwinana's shocking evidence and at the next available opportunity, being Monday, 9 November 2020, I sought advice from my attorneys, who advised me that, given the possible hearing of the application in the next 48 hours or so, their priority was to secure alternative counsel and it would not be feasible to bring the present interlocutory application in such a short space of time. I was advised that the next best alternative would be to seek to bring the new evidence in the appeal itself if leave was granted and/or in any further appeals and/or petitions brought by me in terms of section 17 of the Act. I accepted the advice on the grounds that it was inopportune to bring the application at that stage but later on.

TL DCM

36. Following certain written representations by my legal team to the Honourable Judge President, the Acting Deputy Judge President and the Honourable presiding judge, Justice Tolmay J, the session scheduled for 11 November was effectively turned into a case management meeting, at which, *inter alia*, the hearing dates of 19 and 20 November 2020 were determined.
37. Although an intimation at an amendment and/or supplementation of the heads of argument and agreement and/or leave in that respect was granted, this was in respect of a different minor issue as the issue of new evidence had not yet been reintroduced by me.
38. A few hours thereafter, I was briefed about the outcomes of the session with the Honourable presiding judge and all the arrangements agreed to. It was at this point that I pointed out that the new arrangements, which were otherwise satisfactory to me and for which I am indebted to this Honourable Court, could potentially make it possible to raise my serious concerns about Mrs Kwinana's evidence. After some discussion with my team, I gave instructions in that regard.
39. In response thereto and on the following day, Thursday 12 November 2020, my attorneys duly wrote a letter to the respondents' attorneys making various proposals as to how the issue could be approached. A copy of the said letter is annexed hereto marked "**DMA18**".
40. The self-explanatory contents of the letter included a proposal that the parties should submit a minimum agreed set of facts to the court. This was unreasonably rejected in the respondents' response letter, dated Friday 13 November 2020, a copy of which is annexed hereto marked "**DMA19**".

TL DCM

41. I was accordingly left with no option but to bring the present application, after further consultation with my legal team held over the weekend.
42. I apologise for any inconvenience caused to this Honourable Court as a result of my adamant insistence on the protection of my fundamental rights.
43. Insofar as it may be necessary, I beg the leave of this Honourable Court to condone any lateness in the bringing of this application, which was due to issues beyond my control, including the first time of my awareness of the evidence being when it was adduced at the Zondo Commission less than 10 days ago. The evidence is essential, the delay is short and was inevitable, no incurable prejudice is caused to the respondents and the prospects of the admission obviously is not self-created and the application can only be heard together with the main application.
44. In addition, I wish to point out that the overall conduct of the respondents, including the unreasonable refusal to admit even the most neutral and undeniable facts, is deserving of punitive costs. Added to this is the blatant abuse of the court process associated with its past conduct.
45. In the totality of the circumstances detailed hereinabove, I am confident that had this Honourable Court not been deliberately misled by the silence and/or active concealment of relevant information, the outcome of the trial action and/or some of the key interlocutory rulings would have been different.

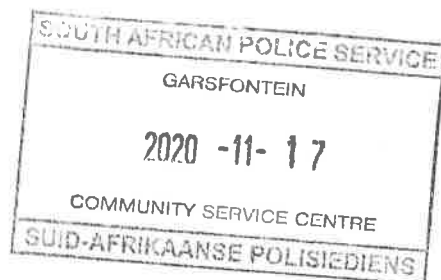
TL DCM

46. Accordingly, I pray that it may please this Honourable Court to grant the application and to show its displeasure by mulcting the respondents with punitive costs in respect of this and/or the main applications.



DEPONENT

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn before me at Garsfontein SAPS on this the 17th day of **November** 2020, the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.




COMMISSIONER OF OATHS

Den

and we found that they were deregistered before this payment was made. So was this some other arrangement that arose out of it?

MS KWINANA: I said the Black Firms Forum which used to be APF before.

ADV HOFMEYR: Yes.

MS KWINANA: Yes. So in fact also the Black Firms Forum is not a registered name, so to say, you will not go to the CIPC and check the Black Firms Forum. That is how
10 we call ourselves as the advocacy group of the black firms.

