IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case number: 15996/2017

In the application for 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

And

In the section 18 application 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

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OUTA AND SAAPA'S HEADS OF ARGUMENT

LEAVE TO APPEAL AND SECTION 18 APPLICATION

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INTRODUCTION

1 On 27 May 2020, this Court declared Ms Dudu Myeni to be a delinquent director in terms of section 162(5) of the Companies Act 71 of 2008, due to her serious misconduct as the former non-executive chairperson of South African Airways SOC Ltd (SAA).

2 This Court's judgment is the first time that Ms Myeni has faced genuine accountability for her actions. Ms Myeni did everything in her power to obstruct and delay this outcome. As this Court found, she engaged in repeated conduct which was "*calculated to cause maximum delay and disruption*" to the trial.[1]

3 Ms Myeni's application for leave to appeal is her latest attempt at delay. It is devoid of prospects and was launched with the clear intention of suspending this Court's order and further postponing the consequences of her misconduct.

4 In these heads of argument, we demonstrate why this further attempt at obstruction should not be permitted. We address three issues in turn:

4.1 First, we demonstrate why Ms Myeni's application for leave to appeal should be dismissed.

4.2 Second, we show why OUTA and SAAPA's application in terms of section 18(1) and 18(3) of the Superior Courts Act 10 of 2013 should succeed, which would ensure that the operation and effect of this Court's order is not suspended for a minute longer.

[1] Judgment p 112 para 283 [Caselines p 009-112].

4.3 Third, we show why the alternative constitutional challenge to section 18 of the Superior Courts Act should succeed, in the event that it is found that section 18 bars this Court from exercising its discretion to grant effective relief, in the interests of justice.

THE APPLICATION FOR LEAVE TO APPEAL

The test for leave to appeal

5 Ms Myeni is required to satisfy the test for leave to appeal under section 17(1) of the Superior Courts Act, which provides, in relevant part, that:

> *"(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;"*

6 This Court has confirmed that section 17(1)(a)(i) has now "*raised the bar for granting leave to appeal*" requiring that the matter "*would*" have reasonable prospects of success, not merely that it "*may*" have such prospects.[2] This has been confirmed by the SCA.[3]

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[2] *Acting National Director of Public Prosecution and Others v Democratic Alliance; In re Democratic Alliance v Acting National Director of Public Prosecution and Others* 2016 ZAGPPHC 489 (24 June 2016) at paras 25, 29 (Full Court), citing *The Mont Chevaux Trust (IT2012/28) v Tina Goosen & 18 Others* LCC 14R/2004 at para 6

[3] *Mothuloe Incorporated Attorneys v The Law Society of the Northern Provinces & another* [2017] ZASCA 17 (22 March 2017) at para 18; *Notshokovu v S* [2016] ZASCA 112 (7 September 2016) 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."*

7 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. As the Full Court of this division recently explained in ***Fair Trade Tobacco Association v President of the Republic of South Africa***,[4] there can be no "*compelling reasons*" where a case merely involves the application of "*settled law*" to the facts.

Insurmountable obstacles to leave to appeal

8 Ms Myeni's application for leave to appeal faces three insurmountable obstacles.

9 First, Ms Myeni's ten-page notice of application for leave to appeal presents a scattershot list of grounds of appeal, framed in the vaguest terms, which leave the bulk of this Court's factual findings and legal conclusions untouched.

10 This Court made multiple findings against Ms Myeni, any one of which is enough to justify the Court's declaration of delinquency for life. The majority of these findings are not addressed, including the multiple findings of dishonesty, wilful misconduct and recklessness. To take just two examples of the many uncontested findings:

10.1 On the Emirates MOU, Ms Myeni does not dispute this Court's findings, based on her own testimony, that she could not provide a coherent or honest explanation for repeatedly blocking the deal:

[4] *Fair Trade Tobacco Association v President of the Republic of South Africa and Others* (21688/2020) [2020] ZAGPPHC 311 (24 July 2020) at para 22 (Mlambo JP, Molefe J, Basson J).

> *"[237] The evidence as set out above speaks for itself , it does not reveal one single legitimate reason why Ms Myeni, frustrated and ultimately caused the demise of the lucrative Emirates deal, which if it could not have saved SAA, could at least have strengthened its financial position considerably and would have limited some of the financial fall out. It might even have been in a position to whether the storm that it is facing now. Her evidence explaining the events and her actions during the course of this deal was unconvincing and were both inexplicable and reckless.*
>
> *…*
>
> *[238] In my view Ms Myeni's conduct in blocking the Emirates deal satisfies multiple grounds of delinquency under section 162(5)(c) of the Companies Act. Not only did she deliberately or through gross negligence inflict substantial harm on SAA, but her belated attempts to justify her conduct show that she acted dishonestly, in bad faith and not in the best interests of SAA and the country."*[5]

10.2 On the Airbus swap transaction, Ms Myeni also does not dispute this Court's findings, again based on her own testimony, that she displayed a reckless disregard for SAA's financial position and the implications for the South African fiscus as a result of the imminent pre-delivery payments (PDPs) to Airbus:

> "*[262] Ms Myeni admitted during cross-examination that the PDP's were in fact due and payable and that SAA did not have the money to pay PDP's. The uncontested evidence detailed above shows the dire consequences for SAA and the country if SAA had defaulted on these payments by delaying conclusion of the Swap Transaction.*
>
> *[263] Ms Myeni displayed complete disregard for public funds. The court asked her whether it was her evidence that SAA had the money to pay the PDP's that were due and payable. She answered "SAA belongs to government 100% ... they wouldn't allow SAA to fail." This answer revealed Ms Myeni's true attitude. She honestly believed that there was no problem if SAA defaulted on its debts, as the government and the public ought to have been saddled with SAA's debts, regardless of the consequences. This was despite the repeated and consistent*

[5] Judgment p 95 paras 237 – 238 [Caselines p 009-95].

> *warnings from Minister Nene that the government did not have the money to bail out SAA and would not do so.*"[6]

11 Accordingly, in the unlikely event that another court would overturn some of the findings, numerous others would necessarily remain standing, as they were not challenged and are based on Ms Myeni's own evidence. Furthermore, Ms Myeni is bound by the limited grounds of appeal set out in her notice and cannot readily seek to introduce new grounds in argument.[7]

12 As this Court noted, directors have previously been declared delinquent for a mere failure to prepare and finalise annual financial statements and to hold AGMs timeously.[8] This Court's uncontested findings of misconduct are of an entirely different magnitude.

13 Ultimately, the question on appeal is whether the order was correct, on the totality of the law and evidence. Ms Myeni's nit-picking at some of this Court's findings does not establish any reasonable prospects of success on appeal, particularly as an appeal lies against the order and not against specific reasons set out in the judgment.[9]

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[6] Judgment p 103 paras 262 – 263 [Caselines p 009-103].
[7] *Basenzi Construction CC t/a Power Wheel and Tyres and Another v Hofmil Investments (Pty) Ltd* [2018] ZAGPPHC 599 (18 January 2018), holding that Rule 49(1)(b) establishes a peremptory requirement that "[a]n applicant seeking leave to appeal must set out its grounds of appeal succinctly and in unambiguous terms in order to enable the court and the respondent to assert the case the applicant seeks to make out and which the respondent has to meet in opposing the application for leave to appeal". See further the cases cited by this Court: *Songono v. Minister of Law and Order* 1996 (4) SA 384 (E) at 395J to 386A; *Philip v Estate Agency Affairs Board* [2013] ZAGPPHC 276 {2 October 2013) para 31; *Fuku v Mpoka* [2013] ZAFSHC 152 (19 September 2013) para 5; *Lewis NO and Others v Cooper NO and Another, Lewis v Soundprops 236 (Pty) Ltd and Others* [2009] ZAWCHC 51 (27 February 2009) para 2.
[8] Judgment p 106 para 269 [Caselines 009-106] referring to *Msimang NO and Another v Katuliiba and Others* [2013) 1 All SA 580 (GSJ).
[9] *Administrator, Cape, and Another v Ntshwaqela and Others* 1990 (1) SA 705 (A) at 714J-715E.

