IN THE DISCIPLINARY ENQUIRY HELD AT JOHANNESBURG

In the matter between:

SOUTH AFRICAN AIRWAYS (SOC) LIMITED Employer

and

MUSA ZWANE First Employee
PHUMEZA NHANTSI Second Employee

FINDINGS

Introduction

1. On 20 April 2018, I directed that the disciplinary proceedings commenced by the employer separately against both employees be consolidated, alternatively heard together. The parties presented their respective cases at a consolidated hearing. In making the aforesaid ruling, I had regard to convenience and a paramount consideration was to avoid unnecessary costs, bearing in mind that it is the taxpayer that funds the employer.

2. The delays in the matters were not occasioned by me, but by the parties.

The parties

3. The employer is the South African Airways (SOC) Limited (**"SAA"** or **"the employer"**). It is the flag carrier airline of South Africa. For purposes of this hearing, it is, however, necessary and as will become clearer having regard to the issues in the matter, that I say something about SAA's financial woes. The last two decades has seen this organ of state[1] cost the taxpayers a fortune. Turning to the present – the new CEO, Mr Vuyani Jarana, recently reported to Parliament that SAA's fourth quarter was not a good quarter. SAA reported a loss in excess of R1.2 billion. I was informed by Mr Zwane of Cliffe Dekker Hofmeyr, representing the employer, that SAA's annual turnover is R30 billion a year.

4. The immediate future is bleak. SAA intends to break even by 2021. This substantially depends on funding for working capital of R12.5 billion, reported Jarana. Of course, this is further dependent on ensuring that the airline operates efficiently, professionally and cost-effectively. In short, it needs good people to operate the airline.

5. The first employee is Mr Musa Zwane (**"Zwane"** or **"the first employee"**). On 1 November 2010, Zwane was appointed CEO of South African Airways Technical (SOC) Limited (**"SAAT"**), a wholly owned subsidiary of SAA. SAAT is responsible for the maintenance and overhaul of aeroplanes operated by SAA as well as aeroplanes of third party customers. In

1 SAA is listed as a major public entity in Schedule 2 of the Public Finance Management Act, 1 of 1999 ("PFMA").

November 2015, Zwane was appointed as Acting CEO of SAA which position he fulfilled until the end of October 2017, whereafter he returned to his position of CEO of SAAT. Prior to 1 November 2010, he was the managing director of Sasol Gas.

6. The second employee is Phumeza Nhantsi (**"Nhantsi"** or **"the second employee"**), a chartered accountant, who took up permanent employment with SAA in the position of Chief Financial Officer (**"CFO"**) on 1 May 2017. This is the position she presently occupies. Prior thereto, she climbed the ranks at Sizwe Ntsaluba Gobodo (**"SNG"**), registered auditors and accountants, after having done under-graduate work at the University of Transkei and graduate work at the University of KwaZulu-Natal. Whilst a senior executive at SNG, she was seconded to SAA in the financial division and, as stated above, became the CFO since 1 May 2017. Prior thereto and whilst on secondment from SNG, she acted as interim CFO of SAA.

7. The events that give rise to the charges formulated against both employees took place in the period April to July 2016. Both employees were given notices to attend disciplinary enquiries containing the particularities of wrongdoing in March 2018, and at which time they were also suspended from work on full pay. It is necessary to explain the delay. As a result of concerns raised by civil society,[2] an investigation was conducted by Attorneys Mothle Jooma Sabdia Inc (**"MJS"**) of Pretoria into alleged impugned conduct of SAA's CFO, Phumeza Nhantsi. This culminated in a

2 OUTA, the SA Pilots Association and the media.

250- page report dated 24 October 2017 by MJS. It is fair to say, I think, having perused the documentation as part of substantial bundles placed before me that but for a vigilant concerned segment of civil society, the alleged wrongdoing would probably have gone unnoticed, unaccounted for and with no consequential relief.

