IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: 15996/2017

Date:

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

22/12/2020 .....
DATE SIGNATURE

In the matter between:

D C MYENI	Applicant
vs	
ORGANISATION UNDOING TAX ABUSE	First Respondent
SOUTH AFRICAN AIRWAYS PILOTS ASSOCIATION	Second Respondent
and	
ORGANISATION UNDOING TAX ABUSE	First Applicant
SOUTH AFRICAN AIRWAYS PILOTS ASSOCIATION	Second Applicant

vs

D C MYENI Respondent

JUDGMENT

TOLMAY J:

INTRODUCTION

[1] The applicant ("Ms Myeni") filed an application for leave to appeal the order handed down by this court on 27 May 2020. The respondents (OUTA and SAAPA, will for convenience sake, collectively be referred to as "OUTA") on the other hand brought an application in terms of section 18(2) and 18(3) of the Superior Courts Act 10 of 2013 (the "Superior Courts Act") for interim enforcement of the court order granted by this court. In the alternative OUTA launched a constitutional challenge to section 18 of the Superior Courts Act, to the extent that if this court should find itself precluded from being able to grant an interim enforcement order, in the light of the wording of section 18.

[2] These applications were heard on 19 November 2020. On 17 November 2020 an interlocutory application was launched on Ms Myeni's behalf to seek leave to introduce newly acquired evidence, which according to

her was extremely relevant to the issues to be adjudicated on by this court.

[3] I will first deal with the interlocutory application, then with the application for leave to appeal and lastly with the application in terms of section 18 of the Superior Courts Act.

INTERLOCUTORY APPLICATION

[4] Ms Myeni brought this application in terms of Rule 6(11) read with section 19(b) of the Superior Courts Act and/or section 34 and 173 of the Constitution of the Republic of South Africa, 1996.

[5] Rule 6(11) of the Uniform Rules of Court makes provision for the launching of interlocutory applications and other applications incidental to pending proceedings. The rule paves the way for interlocutory applications, like this one, and nothing further needs to be said about the application of this rule.

[6] Section 19(b) of the Superior Courts Act deals with the introduction of further evidence on appeal and reads in relevant part as follows:

"*Powers of court on hearings of appeals*

The Supreme Court of Appeal or a Division exercising appeal jurisdiction may, in addition to any power as may specifically be provided for in any other law –

(a) …

(b) Receive further evidence;

(c) …

(d) …"

[7] Section 173 of the Constitution states that the Constitutional Court, Supreme Court of Appeal and the High Courts have the inherent power to protect and regulate their own processes and to develop the common law, taking into account the interests of justice. Section 34 of the Constitution guarantees the right of access to courts.

[8] The evidence Ms Myeni seeks to introduce is the evidence given by Ms Kwinana on 7 November 2020, when she testified before the Zondo Commission. Ms Kwinana, a chartered accountant, served as a non-executive board member under Ms. Myeni's chairmanship. It was contended by Ms Myeni that the evidence given by Ms Kwinana is of direct relevance to the matter before this court. Ms Kwinana *inter alia* stated that:

a) she had a meeting with OUTA shortly after her resignation as a director at South African Airways ("SAA");

b) the meeting concerned the decision by OUTA not to join her in the action to declare the applicant a delinquent director;

c) but for the meeting Ms Kwinana would most likely have been joined as a defendant in the action against the applicant;

d) OUTA recorded the meeting electronically without her knowledge and/or permission;

e) she never made the claims attributed to her by OUTA and directed against Ms Myeni or her son; and

f) in Ms Kwinana's view the information was subsequently falsified or doctored in the "editing" process.

[9] It was submitted that the aforesaid evidence might have led to a different outcome of the trial. The jist of the argument was that Ms Kwinana's evidence might have had an impact on this Court's judgment and order. Allegations were made of improper and even unlawful conduct by OUTA in the presentation of the case before this Court.

[10] Ms Myeni contended that she only became aware of the relevant evidence on 7 November 2020, during the testimony of Ms Kwinana, at the Zondo Commission. She stated that she has good reasons to believe that the evidence led by Ms Kwinana was true, as transcripts of the meetings were handed up. She alleged that the evidence would have been material to the outcome of the trial.

[11] Ms Fick, the executive director of the Accountability Division of OUTA filed an answering affidavit on behalf of OUTA. In this affidavit she alleged that the application should be dismissed on three grounds:

a) no legal basis for the admission of new evidence had been identified to allow for the admission in a leave to appeal, as this court is *functus officio;*

b) the application is out of time and no proper grounds for condonation had been established; and

c) Ms Myeni's application does not satisfy the stringent test for admission of new evidence on appeal.

[12] Ms Fick denied that OUTA struck a deal with Ms Kwinana, relying on illegally obtained evidence, failing to disclose material information to the court and engaging in abuses of process. She dealt with the meetings OUTA had with Ms Kwinana. According to her Ms Kwinana approached OUTA and two meetings were held with her, one on 28 August 2016 and the other on 2 September 2016. She said OUTA found Ms Kwinana to be unreliable and untrustworthy and no deal was struck with her. OUTA filed a complaint against Ms Kwinana with the South African Institute of Chartered Accountants ("SAICA"), which referred the complaint to the Independent Regulatory Board of Auditors. She pointed out that the meetings with Ms Kwinana formed no part of the evidence led against Ms Myeni at the trial and the legal representatives had no contact with Ms Kwinana. A confirmatory affidavit by a Mr Heyneke confirmed the interactions of OUTA with Ms Kwinana, as set out in Ms Fick's affidavit.