ADV HOFMEYR: I understand. I understand, thank you for that. Right, then I would like to just go to two final small matters before concluding aspects, Ms Kwinana, and these parts are going to be relevant to evidence that we traversed with Ms Myeni. I understand from Ms Mbanjwa that you may not have followed that closely but it is actually related to matters that you were asked about in your Regulation 10.6 directive.

The first one relates to the allegation, I will put it
20 broadly, that Ms Myeni used to prepare false whistle blower reports and you were asked in your 10.6 directive to tell the Chairperson and the Commission your knowledge about that and let us take you to what you said, if we can? That is in your affidavit before the Commission in response to the 10.6 directive. So you need to go to DD33 and it is

TL DCM

page 5 of DD33. Now we asked in the 10.6 directive, the Chairperson asked for you to address the allegations that Ms Duduzile Myeni – I am at the bottom of page 5 prepared false whistle blower reports against employees and management of SAA whom she wished to remove and your response to that in your affidavit is:

“I have no way of knowing whether the whistle blower reports allegedly prepared by Ms Myeni are false or not.”

- 10 Is that your evidence that you – you do not know whether the reports allegedly prepared by her are false or not?

MS KWINANA: That is correct, Chair.

ADV HOFMEYR: You see, Ms ...[intervenes]

CHAIRPERSON: There is the question of knowing whether the reports she prepared were false or not. There is the question whether you have knowledge that she prepared certain reports. Which one of the two do you know, which one do you not know?

MS KWINANA: I do not know any one of them, Chair.

- 20 **CHAIRPERSON:** Okay.

ADV HOFMEYR: You see, Ms Nhantsi – do you know Ms Phumeza Nhantsi?

CHAIRPERSON: Yes, Chair.

ADV HOFMEYR: Did you follow her evidence before the Commission?

TL DCM

CHAIRPERSON: Yes, Chair.

ADV HOFMEYR: Okay, she said – and I am just going to quote now from her affidavit. Chair, it is one paragraph, I do not think we need to go there but for records it is DD2 page 22, paragraph 71. If you want to go there, Ms Kwinana, we will. But let me read it in, it is just her account. She said - oh, apologies, DD2 at page 22 paragraph 71. You see we asked Ms Nansi the same question and in her affidavit she said:

10 “Ms Yakhe Kwinana will be the right person to address this as she was the one who informed us about Ms Myeni also going to the internet cafe, disguises as another person and sending damning whistleblower reports about anyone she wanted out of the way.

 After the whistle blowing reports she would pressurise Siyakula Vilakadi, the internal Chief Audit & Risk to investigate those implicated in the report or instruct him to appoint one of the firms,
20 for example EY or ENS to investigate whoever was mentioned in the report.

 After all the investigations she would push for those people to be suspended and dismissed.”

Now that is Ms Nansi’s account of something you told her. Do you confirm that you told her that?

T.L. DCM

MS KWINANA: No Chair.

ADV HOFMEYR: You don't? So is she just making this up?

MS KWINANA: She is making it up Chair.

ADV HOFMEYR: Do you remember saying the same thing at an interview with OUTA about eight days after you resigned from SAA?

MS KWINANA: I remember having an interview Chair and I don't remember saying that Ms Myeni did prepare false
10 whistleblower reports.

ADV HOFMEYR: What do you remember saying to them on this topic?

MS KWINANA: I would have to get the – I would have to get the transcription Chair.

ADV HOFMEYR: Okay but as you sit here now can you just help me with your memory, what do you remember having said on this topic?

MS KWINANA: I remember chair about the whistleblower reports and basically that is all I remember that we used to
20 receive a lot of whistleblower reports from the Hotline or from Ms Myeni herself and she would basically get the Whistleblower reports from the people, other people would refer to give her the information, basically.

ADV HOFMEYR: So they – it was their information and then they would give the Whistleblower reports to her, is

that what your understanding was?

MS KWINANA: Yes Chair.

ADV HOFMEYR: Okay that would tend to indicate that there was nothing false, that explanation says there is a genuine whistleblower, they have got their facts but for some reason they want to get them to Ms Myeni rather than put them through the anonymous system that was created, correct?

MS KWINANA: Yes Chair.