The allegations of wrongdoing

8. The notices to Zwane and Nhantsi to attend disciplinary hearings are attached hereto marked **"X1"** and **"X2"** respectively. The particulars in support of the charges against both employees are substantially the same and no purpose would be served in repeating the contents thereof.

9. For purposes of this hearing, I am not going to make any finding on charge 2. This charge in respect of both individuals contemplates that as senior employees they should have taken steps to report corrupt practices on the part of BNP Capital (Pty) Limited (**"BNP"**), to the Directorate for Serious Economic Offences, as is contemplated in section 34 of the Prevention and Combatting of Corrupt Activities Act 12 of 2004. I decline to spend much energy on this charge for two principal reasons: First, I am not informed whether SAA has in fact reported BNP to the authorities. If not, why not, bearing in mind the contention of SAA that the two accused employees were directly or indirectly advancing the interests of BNP. Secondly, in my experience very little is achieved by reporting criminal conduct to the authorities.

10. To evaluate why the authorities are so ineffective in dealing with complaints is probably a chapter on its own and unnecessary for purposes of these findings. I do not want to spend much energy on a charge which has no great moment in the grand scheme of things.

11. There was much debate before me as to whether BNP had, *prima facie* speaking, committed fraud or any other criminal conduct which triggered the requirement for the two accused employees to make the report in terms of section 34 of Act, 12 of 2004. *Prima facie*, BNP has misrepresented its ability, legally speaking, to have entered into the relationship with SAA because it was not in law qualified to do so. This is an aspect dealt with more fully below. Thus, I am surprised that it can be contended that there was no obligation to make the report or complaint as prescribed in legislation. However, for the reasons articulated above, I absolve the two employees from this charge. Bearing in mind that the board of SAA has tasked me with the responsibility of chairing the hearing and bringing this matter to finality, I have assumed the power to so absolve them. After all, in this position, I sit in place of the board or as an agent of the board and its executives.

12. Insofar as the remaining charges are concerned, I think it is necessary to sketch the material facts which resulted in the events being focussed in the public domain. It will become apparent from these facts that there was a lack of accountability and steps had to be implemented to deal therewith. It may be that upon careful scrutiny that one or more of the charges may be

the classical example of splitting of charges because of overlapping factual issues and I will deal with the wrongdoing (if any) after having scrutinised the factual averments making up the charges.

A chronology of the material facts

13. On 20 August 2015, the then board of SAA comprising its chairperson, Ms Duduzila Myeni (**"Dudu Myeni"**), Dr JE Tembi, Ms Yekho Kwinana, Mr AD Ebcon and Mr Wolf Mayer resolved, *inter alia*, to issue an RFP for long-term funding to banking and non-banking financial institutions for the financing of a total amount of R15 billion in order to consolidate the current debt portfolio of SAA. This was in response to SAA's cash and liquidity risk position as contemplated in March 2016.

14. The minutes of the board meeting of 27 November 2015[3] reflect, *inter alia*, seven institutions that tendered in response to the RFP. This included three South African banks, Standard Bank, Absa Bank and Nedbank which together could provide R4.3 billion over a period of 3 – 7 years. The preferred tenderer was Seacrest Investments 115 (Pty) Limited (**"Seacrest"**) which held out that it could provide R15 billion over a 10-year period at a fixed rate of 5.6% per annum.

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3 *Employer's bundle ("EB"): Part C* – pages 89-97

15. The resolution section of this minute approves Seacrest as the preferred tenderer and in the event of the Seacrest transaction not being concluded, then the aforementioned three South African banks as the second successful tenderer.

16. The following two persons were authorised to finalise the transaction, namely the Acting CFO or HOD: Financial Accounting and Mr Zwane, the Acting CEO.

17. I must point out that subsequent to this, the two people who ran with this project was the first employee who had become the Acting CEO of SAA in November 2015. Thus, he was barely a month in this position and having adopted this mammoth task. The other person, being the second employee, the CFO who took up the position of CFO on 1 May 2017 and prior thereto was Acting CFO or referred to interim CFO in the documentation. They were by now entrusted by the board to undertake what I must emphasise is dramatic in terms of the impact the decision would ordinarily have on the South African economy. R15 billion is serious money and sourcing the funds abroad has major implications for the economy because it is borrowing on behalf of the government.

