

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

SCA Case No: **237/21**

GNP Case No: 15996/2017

In the applications for condonation and leave to appeal between:

DUDUZILE CYNTHIA MYENI Applicant

and

ORGANISATION UNDOING TAX ABUSE NPC First Respondent

SOUTH AFRICAN AIRWAYS PILOTS' ASSOCIATION Second Respondent

SOUTH AFRICAN AIRWAYS SOC LIMITED Third Respondent

AIRCHEFS SOC LIMITED Fourth Respondent

MINISTER OF FINANCE Fifth Respondent

OUTA AND SAAPA'S ANSWERING AFFIDAVIT

I, the undersigned,

STEFANIE FICK

state under oath that:

- 1 I am the Executive Director of the Accountability Division of the first respondent, Organisation Undoing Tax Abuse NPC (OUTA). I am authorised to depose to this affidavit on behalf of the first and second respondents, OUTA and SAAPA.
- 2 The facts in this affidavit are true, to the best of my knowledge and belief, and are within my personal knowledge, unless the context indicates otherwise.



- 6.3 Alternatively, to remit the matter back to the Full Court with a direction to entertain the section 18(4) appeal; and / or
- 6.4 To consolidate this application with Ms Myeni's pending condonation and leave to appeal applications in this Court.
- 7 On 9 April 2021, this Court dismissed her petition for leave to appeal. Accordingly, Ms Myeni's prayer for the consolidation of her applications has been superseded by events and has since been rendered moot. I attach a copy of the order as "**AA 1**".
- 8 Ms Myeni's present application stands to be dismissed on six primary grounds:
- 8.1 First, the Full Court's order is interlocutory in nature and is not appealable.
- 8.2 Second, Ms Myeni has exhausted her rights of appeal under section 18(4) of the Superior Courts Act and has no right to pursue a further appeal in this Court.
- 8.3 Third, Ms Myeni remains in wilful breach of the delinquency order, which provides ample grounds to refuse special leave and all further relief sought, in the interests of justice.
- 8.4 Fourth, Ms Myeni has failed to demonstrate special circumstances warranting special leave to appeal.
- 8.5 Fifth, there are no prospects of overturning the Full Court's order striking her appeal from the roll.



- 13 Ms Myeni applied for leave to appeal in the High Court. In response, OUTA and SAAPA filed a counter-application in terms of section 18(3) of the Superior Courts Act for the enforcement of the delinquency order pending the outcome of the application for leave to appeal and all further appeal processes.
- 14 On 22 December 2020, Tolmay J dismissed Ms Myeni's applications for leave to appeal and simultaneously upheld the counter-application for enforcement of the delinquency order. Ms Myeni neglected to include a copy of this judgment and order in her application. A copy of the judgment is attached as "AA 3".
- 15 On 22 January 2021, Ms Myeni then launched an urgent appeal to the Full Court against this interim enforcement order, in terms of section 18(4) of the Superior Courts Act.
- 16 On 29 January 2021, Ms Myeni's legal representative, Mr Mabuza, wrote to the Judge President of the Gauteng Division seeking an urgent set-down of the section 18(4) appeal.
- 17 In that letter, Mr Mabuza stated that a petition had been lodged in the SCA.
- 18 This was false.
- 19 Ms Myeni had failed to lodge an application by the deadline of 22 January 2021. Ms Myeni only filed her condonation application and the application for leave to appeal on 3 February 2021, well out of time.



- 30 Ms Myeni therefore cannot be allowed to invent an additional right of appeal, over and above the urgent appeal to the Full Court.

THIRD GROUND: ONGOING BREACH OF THE DELINQUENCY ORDER

10. The Full Court correctly held that *“the failure of the applicant to file the application for leave to appeal to the SCA within the prescribed one-month period has the effect that, by operation of law, the order by Tolmay J dated 27 May 2020 is now in full force and effect”*.²
11. On 15 February 2021, the day of the Full Court’s judgment, OUTA and SAAPA’s attorneys wrote to Ms Myeni’s attorneys seeking an undertaking that Ms Myeni would comply with the delinquency order, immediately resign from all of her remaining directorships, and not accept any further directorships. The undertaking was to be provided by close of business on 18 February 2021. A copy of this letter is attached as **“AA 4”**.
12. On 16 February 2021, Ms Myeni’s attorneys responded with various threats of a further appeal of the section 18(3) order and baseless demands. No undertaking was forthcoming. A copy of this letter is attached as **“AA 5”**.
13. On the following day, 17 February 2021, OUTA and SAAPA’s attorneys wrote back advising that, in terms of section 18(4) of the Act, only one appeal to *“the next highest court”* was permissible. The request for an undertaking from Ms

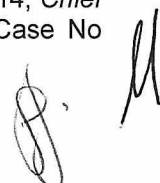
² Section 18(4) judgment, para 22.