14 Second, the uncontested evidence against Ms Myeni and her own testimony will not change on appeal. This Court captured the evidential difficulties in Ms Myeni's case as follows:

> *"[115] … Very little of the evidence led by the witnesses of the plaintiffs was disputed or contradicted. The most concerning aspect was the failure to put a comprehensive version of Ms Myeni's evidence to the witnesses. Counsel's attention was repeatedly drawn to the inherent danger of not doing so by the court.*[10]
>
> *…*
>
> *[232] Ms Myeni's evidence posed serious difficulties for her defence. The versions put on her behalf during the trial changed, the plaintiffs' witnesses did not get the opportunity to answer to crucial aspects of her evidence, as it was never put to them and her evidence contradicted her plea.*
>
> *[233] Ms Myeni was a dishonest and unreliable witness. A perusal of the evidence as set out above illustrates abundantly that her evidence was unreliable and more often than not, blatantly untrue. As a result her version of events cannot be accepted.*
>
> *[234] The failure to put a proper version to all the witnesses and the numerous contradictions which revealed itself during her evidence poses a serious difficulty for Ms Myeni's defence. It is trite that if a defendant wishes to contradict the evidence of an opposing witness, or to draw a negative inference, or imputation about that witness, that version must be put to the witness in cross-examination to allow him or her an opportunity to respond.*
>
> *[235] This was manifestly not done. Counsel for Ms Myeni was warned about the failure to put a proper version to the witnesses. Maybe if Ms Myeni bothered to attend the trial, she could have instructed her counsel properly. She has only herself to blame for the shortcomings in the presentation of her case."*[11]

15 Ms Myeni's grounds of appeal are generally silent on these shortcomings in her case. In any event, there are no prospects that another Court would overturn this Court's findings of fact and its assessment of Ms Myeni's credibility. The

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[10] Judgment Caselines pp 9-48 – 9-49 para 115.
[11] Judgment Caselines p 9-92 – 9-94 paras 232 - 235.

principles set out by Davis AJA in ***R v Dhlumayo***,[12] concerning the limited scope for appellate interference in a trial court's factual findings, have direct relevance here:

> *"3. The trial Judge has advantages - which the appellate court cannot have - in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial. Not only has he had the opportunity of observing their demeanour, but also their appearance and whole personality. This should never be overlooked.*
>
> *4 . Consequently the appellate court is very reluctant to upset the findings of the trial Judge.*
>
> *…*
>
> *8 . Where there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct; the appellate court will only reverse it where it is convinced that it is wrong.*
>
> *9 . In such a case, if the appellate court is merely left in doubt as to the correctness of the conclusion, then it will uphold it.*
>
> *10. There may be a misdirection on fact by the trial Judge where the reasons are either on their face unsatisfactory or where the record shows them to be such; there may be such a misdirection also where, though the reasons as far as they go are satisfactory, he is shown to have overlooked other facts or probabilities.*
>
> *12. An appellate court should not seek anxiously to discover reasons adverse to the conclusions of the trial Judge. No judgment can ever be perfect and all-embracing, and it does not necessarily follow that, because something has not been mentioned, therefore it has not been considered."*

16 Ms Myeni has provided no basis to suggest that this Court's assessment of the evidence was misdirected, nor has she shown that there are reasons that would convince a court of appeal that this Court was wrong.

17 Third, the relevant law on delinquency is well settled and was never disputed by Ms Myeni. The relevant principles are addressed in the SCA's authoritative

[12] *Rex v Dhlumayo and Another* 1948 (2) SA 677 (A) at 705 - 706

judgment in ***Gihwala***,[13] addressed at length in this Court's judgment. The relevant legal principles on directors' duties are also well-settled and are codified in both the Companies Act and the PFMA. While there was some novelty in applying the heightened duties under the PFMA to a delinquency case, there is nothing legally complex or controversial here. On this Court's uncontested findings, Ms Myeni would have been declared a delinquent director even if SAA was a private company. In any event, Ms Myeni's notice of appeal does not take issue with this Court's exposition of the law and the analysis of the intersection of the Companies Act and the PFMA. Accordingly, the application of such settled and uncontroversial law to the facts does not establish a "*compelling reason*" for leave to appeal under section 17(1)(a)(ii) of the Superior Courts Act.[14]

No merit to Ms Myeni's grounds of appeal

18 It appears that Ms Myeni relies on seven primary grounds of appeal. None establish reasonable prospects of success on appeal.

<u>First ground: OUTA's standing</u>

19 Ms Myeni again takes issue with this Court's decision that OUTA has standing in the public interest under section 157(1)(d) of the Companies Act.[15]

19.1 This matter was comprehensively addressed in this Court's judgment of 12 December 2020, dismissing Ms Myeni's special plea.[16] Ms Myeni

[13] *Gihwala and Others v Grancy Property Ltd and Others* 2017 (2) SA 337 (SCA).
[14] *Fair Trade Tobacco Association v President of the Republic of South Africa and Others* (21688/2020) [2020] ZAGPPHC 311 (24 July 2020) at para 22 (Mlambo JP, Molefe J, Basson J).
[15] Application for leave to appeal, para 1 [Caselines p 010-2 – 3].
[16] Judgment of 12 December 2020 [Caselines pp 009-114].

previously brought an application for leave to appeal against this judgment, which was dismissed on 28 January 2020.[17] It is therefore impermissible for Ms Myeni to attempt to revive this issue.

19.2 In any event, this Court had ample grounds to grant OUTA standing under section 157(1)(d) of the Act on the basis of the pleadings. The evidence led at trial puts it beyond all doubt that this case was brought in the public interest.

19.3 Moreover, the question of OUTA's standing can have no bearing on the correctness of this Court's ultimate delinquency order. Even if a court of appeal were to hold that this Court somehow erred in granting OUTA standing, it has always been common cause that the second plaintiff, SAAPA, had standing under section 162(2) of the Companies Act to seek and obtain a declaration of delinquency.

Second ground: Non-joinder

20 Ms Myeni also attempts to resurrect her complaints about the non-joinder of other SAA directors.[18] This too was comprehensively addressed in this Court's previous judgment of 2 December 2019.[19] Notably, Ms Myeni elected not to appeal that judgment in her two previous applications for leave to appeal, heard in late January 2020. We need say no more on this issue.

[17] Judgment of 28 January 2020 [Caselines pp 009-160].
[18] Application for leave to appeal, para 1.4 [Caselines p 010-3].
[19] Judgment of 2 December 2020 at paras 60 - 72 [Caselines p 009-115 at pp 009-139 – 009-142].

