

**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

Appellant

and

ORGANISATION UNDOING TAX ABUSE NPC

First Respondent

SOUTH AFRICAN AIRWAYS PILOTS' ASSOCIATION

Second Respondent

OUTA AND SAAPA'S HEADS OF ARGUMENT: SECTION 18(4) APPEAL

INTRODUCTION

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

- 2 This is the first time that Ms Myeni has faced any genuine accountability for her actions at SAA. Ms Myeni did everything in her power to obstruct this outcome and engaged in repeated conduct throughout the trial which was "*calculated to cause maximum delay and disruption*".²

¹ 27 May 2020 Judgment [Caselines p 009-1].

² 27 May 2020 Judgment p 112 para 283 [Caselines p 009-112].

- 3 On 22 December 2020, Tolmay J dismissed Ms Myeni's application for leave to appeal and upheld the respondents' application in terms of section 18(1) and 18(3) of the Superior Courts Act 10 of 2013 ("section 18(3) judgment"). Ms Myeni now brings an appeal in terms of section 18(4) of the Superior Courts Act, to be heard with extreme urgency.

- 4 In these heads of argument, we demonstrate that the section 18(4) appeal must fail. We address five issues in turn:
 - 4.1 Ms Myeni's section 18(4) appeal would have no practical effect, given her failure to file a petition or any condonation application in the SCA;
 - 4.2 The test for interim execution under section 18(3);
 - 4.3 The exceptional circumstances and irreparable harm to the public if this order is not granted;
 - 4.4 The absence of irreparable harm to Ms Myeni;
 - 4.5 The absence of any prospects of success in any future appeals.

THE SECTION 18(4) APPEAL HAS NO PRACTICAL EFFECT

- 5 Before addressing the merits of the appeal, we highlight that Ms Myeni has failed to file a petition in the Supreme Court of Appeal in time or any condonation application. This is reflected in the exchange of correspondence between the parties and the Judge President, attached as **Annexure 1**:

- 5.1 On 29 January 2021, Ms Myeni's legal representative, Mr Mabuza, wrote to the Judge President seeking an urgent set-down of this section 18(4) appeal. In doing so, he stated that a petition had been lodged in the SCA.³
- 5.2 On 1 February 2021, the respondents' attorneys wrote to this Court noting that the Registrar of the SCA and Ms Myeni's own correspondent attorneys confirmed that no petition had been lodged in the SCA and that Ms Myeni is now out of time for filing a petition.
- 5.3 On 1 February 2021, Mr Mabuza responded admitting that no petition had been filed in the SCA due to unspecified "logistical problems".
- 6 The effect is that there is currently no pending application for leave to appeal against Tolmay J's delinquency order of 27 May 2020, which is now in full force and effect.
- 7 Even if Ms Myeni were to file a belated petition, coupled with an application for condonation (which has not yet been done), this would not suspend the delinquency order. Unless and until condonation is granted, a late application for leave to appeal does not suspend anything.⁴ The SCA also sets a high bar for condonation, making Ms Myeni's prospects slim to none.⁵

³ Paragraph 2 of the letter.

⁴ *Modder East Squatters and Another v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd* [2004] 3 All SA 169 (SCA) at para 46; *Panayiotou v Shoprite Checkers (Pty) Ltd and Others* 2016 (3) SA 110 (GJ) at paras 8, 13 – 14; *Chief of the South African National Defence Force & Others v SANDU & Others* Unreported Case No 38818/2015 on 18 September 2019 (GP) per Raulinga J at paras 10 – 11.

⁵ *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC) at para 22; *Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SCA) at para 6.