10 **ADV HOFMEYR:** Okay so in that scenario there wouldn't be any reason to suspect them being false, do you accept that?

MS KWINANA: Yes Chair, that's why Chair I am saying I have no knowledge if the Whistleblower reports were true or false.

ADV HOFMEYR: And is that what you recall having conveyed to OUTA at that meeting?

MS KWINANA: Yes Chair.

ADV HOFMEYR: Yes, now that meeting as I understand it
20 was you had requested to meet with OUTA is that right?

MS KWINANA: Yes Chair.

ADV HOFMEYR: And then they subsequently, there was a second meeting that was a follow up meeting, correct?

MS KWINANA: Yes Chair.

ADV HOFMEYR: Why did you request to meet with OUTA?

MS KWINANA: The reason why I wanted to meet them, to meet with OUTA is because they wanted to make an application for me, or also myself to be declared a delinquent director so the reason why I went to them, in fact I was advised by one of my lawyer friends to say I need to go to them so that I can clear the things that they may have against me, and in fact I managed to clear the whole lot of wrong information that they had against me, so it was a good thing that I did go and clear it with them, and
10 in fact I told them that the reason why I am going to them is not because I will be declared a delinquent director, the reason why I am going there is that of course I would have to protect myself legally, but the reason why I am going to OUTA is because I will not have money to incur the legal costs to get to the end result, which end result I know that I am not going to be declared a delinquent director. That was the reason why I went there.

ADV HOFMEYR: I understand. Now Ms Kwinana we previously had evidence admitted on affidavit in Ms Nansi's
20 case when she gave evidence from OUTA and OUTA confirmed that you had met with them and everything you have said now is consistent, that you called for the first meeting, that there was a follow up meeting, but they had long recordings from the meeting and they had – but the they had a summary, their own summary of it, in which

their summary records that you told them something very different to what you have testified about today. They said at that meeting you told them that Ms Myeni used to put in false whistleblower reports, does not jog your memory.

MS KWINANA: I am sure they misunderstood me Chair, maybe I wanted to say something but now because I said it in English the it lost the meaning because I speak Xhosa fluently.

10 **ADV HOFMEYR:** Right, so as you sit here today you can confidently say you did not convey to them that Ms Myeni would put false information, incorrect information in Whistleblower reports that she prepared, correct?

MS KWINANA: Correct.

ADV HOFMEYR: Right, you see I am sometimes able to anticipate what – based on what you have told us and our investigations are likely to be the approach you take in the evidence. On this one I thought you might say something like that, so what we did is we went and got the recordings
20 from OUTA and we had them transcribed, so I would like to hand up those transcriptions. We didn't have them previously, and I have to tell you I am going to ask you about two aspects of OUTA, that OUTA interview, and I can tell you Chair we have managed in the time available to transcribe one but not the other, we do have the recording

of the other but all I can show Ms Kwinana today is the transcription of the one dealing with whistleblowers.

So if I can hand that in and copy certainly also to Ms Mbanjwa, and to apologise for that error earlier. Thank you. Have I given you the wrong one, sorry, there you go. Chair if I can request that we enter this as Exhibit DD33A, not there's no A, I have made that error, DD33.26.

CHAIRPERSON: Did you say 53?

ADV HOFMEYR: No 33.

10 **CHAIRPERSON:** 33?

ADV HOFMEYR: Yes thank goodness we are not file 53.

CHAIRPERSON: 33

ADV HOFMEYR: Yes point 26.

CHAIRPERSON: 26. The transcript of a meeting with Ms Yakhe Kwinana at OUTA offices, Johannesburg, 30 August 2016 will be admitted as EXHIBIT DD33.26.

ADV HOFMEYR: So there's – it is a very lengthy recording, what we did was we extracted that part that dealt with the Whistleblower discussion and if you turn to
20 page 3 of 10 you will see that that is where it is – sorry internal page 3 of 10, do you have that Ms Kwinana?

MS KWINANA: Yes Chair.

ADV HOFMEYR: Okay so this is the section of the Whistleblower discussion and Ivan starts speaking and then Ms Kwinana and then there's another person

identified as Rethabile and what happens is this is where the topic of the whistleblower discussion is being introduced and there's an issue that occurs where people are talking about them feeling a bit scared actually and if you go over the page to page 4 of 10 you will see there Ivan says, in the 4th line,

"I have death threats, I have received death threats."