[13] Ms Fick continued to set out why the evidence does not meet the legal requirements for the court to allow this evidence at this stage. Ms Myeni in her replying affidavit set out her reasoning pertaining to the answering affidavit and why the contents thereof should be rejected.

[14] The application is brought in terms of section 19(b) of the Superior Courts Act. This section refers to the powers of a court when hearing appeals. The section refers specifically to the Supreme Court of Appeal or a Division exercising appeal jurisdiction. A court hearing an application for leave to appeal does not exercise appeal jurisdiction. An application for leave to appeal forms part of the jurisdiction of the trial court. That jurisdiction is clearly limited to the trial court's power to determine, whether the requirements for the granting of leave to appeal under section 17(1) of the Superior Courts Act have been met and does not enter the realm of appeal jurisdiction.

[15] I have not been referred to any authority, nor could I find any, where a court sitting in an application for leave to appeal granted leave to introduce new evidence. This court heard the evidence led at the trial and made a determination based on that evidence. It is inconceivable that a court *a quo* could, at this stage, allow the introduction of new evidence, this would actually result in a rehearing of a matter, wherein a court had already made an order and where the court is *functus officio.* Section 19(b) of the Superior Courts Act gives a litigant the opportunity to request a court sitting on appeal to allow further evidence, if the necessary requirements are met, this power is not extended to the court considering the application for leave to appeal. A court considering an application for leave to appeal may conceivably take into consideration that new and relevant evidence became available that could persuade

it to grant leave to appeal, in order to enable the court seized with the appeal jurisdiction to consider whether it should allow such evidence.

[16] The case law referred to, relating to whether new evidence should be allowed, were but for one, instances where a court sitting on appeal had to determine whether evidence should be allowed and not to circumstances like the present, where this court is sitting as a court of first instance, considering an application for leave to appeal.[1] In **Road Accident Fund Appeal Tribunal v Malan and Others[2],** which was an application for leave to appeal the court did not consider the question whether it was appropriate for the court of first instance to consider such an application.[3] In my view section 19(b) of the Superior Courts Act clearly limit this jurisdiction to the court seized with the appeal.

[17] Even if I am wrong in my evaluation of the powers of this court, the test for the admission of new evidence is stringent. This test was set out in **Rail Commuters Action Group v Transnet Ltd t/a Metrorail[4]:**

"The SCA has similarly held that new evidence should be admitted on appeal under this section only in exceptional circumstances. This is because on appeal, a court is ordinarily determining the correctness or

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[1] 2005 (2) SA 359 (CC). See also Colman v Dunbar 1933 AD 142, Shein v Excess Insurance Company Ltd 1912 AD 418, Jones v MBNA International Bank [2000] EWCA 514 , Prince v President of Cape Law Society 2001 (2) SA 388 (CC) at para 21, Road Accident Fund Appeal Tribunal v Malan and Others [2014] ZAGPPHC 33.

[2] [2014] ZAGPPHC 33

[3] *Ibid.*

[4] 2005 (2) SA 359 (CC) at paras 41 – 43. See also Allpay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer, South African Social Security Agency and others 2014 (1) SA 604 CC at para 94, Shein v Excess Insurance Company Ltd 1912 AD p 428 - 429

otherwise of an order made by another court, and the record from the lower court should determine the answer to that question. It is accepted however that exceptional circumstances may warrant the variation of the rule. Important criteria relevant to determining whether evidence on appeal should be admitted were identified in Colman v Dunbar. Relevant criteria include the need for finality, the undesirability of permitting a litigant who has been remiss in bringing forth evidence to produce it late in the day, and the need to avoid prejudice. One of the most important criteria was the following:

'The evidence tendered must be weighty and material and presumably to be believed, and must be such that if adduced it would be practically conclusive, for if not, it would still leave the issue in doubt and the matter would still lack finality.'

In S v Louw, the Appellate Division held also that for new evidence to be admitted on appeal, some reasonably sufficient explanation must be offered to account for the failure to tender the evidence earlier in the proceedings.

In Van Eeden v Van Eeden, the Cape High Court held that it was well established that the court's powers as derived from section 22(a) of the Supreme Court Act should be exercised sparingly. The court held, further, that in that case the additional evidence related to facts and circumstances which had arisen after the judgment of the court a quo. This raised the question whether it was competent for the court, in the exercise of its power under section 22(a), to receive such evidence or to authorise its reception. Comrie J held that the section did not include any express limitation which would exclude the reception of the evidence then sought to be tendered and that the court

exercising appellate jurisdiction had a discretion whether or not to allow the evidence to be admitted, which discretion should be exercised sparingly and only in special circumstances. From time to time, he held, cases did arise which cried out for the reception of post-judgment facts.

In my view, this approach is correct. The Court should exercise the powers conferred by section 22 "sparingly" and further evidence on appeal (which does not fall within the terms of rule 31) should only be admitted in exceptional circumstances. Such evidence must be weighty, material and to be believed. In addition, whether there is a reasonable explanation for its late filing is an important factor. The existence of a substantial dispute of fact in relation to it will militate against its being admitted."