- 8 In these circumstances, unless and until Ms Myeni is granted condonation in the SCA, the section 18(4) appeal is premature, would have no practical effect, and does not merit burdening this court with a hearing under conditions of extreme urgency.
- 9 Despite taking no proper care to ensure that a petition was filed timeously in the SCA, Ms Myeni and her legal representatives nevertheless insist that this Court should convene urgently, putting aside all other cases, to hear and decide her section 18(4) appeal. This is an abuse.
- 10 The circumstances of this case are entirely different from those in *Ntlemeza*.⁶ There the successful parties acted proactively by bringing a section 18(3) application in anticipation of an application for leave to appeal, which had not yet been filed, but while there was still time to file it. The SCA held that this Court was entitled to grant the section 18(3) order, in the exercise of its inherent jurisdiction and as “*the guardian of its own process*”.⁷
- 11 In this case, Ms Myeni is a failed litigant who seeks to further delay the operation of a binding order. She has not taken any proactive action to preserve her rights of appeal and has instead allowed these rights to lapse. There is no reason for this Court to come to her assistance, let alone on a basis of extreme urgency.
- 12 In any event, the section 18(4) appeal has no merits, for the reasons we now address.

⁶ *Ntlemeza v Helen Suzman Foundation and Another* 2017 (5) SA 402 (SCA).

⁷ *Ibid* at para 32, read with fn 7.

THE TEST FOR INTERIM EXECUTION

13 As summarised in the judgment of Tolmay J,⁸ there is a three-part test for interim execution under section 18(3), requiring proof, on a balance of probabilities, that:⁹

13.1 Exceptional circumstances exist for interim enforcement;

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

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

14 In addition, the prospects of success on appeal are an important consideration.¹⁰

EXCEPTIONAL CIRCUMSTANCES AND IRREPARABLE HARM TO THE PUBLIC

15 The meaning of “*exceptional circumstances*” is addressed in detail in Tolmay J’s judgment.¹¹ No further definitional analysis is required here. The circumstances of this case are exceptional, on any reasonable definition.

16 Tolmay J agreed with the respondents that there are no less than six separate factors that render this case exceptional and demonstrate evidence of irreparable harm to the public if interim execution is denied:

⁸ Section 18(3) Judgment, pp 26 – 29, paras 54 – 58.

⁹ *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, 14 - 18.

¹⁰ *University of the Free State v Afriforum and another* 2018 (3) SA 428 (SCA) at paras 14 – 15.

¹¹ Section 18(3) Judgment, pp 29 – 30 paras 58 – 59 [Caselines p 021-29]. Citing *Ntlemeza v Helen Suzman Foundation and Another* 2017 (5) SA 402 (SCA) at para 37, citing *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas, & another* 2002 (6) SA 150 (C) at 156H-157C.

- 16.1 First, the scale of Ms Myeni's proven misconduct and maladministration during her time at SAA and the resulting harm to SAA and the South African economy as a whole make this case sufficiently exceptional.¹²
- 16.2 Second, the manner in which Ms Myeni presented her case during the trial also rendered this case exceptional. Ms Myeni failed to put a clear or consistent version to witnesses, failed to meaningfully dispute the evidence, and was found to be a dishonest and unreliable witness.¹³ As a result, this was not a finely balanced trial with evidence going in both directions, leaving lingering doubts. Ms Myeni's delinquency is not in doubt and no court of appeal would ever interfere with the trial court's factual findings on this score.
- 16.3 Third, the uncontested evidence of Ms Myeni's dishonesty and recklessness that emerged in the trial was a further demonstration of exceptional circumstances and the threat posed to the public.¹⁴
- 16.4 Fourth, the public interest demands that there be swift and effective remedies when maladministration and mismanagement are brought to light.¹⁵
- 16.5 Fifth, the fact that Ms Myeni remained a director of at least four companies at the time of the section 18(3) hearing, including the parastatal, Centlec, also rendered this case exceptional and demonstrated irreparable harm to

¹² Section 18(3) Judgment, p 31 para 60.

¹³ Section 18(3) Judgment, p 31 paras 61 – 62.

¹⁴ Section 18(3) Judgment, p 32 para 63 [Caselines p 021-32]

¹⁵ Section 18(3) Judgment, p 32 para 64 [Caselines p 021-32].

the public.¹⁶ As the respondents have argued throughout, the purpose of delinquency orders is to protect the public from “*rogue*” and “*reckless*” directors like Ms Myeni. Public trust would be eroded if Ms Myeni were allowed to use the appeals process to continue to occupy positions of trust and to earn directors’ fees for several years to come.