Myeni to comply with the delinquency order was repeated. A copy of this letter is attached as “AA 6”.

14. Ms Myeni failed to provide an undertaking in any form on 18 February 2021. A CIPC search has also confirmed that, to date, Ms Myeni has not resigned from her active directorships. A copy of the search report is attached as “AA 7”.
15. Accordingly, Ms Myeni is in wilful breach of the delinquency order. This is against the backdrop of her obstructive conduct in the build-up to the trial, during the trial, and following the judgment, as reflected in the various judgments of Tolmay J.
16. Ms Myeni’s current application for special leave to appeal is silent on her ongoing breach of the delinquency order. She instead maintains that this order is somehow suspended, contrary to the facts and the established law.
17. This Court and the High Court have repeatedly affirmed that a late application for leave to appeal does not suspend anything.³
18. Now that this Court has dismissed Ms Myeni’s application for leave to appeal, the position is even clearer. The delinquency order is in full force and effect.

³ *Modder East Squatters and Another v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd* [2004] 3 All SA 169 (SCA) at para 46; *Panayiotou v Shoprite Checkers (Pty) Ltd and Others* 2016 (3) SA 110 (GJ) at paras 8, 13 – 14; *Chief of the South African National Defence Force & Others v SANDU & Others* Unreported Case No 38818/2015 on 18 September 2019 (GP) per Raulinga J at paras 10 – 11.



granting special leave to appeal a purely interlocutory order striking her appeal from the roll. Furthermore, Ms Myeni has no prospects of success on appeal, which is a necessary but not sufficient condition for special leave.

FIFTH GROUND: NO PROSPECTS OF OVERTURNING THE FULL COURT'S ORDER

34 Ms Myeni has no prospects of overturning the Full Court's order striking her matter from the roll.

35 The Full Court's reasoning on the proper interpretation of section 18 speaks for itself. Section 18 is predicated on the existence of a live application for leave to appeal, or at least the right to bring an application for leave to appeal. Once Ms Myeni failed to file her application for leave to appeal in time, all rights of appeal lapsed and could only be revived if this Court were to condone the delay.

36 In the circumstances, the Full Court had no option but to strike the matter from the roll. There are no reasonable prospects that this Court would hold otherwise, let alone any other compelling reasons to grant leave to appeal. In any event, Ms Myeni's application for leave to appeal has since been dismissed. Accordingly, the legal position remains the same in that Tolmay J's order of 22 May 2020 is now in full force and effect.

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Exceptional Circumstances and Irreparable Harm to the Public

42 The meaning of “*exceptional circumstances*” is addressed in detail in Tolmay J’s judgment.⁸ No further definitional analysis is required here.

43 Tolmay J agreed with the respondents that there are no less than six separate factors that make this an exceptional case warranting interim execution and which demonstrate the irreparable harm to the public if interim execution is denied:

43.1 First, the scale of Ms Myeni’s proven misconduct and maladministration during her time at SAA and the resulting harm to SAA and the South African economy as a whole make this case sufficiently exceptional.⁹

43.2 Second, the manner in which Ms Myeni presented her case during the trial also rendered this case exceptional. Ms Myeni failed to put a clear or consistent version to witnesses, failed to meaningfully dispute the evidence, and was found to be a dishonest and unreliable witness.¹⁰ As a result, this was not a finely balanced trial with evidence going in both directions, leaving lingering doubts. Ms Myeni’s delinquency is not in doubt and no court of appeal would ever interfere with the trial court’s factual findings on this score.

⁸ Section 18(3) Judgment, pp 29 – 30 paras 58 – 59 [Caselines p 021-29]. Citing *Ntlemeza v Helen Suzman Foundation and Another* 2017 (5) SA 402 (SCA) at para 37, citing *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas, & another* 2002 (6) SA 150 (C) at 156H-157C.

⁹ Section 18(3) Judgment, p 31 para 60.

¹⁰ Section 18(3) Judgment, p 31 paras 61 – 62.