18. The Seacrest transaction could not materialise because upon due diligence it was found that it had no funding, but relied on funding on an Russian outfit known as Grissag.

19. The involvement of Grissag did, however, not end with the non-qualification of Seacrest. Dudu Myeni intervened and introduced the Free State Development Corporation (**"FDC"**) to take the place of Seacrest as the preferred bidder. The FDC would now source the money from Grissag in Russia.

20. On 3 December 2016, the SAA board authorised the two employees before me to take the necessary steps to negotiate, conclude and execute a R14 billion loan offer received from the FDC.

21. On 15 January 2016, the interim CFO, Nhantsi, motivated for the appointment of a "Transactional Adviser" (**"the TA"**) regarding the R15 billion consolidated debt restructuring exercise. The functions to be formed by the TA is described as follows:

> "2.1 TA will analyse all the loan agreements that are currently at SAA's disposal;
>
> 2.2 TA will determine which of the total funding of R14bn is inefficient, either because it is expensive, encumbers SAA's ability to raise further funding because of the attached government guarantee requirement or the tenure not being suitable for SAA's Financial turnaround strategy;
>
> 2.3 Will advise SAA on how to restructure its balance sheet through the settlement of inefficient loans;

2.4 Will advise SAA of the strategic loans that, on the face of it appears to be inefficient, however for strategic reasons, it will be important for SAA to keep the loans in place, for example if these represent "equity" funding that shores up SAA's balance sheet; and

2.5 Will analyse the current SAA's leases, the majority of which exposes SAA to the hard currency exchange prejudices, given that approximately 60% of SAA's revenue is US$ denominated. With the new 5 A330s that will commence shortly, will result in approximately 85% of SAA's expenses to be US$ denominated, & recommend to SAA of options to restructure these leases to lessen their burden on SAA."

22. From the seven tenderers which included Deloitte & Touche and Nedbank, BNP was appointed as the TA. Very little is known about BNP save that its director is one Daniel Mahlangu (**"Mahlangu"**). Nor is it explained why a TA was required at this stage and whether BNP had the required gravitas to raise R15 billion[4] for a cash-strapped highly subsidised SAA operating on the goodwill of the government of day from state funds and in respect of which South African commercial banks had lost confidence in its ability to operate profitably and pay its debts.

23. On 25 May 2016, the Minister of Finance, Mr Gordhan, brought to a stop any further negotiations for raising funds from FDC. This is understandable because FDC is part of government and funded by government and the whole idea of it funding the SAA debt is in a word ludicrous. The reasoning

4 More of this later in the findings.

articulated herein is mine and not that of the Minister. The Minister's reasons are set out in his letter addressed to Dudu Myeni. I am critical because if SAA defaults on any loan sourced by the FDC, the ultimate responsibility is that of government which is funding SAA – the whole transaction makes no commercial or any other rational sense.

24. For the two employees, however, this gave rise for a further opportunity in the interest of BNP. BNP was appointed to source the funding of R15 billion for SAA at a fee of R225 million. The appointment was made without compliance with the usual tender process because it was reasoned that without sourcing R15 billion, SAA will not survive in that some R7.4 billion was payable by SAA to its bankers in the course of the next two months. The deviation from tender law principles[5] is startling, bearing in mind that very little is known about BNP.

25. On 19 April 2016, the CEO approved the Bid Evaluation Committee's request to appoint BNP to provide financial advisory services to SAA at an estimated costs of R2,669,830 (VAT included) (R2.66 million).