And then Ms Kwinana you say the following:

10 "One of the reasons why I am scared is that I do not know the powers that be beyond, but the other reason is that it is difficult to bring a proof like for instance Dudu has got her hit list of people that she wants to remove and bring her own people. We've got that and how she operates. How she operates, she will go to internet cafe and write whatever information that she knows are correct and incorrect information and then she will email it to SAA Whistleblower from the internet cafe."

20 And then Ivan says:

"Which information?"

And you say:

"Like for instance – like for instance she will write, okay let me make an example, she will go to internet cafe whatever she knows about me, she will

the correct information together with the incorrect information and now okay if I am an SAA employee she will send that to Whistleblower that is how she operates, she will send that to Whistleblower and after sending it to Whistleblower.”

Ms Kwinana that I put to you is very different to what you said just now is what you conveyed to OUTA, do you accept that it is very different?

MS KWINANA: It is very different Chair.

10 ADV HOFMEYR: Do you have any reason to dispute this transcript?

MS KWINANA: Chair this transcript I see that it is edited.

ADV HOFMEYR: Yes.

MS KWINANA: And so – and I did, I was not taking the minutes myself and therefore I will definitely not be able to confirm with certainty if this is what was discussed, but what I am saying is I will not be in a position as I said before, I will not be in a position to know if the whistleblower is true or false.

20 ADV HOFMEYR: No but that is not what ...[intervenes] – sorry Chair.

CHAIRPERSON: Ja, let's start here, you have accepted that what you have said about what you know with regard to Ms Myeni's connection with whistleblowers reports is different from what is said here, which one is true, is it

what you said earlier on here or is it what is reflected here, which one is true?

MS KWINANA: This is what I said earlier on here Chair.

CHAIRPERSON: That is what is true?

MS KWINANA: Yes Chair.

CHAIRPERSON: Are you saying that you never said what is reflected here when you met with OUTA?

MS KWINANA: I may have said it Chair not wanting to convey the message as it is. As I was saying maybe if I
10 was interviewed by OUTA in Xhosa I would be in a position to articulate myself and reflect what I have just said in this Commission today.

CHAIRPERSON: No Ms Kwinana please, I have listened to you speaking English on Monday, Tuesday and today, you speak English very well, I understand what you are saying, I don't have a problem, I think Ms Hofmeyr understands you. We understand you and when we speak to you, you understand us, it cannot be a question of language. It can't be.

20 **MS KWINANA:** Chair it could be a question of language, also in this Commission. Ms Hofmeyr has been asking, including you Chair, many times if I heard Ms Hofmeyr, if I understood what she was trying to say. You will be explaining Chair a whole lot of times.

CHAIRPERSON: Yes but I don't think it is because of the

language, it has not been because of the language, your command of English is very good, your understanding of English when somebody else is speaking English is very good.

MS KWINANA: Chair between this recording, OUTA recording, and what I have just said in this Commission I stand by what I have said in this Commission.

ADV HOFMEYR: But then – sorry.

CHAIRPERSON: Ja, no it's fine.

10 **ADV HOFMEYR:** Then I would like to put it to you that you went to OUTA with an intention to try and avoid being one of the defendants in the delinquent director application that they were considering bringing and then said something false to them about Ms Myeni to try and put yourself in a good light to avoid that, what is your response?

MS KWINANA: I don't think the reason for me to be excluded in the application is because of the whistleblowers, it is because of the clarification of the
20 incorrect things that they heard about me, like for instance one of them was BNP Capital where they were thinking that I knew who the directors of BNP Capital because the director of BNP Capital is a co-director in another company with my cousin's brother.

CHAIRPERSON: Ja, Ms ...[intervenes]

MS KWINANA: So basically those are the things that they had misinformation about. I don't think they are reason for them to exclude me is because of my lack of English.