No Irreparable Harm to Ms Myeni

45 Tolmay J cannot be faulted for finding that Ms Myeni would not suffer any irreparable harm if interim execution is granted.

46 In Ms Myeni's answering affidavit in the section 18(3) application, the only harm that she alleged was that she would be deprived of an income from her role as deputy-chairperson of the Centlec board, a parastatal in the Free State.¹⁵ Ms Myeni expressly stated that she earned no other income from other directorships.¹⁶

47 Tolmay J drew attention to Ms Myeni's previous dishonesty and inconsistency regarding her earnings from Centlec.¹⁷

47.1 During the trial, Ms Myeni previously hid her role at Centlec and her remuneration by claiming, on oath, that she was "*unemployed*", "*do[es] not earn any income*" and that she "*do[es] not hold any position of directorship that is of interest to [the applicants]*".¹⁸

47.2 Under cross-examination, Ms Myeni then sought to downplay the remuneration that she received from Centlec, claiming that this was just a "*stipend*" and is "*a minimal amount, very minimal*".¹⁹

¹⁵ AA p16, para 70 [Caselines p 013-19].

¹⁶ AA p16, paras 64 and 70 [Caselines p 013-19].

¹⁷ Section 18(3) Judgment, p 34 para 69.

¹⁸ RA para 24 [Caselines p014-9].

¹⁹ FA p 23, para 88 [Caselines p 012-27]; RA para 25 [Caselines p 014-9].



- 51 Tolmay J found that Ms Myeni was a dishonest witness during the trial. She continues to play fast and loose with the truth during the course of the section 18 applications. This alone is reason enough to dismiss this appeal: the public should be protected against Ms Myeni occupying a directorship of any board.
- 52 In any event, there is clear Constitutional Court authority, cited by Tolmay J,²² which confirms that the deprivation of earnings or a salary for an interim period does not qualify as “irreparable harm”. The Constitutional Court reached this conclusion in both *Ngaka Modiri Molema District Municipality v Chairperson, North West Provincial Executive Committee and Others*²³ and in *Road Traffic Management Corporation v Tasima (Pty) Limited*.²⁴ Ms Myeni again offers no response to this authority.

The alternative constitutional challenge

- 53 OUTA and SAAPA raised an alternative constitutional challenge to section 18 of the Superior Courts Act, if it was found that section 18(3) precluded the High Court from granting effective interim relief.
- 54 However, it would only be necessary to address these arguments if this Court were inclined to uphold Ms Myeni’s section 18(4) appeal.

²² Section 18(3) Judgment p 34 para 71.

²³ *Ngaka Modiri Molema District Municipality v Chairperson, North West Provincial Executive Committee and Others* [2014] ZACC 31; 2015 (1) BCLR 72 (CC) at paras 8, 10.

²⁴ *Road Traffic Management Corporation v Tasima (Pty) Limited; Tasima (Pty) Limited v Road Traffic Management Corporation* [2020] ZACC 21 at paras 130 -131.



58 However, this Court need only reach these constitutional issue if it were to hold that Tolmay J was wrong and that Ms Myeni would suffer irreparable harm that precludes relief under the current wording of section 18(3).

Summary

59 For these reasons, Ms Myeni has no reasonable prospects of success in overturning the section 18(3) order, let alone any other compelling reason for granting special leave to appeal.

RESPONSES TO INDIVIDUAL PARAGRAPHS IN THE FOUNDING AFFIDAVIT

60 I now turn to address the individual paragraphs in Ms Myeni's affidavit to the extent necessary. Any paragraph which is not addressed, and which is inconsistent with what is set out above or in my previous affidavits, must be taken to be denied.

61 AD PARAS 1 – 5

61.1 Save to deny that the contents of Ms Myeni's affidavit are true and correct, I note the contents of these paragraphs.

62 AD PARAS 6 – 9

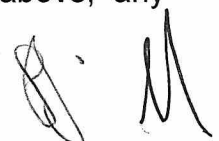
62.1 I deny the allegations contained in these paragraphs for the reasons canvassed further above.

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- 65.1 Save to admit that Ms Myeni had a section 18(4)(ii) right of appeal “*to the next highest court*”, I deny that the section 18(3) order was automatically suspended from 22 December 2021.
- 65.2 That suspension only took effect when Ms Myeni filed her section 18(4) notice of appeal on 21 January 2021, not 8 January 2021, as claimed.
- 65.3 However, the suspension of the section 18(3) order was academic. This was because Ms Myeni’s failure to file an application for leave to appeal in this Court before the deadline meant that the delinquency order was in full force and effect.
- 65.4 The right of appeal in respect of section 18 proceedings does not exist in perpetuity. Ms Myeni’s right of appeal lapsed when she failed to file an application for leave to appeal in this Court within the prescribed time period.
- 65.5 Save as aforesaid, I deny the allegations contained in these paragraphs.