17 None of these multiple findings are meaningfully contested in Ms Myeni’s notice of appeal or in the heads of argument filed on her behalf.

18 Instead, Ms Myeni argues that harm to the public is insufficient to establish irreparable harm under section 18(3). Ms Myeni argues that only direct harm to OUTA and SAAPA would suffice.¹⁷ This is at odds with the SCA’s judgment in *Ntlemeza*, which accepted that proof of irreparable harm to the public interest qualifies as irreparable harm under section 18(3).¹⁸ Both OUTA and SAAPA have litigated in the public interest throughout these proceedings.

19 Next, Ms Myeni impermissibly attempts to introduce new evidence, as her notice of appeal claims, for the very first time, that her term on the Centlec board expired in November 2020. On this basis she argues that the “*fundamental basis for the judgment of Tolmay J has been removed or substantially ameliorated*”.¹⁹

20 This is at odds with Ms Myeni’s evidence in the section 18(3) application, in which she gave no indication whatsoever that her term on the Centlec board would be

¹⁶ Section 18(3) Judgment, p 32 para 64 [Caselines p 021-32].

¹⁷ Myeni Heads, p 024-16 at para 57.

¹⁸ *Ntlemeza v Helen Suzman Foundation and Another* 2017 (5) SA 402 (SCA) at para 47.

¹⁹ Notice of Appeal, paras 2.1-2.3.

expiring. Instead she made impassioned pleas to be allowed to continue earning hefty fees from Centlec, claiming 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.” We return to address these inconsistencies below.

21 This appeal is confined to the facts and circumstances on the record before Tolmay J, as Ms Myeni’s counsel appear to acknowledge in their heads of argument.²⁰

22 In any event, regardless of whether Ms Myeni remains at Centlec, she is still the director of at least three other companies, including the Jacob Zuma Foundation. She would also be at large to take up positions on other boards if this Court’s order of 27 May 2020 were suspended pending further appeal processes.

23 On Ms Myeni’s own reckoning, this appeals process is likely to drag on “*for the next .. two to three years*”.²¹ This establishes a clear need to protect the public from Ms Myeni’s proven delinquency during this lengthy interim period.

NO IRREPARABLE HARM TO MS MYENI

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

²⁰ Ms Myeni’s Heads p 15 para 61 [Caselines p 024-17]

²¹ Notice of Appeal, para 7 [Caselines p 022-4].

- 25 In Ms Myeni's answering affidavit in the section 18(3) application, the only harm that she alleged was that she would be deprived of an income from her role as deputy-chairperson of the Centlec board.²² Ms Myeni expressly stated that she earned no other income from other directorships.²³
- 26 Tolmay J drew attention to Ms Myeni's previous dishonesty and inconsistency regarding her earnings from Centlec.²⁴
- 26.1 During the trial, Ms Myeni previously hid her role at Centlec and her remuneration by claiming, on oath, that she was "*unemployed*", "*do[es] not earn any income*" and that she "*do[es] not hold any position of directorship that is of interest to [the applicants]*".²⁵
- 26.2 Under cross-examination, Ms Myeni then sought to downplay the remuneration that she received from Centlec, claiming that this was just a "*stipend*" and is "*a minimal amount, very minimal*".²⁶
- 27 As a result, Tolmay J rightly held that it was "*preposterous*" for Ms Myeni to attempt to rely on income that she had initially hid from the court, and later claimed was "*minimal*", in an attempt to persuade the court that she would now suffer irreparable harm.²⁷

²² AA p16, para 70 [Caselines p 013-19].

²³ AA p16, paras 64 and 70 [Caselines p 013-19].

²⁴ Section 18(3) Judgment, p 34 para 69 [Caselines p 021-34].

²⁵ RA para 24 [Caselines p014-9].

²⁶ FA p 23, para 88 [Caselines p 012-27]; RA para 25 [Caselines p 014-9].

²⁷ Section 18(3) Judgment p 34 para 71 [Caselines p 021-34].