Third ground: Evidence led beyond the pleadings

21 Third, Ms Myeni makes vague and unspecified claims about evidence being introduced beyond the scope of the pleadings.[20] There is no specificity to this complaint, which renders the notice fatally defective, as it is "*so widely expressed that it leaves the Appellant(s) free to canvas every finding of fact and every ruling of law made by the court a quo*".[21]

Fourth ground: Emirates

22 Ms Myeni's grounds of appeal on the Emirates deal are confined to just two complaints, which leave all of this Court's other substantive findings untouched.[22] These uncontested findings are summarised as follows in the judgment:

> "*[132] In summary, Ms Myeni did not have any reasonable grounds to block the signing of the Emirates MOU on 16 June 2015 or thereafter. This led to the inevitable conclusion that Ms Myeni breached her fiduciary duty to act in good faith, for a proper purpose, and in the best interests of SAA. The Emirates deal was never concluded, as a result of Ms Myeni's actions. This led to irreparable harm for SAA and the country. What motivated these reckless and detrimental actions to SAA and country, we still do not know. Ms Myeni acted recklessly and broke her fiduciary duty in sabotaging this deal and the people of South Africa and SAA's employees are paying the price for her actions."*[23]

23 Instead of addressing these issues, Ms Myeni's grounds of appeal are confined to two narrow points.

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[20] Application for leave to appeal, para 3.1 [Caselines p 010-4].
[21] *Songono v Minister of Law and Order* 1996 (4) SA 384 (E) at 385G – H.
[22] Application for leave to appeal, paras 4 – 5 [Caselines pp 010-4 – 010-5].
[23] Judgment p 55 para 132 [Caselines p 009-55].

24 The first is that this Court allegedly erred in holding that the question of President Zuma's instructions to Ms Myeni were immaterial to the question of her delinquency.[24] The suggestion is that the plaintiffs' case somehow stands or falls on whether they could prove that President Zuma instructed Ms Myeni not to go ahead with the Emirates MOU.

25 This has no basis in the pleadings. As is apparent from the particulars of claim,[25] the plaintiffs' case never relied solely or even primarily on President Zuma's instructions to Ms Myeni. The focus was instead on the damage done by Ms Myeni's obstruction of the finalisation of the Emirates MOU and her failure to offer any valid reason for doing so. We again can do no better than to refer to this Court's judgment, which addressed the point as follows:

> *"[127] The question of whether Ms Myeni was indeed instructed by the then president, Mr Zuma not to allow the signing of the MOU is not determinative of the question of her alleged delinquency. Mr Bezuidenhout and Mr Meyer testified that, that was what she said, whether this instruction emanated from Mr Zuma, we will never know. What we do however know is that it was common cause that Ms Myeni gave a direct instruction not to proceed with the signing of the MOU on 16 June 2915 to the great embarrassment of not only Messrs Bezuidenhout, Meyer and Bosc, but ultimately to the detriment of SAA and the whole country.*
>
> *[128] Ms Myeni had no valid reason to block the signing of the Emirates MOU. She was not acting on behalf of the Board in issuing such an instruction, and she clearly was engaging in a frolic of her own. Whether or not Ms Myeni in fact invoked President Zuma's name could merely be of aggravation, which will not change the conclusion that there was serious misconduct on her part."*[26]

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[24] Application for leave to appeal, para 4 [Caselines p 010-4].
[25] See POC pp 30 - 33 paras 86 – 88 [Caselines pp 007-32 – 007-35].
[26] Judgment pp 53 – 54 paras 127 – 128 [Caselines pp 9-53 – 9-54].

26 The second complaint is that this Court somehow "disregarded" the Board minutes of 10 July 2020,[27] which allegedly provided Board authorisation to conclude the Emirates MOU. Far from it, this Court addressed the Board minutes in detail:

> *"[130] It was only during the course of her examination-in-chief that Ms Myeni 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, Ms Myeni 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 stands in stark contradiction with 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. Ms Myeni did not provide this Court with a consistent credible version.*
>
> *[131]The only witness who was given the opportunity to respond to Ms Myeni's new version on the 10 July 2015 meeting was Mr Meyer. He denied Ms Myeni's claims that these minutes reflected Ms Myeni's approval. He confirmed that at no point did Ms Myeni expressly revoke her instruction not to sign the MOU, nor did she ever express her support for the transaction."*

27 This Court's findings are supported by the plain text of the 10 July 2015 minutes. Under Item 4.4 of these minutes it was recorded that:

> *"The Board confirmed that it was satisfied with the draft non-binding Emirates Memorandum of Understanding (MoU) and concluded that the next process as outlined In the action list from the meeting held on Friday 03 July 2015 with the Emirates Operational Review Team should be followed."*[28]

28 As is clear from these minutes, no resolution was taken on this matter. The action list referred to in this item repeated that the Operational Review Committee was to meet with Emirates, the Department of Transport, and the Board. Ms Myeni

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[27] Application for leave to appeal, para 5.1 [Caselines p 010-5].

[28] An extract of the minutes appears at Emirates Bundle pp 194.222 – 194.223 [Caselines pp 001-568 – 001-569].

also insisted that a further meeting be arranged between herself and the Chairperson of Emirates. Far from being a greenlight to conclude the MOU, these minutes show that Ms Myeni placed further hurdles in the way.

Fifth ground: Airbus

29 On the Airbus transaction, Ms Myeni again does not dispute the bulk of this Court's findings leading to the conclusion of delinquency. On Ms Myeni's own evidence, she could not explain why the Swap Transaction was delayed after the Board had given its full authorisation in March 2015 and she could not explain why she blocked the transaction from going ahead. The documentary evidence and the uncontested evidence of the plaintiffs' witnesses established that she lied to Airbus, she lied to the Minister of Finance, and took SAA and the country to the brink of financial ruin.

30 Ms Myeni's notice of appeal raises a number of narrow objections.

31 First, Ms Myeni claims that there was "no evidence" that she attempted to unilaterally renegotiate the Swap Transaction and she again seeks to pass the buck to Dr Tambi and Ms Kwinana.[29]

32 This is directly contradicted by Ms Myeni's letter of 29 September 2015 to Mr Fabrice Bregier, the President of Airbus, in which she unilaterally sought to renegotiate the Swap Transaction and misrepresented that she did so on behalf

[29] Application for leave to appeal para 8 [Caselines pp 010-6].

of SAA. As this Court found, Ms Myeni's own testimony confirmed that she signed this letter and approved of its contents:

> *"[155] Ms Myeni claimed in evidence that her letter of 29 September 2015 was prepared by the Company Secretary, Ms Kibuuka, in an apparent attempt to shift the blame for any misrepresentations. However, when pressed, Ms Myeni stated that she approved of the contents of the letter. Ms Myeni further testified that she checked all draft correspondence carefully before signing and that by signing this letter she indicated her approval of its contents. Therefore, there is no basis for Ms Myeni to attempt to disavow this letter."*[30]

33 Second, Ms Myeni takes issue with findings on the involvement of Quartile Capital.[31]

33.1 Ms Myeni again seeks to disavow her letter to the Board, motivating for the appointment Quartile Capital as a transaction adviser. However, this issue was settled when SAA produced a signed copy of this letter, bearing Ms Myeni's signature, under subpoena.[32]

33.2 Ms Myeni also seeks to challenge the suggestion that a Mr Matloba of Quartile Capital joined her at a meeting with Airbus on 10 October 2015. This was resolved by Mr Meyer's testimony, which Ms Myeni did not meaningfully dispute during the trial, as he confirmed that he had seen Mr Matloba at the venue shortly before this meeting.[33]

34 Third, there is some suggestion that this Court was mistaken in concluding that Ms Myeni played a leading role in authorising and sending the application for the amendment of the section 54 approval. Even the briefest perusal of the

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[30] Judgment p 64 para 155 [Caselines p 009-64].
[31] Application for leave to appeal para 6 [Caselines 010-5]
[32] Judgment p 71 paras 170 -172 [Caselines p 009-71].
[33] Judgment p 73 para 176 [Caselines p 009-73].

documentary evidence, as confirmed by the plaintiffs' witnesses, shows that this Court's findings cannot be challenged:

34.1 Ms Myeni signed the covering letter to this application, in which she fully endorsed its contents.[34]

34.2 The section 54 application form contains only two signatures: Ms Myeni's and Mr Zwane's, the new Acting CEO.[35] There were no signatures from any other members of EXCO or the Company Secretary, as would be expected in such an application.