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5 Section 217 of the Constitution of the Republic of South Africa guarantees fair, equitable, transparent, competitive and cost-effective procurement processes. Fairness is inherent in the tender procedure. "It's very essence is to ensure that, before government, national or provincial purchases goods or services, or enters into contracts for the procurement thereof, a proper evaluation is done of what is available and at what price, so as to ensure cost-effectiveness and competitiveness. Fairness, transparency and other facts mentioned in Section 217 permeate the procedure for awarding or refusing tenders". (See: **Logbro Properties CC v Bedderson N.O. & Others** 2003 (2) SA 460 SCA; **Steenkamp N.O. v Provincial Tender Board Eastern Cape** 2007 (3) SA 121 CC).

26. On 25 April 2016, BNP was informed that it was awarded the contract for the provision of financial advisory services at the total cost of R2.66 million. The letter informing BNP is erroneously dated 20 March 2016, it should be 20 April 2016 and received by the Director of BNP on 25 April 2016.

27. By way of letter dated 25 May 2016, being the same day when the Minister's letter disqualified FDC,[6] BNP is congratulated that it is appointed as the agent of SAA to source R15 billion. The letter itself is received by Mahlangu, it would appear, on 3 June 2016.

28. Significantly on 25 May 2016 (**EB: Part C** – page 146), the CEO of BNP acknowledges receipt of the award and accepts the award, but inserts a further condition that should *"SAA decide to unilaterally terminate our services, ahead of us fulfilling our mandate, for whatever reasons on any matter outside of our control, a cancellation fee of 50% of all the fees per our proposals to SAA, shall become due and payable in 5 working days following the cancellation notification date"*. I have not seen any proposals, but will revert to this matter later.

29. The award letter dated 25 May 2016 addressed by SAA to BNP and received by Mahlangu of BNP on 3 June 2016 in which BNP is congratulated on being awarded the contract for the sourcing of funds for SAA does not stipulate the amount to be payable to BNP. That is to be found in a document titled "Request for SAA Board approval to confine and

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6 Minister Gordhan's letter is dated 25 May 2016. *EB: Part C* – page 170

award the contract for the sourcing of funds for the SAA to be BNP" dated 18 May 2016 and to be found at pages 131-133 of the Employer's Bundle.

30. The document is signed by four people, the commodity manager, the chief procurement officer and the first and second employees and dated 18 May 2016. It recommends that the SAA board approved the request to confine and award the contract for the sourcing of funds for the SAA to BNP, at an estimated total cost of R256,300,000 (**"R256 million"** or **"quarter billion rand"**). All of the board members who consented to this award, for reasons apparent in these findings, are not worthy to serve on any board of state-owned entities.

31. It follows from the chronology that a month after (to be precise 19 April 2016), the appointment of BNP to provide financial advisory services to SAA at a cost of R2,66 million, BNP is then awarded between the period 18 May and 25 May 2016 a further contract to source funds at a cost of a quarter billion rand. The latter without any compliance of tender law principles dealt with in paragraph 24 and footnote 5 above.

32. In *Allpay*,[7] the highest Court of the land made the following observation in dealing with deviations from procurement processes. *"There is a further consideration. As Corruption Watch explained, with reference to international authority and experience, deviations from fair process may themselves all too often be symptoms of corruption*

7 *Allpay Consolidated v CEO, SASSA* 2014 (1) SA 604 at paragraph 27 at 615

or malfeasance in the process. In other words, an unfair process may betoken a deliberately skewed process. Hence insistence on compliance with process formalities has a three-fold purpose: (a) it ensures fairness to participants in the bid process; (b) it enhances the likelihood of efficiency and optimality in the outcome; and (c) it serves as a guardian against a process skewed by corrupt influences."

33. By way of letter dated 31 May 2015, Mahlangu of BNP motivates the cancellation fee of a quarter billion rand.[8] I am unpersuaded that, by this time, BNP had already incurred costs and disbursements. The decision to award the contract to BNP is dated 25 May 2016 and received by Mahlangu on 3 June 2016. The letter of award is subject to three conditions, framed vaguely, imprecisely and at best creates uncertainty. But it cannot be suggested that the letter of award dated 25 May 2016 creates a binding agreement although that seems to be the import of the letter by reference to the imprecise nature of the conditions. This was probably deliberate to promote BNP's interests.