[18] I accept that the relevant evidence only became available on 7 November 2020. Ms Myeni could however have called Ms Kwinana as a witness during the trial as she made mention of her role during her evidence and no explanation was given why she failed to call her as a witness. Furthermore, in this instance there exists no special circumstances why the evidence should be allowed. The evidence of Ms Kwinana does not have any bearing on the question of whether Ms Myeni should have been declared a delinquent director or not. The evidence of Ms Kwinana would not likely have changed the outcome of the matter. The evidence is not weighty, material and even if believed, would not have had any impact on the outcome of the trial.

[19] Mr Mpofu (SC) also raised section 173 of the Constitution and sought to invoke the court's power to protect and regulate its own process and to develop the common law, taking into account the interests of justice. If I understand his argument correctly, the court should, in the exercise of these powers develop the common law to allow the evidence at this stage of the proceedings. I see no need for such a development of the common law, to the contrary, the common law, applicable legislation and constitutional principles make adequate provision for the protection of a litigant's rights in circumstances like these and developing the common law is not appropriate under these circumstances. It will not be in the interests of justice to develop the common law as proposed by Mr Mpofu (SC)

[20] It is trite that litigation should be resolved and that parties are entitled to finality.[5] It is inconceivable that the court is called upon to develop the common law in such a manner that could ultimately frustrate the principle that litigation should be resolved and finality reached. It will also open the flood gates for litigants who are not satisfied with the outcome of trials, to attempt to reopen their cases at the stage of application for leave to appeal. A trial is determined on the legal and factual issues raised at the trial.[6] This court determined the issues before her solely on the evidence that the parties put before her.

[5] Jones v MBNA International Bank [2000] EWCA 514.
[6] Ibid at para 52, Colman v Dunbar 1933 AD 142.

[21] Regarding the application of section 34 of the Constitution, it is suffice to say that Ms Myeni was not denied access to court, nor will she be, to the contrary, she still has all her remedies regarding the appeal process available to her.

[22] This application should for all the reasons set out above be dismissed with costs.

[23] OUTA seeks not only a punitive costs order but a *de bonis properiis* order. Despite the fact that the application was certainly ill advised, I am not of the view that a punitive or *de bonis properiis* costs order should, in the exercise of my discretion be granted. In any event due to the fact that this court heard all the applications, simultaneously and gave judgment on all the applications, the only prejudice suffered by Outa was the extra preparation of papers and heads of argument that had to be filed on short notice. OUTA did not suffer such prejudice as to justify a punitive costs order, despite the fact that they have been inconvenienced.

THE APPLICATION FOR LEAVE TO APPEAL

[24] Section 17 of the Superior Courts Act provides in relevant part as follows:

"(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-

(a)

(i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration."

[25] It is by now trite that the bar has been raised for granting leave to appeal due to the insertion of the word "*would*" and not merely "*may*" have reasonable prospects of success.[7]

[26] The test for "*some other compelling reason*" under section 17(1)(a)(ii) is also not easily overcome. This generally requires some legal controversy of wider significance that warrants the effort and attention of a court of appeal. In **Fair Trade Tobacco Association v President of the Republic of South Africa**,[8] the following was said:

"As is clear from the aforegoing exposition of FITA's grounds, and bearing in mind what the questions of law before this Court were, our view is that on both legs of the section 17 inquiry, FITA has come short. Not only has FITA failed to show that the appeal bears reasonable prospects of success, FITA has in turn failed to show that some compelling reason exists why the appeal should be heard. Not only are the issues raised by FITA settled law, the arguments proffered by FITA regarding the national importance of the matter are, in our view, not sufficient to arrive at a finding that compelling reasons exist to grant leave. Moreover, reliance on the judgment in Beadica 231 CC v Sale's Hire CC is, in this instance, misplaced given that that matter concerned an application for special leave to appeal to the SCA."

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[7] Mothuloe Incorporated Attorneys v The Law Society of the Northern Provinces & another [2017] ZASCA 17 at para 18, Notshokovu v S [2016] ZASCA 112 at para 2: "[a]n appellant ... faces a higher and stringent threshold, in terms of the Act compared to the provisions of the repealed Supreme Court Act 59 of 1959."

[8] [2020] ZAGPPHC 311 at para 22.

27] As far as this Court's judgment is concerned it speaks for itself and it will not be appropriate to repeat the contents thereof, therefore only the grounds on which the application for leave to appeal are based on, will briefly be dealt with and the judgment handed down should be read herewith.

[28] Ms Myeni takes issues with the decision that OUTA had standing in the public interest under section 157(1) (a) of the Companies Act 71 of 2008 (the "Companies Act"). This court gave judgment on 12 December 2020, dismissing Ms Myeni's special plea.[9] Ms Myeni brought an application for leave to appeal, that was dismissed.[10] As a result this issue cannot be revisited at this point.

[29] Ms Myeni raised the issue of non-joinder of all the other directors. This Court gave judgment on this issue on 2 December 2019 and no application for leave to appeal was launched on this point.[11] As a result this issue cannot be raised at this point.