34.3 As already noted, the application was accompanied by a Board submission, ostensibly serving as proof of a Board resolution. The Board submission only contains the signatures of Ms Myeni and Ms Kwinana, suggesting that they both prepared and approved the submission, without any executive input.[36]

34.4 Even if Mr Zwane, the Acting CEO, had some hand in preparing this application, it would have been entirely unreasonable for Ms Myeni to simply rubber-stamp his work. Ms Myeni knew full well that Mr Zwane had been in the job for no more than three days, after Ms Mpshe was removed from her position on 13 November 2015. The CFO, Mr Meyer, had resigned on 12 November 2015, and confirmed in his testimony that he was not consulted on this section 54 application before his departure. In these circumstances, a responsible chairperson would have closely

[34] Airbus Bundle vol 4 p 243 – 245.
[35] Airbus Bundle vol 4 p 250.
[36] Airbus Bundle vol 4 p 256 at 261.

scrutinised the section 54 application, knowing that the Acting CEO had no prior involvement in the matter. The absence of any proof that Ms Myeni took such steps is again ample grounds for a finding of gross negligence.

Sixth ground: Sanction

35 Ms Myeni next takes issue with the imposition of a lifetime declaration of delinquency.[37] In determining the duration of this declaration, this Court was exercising a "*true discretion*" which will not be easily overturned on appeal.

35.1 In ***Mwelase v Director-General for the Department of Rural Development and Land Reform*****,**[38] the Constitutional Court explained the nature of such a true discretion and the limited scope for attack on appeal as follows:

> *"[68] A "true discretion" or "discretion in the strong sense" is a power entrusted to a court to consider a wide range of available options, each of which is equally permissible. The court then has a choice as to which option it selects. And its pick can be said to be wrong only if it has failed to exercise that power judicially or has been influenced by wrong principles or a misdirection on the facts, or reached a decision that could not reasonably have been made by a court properly directing itself to all the relevant facts and principles."*

35.2 It follows that any appeal court will be "*slow to substitute its own decision solely because it does not agree with the permissible option chosen by the lower court.*"[39]

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[37] Application for leave to appeal para 15.8 [Caselines p 010-9].
[38] *Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another*[2019] ZACC 30 (20 August 2019) at para 68.
[39] *Trencon Construction (Pty) Ltd v IDC* 2015 (5) SA 245 (CC) at paras 88 – 90.

35.3 Ms Myeni has offered no basis for concluding that this Court's sanction was misdirected or based on wrong principle.

35.4 In any event, as this Court pointed out, this order offers Ms Myeni "*hope of redemption*" as it is open for Ms Myeni to apply for the lifting of this order after three years, provided that she can show evidence of her rehabilitation.[40]

36 Ms Myeni further suggests that this Court erred in referring her case to the NPA for further investigation. Ms Myeni again fails to engage with this Court's judgment, which clearly explained that the proven breaches of sections 50, 51, and 55 of the PFMA are also criminal offences under section 86(2) of that Act, which, at the very least, warrant further criminal investigations.[41]

Seventh ground: Alleged bias

37 Lastly, Ms Myeni raises a ground of appeal involving alleged bias, based on the allegation that the judgment is a "carbon copy" of the plaintiffs' heads of argument and submissions. Ms Myeni has not brought any formal application for recusal and appears content to rely on the mere content of the judgment.

38 This complaint has no basis in fact or in law.

[40] Judgment p 108 para 274 [Caselines p 009-108].
[41] Judgment p 3 para 6 [Caselines p 9-3].

39 The material part of the Court's judgment is to be found at paragraphs 231 to 285 of the judgment, which sets out detailed factual and legal conclusions. This is plainly the Court's own reasoning.

40 The sections of the judgment that precede this provide an uncontentious summary of the relevant legal framework and a chronological summary of the evidence on the Airbus and Emirates deals. To the extent that this Court may have used portions of the plaintiffs' heads of argument as a foundation for these parts of the judgment, this is unobjectionable.

41 The relevant legal framework and principles were never disputed by Ms Myeni. The chronological summary of the relevant events and evidence was also not meaningfully disputed, based as this was on the admitted documentary evidence, including contemporaneous correspondence, and the largely uncontested evidence of the plaintiffs' witnesses and Ms Myeni's own testimony.

42 It is important to note that at the conclusion of the trial on 28 February 2020, this Court granted the parties the opportunity to file supplementary heads of argument by 27 March 2020 to address the evidence in greater detail and to incorporate references to the transcripts. The complete transcripts were not yet available at the end of the trial.

43 Ms Myeni's counsel failed to submit supplementary heads of argument. Instead, she was apparently content to rely on the brief heads of argument filed at the conclusion of the trial, which did not contain any meaningful exposition of the

relevant facts and evidence, let alone directing this Court to relevant documents or excerpts from the transcripts.

44 Only the plaintiffs' counsel filed fully referenced heads of argument, that provided a comprehensive overview of the relevant facts and evidence, in chronological sequence, supported by references to the documentary evidence and the transcripts. Ms Myeni did not file any further heads of argument to respond to this exposition of the evidence.

45 Given the volume of the documentary evidence and the transcripts, running to many thousands of pages, Ms Myeni cannot fault the Court for finding assistance in the plaintiffs' summary of the evidence. Ms Myeni again fails to identify any respect in which this summary is materially mistaken or does not reflect the record.

46 As a result, this case is a far cry from the circumstances addressed in ***Stuttafords Stores (Pty) Ltd And Others v Salt Of The Earth Creations (Pty) Ltd***.[42] There the judge wrote a judgment which reproduced one party's heads in their entirety, apart from just 32 lines, without removing phrases such as "*it is submitted*".

46.1 The appellant brought an application for the recusal of the judge, which was dismissed. On appeal, the Full Court of this Division held that there were no grounds for recusal as "*[t]he fact that he fully agreed with the*

[42] Stuttafords Stores (Pty) Ltd and Others v Salt of the Earth Creations (Pty) Ltd 2011 (1) SA 267 (CC).

arguments of [Salt] and adopted their heads for the sake of convenience when he was saying just that, is no indication of bias".[43]

46.2 The Constitutional Court refused leave to appeal on the basis that the question was moot, as the judge had retired. The Court neither overturned nor endorsed the Full Court's reasoning. While it sounded a note of caution about the complete reproduction of heads of argument in judgments, it acknowledged that "*[s]ome reliance on and invocation of counsel's heads of argument may not be improper.*"[44]

47 This is indeed a case where some reliance on the plaintiffs' heads of argument could not be faulted.

48 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 the facts. In *President of the RSA v South African Rugby Football Union*[45] the Constitutional Court explained 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*

[43] Unreported judgment, summarised in the Constitutional Court's judgment.
[44] Ibid at para 11.
[45] *President of the RSA v South African Rugby Football Union* 1999 (4) SA 147 (CC) at para 48.