66 AD PARAS 21 – 23

- 66.1 I deny the allegations contained in these paragraphs. In any event, these paragraphs relate to Ms Myeni’s grounds for condonation which have since been accepted by this Court, but the application for leave to appeal was dismissed.
- 66.2 Further, I deny that the 22 December 2020 decision was “automatically suspended” by delivery of the notice of appeal. That notice was only delivered on 21 January 2021. As already pointed out above, any

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dismissed the application for leave to appeal on the basis that it had no reasonable prospects of success and there were no other compelling reasons to grant leave.

70 AD PARAS 33 - 36

70.1 I deny that the Full Court's order is appealable, for the reasons addressed above.

70.2 I further deny that it would be in the interests of justice for Ms Myeni to be granted special leave to appeal in light of her ongoing refusal to comply with the delinquency order, as outlined further above.

71 AD PARAS 37 – 38

71.1 I deny the allegations contained in these paragraphs.

71.2 In particular, I deny Ms Myeni's deliberate mischaracterisation of what is plainly a typographical error on the Full Court's part.

71.3 I further deny that the Full Court erred by having regard to section 18(5) of the Superior Courts Act. Section 18 must be read in a holistic manner.

72 AD PARAS 39 - 40

72.1 I deny the allegations contained in these paragraphs.

72.2 In particular, I deny that section 18(4) is triggered by the "sole jurisdictional requirement" of a decision in terms of section 18(1). Such a summation is over-simplistic. On Ms Myeni's own version, the provisions

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the petition to the SCA does not suspend the operation and execution of any order" does not find applicability in the present circumstances.³¹

73.3 Ms Myeni further neglects to refer to this Court's judgment in *Modderklip*,³² upon which Sutherland J placed reliance in *Panayiotou*.

73.4 Further, Ms Myeni's attempt to both distinguish the *Panayiotou* decision and simultaneously rely on its public policy considerations is opportunistic and indicative of an inadvertent realisation that the decision's principles are indeed applicable and binding in the circumstances.

73.5 I further maintain that the circumstances of this case are entirely different from those in *Ntlemeza*. There, the successful parties acted proactively by bringing a section 18(3) application in anticipation of an application for leave to appeal, which had not yet been filed, but while there was still time to file it. The SCA held that this Court was entitled to grant the section 18(3) order, in the exercise of its inherent jurisdiction and as "*the guardian of its own process*".³³

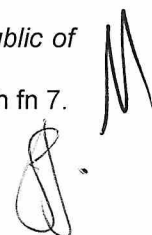
73.6 In this case, Ms Myeni is a failed litigant who seeks to further delay the operation of a binding order. This Court has already found that Ms Myeni bears no prospect of success in appealing the delinquency order. There is no reason for this Court to come to her assistance.

74 AD PARA 43

³¹ Section 18(4) judgment, para 19.

³² *Modder East Squatters and Another v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd* [2004] 3 All SA 169 (SCA) at para 46

³³ *Ntlemeza v Helen Suzman Foundation and Another* 2017 (5) SA 402 (SCA) para 32, read with fn 7.



77 AD PARAS 47 – 49

77.1 I deny the allegations contained in these paragraphs for the reasons set out above.

77.2 In particular, I deny that it would be competent for this Court to entertain the section 18(4) appeal. I further deny that this matter warrants remittal back to the Full Court.

78 AD PARAS 50 – 51

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

78.2 The proceedings before the Full Court constitute a full exercise of Ms Myeni's rights in terms of section 18(4).

79 AD PARAS 52 – 55

79.1 I deny the allegations contained in these paragraphs for the reasons already canvassed further above. I have already explained why it is not in the interests of justice that this application be granted.

80 AD PARAS 56 – 57

80.1 I deny the allegations contained in these paragraphs for the reasons already canvassed further above. There are no exceptional circumstances in this matter that warrant special leave to appeal, nor is it in the interests of justice to grant leave.



amended by Regulation No. 1648 dated 19 August 1977, by GN R1428 of July 1980 and by GN R774 of 23 April 1982, having been complied with.


COMMISSIONER OF OATHS

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