

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

Case number: 15996/2017

In the matter between

ORGANISATION UNDOING TAX ABUSE NPC	First Applicant
SOUTH AFRICAN AIRWAYS PILOTS' ASSOCIATION	Second Applicant

and

DUDUZILE CYNTHIA MYENI	First Respondent
SOUTH AFRICAN AIRWAYS SOC LIMITED	Second Respondent
AIRCHEFS SOC LIMITED	Third Respondent
MINISTER OF FINANCE	Fourth Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Fifth Respondent

NOTICE IN TERMS OF RULE 16A

TAKE NOTICE THAT the Applicants raise the following constitutional issue as alternative relief in their application in terms of section 18 of the Superior Courts Act 10 of 2013.

- 1 Whether section 18 of the Superior Courts Act is unconstitutional to the extent that it removes judicial discretion and peremptorily requires an application for interim enforcement of a decision pending appeal to satisfy all the requirements in sections 18(1) and (3), to the exclusion of judicial discretion.

- 1.1 On 27 May 2020, this Court declared the First Respondent ("Ms Myeni") a delinquent director in terms of section 162(5) of the Companies Act 71 of 2008.
- 1.2 Ms Myeni has applied for leave to appeal.
- 1.3 The Applicants have applied for interim enforcement of this Court's order pending Ms Myeni's application for leave to appeal and any subsequent applications for leave to appeal (or appeals) in terms of section 18 of the Superior Courts Act.
- 1.4 The Applicants primarily contend that they satisfy the test for interim enforcement as currently set out in section 18 of the Superior Courts Act.
- 1.5 In the alternative, the Applicants argue that section 18 of the Superior Courts Act is unconstitutional because it excludes judicial discretion as to whether a decision should be enforced pending appeal. On the text of section 18, the requirements for interim enforcement are peremptory and courts have no overriding discretion. In this way, section 18 is unconstitutional because it fetters courts' discretion on a decidedly judicial issue of the effect of court orders pending an appeal process.
- 1.6 The Applicants challenge the constitutionality of section 18 on the basis that the rigid regime it puts in place for interim enforcement:
 - 1.6.1 is a wholesale deprivation of judicial discretion, which infringes the Applicants' section 34 right to a fair hearing;

- 1.6.2 violates the separation of powers because it constitutes an undue legislative interference with the inherent jurisdiction of courts to regulate their own process; and
- 1.6.3 infringes several other constitutional rights.
- 1.7 Section 18 comes with no safety valve. On the text of the section, if a court finds that a respondent will suffer *any* irreparable harm—no matter how minor—judicial discretion is removed, and the provisions of the section are rendered immutable. There is no room for proportionality balancing. In this way, section 18 ties a court’s hands sufficiently tightly to render the hearing unfair, infringing section 34 of the Constitution (amongst other constitutional rights).
- 1.8 The Applicants argue that section 18 should be read down to allow courts to exercise discretion as to whether to enforce a decision pending an appeal. If reading down is not possible, the Applicants argue that section 18 should be declared invalid and deemed to read as follows:
- “(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 other party will not suffer irreparable harm is the court so orders, unless the court holds that the party who applied to order otherwise in terms of subsection (1) has established, on a balance of

probabilities, that it is in the interests of justice to order otherwise”

TAKE FURTHER NOTICE that despite the time frames stated elsewhere in this notice, the Applicants intend to seek an **EXPEDITED HEARING** of this application. Any party intending to seek admission as an *amicus curiae* ought to contact the Applicants’ attorneys for information about the hearing date and related filing times for any application for admission as an *amicus curiae*.

TAKE NOTICE FURTHER that any interested party may, with the written consent of all the parties to the proceedings, given not later than 20 days after the filing of the founding affidavit be admitted therein as *amicus curiae* upon such terms and conditions as may be agreed upon in writing by the parties.

TAKE NOTICE FURTHER that the written consent referred to above shall, within five days of its having been obtained, be lodged with the registrar and the *amicus curiae* shall, in addition to any other provision, comply with the times agreed upon for the filing of pleadings and written argument.

TAKE NOTICE FURTHER that the terms and conditions agreed upon may be amended by the Court.

TAKE NOTICE FURTHER that if the interest party is unable to obtain the written consent as contemplated herein, he or she may, within five days of the expiry of the 20-day period prescribed above, apply to the Court to be admitted as an *amicus curiae* in the proceedings. Such application shall:

- a) briefly describe the interest of the *amicus curiae* in the proceedings;
- b) clearly and succinctly set out the submissions which will be advanced by the

amicus curiae, the relevance thereof to the proceedings and his or her reasons for believing that the submissions will assist the Court and are different from those of the other parties; and

c) be served upon all the parties to the proceedings.

TAKE FURTHER NOTICE that any party to the proceedings who wishes to oppose an application to be admitted as an *amicus curiae*, shall file an answering affidavit within five days of the service of such application upon such party. The answering affidavit shall clearly and succinctly set out the grounds of such opposition.

DATED AT JOHANNESBURG ON THIS 9TH DAY OF July 2020.

PANDOR ATTORNEYS

Applicants' Attorneys

77 Waterval Road

Little Falls

Roodepoort

Tel: 010 007 1469

Mobile: 082 551 3784

Fax: 086 595 4952

Ref: R.Pandor/Myeni

Email: rashaad@pandorlaw.co.za

C/O Lee Attorneys

51 Elandslaagte Street

Hazelwood

Tel: 082 451 2142

Email: lenelllee@msn.com

TO:
The Clerk of the above Honourable Court
PRETORIA

AND TO:

MABUZA ATTORNEYS
First Respondent's Attorneys
1st Floor, 83 Central Street
Houghton, 2198
Tel: (011) 483-2387/483-0476
Fax: (011) 728-0145/ 086 678 2748
Cell: 082 561 1067
E-Mail: eric@mabuzas.co.za
thomas@mabuzas.co.za
Ref: Mr ET Mabuza/ Mr T Sibuyi

C/O NKOME ATTORNEYS
Suite 204 Hatfield Forum East
1077 Arcadia Street
Tel: (012) 342 6009
Fax: (012) 342 2454
Ref: Mr A Nkome

SERVICE VIA EMAIL

AND TO:
DYASON INCORPORATED
The Second and Third Respondents' Attorneys
134 Muckleneuk Street
Nieuw Muckleneuk
Pretoria
Ref: TP WOOD/NM/MAT/85612
Tel: (012) 452 3500
Fax: (012) 452 3554
Email: wood@dyason.co.za

SERVICE VIA EMAIL

AND TO:

THE MINISTER OF FINANCE
The Fourth Respondent
40 Church Street
Pretoria

AND TO

THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPEMENT
SALU Building, 28th Floor
316 Thabo Sehume Street(c/o Thabo Sehume and Francis Baard Streets)
Pretoria