> *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".*

49 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 places 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 apprehension of bias. The effect of the presumption of impartiality is that a judicial officer will not lightly be presumed to be biased.*"[46]

50 A reasonable person would have regard to the totality of the circumstances in this trial, including the great lengths to which this Court went to accommodate Ms Myeni and to afford her every opportunity to present her case, despite her deliberately obstructive stance. As appears from the record, this Court:

50.1 Granted an initial postponement when Ms Myeni failed to attend Court at the commencement of the trial in October 2019;

50.2 Granted a further postponement of the matter to allow Ms Myeni's new legal team to prepare for the trial;

50.3 Entertained no less than four interlocutory applications;

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

50.4 Entertained two leave to appeal applications after the interlocutory applications were dismissed;

50.5 Repeatedly warned Ms Myeni's counsel of the need for his client to be present in court;

50.6 Repeatedly advised Ms Myeni's counsel of the dangers of not putting a version to the plaintiff's witnesses and afforded ample opportunities for him to take further instructions during the course of cross-examination;

50.7 Allowed the matter to stand down to allow Ms Myeni to travel to court to give evidence;

50.8 During the course of Ms Myeni's cross-examination, the Court took the further exceptional step of allowing Ms Myeni to procure further documents, which had not been discovered, to assist in her testimony.

51 In these circumstances, no reasonable person, with knowledge of the full facts of the conduct of this trial, could ever reasonably conclude that this Court was biased.

THE SECTION 18 APPLICATION FOR INTERIM ENFORCEMENT

52 Ms Myeni's conduct, as catalogued in this Court's judgment, shows that she cannot be trusted to be a director of any company, let alone the director of a state-owned entity. She remains a director of at least four companies, including one public entity. Without interim enforcement of this Court's order under section 18(1) and 18(3) of the Superior Courts Act, the protective purpose of this Court's delinquency declaration is defeated.

The section 18 test

53 An order made under section 18(1) and 18(3) of the Superior Courts Act serves to regulate the interim position between the litigants from the time when such an order is made until the final judgment on appeal is handed down.[47] Section 18 of the Superior Courts Act provides, in relevant part, as follows:

> *"(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.*
>
> *…*
>
> *(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."*

[47] *Department of Transport and others v Tasima (Pty) Limited; Tasima (Pty) Limited and others v Road Traffic Management Corporation and others* 2018 (9) BCLR 1067 (CC) para 56.

54 The SCA has laid down a three-part test for such an order, requiring proof, on a balance of probabilities, that:[48]

54.1 Exceptional circumstances exist for interim enforcement;

54.2 There will be irreparable harm if the court refuses to grant this order; and

54.3 Ms Myeni will not suffer irreparable harm if the order is granted.

55 The SCA has further held that the prospects of success on appeal are an important consideration.[49]

Exceptional circumstances

56 The meaning of "*exceptional circumstances*" has been discussed in some detail in previous judgments.[50] However, no detailed definitional analysis is needed here, save to record that the appellant's prospects of success are relevant. The circumstances of this case are exceptional, on any reasonable definition.

57 This litigation is of paramount public importance. The evidence led at trial, which was, by and large, uncontested, shows the damage that Ms Myeni did to SAA and the knock-on effects for the South African economy.

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[48] *Incubeta Holdings (Pty) Ltd v Ellis* 2014 (3) SA 189 (GJ) at para 16; *Ntlemeza v Helen Suzman Foundation and Another* 2017 (5) SA 402 (SCA) at para 36; *University of the Free State v Afriforum and another* 2018 (3) SA 428 (SCA) at para 11.
[49] *University of the Free State v Afriforum and another* 2018 (3) SA 428 (SCA) at paras 14 – 15.
[50] *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.

58 SAA never recovered. It is now on corporate life support under busines rescue and faces liquidation. The Emirates deal could have changed SAA's fate. It promised guaranteed annual revenue in the billions of Rand. It also offered an intangible reputation boost. Ms Myeni torpedoed the deal. Her conduct caused "incalculable" damage to SAA and "irreparable harm for ... the country".[51]

59 This is viewed against the backdrop of Ms Myeni's extraordinary disregard for the basic rules of corporate governance and for her fiduciary duties. The sheer extent of her misconduct and incompetence while at the helm of SAA makes this case exceptional.

60 This litigation involves one of South Africa's biggest state-owned companies. SAA's financial position is of obvious national importance, and this litigation evoked nationwide interest and concern. The mismanagement of state-owned entities and public money—and the conduct of those entrusted to care for both—is a matter of pressing and exceptional national concern.[52]

61 What is more, Ms Myeni hardly disputed the evidence against her at trial. This too makes this case exceptional. This is not a finely balanced case with lingering doubts and evidence that goes the other way. This Court's judgment demonstrates that Ms Myeni failed to present a credible contrary version for most of the allegations against her. She was an evasive witness and this Court made numerous adverse credibility findings against her. Ms Myeni's extraordinarily

[51] S18 FA, p17, paras 62-63 [Caselines p 012-21].
[52] S18 FA, p17, para 66 [Caselines p 012-21].

weak prospects of success on appeal also make this an exceptional case for interim enforcement.

62 Ms Myeni's disregard of her fiduciary duties coupled with the several findings of dishonesty made against her at trial rightly disqualify her from holding positions of trust. – *"Ms Myeni was a dishonest and unreliable witness. A perusal of the evidence as set out above illustrates abundantly that her evidence was unreliable and more often than not, blatantly untrue. As a result, her version of events cannot be accepted."*[53]

63 Ms Myeni remains unrepentant. She persists in her denial of any misconduct or harm resulting from her actions. She further denies the consequences of her actions for SAA and the country. Instead, she maintains that in the absence of any "*finding by the court of a misappropriation of funds*" there can be no genuine prejudice to the public.[54] This again reflects a profound misunderstanding of the fiduciary duties of directors, who are required to do far more than merely refrain from stealing public money. In turn, Ms Myeni's lack of contrition or insight is sufficient proof that there are exceptional circumstances that warrant interim execution.[55]

64 The purpose of delinquency is precisely to protect the public from "*rogue*" and "*reckless*" directors like Ms Myeni who display "*complete disregard for public funds*." This protective purpose assumes even greater significance in the case of

[53] Judgment p 93, para 233 [Caselines p 009-93].
[54] S 18 AA p 15 para 63 [Caselines p 013-18].
[55] S18 RA para 10-11 [Caselines p 014-4].

SOEs. The interests of the entire South African public are at stake, not merely a narrow class of shareholders. This was particularly so as SAA received billions in government guarantees, leaving the government liable should SAA have defaulted on any of its liabilities.

65 This case is also exceptional because of the light it shines on the mismanagement of SAA during Ms Myeni's tenure. The rule of law and the public interest demands that there be swift, effective remedies when evidence of maladministration and mismanagement is brought to light. Ms Myeni should not be allowed to use the appeal process to delay the consequences of her delinquency, especially while she remains a director of at least one state-owned entity and thus overseeing (and being paid from) public funds.

66 For as long as Ms Myeni delays the execution of this Court's decision through a prolonged appeal process, the longer she will be able to occupy the same positions of trust that she so severely abused at SAA.

67 In *Ntlemeza*,[56] the SCA emphasised the importance of the public interest in determining whether an application such as this ought to be granted.[57] We submit, similarly, that the public interest requires this section 18 order. A strong message is needed that the mismanagement of parastatals will not go unnoticed and without consequences and that wayward directors cannot use the appeals process to further evade accountability.

[56] *Ntlemeza v Helen Suzman Foundation and Another* 2017 (5) SA 402 (SCA) at para 45.
[57] Ibid at para 45.

Irreparable harm if the section 18 order is refused

68 Interim enforcement is necessary to prevent further irreparable harm to the investing public and the public purse. In short, this Court cannot allow a sequel of the damage that Ms Myeni did at SAA, whether to a state-owned company or a private company.