34. The letter of award is not the usual letter of award utilised by organs of state which is emphatic that until a written agreement (usually referred as a supply level agreement) incorporating the terms and conditions is concluded, there is no agreement.

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8 *EB: Part C* – page 147

35. In spite of this and on 2 June 2016, the CFO informs Mahlangu that she will put his proposal for a cancellation fee of 50% in the event of SAA terminating the mandate to the board for the board's decision.

36. The subsequent events are chilling.

36.1. No payments are made to BNP because of media reports in the Business Day "exposing" the transaction itself. I will revert to why I designedly use the word "exposing".

36.2. The Acting CEO, Zwane, testified under oath that he was contacted by Dudu Myeni to enquire why payment could not be made to BNP. He informed her that his limit for making payment was R50 million and therefore any payment beyond R50 million required board approval.

36.3. He testified that she put him under pressure to pay to BNP the amount of R50 million.

36.4. On 2 June 2016 a document is prepared by the second employee and addressed to the SAA board titled "Request for Acting CEO and Board to approve the cancellation fee that the Transaction Advisor will require should SAA terminate the mandate of sourcing

the funds".[9] This is for a cancellation fee of 50% in the event SAA terminating BNP's mandate.

36.5. By this time, BNP's inability to perform is in the public domain. But on 4 July 2016, both employees motivate payment of R49,900,000 to BNP as a "cancellation fee".

36.6. The relevant document[10] titled "Request for Acting CEO and board to approve the cancellation fee that the TA will require should SAA terminate the mandate to source funds" is signed by both employees and under paragraphs 3 and 4 appears the following:

> "3. **RECOMMENDATION**
>
> 3.1 That the ACEO and the Board approve the cancellation fee should SAA terminate the mandate of sourcing the funds.
>
> 4. **FINANCIAL IMPLICATION**
>
> An amount of R49,900,000 will be payable to BNP Capital (Pty) Ltd."

36.7. The aforesaid recommendation is signed by the interim CFO, the second employee and the Acting CEO, the first employee, respectively on 6 and 7 July 2016. Both of them knew that the

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9 *EB: Part C* – pages 144-145

10 *EB: Part C* – pages 154-155

money is not payable. There is no legal basis to make this payment to BNP and in fact there is no moral or any other basis as to why such payment must be made. This is a clear sham and the two employees knowingly participated in a scheme or course to procure payment from the employer for a third party in respect of which the third party is not entitled to payment.

36.8. On 8 July 2016, Mahlangu, the director of BNP writes to the CFO that BNP received a letter from the Financial Services Board (**"FSB"**) dated 12 May 2016 indicating its intention to temporary suspend BNP's licence for a period of 3 months based on the reason that according to the Financial Advisory and Intermediary Services Act, No, 37 of 2002 (**"the FAIS Act"**), the key individual failed to successfully complete the first level regulatory examinations applicable to the category for which they are authorised or approved.

36.9. In response on 13 July 2016, the second employee, under her title Interim CFO, calls upon Mahlangu to make available the correspondence which BNP received from the FSB.

36.10. By way of letter dated 20 July 2016, the Acting CEO gives notice to BNP that SAA terminates BNP's appointment to provide SAA with financial advisory services and to source funds on behalf of SAA as BNP did not have a valid FSB licence.

37. In the interim, two important aspects need to be recorded. First, by way of letter dated 18 April 2016, the Deputy Registrar of FSB had informed BNP that its licence to act as a financial services provider in terms of section 9(1) and (2) of the FAIS Act is suspended. BNP was afforded an opportunity to provide reasons to the Registrar as to why the withdrawal of its authorisation should not be effected.[11] Significantly it follows that at all material times when BNP is interacting with SAA, it omits to inform SAA that its activities are illegal.