- 28 Ms Myeni's version on Centlec has now shifted yet again, as she claims to have left Centlec in November 2020.²⁸ Ms Myeni is suitably vague about the precise date. No explanation is offered as to why this was not disclosed to the court during the hearing of the section 18(3) application on 20 November 2020.
- 29 Ms Myeni nevertheless persists in her submission that Tolmay J erred in finding that she would not suffer irreparable harm "*if the source of her living which she procures from being remunerated as a board member of an entity is removed for the next two to three years while the appeal is under way*".²⁹ In addition, Ms Myeni seeks to rely on her constitutional right to choose a trade, occupation or profession.³⁰
- 30 Ms Myeni makes both of these submissions in circumstances where she has previously stated on oath that she had "*no intention of taking on any other directorships pending the finalisation of her appeal*".³¹ Once again, Ms Myeni appears to advance whatever position is most expedient in the circumstances.
- 31 In any event, there is clear Constitutional Court authority, cited by Tolmay J,³² which confirms that the deprivation of earnings or a salary for an interim period does not qualify as "irreparable harm". The Constitutional Court reached this conclusion in both *Ngaka Modiri Molema District Municipality v Chairperson*,

²⁸ Notice of Appeal, para 2.2 [Caselines p 022-2].

²⁹ Notice of Appeal, para 7 [Caselines 022-4].

³⁰ Notice of Appeal, para 6 [Caselines 022-4].

³¹ Section 18(3) Judgment p 32 para 65 [Caselines p 021-32]; S18 AA p16, paras 64 and 70 [Caselines p 013-19].

³² Section 18(3) Judgment p 34 para 71 [Caselines p 021-34].

*North West Provincial Executive Committee and Others*³³ and in *Road Traffic Management Corporation v Tasima (Pty) Limited*.³⁴ Ms Myeni offers no response to this authority.

32 Ms Myeni's versions flip-flop according to what best suits her argument at any given moment. When it suited her to argue that she was impecunious and could not afford to travel to Pretoria to participate in the trial, she said that her director's fees were insignificant – that she was effectively “unemployed”. When it suited her to demonstrate irreparable harm should the order of Tolmay J be executed pending the final determination of the case, she claimed that her director's fees – and particularly those she earned at Centlect – were essential to her livelihood. Finally, when she wanted to challenge Tolmay J's judgment in the section 18 application, she claimed that she no longer served on the board of Centlec.

33 Tolmay J found that Ms Myeni was a dishonest witness during the trial. She continues to play fast and loose with the truth during the course of the section 18 applications. This alone is reason enough to dismiss this appeal: the public should be protected against Ms Myeni occupying a directorship of any board.

NO PROSPECTS OF SUCCESS ON APPEAL

34 Ms Myeni's prospects on appeal are extraordinarily weak. Tolmay J confirmed this in the detailed judgment dismissing Ms Myeni's application for leave to appeal, which concluded that:

³³ *Ngaka Modiri Molema District Municipality v Chairperson, North West Provincial Executive Committee and Others* [2014] ZACC 31; 2015 (1) BCLR 72 (CC) at paras 8, 10.

³⁴ *Road Traffic Management Corporation v Tasima (Pty) Limited; Tasima (Pty) Limited v Road Traffic Management Corporation* [2020] ZACC 21 at paras 130 -131.

*“There is no reasonable possibility that another court would come to another conclusion on the evidence led at this trial and that a court of appeal would come to a different conclusion, nor is there any other compelling reason why leave to appeal should be granted. As a result, the application for leave to appeal should be dismissed with costs”.*³⁵

35 While considering the section 18(3) application, Tolmay J further held that–

*“A consideration of the judgment and the evidence enforces the conclusion that Ms Myeni’s prospects of success on appeal is weak and this contributes to the conclusion that the order should not be suspended.”*³⁶

36 Nevertheless, Ms Myeni continues to recycle a list of grounds of appeal in her heads of argument in these proceedings. The difficulty remains for Ms Myeni that these grounds leave the bulk of the trial court's factual findings and legal conclusions untouched.