ADV HOFMEYR: No, no, no Ms Kwinana that is not what I was saying at all. I am not actually asking you about their reason, you could never know their reason, I am asking about what you went there to achieve, because what has been revealed now is that there's a transcript of a meeting that you had with OUTA, eight days after you left SAA, in
10 which you on two occasions make it very clear that what Ms Myeni was including in these whistleblower reports was "incorrect information", you say in your evidence today that is false, that you did not say that, and that you have not ever I understand your evidence to be had that knowledge that she was doing things and putting false information in Whistleblower reports, but if that is the truth then I put it to you, you – your motivation for then making up what is false, a lie, served your interests because it puts you as an adversary to her, painted her in a worse light so that you
20 could escape being one of the defendants in the delinquent director application.

If that is not it Ms Kwinana how else do you explain if this is accurate the lie that lies here. You were then lying that she used incorrect information in the Whistleblower reports.

T.L. DEM

MS KWINANA: Let me respond Chair for the last time. I am saying this document you have just confirmed that it is edited, that is number one, and number two you have asked me that between what I have said here and what is in this document which statement do I stand for, I am saying Chair for the last time I am standing by the information that I have said in this Commission.

CHAIRPERSON: If it were to be found that you did actually say what is reflected here would you agree that
10 then if what you have told us is true, namely that you don't know whether Ms Myeni was involved in preparing false reports will you not accept that then you were untruthful when you spoke to OUTA if it were to be found that you did say this?

MS KWINANA: Chair you know without firstly I wasn't even informed that I am recorded and secondly here I am speaking under oath, there was no oath here Chair, and therefore when you say between what I am saying here today and what is stated here I am saying Chair I stand by
20 what we have heard here before.

CHAIRPERSON: Yes, but that does not answer my question. The fact that you may not have been speaking under oath at OUTA offices cannot change whether what you said is true or not is it? Even if – in other words something doesn't become true only because you are under

oath. When you are not under oath you can tell something that – you can be untruthful or you can be truthful. Now my question to you was if it were to be found that you did says this at OUTA as reflected here, but now you are saying that is not true, what is true that you do not know anything about Ms Myeni making false whistleblower reports, would you accept that you were therefore untruthful when you said this to OUTA, if it is found that you did say this?

- 10 **MS KWINANA:** Chair this OUTA report, this report, as I said it is edited, that is number one, number two Chair this report I was never informed that I am being recorded, and thirdly Chair I was never informed that this report will be used against me in any forum and therefore Chair I do not recognise this report.

- CHAIRPERSON:** I have asked you the same question two times, and each time you have not answered the question. I am going to ask it for the third time and the last time, and see whether you are going to give me an answer. The
- 20 question is if it were to be found that you did say what is reflected in this report and now given the evidence that you have now given here would you accept that therefore it would mean that you were untruthful in what you said to OUTA about Ms Myeni?

- MS KWINANA:** Chair I beg not to answer that question.

TL DCM

CHAIRPERSON: You don't have a right not to answer the question Ms Kwinana, but we are going to move ahead, this does not do you any good Ms Kwinana, it does not do you any good. Continue Ms Hofmeyr.

ADV HOFMEYR: Thank you, Chair I really don't want to take more time, if we had time I would suggest that we play the recording but I am not going to suggest we do that now, we have been here the whole day. What I want to propose is that we give Ms Kwinana the recording and she
10 listens to it, she gets her own transcriber and if there is any part of this transcript that she says is inaccurate she could let us know.

CHAIRPERSON: Yes, she can do a supplementary – an affidavit.

ADV HOFMEYR: Indeed because when transcribers say edited at the top it means they have gone through and they have changed scarred which appeared with two r's into scared, they are editing it for ensuring that there are no typographical errors, they are not editing to change the
20 task which is to have an accurate reflection of the document, but I can see Ms Kwinana is not comfortable relying on this, so we will make the recording available to her and she can let us now in a supplementary affidavit if she disputes the transcript that has become EXHIBIT ED33.26.

The last aspect of your interview there Ms Kwinana is what you had said about Talente Myeni, Dudu Myeni, Duduzilo Myeni's son, in his involvement in BNP, do you remember what you told OUTA what is Mr Myeni's involvement in BNP?

MS KWINANA: No Chair I don't remember.