38. Secondly, by way of email dated 25 May 2016, Cynthia Stimpel, the group treasurer in finance at SAA, informed the CFO that a fee of R256 million to source the funds were exorbitant as preliminary investigations indicated that the banks would charge R85 million inclusive of VAT for this function. In short, SAA was overpaying R171 million.

Analysis

39. On 27 November 2015, the then board of SAA, under the leadership of Dudu Myeni, authorised the acting interim CFO and the acting CEO, the employees before me, to appoint the successful bidder as recommended in paragraph 32 of the resolution and conclude, execute and sign on behalf of SAA, the term loan agreement for an amount not exceeding R15 million with Seacrest.[12]

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11 *EB: Part C* – pages 114-118

12 *EB: Part C* – pages 89-96

40. Both employees should have appreciated soon thereafter that this substantial transaction was fraught with irregularities if not sinister innuendos. It was soon discovered that Seacrest had no substantial assets and was a conduit. It in turn relied on a Russian based entity, Grissag, to fund the debt.

41. Simple common sense will dictate that if Grissag was to provide the funding then it required guarantees (which was not available) and would expect a better return than the banks. This negates any calculations Nhantsi suggests that there would have been a savings in interest charges. An outsider providing funding normally within the preserve of the financial institutions would have a rate of interest higher than that charged by the financial institutions. It is astonishing that Nhantsi could believe that Seacrest would moreover provide an interest free break to ease the financial plight of SAA. Her evidence that Seacrest would ensure that in the first 5 years or so of the loan period the interest would be limited to payment quarterly instead of monthly and that there would be some R500 million of savings in interest is too good to be true. I need say no more of this because it has all the hallmarks of innocent people being suckered into Ponzi schemes with promises that never mature.

42. In any event, Seacrest failed basic due diligence and Nhantsi never investigated the credibility of the source of the financier, Grissag. It was also too convenient and sinister to accept the instruction of the chairperson, Dudu Myeni, that the FDC, an organ of state, and the investment arm of the

Free State Province would step into the shoes of Seacrest. FDC too was relying on Grissag for funding. Nhantsi's only investigation was that they were two farmers in the Free State of Afrikaans descent who had the connection with Grissag. It never occurred to her to investigate this matter any further. Her meeting with the farmers and her knowledge of the matter of the source of the funds was limited to one of the farmer's name, being a Van der Merwe. How can this be of any assistance? I know at least six Van der Merwe's practising as advocates in South Africa. Thus, for her to actually believe that there was merit in this transaction with the only knowledge that a Russian outfit will provide the source of funds through the office of a Van der Merwe, a farmer in the Free State, demonstrate the parlous state of affairs at SAA in terms of governance and functionaries who run this august airlines.

43. I have grave difficulties understanding why the two employees before me did not distance themselves from this transaction other than to promote their own interests. It has all the hallmarks of a plot to attempt to enrich those in control of SAA at the expense of SAA and the taxpayer.

44. The interim CFO was rewarded – she became the permanent CFO on 1 May 2017 whilst the SAA was under the control of Dudu Myeni. On the probabilities, Zwane was moved from SAAT to act in the prestigious position as Acting CEO of SAA because he was pliable.

The appointment of BNP as TA

45. It is clear that no periphery (let alone proper investigation) was conducted as to the reputation, competence, reliability and, most importantly, honesty of BNP.

46. BNP was awarded the contract as TA. I have difficulties understanding why Nhantsi, a professional chartered accountant, could not perform the functions required of the TA. She could have easily recruited the services of her employer while she was an interim CFO, namely SNG for any expertise or capacity that was lacking in SAA to undertake the task.

47. Any periphery investigation ought to have revealed that BNP was not credited with the FSB. Its status not only being dubious, but illegal.

48. The quantum leap in BNP's appointment as TA for a fee of R2.66 million to a staggering fee of a quarter billion rand a month or so later without compliance with any credible procurement process is bizarre in the circumstances, and have all the hallmarks of corrupt activities.