[30] The point was raised that evidence was introduced beyond the scope of the pleadings. The applicant did not specify the evidence that was erroneously introduced, nor how this impacted on the hearing and the conclusion that the Court arrived at. Due to the fact that it is so widely stated this Court cannot properly consider the validity of the argument

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[9] Organisation Undoing Tax Abuse NPC and Another v Myeni and Another [2019] ZAGPPHC 957.
[10] OUTA judgment delivered 28 January 2020
[11] *Supra* at fn 11.

and the notice in this regard is rendered defective. As a result, despite the importance of pleadings and the parties' obligation to remain within the confounds of the pleadings, this argument does not have any merit.[12]

[31] It was also contended that the Court erred in finding that no proper version was put on behalf of Ms Myeni. A perusal of the judgment illustrates Ms Myeni's counsel's failure to put a proper version to the witnesses, this is supported by the transcript. The Court warned against this failure on numerous occasions. It is alleged that the Court erred in finding that the question whether Ms Myeni got her instructions from former President Zuma was immaterial to the question of delinquency. It was submitted that OUTA's case depended on the question of whether OUTA could prove that former President Zuma instructed Ms Myeni not to go ahead with the Emirates Memorandum of Understanding ("MOU"). This argument has no merit as an analysis of the pleadings clearly illustrates that the crux of the case was based on the damage done by Ms Myeni's obstruction of the conclusion of the Emirates deal, irrespective of whether that instruction emanated from former President Zuma or not.

[32] It must be pointed out that OUTA's witnesses in any event testified that this was what Ms Myeni conveyed to them and that this court only has her word that he did not instruct her to do so. The crux of the matter is

[12] The Prudential Insurance Company Limited v Commissioner for Her Majesty's Revenue and Customs [2016] EWC 376.

that a responsible director would not have given such an instruction, whoever may or may not have instructed her. The fiduciary duties of directors were extensively dealt with in evidence and the judgment. Even if the court erred in finding that the source of the instruction is immaterial, the evidence confirmed the pleadings and the Court found OUTA's witnesses to be credible.

[33] The complaint was also raised that the court disregarded the Board minutes of 10 July 2015 which allegedly provided Board authorisation for the conclusion of the Emirates deal. This is incorrect. It was only during the course of Ms Myeni's examination-in-chief, that she for the first time, alleged that the events of 16 June 2015 were not significant, as there was still an opportunity to conclude the Emirates MOU after 16 June 2015. She testified that the Board approved the MOU on 10 July 2015, and she testified that she could not understand why the executive did not conclude the MOU after that date. This evidence contradicted her pleadings, the version that was put on her behalf and the evidence of the other witnesses. While the events of 16 June 2015 did not bring a complete end to negotiations with Emirates, the damage to SAA was clearly incalculable. As stated in the judgment, Ms Myeni did not provide this court with a consistent credible version as comprehensively dealt with in the judgment.[13]

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[13] Organisation Undoing Tax Abuse and Another v Myeni and Others (15996/2017) [2020] ZAGPPHC 169 at paras 115, 116, 117, 118, 121, 232 and 234.

[34] The only witness who was given the opportunity to respond to Ms Myeni's version on the 10 July 2015 meeting was Mr Meyer. He denied Ms Myeni's claim that these minutes reflected her approval. He confirmed that at no point did Ms Myeni revoke her instructions not to sign the MOU, nor did she ever express her support for the transaction.[14] A perusal of the minutes makes it clear that no resolution was taken and that the next process was as outlined in the action list, which required of the Operational Review Committee to meet with Emirates, the Department of Transport and the Board. Ms Myeni also required a meeting between herself and the Chairperson of Emirates. There is absolutely no indication that a Board Resolution was obtained on 10 July 2015 to conclude the MOU.

[35] As far as the Airbus transaction is concerned, Ms Myeni claimed that there was no evidence that she attempted to unilaterally renegotiate the Swap Transaction and put the blame on Ms Kwinana and Dr Tambi. Ms Myeni's letter of 29 September 2015 to the President of Airbus contradicts this allegation. Ms Myeni's evidence confirmed this.[15]

[36] The findings on the involvement of Quartile Capital are also questioned. However, a copy of a letter confirming Ms Myeni signed the letter was produced during the course of the trial. She also questioned the correctness of the finding that Mr Matloba of Quartile Capital joined her

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[14] *Ibid.*
[15] *Ibid* at para 155.

at a meeting on 10 October 2015. Mr Meyer confirmed that he saw him there and Ms Myeni did not satisfactorily challenge that evidence.[16] The evidence of Mr Meyer was accepted as credible by this court.

[37] It was alleged that the Court was mistaken in concluding that Ms Myeni played an important role in authorising and sending the application for the amendment of the section 54 approval. There is no merit whatsoever in this complaint. She signed the covering letter to the application, in which she endorsed the contents. Only Ms Myeni and Mr Zwane's signatures appear on the section 54 application. The application was accompanied by a Board submission, but this contains only the signatures of Ms Myeni and Ms Kwinana. As set out in the judgment, at that point Mr Zwane had only been in the position for three days. Mr Meyer resigned on 12 November 2015 and testified that he had not been consulted on the section 54 application.[17]

[38] Ms Myeni questioned the imposition of a lifetime declaration of delinquency. The court exercised this discretion in the light of all the evidence which speaks for itself. It cannot be said that in the light of the evidence led, that pointed out the damage done to SAA, that this court did not exercise its discretion judicially. The evidence stands largely

[16] *Ibid* at para 176.
[17] *Ibid* paras 201 – 212.

uncontested. As a result, an appeal court will not lightly substitute its own decision with that of the lower court.[18]

[39] It was alleged that the court erred in referring the case to the NPA to investigate. The breaches of sections 50, 51 and 55 of the Public Finance Management Act, 1 of 1999 (PFMA) are criminal offences under section 86(2), which warrants investigation. In any event the final decision whether to investigate or not, rests with the NPA, after considering the findings of the court.