ADV HOFMEYR: Okay, because your affidavit before the Commission – let me just deal with that, give me a moment – it is at page 6 of Exhibit DD33, you were asked again
10 about the allegations that Ms Myeni's son, Mr Talente Myeni, was in a relationship with Mr Masotsha Mgadi, Mr Masotsha Mgadi was the person who was involved in BNP, did you know that, that Mr Mgadi was involved in BNP?

MS KWINANA: Yes Chair.

ADV HOFMEYR: Okay, so the question was what do you know about the allegations that Talente Myeni had a relationship with Mr Masotsha Mgadi and your answer there on affidavit was I have no knowledge of the alleged relationship between Mr Myeni and Mr Mgadi. So did you
20 not tell OUTA anything about that relationship?

MS KWINANA: I don't remember Chair.

ADV HOFMEYR: Okay so you could have.

MS KWINANA: I don't know, I really do not know, I don't know what is it that I would have told OUTA because I really do not know.

ADV HOFMEYR: Do you remember telling them that you had seen Mr Talente Myeni and Mr Masotsha Mgadi together at SAA?

MS KWINANA: Definitely no.

ADV HOFMEYR: Do you remember telling them that they are likely – that they are associates, business partners?

MS KWINANA: No, I don't know that.

ADV HOFMEYR: Do you remember telling them that you had seen them in Sandton together?

10 **MS KWINANA:** No.

ADV HOFMEYR: Okay, that is what appears in the recording of the meeting with OUTA. We did not get it transcribed, there was insufficient time, we got the recording, we will provide it to Ms Kwinana and she can tell us why today she confirms under oath that she did not say those things whereas the recording indicates that she did.

Chair I would then like to just go to the concluding aspects if I may, unless there is something further.

CHAIRPERSON: Ja.

20 **ADV HOFMEYR:** Ms Kwinana we will make likely – we will likely make submissions in due course through the Chairperson that seek to summarise the effect and content of your evidence over the last three days, and this is the opportunity where I indicate to you what the submissions are likely to be and you have an opportunity to respond.

TH DEM



DMA18

Pandor Attorneys
Applicants' Attorneys
774 Waterval Road
Little Falls
Roodepoort

Email: rashaad@pandorlaw.co.za
lenelllee@msn.com

1st Floor
83 Central Street
Houghton
2198
PO Box 55045
Northlands 2116
Tel: +27 11 483-2387/483-0476
Fax: +27 11 728 - 0145
Direct e-mail: eric@mabuzas.co.za

Your Ref:
Our Ref: Mr. ET Mabuza/Mr T Sibuyi
Date: Tuesday, 10 November 2020

Dear Madam,

DC Myeni: OUTA - Case Number: 15996/2017

1. As indicated and agreed at the session with the presiding judge, we intend to make one minor and possibly one major adjustment(s) to our client's heads of argument, with or without the need to file supplementary heads and subject to your clients' rights to file consequential supplementary heads, as directed. The presiding judge also, correctly, directed that the parties discuss the new aspects among themselves even before filing any new papers.
2. It is in that spirit that we write this letter to you in respect of both the minor adjustment and the potentially more significant one.

A. The minor adjustment

3. At the end of paragraph 137 of the current set of heads, the following sentence appears:

"In the circumstances, this is a classical case of judicial plagiarism."

4. Due to a clerical oversight, this sentence was not removed from the final set of heads delivered by the applicant. This was very unfortunate. The consensus in our team is

Eric T Mabuza B Proc (Unin) LLB (Wits) Senior Associates: Rudolph N Baloyi LLB (UL) Zondiwe Longwe LLB (Wits) Thomas Sibuyi LLB (UNISA) LLM (UNISA)

✦ Mzuphele GM Yeko B.Proc (UNITRA)

72 DCM

that this may be read as an unnecessary attack on the presiding judge. Such an attack would be unwarranted, more particularly in that it does not form part of the essence of the complaint. Although bias is imputed, we do not go as far as to impute deliberate or even actual bias but only a reasonable perception or apprehension thereof. The difference between the two, though nuanced, is significant. If necessary, the difference will be explained during argument.

5. It is therefore in this first regard, by the deletion of the aforesaid sentence, that we intend to amend our client's heads.