49. The steadfast refusal of the CFO to interrogate and investigate the enormity of the fee of R256 million in the face of advice from Treasury, namely Cynthia Stimpel (**"Stimpel"**), that the amount appears *prima facie* to be substantially above market-related prices must cast doubt on the integrity of the CFO in the face of all the material factual considerations. I think her referral to her former employer SNG for an indication of the amount charged

by fundraisers is far more hypothetical than Stimpel's endeavours to save unnecessary costing in the face of an airline struggling to make ends meet.

The recommendation for a cancellation fee of R49,900,000

50. Both employees testified that they used the format of SAA board's draft minute pre-prepared packs which provides for the methodology to read as a recommendation, but does not mean it is what those who are making the recommendation intend it to be their recommendation.

51. I find this horrendous. I understand the Acting CEO's version under oath that he voted against the payment. I also appreciate the CFO's version that she abstained. In fact, the other two board members at the time abstained and the only person who voted in favour of this payment was Dudu Myeni, the chairperson of the board.

52. However, in my view, the Acting CEO and the CFO must conduct themselves as the leaders in the management of SAA. That is exactly what they were. They signed a document which reads that they recommended the payment. Any outsider, be it a shareholder, other officials, members of Treasury and any concerned South African will read the document as it provides, namely that it was the recommendation of these two officials that payment be made. The same reasoning must apply in respect of the recommendation made by these two employees on 18 May 2016 to award the sourcing of funds contract to BNP for a staggering R256 million. The

directors' resolution to this effect reads in similar terms dated 21 May 2016 (*EB: Part C* – pages 135 and 137).

Critical conceptual *prima facie* finding

53. Having regard to the objective facts of the matter, I am of the *prima facie* view that the then chairperson, Dudu Myeni, orchestrated the entire transaction commencing with the funding of the R15 billion debt for an untoward purpose. The purpose being to involve BNP and enrich BNP and on the probabilities to share in ill-gotten financial proceeds to the detriment of SAA. Had it not been for a vigilant sector of civil society, this would probably have succeeded.

54. The findings are "on the face of it" because I am aware that Dudu Myeni has not been given an opportunity to test the case against her and to present her own case. Ours is now a system based process and sometimes process undermines the pursuit of the true facts. This is such an instance; Dudu Myeni will probably avoid scrutiny because she does not want to account for her conduct. Nevertheless, I accept that she is entitled to be heard. I am, however, not confident that there is political will or functional capacity to pursue Dudu Myeni where she will be held accountable for her conduct, implicit in which is that she will be afforded the protection of natural justice.

55. Our Courts have found the guiding principles in drawing appropriate inferences, which I have done, to be as follows:

55.1. The adjudicator can only correctly draw an inference on a balance of probabilities if it is the most readily apparent and acceptable inference from a number of possible inferences (*Ocean Accident & Guarantee Corporation Ltd v Koch* 1963 (4) SA 147 (A) at 159B-E).

55.2. Inferences must be drawn from the proven facts (established by direct evidence) and not assumption, speculation, contention or submission (*Imperial Marine Co v Delulemar Compangnia Di Navigazione SPA* 2012 (1) SA 58 SCA para 24).

55.3. Inferences must further be consistent with the proven facts and must be drawn from an assessment of all the evidence, not only parts thereof (*SA Post Office v De Lacy* 2009 (5) SA 255 SCA para 29 and 35).

56. I am satisfied that the inferences I rely upon drawn from prudent facts and assessments of all the material evidence warrants the finding I have made. The finding is important to assess the conduct of the two employees. I now turn to the charges.

Musa Zwane

57. In terms of charge 1 and as all other charges, Zwane was the most senior employee at the material time. He was grossly negligent in not realising that the award of R15 billion contract under his watch to Seacrest and

thereafter to FDC was suspect. In these circumstances, he ought to have been alerted to the fact that BNP was probably irregularly appointed and the fee payable to it artificially inflated.