69 Ms Myeni remains a director of at least one state-owned entity, Centlec, the electricity utility wholly owned by the Mangaung Metropolitan Municipality. As a state-owned entity, Centlec is subject to a host of constitutional and statutory obligations relating to the use and management of public funds—the very same constitutional and statutory obligations over which Ms Myeni ran roughshod during her tenure on the SAA board.[58]

70 In her answering affidavit, Ms Myeni argues that in the absence of any formal complaint about her conduct at Centlec, there can be no harm in allowing her to continue to serve as a director of this parastatal. That misses the point. It is the individual against whom the public must be protected, not a particular board of directors.

71 However, Ms Myeni went further to claim that Centlec had "*been performing well as an entity in the time that I have been part of the board*" and that "*Centlec has received unqualified audits from the Auditor General for four consecutive years*

[58] S18 FA, p19, paras 72-73 [Caselines p 012-23].

while I have been on the board".[59] Once again, Ms Myeni has been dishonest and fails to take this Court into her confidence.

72 Evidence on the public record shows that this is in fact far from the truth. Centlec has received qualified audits in the last four years and is certainly not "*performing well*", by any measure. On the publicly available audit records, the Auditor General found over **R231 million** in irregular expenditure and fruitless and wasteful expenditure in this period:

72.1 This is reflected in a consolidated spreadsheet of the Auditor's General's audit opinions on Centlec.[60]

72.2 As appears from this spreadsheet, in the 2018/2019 financial year, the Auditor General's audit opinion was "financially unqualified with findings", as it found that Centlec had engaged in irregular expenditure and fruitless and wasteful expenditure of over **R21.3 million**.

72.3 In the 2017/2018 audit, Centlec was "*disclaimed with findings*", with irregular expenditure and fruitless and wasteful expenditure of over **R107.93 million**.[61]

72.4 In 2016/2017, the Auditor General's opinion was "*financially unqualified with findings*" with irregular expenditure and fruitless and wasteful expenditure of **R77.69 million**.[62] The Auditor General noted that Centlec

[59] S18 RA, paras 13 and 17 [Caselines p014-4 and 014-6].
[60] S18 RA, annexure RA2 [Caselines p 014-53]. The applicants' legal representatives have prepared this document by combining the Auditor General's annual spreadsheets of municipal audit outcomes that are published on its website, available at: https://www.agsa.co.za/Reporting/MFMAReports.aspx.
[61] S18 RA, annexure RA3 [Caselines p 014-54].
[62] S18 RA, annexure RA4 [Caselines p 014-63].

had sustained losses of over R80 million in this period and that its liabilities exceeded its assets by over R269 million, indicating "*significant doubt on the municipal entity's ability to operate as a going concern and to meet its service delivery objectives*".[63]

72.5 In 2015/2016, Centlec was again marked "*financially unqualified with findings*" with irregular expenditure and fruitless and wasteful expenditure of **R25.01 million.**

72.6 The Auditor General's website explains that the phrase "*financially unqualified with findings*" does not mean an unqualified or "clean" audit outcome.[64] The phrase "*financially unqualified*" simply means that Centlec's financial statements contain no material misstatements, but that findings have been made of non-compliance with legislation or reporting irregularities, or both. The Auditor General's opinion of "*disclaimed with findings*" in 2017/2018 means that Centlec failed to provide any evidence on which the Auditor General could base an audit opinion and that irregularities were found.

73 Allowing Ms Myeni to continue serving on the Centlec Board and receiving substantial payments (from the public purse) – the very role and payments that she previously hid from this Court – would cause irreparable harm to the administration of justice and public trust.

[63] S18 RA, annexure RA4, para 7 [Caselines p 014-63].
[64] S18 RA, annexure RA4, para 2 [Caselines p 014-70].

74 As this Court has confirmed in its judgment, directors of state-owned enterprises (SOEs) are subject to heightened duties. They are not only subject to the duties of ordinary company directors, but they are also subject to further duties under the Public Finance Management Act 1 of 1999.

75 There is also the prospect that Ms Myeni might be appointed to the board of directors of any state entity before the case is finally determined. Although she says she has no intention to do so, Ms Myeni has lied so often under oath that there is no reason for this Court to take her at her word.

No irreparable harm to Ms Myeni

76 The applicants maintain that Ms Myeni will suffer no genuine harm if the order sought is granted.

77 The only financial harm that Ms Myeni alleges is that she will be deprived of an income from her role as deputy-chairperson of the Centlec Board. She claims that "*[t]he income I earn from Centlec is effectively the only formal source of income I still have. The harm I shall suffer in no longer being able to earn anything is irreparable.*"[65] Ms Myeni claims that she earns no other income from other directorships and expressly disavows any intention of taking on other directorships pending the finalisation of her appeal.[66]

[65] S 18 AA p16, para 70 [Caselines p 013-19].
[66] S18 AA p16, paras 64 and 70 [Caselines p 013-19].

78 As outlined in both the founding and replying papers, 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]*".[67]

79 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*".[68] An extract from Ms Myeni's testimony on 21 February 2020 is attached to the replying affidavit.[69] If this is the case, then the harm she would suffer by not receiving the stipend cannot be described as irreparable.

80 Ms Myeni's new claims, on oath, that the Centlec remuneration is critical to her livelihood, her wellbeing, and her family's financial survival is yet another self-serving about-turn. Once again, Ms Myeni says whatever is expedient in the moment, without regard to the truth.

81 Given this pattern of evasion and dishonesty surrounding the Centlec payments, it is submitted that Ms Myeni's allegations should be disregarded as conflicting statements that are wholly unreliable.

No prospects of success on appeal

82 As addressed in detail above, Ms Myeni's prospects on appeal are extraordinarily weak. The evidence against her easily supports this Court's

[67] S18 RA para 24 [Caselines p014-9].
[68] S18 FA p 23, para 88 [Caselines p 012-27]; S18 RA para 25 [Caselines p 014-9].
[69] S18 RA annexure RA8 [Caselines p 014-78].

decision to declare her a delinquent director. For these reasons, Ms Myeni's hopeless application for leave to appeal should not delay effective relief for a moment longer.

No basis to join Centlec

83 Finally, there is no basis to Ms Myeni's point *in limine* concerning the alleged need to join Centlec in these proceedings.

84 This Court has previously addressed the relevant principles on joinder in its judgment of 2 December 2020, dealing with Ms Myeni's previous claims of non-joinder relating to other SAA directors.[70]

85 On these well-established principles, Centlec had no direct and substantial interest in the delinquency order and it therefore cannot have any direct and substantial interest in the section 18 interim enforcement order.

85.1 The interim operation of the delinquency order is a question of Ms Myeni's legal status and eligibility to serve as a director, which only indirectly effects the companies on which she serves. The implication is that Centlec would be unable to replace her, which is absurd.

85.2 If Ms Myeni is correct that Centlec should be joined, then every time a litigant approaches a court for a declaration of delinquency, every board on which that director sits would have to be cited.

[70] Judgment of 2 December 2020 at paras 60 - 72 [Caselines p 009-115 at pp 009-139 – 009-142].

85.3 It is also notable that Ms Myeni does not ask for the Jacob Zuma Foundation or any of the other companies of which she is a director to be joined in these proceedings, but does not explain what is special about Centlec.

IN THE ALTERNATIVE: THE CONSTITUTIONAL CHALLENGE TO SECTION 18

86 If this Court finds that Ms Myeni's loss of a self-described "*minimal amount, very minimal*" from Centlec constitutes irreparable harm that precludes any interim enforcement of the order, then OUTA and SAAPA bring a constitutional challenge to section 18 of the Superior Courts Act.