[40] Ms Myeni raised a ground of bias based on the allegation that the judgment is a "carbon copy" of the respondent's heads of argument. She did however not bring any application for recusal. Mr Mpofu (SC) was at pains to argue that her case is not one of actual bias, but perceived bias. A perusal of the transcript and the judgment will put any fear of bias to bed. Ms Myeni was afforded numerous opportunities to file applications and the court was at pains to point out that no proper version was put to the witnesses and to warn counsel that her continued absence would prejudice her. All of this in order to ensure that she would get a fair trial.

[41] For Ms Myeni to succeed with this ground of appeal, she would have to satisfy the strict "*double reasonableness*" test for bias, on a totality of all

[18] Mwelase v Director General for the Department of Rural Development and Land Reform [2019] ZACC 30 at para 68, Trencon Construction (Pty) Ltd v IDC 2015(5) SA 245 (CC) paras 88 – 90.

the facts. In **President of the RSA v South African Rugby Football Union**[19] the Constitutional Court set out this test as follows:

"It follows from the foregoing that the correct approach to this application for the recusal of members of this court is objective and the onus of establishing it rests upon the Applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial".

[42] Not only does Ms Myeni bear the onus of proving a reasonable apprehension of bias, but she is also faced with the presumption of judicial impartiality. This put a "*formidable*" burden on a party alleging bias, who is required to present "*cogent evidence that demonstrates something the judicial officer has done which gives rise to a reasonable*

[19] President of the RSA v South African Rugby Football Union 1999 (4) SA 147 (CC) at para 48.

apprehension of bias. The effect of the presumption of impartiality is that a judicial officer will not lightly be presumed to be biased."[20] In this instance Mr Mpofu (SC) relied on Ms Myeni's subjective perception of bias, which does not meet to requirements of the test.

[43] It may be appropriate to deal with the reliance courts place on heads of argument in the light of the criticism raised against the court. Given the volume of the documentary evidence and the transcripts, running to many thousands of pages. Ms Myeni failed to identify any respect in which this summary is materially mistaken, or does not reflect the record. Unfortunately, the heads of argument filed on her behalf, was not of much assistance.

[44] A court when deciding a matter should take the heads of argument into consideration. The whole purpose of heads of argument is to assist the court to finalise a judgment as expeditiously and effectively as possible. The law is the law and if the court, in order to deliver a judgment expeditiously relies, on the legal framework, set out correctly, I may add, in one of the parties' heads there cannot be anything untoward about that, nor can that be perceived as bias. If, furthermore a helpful and complete summary of evidence is provided to the court, this also assists the court in finalising the judgment.

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[20] Bernert v ABSA Bank Ltd 2011 (3) SA 92 (CC) at para 33

[45] This trial lasted five weeks, at the end of it the transcript was not available yet. Work pressure does not allow for a Judge to wait for the transcript, before starting to write the judgment. In such circumstances a Judge must rely on her handwritten notes and the heads of argument. It is only when a court, without considering the law herself and relies on an incorrect summary of the legal framework or facts, that it may justifiably be criticised. In this instance the transcript speaks for itself and will reveal the evidence as it was presented in court and will confirm the correctness of the summary.

[46] Judges should not be too easily affronted, and should have the ability to consider criticism objectively and to do the necessary introspection. If the criticism is without any merit one should rise above such criticism, if there is merit one should rectify one's error. After all, "to err is human" and hopefully once one is appointed in a position like this, one would be able to set one's ego aside and take legitimate criticism on the chin.

[47] The following helpful Canadian authority was provided by OUTA's representatives, which deals with the plight of judges. In **Cojocaru v British Columbia Women's Hospital & Health Care Centre**[21] the following was said:

"Judges are busy. A heavy flow of work passes through the courts. The public interest demands that the disputes and legal issues brought before the courts be resolved in a timely and effective manner, all the

[21] 2013 SCC 30, [2013] S.C.R 357 para 37.

while maintaining the integrity of the judicial process. In an ideal world, one might dream of judges recasting each proposition, principle and fact scenario before them in their own finely crafted prose. In reality, courts have recognized that copying is acceptable, and does not, without more, require the judge's decision to be set aside." [court's emphasis]

[48] It may be appropriate in the light of the criticism that was raised by Ms Myeni, that the reality of the circumstances in this Division be dealt with in order to illuminate the circumstances that Judges are working under. In an ideal world a Judge would get a few weeks to prepare for a trial like this, which included various interlocutory applications and would get at least a few weeks after the trial to write a judgment. This is however not the reality in this Division. One very seldom gets any additional time to prepare or to write judgments. This is done after hours, during weekends and recess. A Judge also proceeds directly from one set of duties to the next. While one is seized with a trial, one is not excused from other duties and also gets petitions, reviews, applications for leave to appeal, surrogacy applications and case management matters to attend to expeditiously, whilst still having to prepare for upcoming duties.