B. The second adjustment

6. The second issue has much more significant and wider implications in respect of the merits of one or more or all application(s) to be dealt with next week.
7. It has recently come to the attention of our client that during the testimony of one Mrs Yakhe Kwinana, who was at all material times material to this matter, a fellow non-executive director at SAA, OUTA, which is your client and the first plaintiff, held secret or hitherto undisclosed meetings with Mrs Kwinana, as a result of which, *inter alia*:
 - 7.1. OUTA gathered information which was possibly used to institute the trial action; and/or
 - 7.2. certain false but serious allegations were made against Ms Myeni;
 - 7.3. certain illegally obtained evidence relevant to this matter was secretly generated; and
 - 7.4. OUTA struck a deal or agreement with Mrs Kwinana not to join her as a defendant in the trial action brought in terms of section 162(5) against Ms Myeni.

T.L. DCM

8. It is not clear if but highly probable that similar meetings were held with other non-executive directors and/or executives, managers, customers and/or employees of SAA. Kindly disclose the full list of such meetings and their attendees.

Relevance

9. If true, these revelations will obviously have a material effect on the further proceedings associated with the court decision, which is the subject matter of the present application(s) and intended appeal proceedings.
10. To mention a few, such information is highly relevant to some of the central issues in the litigation, including:
 - 10.1. the alleged right or *locus standi* of OUTA to institute the trial action;
 - 10.2. the dispute about the non-joinder of other non-executive directors despite the inherently collective nature of the Board decisions on the basis of which the delinquency declaration was sought and obtained;
 - 10.3. the credibility of the allegations on the merits, on the basis of which the decisions to declare our client a delinquent director and to refer her for criminal investigations were apparently made;
 - 10.4. the legal implications of the failure to disclose the information to the court and/or to the defendants.

Proposed way forward

11. It was initially thought that the court could be asked to take judicial notice of these developments, but this may well not be the most appropriate way to deal with the matter, more particularly in that future courts may wish to be more fully appraised thereof, or not be prepared to take such judicial notice.
12. Accordingly, it seems inevitable that this new evidence must be introduced into the record, obviously without any concessions at this stage as to the extent of its

TL DCM

relevance and/or its overall impact on the ongoing litigation between the parties, but merely on the issue of its existence. We are therefore instructed to make the following proposals regarding the most practical ways to deal with this situation which has unforeseeably arisen.

First proposal: Statement of admitted facts

13. In order to save time and for the convenience of the court and the parties, an agreed statement of minimum agreed facts could be submitted to the court and supplementary submissions be made in respect thereof. The parties could, for example, agree that:
 - 13.1. Such a meeting or meetings were held with Mrs Kwinana and/or other persons;
 - 13.2. The genesis and purpose of such meetings;
 - 13.3. The relevant issues discussed at such meetings;
 - 13.4. The exchange of the recordings and/or transcripts of such meetings;
 - 13.5. The allegation that Mrs Kwinana and/or other attendees, if any, were secretly being recorded (i.e. without their knowledge or permission).

Second proposal: Video, audio and/or transcript evidence of the relevant proceedings before the Zondo Commission

14. Failing the above and/or in addition thereto, the video, audio and/or transcript evidence of Mrs Kwinana, led at the Zondo Commission, particularly on Saturday 7 November 2020, could be presented to the presiding judge by agreement a day or two before the hearing of the present application(s).

Third proposal: Formal application

15. Failing all of the above, we hold instructions to make an application urgently to introduce the new evidence in terms of the Rules of Court and before the hearing of

TL DEM

the present applications. The said application would obviously be set down to be heard upfront and on the scheduled day(s) of the hearings, being 19 and/or 20 November 2020.

16. We would need a day or two to gather the necessary information from the Commission and/or others.
17. We hope that this route can be avoided by the application of common sense and the necessary co-operation to assist the court and save unnecessary costs. However, and should that not be the case, we would propose the following timetable:
 - 17.1. Saturday 14 November: Service of the application.
 - 17.2. Monday 16 November: Answering papers.
 - 17.3. Tuesday 17 November: Reply.
 - 17.4. Wednesday 18 November: Exchange of supplementary heads.
 - 17.5. Thursday 19 November (as agreed): first day of the hearing of all applications.
18. We apologise for any inconvenience caused but we trust that you will appreciate the need to protect our client's rights as instructed and given the recent nature of the relevant revelations and amid the public importance of the issues involved.
19. The stakes could not possibly be higher. According to the judgment, Ms Myeni's alleged conduct as chairperson of SAA "*brought SAA to its knees*" and possibly resulted in a reshuffle of the Cabinet, as well as adversely affecting the South African economy. Furthermore and according to paragraph 60 of your clients' current heads of argument:

"This litigation involves one of South Africa's largest state-owned companies. SAA's financial position is of obvious national importance, and this litigation evoked nationwide interest and concern. The mismanagement of state-owned

TL DCM

entities and public money – and the conduct of those entrusted to care for both – is a matter of pressing and exceptional national concern.”

20. While we may not agree with some of these interesting observations, they only confirm the importance of some of the issues at stake in this litigation and other processes related thereto.
21. We therefore look forward to your urgent response. In particular, please indicate which option your client has elected as a matter of urgency and preferably by no later than 11h00 tomorrow, ie Friday 13 November, failing which our instructions are to proceed with approaching the court to grant the aforementioned application, with costs, and to make the contents of this letter, which is written with prejudice, available to the court.

Yours faithfully



MABUZA ATTORNEYS

T.L. DCM

DMA19



Date: 13 November 2020

Our Reference: R Pandor/OUTA

Your Reference: MR ET Mabuza/ Mr T
Sibuyi

MABUZA ATTORNEYS

Email: eric@mubuzas.co.za

Dear Mr Mabuza,

**DC MYENI & OTHERS V ORGANISATION UNDOING TAX ABUSE NPC & ANOTHER:
CASE NO 15996/2017**

1. We refer to your letter received this morning, 13 November 2020, demanding an urgent response by 11am.
2. At the case management meeting held on Wednesday 11 November 2020, your counsel indicated a desire to make a "small" amendment to your heads of

774 Waterval Road, Little Falls, Roodepoort

Telephone: 011 675 7346

Fax: 086 595 4952

Email: info@pandorlaw.co.za

In association with Fox & Barratt Attorneys & Harrisons Attorneys

TL DEM

argument in the leave to appeal and section 18 applications. The judge directed that your client file amended heads of argument and inform our counsel of the nature of the changes as soon as possible.

3. In respect of the "minor amendment" addressed at paragraphs 3 to 5 of your letter, we have no objection to the deletion of the baseless accusation of "judicial plagiarism". This was an unwarranted attack on the Court which is not cured by mere deletion of the offending words. We expect that your counsel will issue a full apology to the Court at the hearing.
4. In respect of the so-called "second adjustment", addressed at paragraphs 6 to 20, this is an impermissible attempt to introduce new evidence long after the trial has concluded. We do not intend to address the substance or merits of the allegations contained in your letter. It suffices to say:
 - a. The introduction of new evidence in a leave to appeal application is impermissible, hopelessly out of time, and entirely irrelevant;
 - b. Your client had ample opportunity to present her case during the trial;
 - c. This is yet another attempt at obstruction and delay by your client, which has previously resulted in your client being visited with punitive costs orders;

774 Waterval Road, Little Falls, Roodepoort

Telephone: 011 675 7346

Fax: 086 595 4952

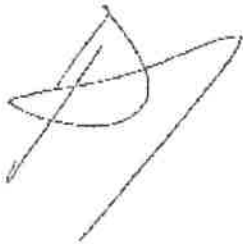
Email: info@pandorlaw.co.za

In association with Fox & Barratt Attorneys & Harrison's Attorneys

TL DCM

- d. Our clients do not consent to any of the "proposals" made by your client for the introduction of new evidence.
5. Should your client persist with an application to introduce new evidence, our clients will seek punitive costs against your client and an order holding her legal representatives jointly and severally liable for these costs, de bonis propriis.
6. Your letter is written "with prejudice", as is ours.
7. All our clients' rights remain reserved.
8. We trust you find the above in order.

Yours faithfully



PANDOR

774 Waterval Road, Little Falls, Roodepoort
Telephone: 011 675 7346
Fax: 086 595 4952
Email: info@pandorlaw.co.za

In association with Fox & Barratt Attorneys & Harrison's Attorneys

T.L. DCM