87 The constitutionality of this provision is challenged on the grounds that the requirements and procedure imposed by section 18 are unconstitutional and invalid as they, *inter alia*,

87.1 Remove judicial discretion and, in doing so, undermine the applicant's section 34 right to a fair hearing; and

87.2 Constitute an impermissible interference in judicial functions, in breach of the separation of powers and the specific duties under section 165 of the Constitution;

87.3 Result in an unjustifiable limitation of other constitutional rights.

The changes brought about by section 18

88 The requirements under the common law and Rule 49(11) of the Uniform Rules of Court were not as onerous on an applicant as those under section 18 and it is uncertain why a deviation to such strict and onerous requirements was thought necessary. The Minister of Justice and Constitutional Development was cited as a party in this constitutional challenge in the hope that he would cast light on this

issue. However, the Minister has elected not to oppose this application and has filed no affidavits.

89 Rule 49(11), prior to its deletion, provided as follows:

> "When an appeal has been noted or an application for leave to appeal against or to rescind, correct or vary an order of a court has been made, the operation and execution of the order in question shall be suspended, pending the decision of such an appeal or application, unless the court which gave such order, on the application of a party, otherwise directs"

90 The previous test under the common law and Rule 49(11) was captured in ***South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd***[71] by Corbett JA (as he then was) and was referred to in *Incubeta* at para 11. The overriding consideration was the determination of what was just and equitable in all the circumstances,[72] and the rule was aimed at preventing irreparable damage from being done to the intended appellant. The Court, however, had a wide discretion to grant or refuse enforcement and, if necessary, to determine conditions upon which the right to execute could be exercised. This discretion emanated from the inherent jurisdiction of the Court to control its own judgments. The court would normally have regard to the following factors:

90.1 The potential of irreparable harm to the respondent if enforcement is granted;

90.2 The potential of irreparable harm to the applicant if enforcement is not granted;

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[71] *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 544H – 546B.
[72] *Gauteng Province Driving School Association v Amaryllis Investments (Pty) Ltd* [2012] 1 All SA 290 (SCA) at para 13.

90.3 The prospects of success on appeal , including whether the appeal is frivolous or vexatious;

90.4 Where there is the potential of irreparable harm or prejudice to both parties, the balance of hardship or convenience, as the case may be.

91 The critical component of the approach under Rule 49(11) was judicial discretion, derived from the inherent jurisdiction of the court, to rule in accordance with the equities present in a given case.[73]

92 Section 18 has done away with the application of equities and brought in a new set of strict criteria.

93 The irreparable harm leg of section 18(3) introduces a fundamentally different test. In the previous test, the Court would ask, in short, which of the parties would be worse off if the order is granted or refused.[74] The section 18 test, however, operates differently, as explained by the SCA:

> *"A hierarchy of entitlement has been created, absent from the [common law] test. Two distinct findings of fact must now be made, rather than a weighing up to discern a 'preponderance of equities'".* [75]

94 In *Ntlemeza*, the SCA further held that "*[w]here there is potentially irreparable harm or prejudice to both parties the Court should refuse the application as it will no longer balance the two in the interest of justice.*"[76]

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[73] *Incubeta* at para 12.
[74] *Incubeta* at para 21 and 24.
[75] *University of the Free State v Afriforum and Another* 2018 (3) SA 428 (SCA) at para 11.
[76] *Ntlemeza v Helen Suzman Foundation and Another* 2017 (5) SA 402 (SCA) at para 19.

95 These findings of fact are strict proof requirements, and a Court will not have the discretion to grant the order if an applicant is unable to prove both requirements. The applicant must prove that it will suffer irreparable harm, and that the respondent will not suffer irreparable harm if the order is granted.

96 The SCA notes that the requirements introduced by sections 18(1) and (3) are far more onerous and introduce a higher threshold in the form of a requirement of proof, on a balance of probabilities, that the applicant will suffer irreparable harm if the order is not granted and conversely that the respondent will not, if the order is granted.

The removal of judicial discretion – section 34 of the Constitution

97 The Constitutional Court has on at least two occasions determined challenges to statutes on the basis that they limit judicial discretion in an unconstitutional manner. In both cases the Court found that the statutes were saved by provisions that allowed judges a measure of flexibility in applying the relevant statutory principles. That is not the case with section 18(3) of the Superior Courts Act.

98 In ***Dodo***[77], the Constitutional Court considered whether the prescription of minimum sentences in serious crimes of the Criminal Procedure Law Amendment Act 105 of 1997 constitutes an unconstitutional limitation of judicial discretion.

[77] *S v Dodo* 2001 (3) SA 382 (CC).

99 Ackerman J establishes the test at paragraph 26:

> *"The Legislature's powers are decidedly not unlimited. Legislation is by its nature general. It cannot provide for each individually determined case. Accordingly such power ought not, on general constitutional principles, wholly to exclude the important function and power of a court to apply and adapt a general principle to the individual case. This power must be appropriately balanced with that of the Judiciary. What an appropriate balance ought to be is incapable of comprehensive abstract formulation, but must be decided as specific challenges arise. In the field of sentencing, however, it can be stated as a matter of principle that the Legislature ought not to oblige the Judiciary to impose a punishment which is wholly lacking in proportionality to the crime. This would be inimical to the rule of law and the constitutional State. It would a fortiori be so if the Legislature obliged the Judiciary to pass a sentence which was inconsistent with the Constitution and in particular with the Bill of Rights. The clearest example of this would be a statutory provision that obliged a court to impose a sentence which was inconsistent with an accused's right not to be sentenced to a punishment which was cruel, inhuman or degrading as envisaged by s 12(1)(e) of the Constitution, or to a fair trial under s 35(3)"*

100 In short, the Court held that, while it is permissible for the legislature to limit judicial discretion, it may not remove judicial discretion entirely. This is because, in the absence of any discretion at all, a judge is unable to apply and adapt a statutory principle to the particular facts of a case, and might then have to hand down orders that are inconsistent with the Constitution.

101 The Court found that, because the minimum sentence regime that the Act prescribed allowed a judge to depart from the minimum sentence in "*substantial and compelling circumstances*", the Act did not remove judicial discretion. This meant that the legislature had limited, but not removed, judicial discretion. However, in the absence of the "substantial and compelling" escape hatch provision, the provision would have indeed been unconstitutional on the basis that it removed judicial discretion.

102 In ***Beinash***,[78] the High Court had made an order terms of section 2(1)(b) of the Vexatious Proceedings Act. The applicants took issue with *inter alia* the limitation that the provision had on judicial discretion. They argued that a judge would not be able to tailor an order to suit the specific circumstances of the case and that this constituted an impermissible infringement of section 34 of the Constitution.

103 In the context of a limitations analysis in terms of section 36 of the Constitution, the Court found (at paragraph 19) that :

> *"While such an order may well be far-reaching in relation to that person, it is not immutable. There is escape from the restriction as soon as a prima facie case is made in circumstances where the Judge is satisfied that the proceedings so instituted will not constitute an abuse of the process of the court. When we measure the way in which this escape-hatch is opened in relation to the purpose of the restriction, for the purposes of s 36(1)(d), it is clear that it is not as onerous as the applicants contend, nor unjustifiable in an open and democratic society which is committed to human dignity, equality and freedom. The applicant's right of access to courts is regulated and not prohibited. …. The procedure which the section contemplates therefore allows for a flexible proportionality balancing to be done, which is in harmony with the analysis adopted by this Court, and ensures the achievement of the snuggest fit to protect the interests of both applicant and the public."*

104 As with *Dodo*, what saved the provision in Beinash's case was the "*escape hatch*" that "*allows for a flexible proportionality balancing to be done*". Without the escape hatch, the provision would have removed judicial discretion to the extent that the statutory principle would be "*immutable*", and accordingly the subsection would not have passed constitutional muster.