[49] The luxury to focus on one matter at a time is not afforded to the Judges in this Division. A Judge will also very seldom get any, or very limited time to write a judgment, one may request time, but due to the workload in this Division, it will only mean that another already overburdened Judge will have to stand in. If given any time a few days will be the best one can hope for.

[50] In this Division there are six law researchers to assist approximately 36 permanent judges and numerous Acting Judges, this must be compared with the Constitutional Court, where the Chief Justice and his deputy have 4 law researchers, Justices have 3 law researchers and Acting Justices have 2 law researchers. The Constitutional Court is the apex court, and due deference to the importance of their work and judgments are appropriate, but most litigants do not have the means to take their matters to the Constitutional Court, nor do these matters require the attention of the apex court, but their disputes are not less important in a Constitutional democracy, where equality is one of the core principles. Judges in the High Court should be properly resourced to enable them to serve the people. Can we truly speak about living up to the principles of equality, if a judge hearing the matter of Mr Khumalo, who is fighting to keep a roof over his head, or Ms Visser who needs to get out of an abusive relationship, is not properly resourced, or work under such time pressure that they cannot consider these matters properly? Without losing sight of the public interest and need for finality in this case, should one not take time to again consider the objectives of our Constitution. Dare we continue with a system where Judges are unable to give equal time and consideration to all matters, irrespective of the prominence or public interest it may invoke. The reality is also that Judges are human and should not be so drained that they are unable to give the required attention to each case. The unbearable workload and numerous challenges that judges in this Division face is mostly unknown to the public. The High Court suffers from a lack of basic resources, like proper

access to legal libraries at all times, poor internet connection, telephone systems that often do not function. Finally, the norms and standards require of a judge to deliver a judgment within three months of hearing a matter. Not even the Constitutional Court which is much better resourced, always succeeds in complying with this standard.

[51] Ironically apart from the attack on the court no single example was given of any error either in law or of any factual mistake based on the transcript. As a result this matter is clearly distinguishable from **Stuttafords Stores (Pty) Ltd & others v Salt of the Earth Creations (Pty) Ltd,**[22] where in the judgment, the Judge reproduced the one party's heads in its entirety.

[52] This court could only decide this matter on the evidence before it. Ms Myeni made a conscious decision to present her case the way she did, and decided not to be present for most of the trial. It is unfathomable how bias, real or perceived can be raised as a ground for appeal, if one considers the evidence in this matter.

[53] There is no reasonable possibility that another court would come to another conclusion on the evidence led at this trial and that a court of appeal would come to a different conclusion, nor is there any other compelling reason why leave to appeal should be granted. As a result, the application for leave to appeal should be dismissed with costs.

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[22] 2011(1) SA 267 (SCA).

SECTION 18 APPLICATION

[54] Section 18 of the Superior Courts Act reads as follows:

"*18 Suspension of decision pending appeal*

(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.

(2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of an final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.

(3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.

(4) If a court orders otherwise, as contemplated in subsection (1) –

(i) the court must immediately record its reasons for doing so;

(ii) the aggrieved party has an automatic right of appeal to the next highest court;

(iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and

(iv) such order will be automatically suspended, pending the outcome of such appeal.

(5) For the purposes of subsections (1) and (2), a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules."

[55] In order for the court to grant *interim* enforcements of the order exceptional circumstances need to be present and a court may only "*order otherwise*" if the application proves on a balance of probabilities that irreparable harm will be suffered and that the other party will not suffer irreparable harm.[23] The onus is thus clearly placed on the applicant. In the matter of **University of the Free State v Afriforum**[24] it was held that the prospects of success on appeal are an important consideration when the determination is made of whether the order should not be suspended.

[56] In **Ntlemeza v Helen Suzman Foundation and Another** it was stated that:[25]

" The primary purpose of section 18(1) is to re-iterate the common law position in relation to the ordinary effect of appeal processes – the suspension of the order being appealed – not to nullify it. It was designed to protect the rights of litigants who find themselves in the position of

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[23] Ntlemeza v Helen Suzman Foundation and Another 2017 (5) SA 402 (SCA) at para 35.
[24] 2018(3) SA (SCA) at paras 14 – 18.
[25] *Supra* fn 25 at para 28 – 30.

General Ntlemeza, by ensuring, that in the ordinary course, the orders granted against them are suspended whilst they are in the process of attempting, by way of the appeal process, to have them overturned. The suspension contemplated in section 18(1) would thus continue to operate in the event of a further application for leave to appeal to this court and in the event of that being successful, in relation to the outcome of a decision by this court in respect of the principal order. section 18(1) also sets the basis for when the power to depart from the default position comes into play, namely, exceptional circumstances which must be read in conjunction with the further requirements set by section 18(3). As already stated and as will become clear later, the Legislature has set the bar fairly high.

The preliminary point on behalf of General Ntlemeza referred to in para 17 above does not accord with the plain meaning of section 18(1). As pointed out on behalf of HSF and FUL, and following on what is set out in the preceding paragraph, section 18(1) does not say that the court's power to reverse the automatic suspension of a decision is dependent on that decision being subject to an application for leave to appeal or an appeal. It says that, unless the court orders otherwise, such a decision is automatically suspended.