58. In terms of charge 3, I find him guilty of wrongful conduct in making a recommendation in which he believed was not warranted. But more importantly, his conduct demonstrates an individual who cannot be relied to a CEO of any company, let alone of the SAA, a major public entity funded by the taxpayer. On his own version, Dudu Myeni pressurised him to make a payment to BNP of monies not due to BNP. This is nothing short of theft. She enquired what his limit was to make payment and to reduce the payment amount to be within his limit. He resisted, but made the recommendation to the board. He took no steps to expose her.

59. In terms of charge 4, I would have expected a person in the form of the acting CEO to take issue with a format which says he is making a recommendation, but effectively it is not a recommendation. For purposes of my finding, I think charges 3 and 4 should be read together because, in my view, this employee yielded to pressure of his chairperson and sought to make payment of monies which would have been a fraud on the shareholder and ultimately the taxpayer.

60. In the result, I find Muza Zwane guilty of gross financial misconduct in relation to charge 1 and guilty of gross misconduct involving dishonesty in relation to charges 3 and 4 read together.

Phumeza Nhantsi

61. In respect of charge 1, I find the second employee guilty of gross misconduct. She was, at all material times, the most senior employee dealing with the finances of SAA. She was prepared to run with the project to find funding of R15 billion. In so doing, she acted recklessly by following orders and not applying her own mind. I understand that she is not charged in respect of such conduct. The appointment, however, of BNP flows from the resolution to find a funder of R15 billion. By basic investigation, she would have appreciated that BNP is a front to extract funds from SAA illicitly. She went along with the charade and, in so doing, failed to have regard to the best interest of her employer. The payment of a quarter billion rand, in the circumstances, was not only exorbitant, but unjustified.

62. Insofar as charges 3 and 4 are concerned, I find the second employee's conduct to be wrongful and dishonest for the reasons already set out above.

Recommended sanction

63. South Africa can do better. Ordinary South Africans expect better from the rulers of the day. We cannot afford CEO's and CFO's who look after their own interests and not that of the citizens.

64. Both employees conducted themselves badly and dishonestly. Given an opportunity in cross-examination, they were adamant that they did nothing wrong. Their arrogance knows no bounds, in particular the second

employee who tried to justify her conduct in the face of overwhelming objective evidence that she did wrong.

65. Mr Zwane is not CEO material and Ms Nhantsi has breached her ethical duties as a chartered accountant and CFO. Her conduct must be reported to the relevant authorities that regulate the conduct of chartered accountants.

66. From a labour law perspective, I have had regard to the Code of Good Practice in Schedule 8 to the Labour Relations Act, in particular item 3, paragraph 4. This is serious misconduct and, on the facts of this case, dishonesty which destroys the employment relationship. The employment relationship is regarded as one of the highest good faith.[13]

67. The success of any enterprise depends upon the absolute integrity and honesty of its employees, and any form of dishonesty or deception may have serious and far-reaching consequences, particularly at executive level.[14]

68. The concept of honesty in the employment context does not merely mean refraining from criminal conduct. It embraces any conduct which involves deceit (*Sappi Novo Board* at 787).

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13 *Counsel for Scientific and Industrial Research v Fijen* (1996) 17 ILJ 18 (A) at 26B-F; *Standard Bank of SA Ltd v CCMA* (1998) 19 ILJ 903 (LC) at 913E-H; *Sappi Novo Board (Pty) Ltd v Bolleurs* (1998) 19 ILJ 784 (LAC) at 7 and the authorities cited therein.

14 *JD Group Ltd v De Beer* (1996) 17 ILJ 1103 (LAC) at 1112-1113; *Carter v Value Truck Rental (Pty) Ltd* (2005) 26 ILJ 711 (SE) at 34

69. The employees have not shown any remorse. Acknowledgment of wrongdoing is the first step towards rehabilitation. There is, in my view, no prospect on any basis for SAA and SAAT to keep these two individuals in their employment.

70. I recommend summary dismissal.

NA CASSIM SC
Chairperson

Chambers, Sandton
19 June 2018