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[78] *Beinash and another v Ernst & Young and others* 1999 (2) SA 116 (CC).

105 There is no escape hatch in section 18(3) of the Superior Courts Act. If the Court finds that the respondent will suffer irreparable harm, judicial discretion is removed, and the provisions of the section are rendered immutable. There is no room more proportionality balancing.

106 Section 34 provides as follows:

> *"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."*

107 Where the court's hands are tied, there is every possibility that the hearing will not be fair and that litigants will be denied effective remedies. In the circumstances, on its plain meaning, the section offends section 34 of the Constitution.

The separation of powers and sections 165 and 173 of the Constitution

108 For the same reasons, section 18 represents an impermissible legislative interference into the operation and effectiveness of the courts, which constrains the court's inherent jurisdiction under section 173 of the Constitution.

109 This is a breach of the separation of powers, as given particular effect by section 165 of the Constitution. Section 165 provides, in relevant part, that:

> "*(3) No person or organ of state may interfere with the functioning of the courts.*
>
> *(4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility <u>and effectiveness of the courts.</u>*"

110 The radical change to the test for interim enforcement introduced by section 18 constitutes a direct interference that diminishes the effectiveness of the courts and their orders. This case is a clear example of this. If Ms Myeni's potential loss of earnings at Centlec is "irreparable harm" that, despite the overwhelming public interest, precludes any interim enforcement, this would blunt the effectiveness of this Court's order and substantially undermine public confidence in the courts.

The infringement of other constitutional rights

111 Section 18 can also have a substantial impact on other constitutional rights. The effect of section 18 is that a successful litigant's rights (which may include rights to property, dignity, physical and psychological integrity, freedom of expression, the environment and even, conceivably, life) may be irreparably impaired pending an appeal even though the litigant was successful before the court of first instance or a court of appeal. And this is simply on the basis that the unsuccessful respondent may suffer some irreparable harm if the substantive order is enforced.

112 Where constitutional rights have been infringed, the courts are obliged by the Constitution to grant appropriate and effective remedies.[79] The denial or frustration of an effective judicial remedy for rights violations is itself a limitation of fundamental rights.[80]

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[79] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at para 69.
[80] See, for example, *Nyathi v MEC for Department of Health, Gauteng and Another* 2008 (5) SA 94 (CC); *Bannatyne v Bannatyne (Commission for Gender Equality, as Amicus Curiae)* 2003 (2) SA 363 (CC) at para 31; *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC) at para 75; *Mankayi v Anglogold Ashanti Ltd* 2011 (3) SA 237 (CC) at para 14.

No justification under section 36 of the Constitution

113 The limitation imposed by section 18 on a successful litigant's rights is unjustifiable under section 36 of the Constitution. The onus is on the state or other parties seeking to defend the constitutionality of this provision to demonstrate that it is reasonable and justifiable, on a proportionality test.[81] No such defence has been advanced by Ms Myeni or by the Minister.

114 There is no reason why the determination of interim enforcement should not be based on a balance of convenience and/or on a weighing of irreparable harm and the interests of justice, as was the case prior to the introduction of section 18. This would ensure both the rights of the applicant and the respondent – as well as the public interest – are given proper weight and are protected insofar as is necessary. There is certainly no reason of logic or law why an unsuccessful respondent's interests should be given primacy over the successful applicant's rights and interests in every case, regardless of the facts.

115 This discretion, which existed prior to section 18, is the less restrictive means to regulate the process and the enforcement of orders pending appeal.[82] Allowing a court to grant an enforcement order on a balance of convenience or balance of harm assessment is more readily compatible with the Constitution. In these

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[81] *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO)* [2004] ZACC 10; 2005 (3) SA 280 (CC); 2004 (5) BCLR 445 (CC) at para 34.

[82] See *Beinash and Another v Ernst & Young And Others* 1999 (2) SA 116 (CC) at paras 19 to 21, where the Court held that section 2(1)(b) of the Vexatious Proceedings Act, 1956 was in breach of section 34 of the Constitution but was reasonable and justifiable as it allowed for a flexible proportionality balancing to be done. This case is distinguishable from the case at had where there is no discretion or balancing exercise to ensure just results.

circumstances, and on application of section 36 of the Constitution, the limitation of rights cannot be justified.

Just and equitable remedy

116 To avoid constitutional invalidity, section 18 of the Superior Courts Act should be "*read down*" in a manner that restores the discretion that previously existed under Rule 49(11) of the Uniform Rules of Court, to the extent that its text is reasonably capable of such an interpretation. This is the obligation imposed by section 39(2) of the Constitution.[83] We acknowledge however, that such an interpretation is possibly unavailable to this Court due to the SCA's interpretation of section 18 in *UFS* and *Ntlemeza*, as addressed above.

117 If section 18 is not reasonably capable of such an interpretation, then it must be declared invalid under section 172(1)(a) of the Constitution. \

118 This Court then has a discretion under section 172(1)(b) of the Constitution to grant a just and equitable remedy following from the declaration of invalidity. We submit that the appropriate remedy in this case is to suspend the declaration of invalidity for no more than 12 months to allow Parliament to remedy the defects, having regard to the grounds of unconstitutionality as found by the Court.

119 While Parliament does its work, it is just and equitable to grant an "*interim reading-in*" order to cure the invalidity and to ensure that SAAPA and OUTA are

[83] *Makate v Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC) at para 87 – 89.

able to secure effective relief.[84] The table below shows the proposed reading-in, compared with the current text of section 18(3):

Current (and unconstitutional) wording of section 18(3):	**Proposed interim reading-in (underlined words):**
"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."	"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, <u>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</u>"

120 If at the end of the 12-month period, an amended section 18 has still not come into force, the interim reading-in order should become final.

CONCLUSION AND COSTS

121 For the reasons set out above, Ms Myeni's application for leave to appeal should be dismissed in its entirety.

122 Regardless of the outcome of the application for leave to appeal, OUTA and SAAPA should be granted the section 18 relief set out in their notice of motion and this Court's order should be enforced pending the outcome of any and all appeals.

[84] For a recent discussion of the relevant principles on interim reading-in orders, see *Centre for Child Law and Others v Media 24 Limited and Others* (CCT261/18) [2019] ZACC 46; 2020 (3) BCLR 245 (CC) at paras 114 – 126.

123 To the extent that this Court finds itself prevented from granting the section 18 relief, this provision should be declared unconstitutional to the extent indicated above and in the notice of motion, an interim reading-in order should be made, and the section 18 relief should be granted.

124 Ms Myeni should be made to pay the costs in both the leave to appeal application and the section 18 application, including the costs of three counsel. Once again, we submit that a punitive costs award is warranted, particularly due to Ms Myeni's further untruthfulness and evasions regarding Centlec, as well as her re-raising grounds of appeal in respect of the interlocutory applications that this Court has already decided. The principles on punitive costs addressed in this Court's judgment have equal application here.[85]

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4 September 2020

[85] Judgment p 109 – 110 para 277 [Caselines pp 009-109 – 110], citing *Public Protector v South African Reserve Bank* [2019] ZACC 29; 2019 (9) BCLR 1113 (CC) at paras 221 – 223.

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