Moreover, contextually, the power granted to courts by section 18 must be seen against the general inherent power of courts to regulate their own process. This inherent jurisdiction is now enshrined in s 173 of the Constitution which provides:

'The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.'"

[57] It was also stated that "*it would be salutary practice to provide reasons pari passu with the order being made.*"[26]

[58] In **Ntlemeza**[27] the court referred with approval to **Incubeta Holdings (Pty) Ltd and Another v Ellis and Another**[28] where the test that needs to be applied was referred to, with reference to **MV Ais Mamas; Seatrans Maritime v Owners Ais Mamas & Another** it was stated that:[29]

"As to what would constitute exceptional circumstances, the court, in Incubeta, looked for guidance to an earlier decision (on Admiralty law), namely, MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas, & another 2002 (6) SA 150 (C), where it was recognised that it was not possible to attempt to lay down precise rules as to what circumstances are to be regarded as exceptional and that each case has to be decided on its own facts. However, at 156H-157C, the court said the following:

'What does emerge from an examination of the authorities, however, seems to me to be the following:

1. What is ordinarily contemplated by the words "exceptional circumstances" is something out of the ordinary and of an unusual nature; something which is excepted in the sense that the general rule does not apply to it; something uncommon, rare or different; "besonder", "seldsaam", "uitsonderlik", or "in hoë mate ongewoon".

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[26] *Supra* fn 25, at para 33.
[27] *Supra* fn 25, at para 37.
[28] 2014(3) SA 189 para 16.
[29] 2002(6) SA 150 (C).

2. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.

3. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the Court must decide accordingly.

4. Depending on the context in which it is used, the word "exceptional" has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different.

5. Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional.'"[30]

[59] It was further stated:

"In UFS, this court agreed that whether exceptional circumstances were present depended on the facts of each case. The circumstances must be such as to justify the deviation from the norm. The high court, in deciding the application in terms of s 18(1), after referring to Incubeta, went on to consider the facts. It took into account that the DPCI was an essential component of South Africa's democracy and that given its functions, it was vital that the National Head had to be someone of integrity. In this regard it considered the judicial pronouncements of Matojane J to be crucial."[31]

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[30] *Supra* fn 25, at para 37.
[31] *Supra* fn 25, at para 39.

[60] OUTA argued that exceptional circumstances exist because of the public interest and based on the evidence led and the findings reached in the judgment. The Court made findings regarding the harm done by Ms Myeni to SAA and the broader economy. The evidence led pointed towards Ms Myeni's disregard to follow the basic principles of corporate governance and her total disregard for the impact her actions had on SAA and the broader economy. In my view her mismanagement of SAA as a State Owned Enterprise (SOE) as illustrated by the evidence and referred to in the judgment in itself fulfil the requirement of exceptional circumstances.

[61] The way in which Ms Myeni chose to present her case is another contributing factor, that supports a finding of exceptional circumstances being present. By not putting a consistent and complete version to the witnesses and then deviating from the versions put in her evidence and affidavits filed by her, also contributed to this Court's conclusion that exceptional circumstances exist as envisaged in section 18(3) of the Superior Courts Act.

[62] In this matter Ms Myeni, during the trial, failed to meaningfully dispute the evidence against her. The Court also found her to be an unreliable witness. These also constitute exceptional circumstances.

[63] Ms Myeni argued that in the light of the fact that this Court made no finding that she misappropriated any funds, her continuing to act as a director of companies poses no threat to the public. One needs only to consider the harm done to SAA to realise the fallacy of this argument.

This points towards a rather simplistic approach and disregards the importance of directors, and their obligation to fulfil their fiduciary duties, especially when serving at a SOE. It is not only the misappropriation of funds, but failure to comply with fiduciary duties that pose a threat to companies and in the case of a SOE to the public at large. Her failure to comply with those duties is recorded in the judgment and is supported by a perusal of the evidence as reflected in the transcript. This Court found, based on the evidence, that Ms Myeni was reckless in the execution of her duties and pointed out various instances of dishonesty in affidavits filed by her.[32] Dishonesty and recklessness in my view must also constitute exceptional circumstances, to enforce the court order in the meantime.

[64] I agree with OUTA that public interest demands that there be swift and effective remedies when maladministration and mismanagement is brought to light. In **Ntlemeza**[33] the importance of public interest was also emphasized and led to the court order being enforced.

[65] Ms Myeni at this stage remains a director of Centlec, a SOE, as such Centlec is subject to the same constitutional and statutory obligations as SAA. Ms Myeni has illustrated her inability to comply with these obligations and as a result irreparable harm to yet another SOE could result if she should be allowed to continue in her position as a director until all appeal procedures have been exhausted.

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[32] *Supra* at fn 15.
[33] Supra at fn 25, at para 45.

[66] Ms Myeni as a point *in limine* raised the point that Centlec should have been joined as a party to these proceedings. The principles pertaining to joinder were dealt with in this Court's judgment on the joinder issue[34] and will not be repeated herein. The interim operation of the delinquency order will only indirectly effect Centlec and the other companies she is a director of and as such does not meet the requirements of joinder. Interestingly enough she does not ask for the joinder of all the other companies she still is a director of.