37 In her judgment of 27 May 2020, Tolmay J made multiple findings against Ms Myeni, any one of which is sufficient to justify the declaration of delinquency for life. The majority of these findings are simply not addressed by Ms Myeni.

38 To take just one example, Ms Myeni has never disputed the trial court’s findings, based on her own testimony, that she displayed a reckless disregard for SAA’s financial position and the implications for the South African fiscus when she delayed the conclusion of the Airbus Swap Transaction despite the imminent pre-delivery payments (PDPs) that were due 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

³⁵ Leave to Appeal Judgment, p 25 para 53 [Caselines p 021-25].

³⁶ Section 18(3) Judgment, p 35 para 73 [Caselines p 021-35].

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 warnings from Minister Nene that the government did not have the money to bail out SAA and would not do so."³⁷

39 This finding alone is sufficient to justify the trial court's finding of delinquency. Ms Myeni's nit-picking at some of the trial 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.

40 Ms Myeni's prospects have now gone from bad to worse due to her failure to file any petition or condonation application in the SCA. All her rights of appeal have now lapsed and Ms Myeni will face an uphill battle convincing the SCA to revive them.

THE ALTERNATIVE CONSTITUTIONAL CHALLENGE

41 The respondents have raised an alternative constitutional challenge to section 18 of the Superior Courts Act, if it is found that section 18(3) precludes this Court from granting effective interim relief.

³⁷ Judgment p 103 paras 262 – 263 [Caselines p 009-103].

42 The basis for that constitutional challenge is addressed in detail in OUTA and SAAPA's heads of argument in the section 18(3) application and need not be repeated here.³⁸ It would only be necessary to address this constitutional challenge if this Court is inclined to uphold Ms Myeni's section 18(4) appeal.

43 The constitutional challenge concerns the stringent test that has now been introduced by section 18(3). The previous test under the common law and Rule 49(11) required a balancing of interests. Where there was harm to both parties, the court would consider the balance of hardship or convenience, as the case may be.³⁹

44 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'".*⁴⁰

45 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."⁴¹

46 The respondents submit that this removal of judicial discretion to balance competing harms is unconstitutional at two levels:

³⁸ OUTA and SAAPA's Heads, pp 36 – 46 paras 86 – 120 [Caselines 015-390 – 400].

³⁹ *Incubeta Holdings (Pty) Ltd v Ellis* 2014 (3) SA 189 (GJ) at para 12.

⁴⁰ *University of the Free State v Afriforum and Another* 2018 (3) SA 428 (SCA) at para 11.

⁴¹ *Ntlemeza v Helen Suzman Foundation and Another* 2017 (5) SA 402 (SCA) at para 19.

- 46.1 It represents an impermissible legislative interference into the operation and effectiveness of the courts, in breach of section 173 and 165 of the Constitution.
- 46.2 It is also an unjustifiable limitation of rights, as it threatens to deprive successful litigants of effective judicial remedies for proven violations of constitutional rights.
- 47 However, this Court need only reach these constitutional issue if it were to hold that Tolmay J was wrong and that Ms Myeni would suffer irreparable harm that precludes relief under the current wording of section 18(3).

CONCLUSION AND COSTS

48 For the reasons set out above, Ms Myeni's appeal should be dismissed with costs, including the costs of three counsel.

**CAROL STEINBERG
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**OUTA and SAAPA's counsel
Chambers, Sandton
3 February 2021**

LIST OF AUTHORITIES

Chief of the South African National Defence Force & Others v SANDU & Others
Unreported Case No 38818/2015 on 18 September 2019 (GP) per Raulinga J at
paras 10 – 11

Incubeta Holdings (Pty) Ltd v Ellis 2014 (3) SA 189 (GJ) at para 16

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

MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas, & another 2002 (6)
SA 150 (C) at 156H-157C

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

Ntlemeza v Helen Suzman Foundation and Another 2017 (5) SA 402 (SCA)

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paras 8, 13 – 14

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Limited v Road Traffic Management Corporation* [2020] ZACC 21 at paras 130 -
131.

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*Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as
Amicus Curiae)* 2008 (2) SA 472 (CC) at para 22