[67] Ms Myeni stated that there have not been any complaints about her actions at Centlec, this is however not the point, the fact is that she proved herself to be unfit to act as a director. When one considers section 162(5) of the Companies Act it is clear that a person having been declared delinquent may not serve as a director of a company, that includes any company, the fact that Centlec has thus far not suffered any harm is of no consequence.

[68] Her submission that Centlec has been performing well and has received unqualified audit reports for the last four years is thus irrelevant. OUTA in any event disputes her submissions and points out that the Auditor-General has found wasteful and irregular expenditure in the amount of R231,000,000.00. In my view however, the success or not of Centlec should not be the yardstick that is applied, but the suitability of Ms Myeni to act as a director, in the light of what was revealed during the evidence in this case as discussed in the judgment,[35] she was disqualified to act

[34] *Supra* at fn11.
[35] *Supra* at fn 15.

as a director, especially of a SOE. She also remains a director of four other companies, which broadens the scope of potential harm.

[69] As outlined in both the founding and replying papers, Ms Myeni previously did not reveal her role at Centlec and the remuneration she received as a director. She claimed under oath, that she was "*unemployed*", "*do[es] not earn any income*" and that she "*do[es] not hold any position of directorship that is of interest to [the applicants]*"

[70] I am of the view that the public will suffer irreparable harm if the court order is not implemented pending the completion of all the appeal processes. Mr Mpofu (SC) was clear in his argument that appeal procedures will continue and therefore there is no question that this will not be the end of litigation.

[71] The next test is whether OUTA proved that Ms Myeni will not suffer irreparable harm. She relies on the potential loss of income from Centlec as a ground for such potential harm. Ironically in the papers before this court she stated that this income was merely a "*stipend very minimal*". In any event temporary loss of income from a public institution does not constitute irreparable harm as envisaged in the Act.[36] It must be noted that the loss of income from Centlec is the only income she states that

[36] Ngaka Modiri Molema District Municipality v Chairperson North West Province Executive Committee & Others [2014] ZACC 31, 2015 BCLR 72 (CC) at paras 8 – 10, Road Traffic Management Corporation v Tasima (Pty) Limited; Tasima (Pty) Limited v Road Traffic Management Corporation [2020] ZACC 21at paras 130 -131.

she will be unable to earn. She expressly stated in her affidavit that she has no intention of taking on any other directorships pending the finalisation of her appeal. It is preposterous that she attempts to rely on the income she initially did not reveal to the court to persuade the court that she will suffer irreparable harm if an enforcement order is granted.

[72] As a result OUTA did prove that she will suffer no irreparable harm if the court's order is enforced pending the appeal process.

[73] A consideration of the judgment and the evidence enforces the conclusion that Ms Myeni's prospects of success on appeal is weak[37] and this contributes to the conclusion that the order should not be suspended.

[74] In conclusion OUTA proved exceptional circumstances of irreparable harm to the public at large and that Ms Myeni will not suffer irreparable harm. As a result immediate enforcement of the court order, pending the finalisation of appeal processes should follow.

[75] OUTA argued that section 18(2) and 18(3) is unconstitutional as it removes judicial discretion, and as a result breaches the principle of separation of powers. This was raised only in the alternative, as a result anything this court states about this issue is obiter.

[76] As far as it may be relevant, despite the strict criteria that section 18 introduced for an order not to be suspended, the SCA in **Ntlemeza,**[38] illustrated convincingly that the courts will still be able to interpret the section in such a way that constitutional muster will be met and as such judicial discretion, will remain. I am accordingly of the view that section 18(2) and 18(3) will meet constitutional muster.

[77] I must point out however that the wording of section 18(4) is, in my view, intemperate and shows a remarkable lack of insight in the judicial process by the legislature. When preparing and formulating legislation, restraint must be used in formulating legislation in such a manner that it ensures proper application and interpretation, with due deference to the separation of powers. The use of words like "*immediately records its reasons*" and "*the court hearing such an appeal, must deal with it as a matter of extreme urgency*" are undesirable and may result in interference with judicial discretion. In practice the urgency or not, falls within the domain of the presiding judge and will depend on the facts of the case. This may indeed result in a breach of separation of powers and a limitation of judicial discretion.

COSTS

[78] OUTA seeks a punitive costs order in relation to all the applications. I am of the view that such an order is not warranted as Ms Myeni merely

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[38] *Supra* at fn 25.

exercised her right to apply for leave to appeal and should not be burdened with a punitive costs order, despite the granting of such an order in the judgment. In so far as she was found to be dishonest and reckless and did untold harm to SAA, the punitive costs order granted, already indicated the court's displeasure with her actions and she should not be punished twice for the same actions.

[79] I make the following order:

1. **The application in terms of rule 6(11) to allow further evidence is dismissed with costs, on a party and party scale;**

2. **The application for leave to appeal is dismissed with costs, on a party and party scale;**

3. **The application in terms of section 18 for *interim* enforcement of the court's order as set out in the judgment of 27 May 2020 is granted; and the order granted will be immediately enforceable pending the finalisation of all appeal processes.**

4. **All costs to include the costs of three counsel, wherever and to the extent that they may have been employed.**

R G TOLMAY

JUDGE OF THE HIGH COURT, PRETORIA

DATE OF HEARING: **19 & 20 NOVEMBER 2020**

DATE OF JUDGMENT: **22 DECEMBER 2020**

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