

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

SCA Case No: 099/21
GNP Case No: 15996/2017

In the applications for condonation and leave to appeal between:

DUDUZILE CYNTHIA MYENI Applicant

and

ORGANISATION UNDOING TAX ABUSE NPC First Respondent

SOUTH AFRICAN AIRWAYS PILOTS' ASSOCIATION Second Respondent

SOUTH AFRICAN AIRWAYS SOC LIMITED Third Respondent

AIRCHEFS SOC LIMITED Fourth Respondent

MINISTER OF FINANCE Fifth Respondent

In re:

ORGANISATION UNDOING TAX ABUSE NPC First Plaintiff

SOUTH AFRICAN AIRWAYS PILOTS' ASSOCIATION Second Plaintiff

and

DUDUZILE CYNTHIA MYENI First Defendant

SOUTH AFRICAN AIRWAYS SOC LIMITED Second Defendant

AIRCHEFS SOC LIMITED Third Defendant

MINISTER OF FINANCE Fourth Defendant

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES Fifth Defendant

OUTA AND SAAPA'S ANSWERING AFFIDAVIT



I, the undersigned,

STEFANIE FICK

state under oath that:

- 1 I am the Executive Director of the Accountability Division of the first respondent, Organisation Undoing Tax Abuse NPC (OUTA). I am authorised to depose to this affidavit on behalf of the first and second respondents.
- 2 The facts in this affidavit are true, to the best of my knowledge and belief, and are within my personal knowledge, unless the context indicates otherwise. Where I make submissions on the applicable law, I do so on the advice of the applicants' legal representatives.
- 3 This answering affidavit is filed as a combined response to Ms Myeni's condonation application and her application for leave to appeal.

INTRODUCTION AND OVERVIEW

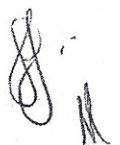
- 4 On 27 May 2020, Her Ladyship Madam Justice Tolmay declared Ms Dudu Myeni to be a delinquent director in terms of section 162(5) of the Companies Act 71 of 2008.
- 5 This is the first time that Ms Myeni has faced any genuine accountability for her serious misconduct as the former non-executive chairperson of South African Airways SOC Ltd (SAA).
- 6 Ms Myeni has now filed an application in this Court seeking condonation for her failure to file an application for leave to appeal in time.
- 7 In what follows, I demonstrate why this condonation application must fail and why Ms Myeni has no prospects of obtaining leave to appeal. I address the following points in turn:
 - 7.1 First, I briefly set out the relevant background and litigation history;
 - 7.2 Second, I address Ms Myeni's ongoing defiance of the High Court's orders and the implications for her applications to this Court;



- 7.3 Third, I demonstrate why there are no grounds to condone the late filing of Ms Myeni's application;
- 7.4 Fourth, I show why Ms Myeni has no prospects of obtaining leave to appeal;
- 7.5 Lastly, I address individual allegations made in Ms Myeni's affidavits.

BACKGROUND

- 8 The mismanagement of SAA and its current plight are matters of public record. From 2009 to 2017, Ms Myeni was the one constant on a constantly rotating SAA board of directors. From 2012 until her departure in 2017, she served as its non-executive chairperson.
- 9 During her time at SAA, Ms Myeni blocked, delayed and obstructed key initiatives to turn around the airline. The plaintiffs' case focused on two examples of serious misconduct:
- 9.1 The Emirates deal: Ms Myeni scuttled a non-binding Memorandum of Understanding (MOU) between SAA and Emirates in 2015, which deprived SAA of the opportunity to earn a guaranteed minimum revenue of USD 100 million per year and irreparably harmed SAA's relationship with Emirates, the world's largest international airline.
- 9.2 The Airbus "Swap Transaction": Ms Myeni took SAA and the country to the brink of financial ruin by improperly obstructing a deal with Airbus to allow SAA to escape an onerous contract for the purchase of aircraft. In doing so, Ms Myeni misrepresented board resolutions, attempted to negotiate directly with Airbus without board authority, misrepresented the facts to the Minister of Finance, and further imperilled SAA's financial position.
- 10 Ms Myeni accepts the High Court's summary of the facts in respect of both deals. She states that the "*detailed factual background is sufficiently set out in the judgment(s) ... and no useful purpose can be served by the unnecessary*



[repetition] thereof¹ and that the “two issues [Emirates and Airbus] are fully canvassed in the judgment”.² OUTA and SAAPA agree. On uncontested facts such as these, the High Court had no option but to find Ms Myeni to be a delinquent director.

Ms Myeni’s obstructive conduct

- 11 Ms Myeni tried every trick in the book to obstruct this inevitable outcome. As Tolmay J observed in her judgment, Ms Myeni engaged in repeated conduct throughout the proceedings which was “*calculated to cause maximum delay and disruption*”.³
- 12 The trial was scheduled to begin on 7 October 2019. Ms Myeni did not arrive in court that day and had no legal representatives present following the withdrawal of her former attorney, Mr Lugisani Daniel Mantsha, shortly before the proceedings were due to begin.
- 13 On 8 October 2019, Mr Mantsha then reappeared, without explanation, and requested a postponement on Ms Myeni’s behalf.
- 14 In the postponement application filed on 9 October 2019, Ms Myeni claimed, on affidavit, that she was unemployed and had no money to travel to Pretoria. The High Court found that this was all a lie.⁴ Ms Myeni was still a director of no less than four companies at the time and was earning hefty directors’ fees from Centlec, a Free State parastatal, in addition to the millions she had earned at SAA.⁵ Ms Myeni does not seek to appeal any of these serious findings of dishonesty and disrespect for the court’s processes.
- 15 When the High Court refused Ms Myeni’s application for a lengthy postponement, she proceeded to bring three further interlocutory applications.

¹ Leave to appeal FA p 4 para 10.

² Ibid at para 13.

³ Main Judgment p 112 para 283.

⁴ Main Judgment pp 110 – 112 at paras 279 – 282.

⁵ Ibid at p 111 at para 281.

- 16 On 2 December 2019, Tolmay J dismissed Ms Myeni's amendment and joinder applications. This was followed by a further judgment on 12 December 2019, in which Tolmay J dismissed the special plea challenging OUTA's standing. Notably Ms Myeni fails to attach these judgments to her papers, despite the fact that she seeks to resurrect the issues that were decided in these judgments. I attach copies of these judgments as **SF 1** and **SF 2** respectively.
- 17 The trial was then scheduled to begin in earnest on 27 January 2020. On 23 January 2020, just two court days before the start of the trial, Ms Myeni filed an application for leave to appeal the dismissal of her special plea. Tolmay J dismissed that application for leave to appeal in a judgment delivered on 28 January 2020, attached as **SF 3**.
- 18 Undeterred, Ms Myeni filed a separate application for leave to appeal, seeking to challenge the dismissal of her amendment application. That application was also dismissed on 29 January 2020, in a further judgment attached as **SF 4**.
- 19 Following the dismissal of these applications, Ms Myeni's legal representatives presented OUTA and SAAPA with an unsigned application purporting to be a petition to this Court. Her counsel then attempted to seek a stay of the trial pending the finalisation of that application. To my knowledge, no application was ever filed in this Court and Tolmay J directed that the trial should proceed.

The trial

- 20 The trial ran for five weeks, until 28 February 2020. The bundle of admitted documentary evidence runs to over 4000 pages and the transcript runs to a further 2400 pages.
- 21 The plaintiffs called six witnesses, including four former SAA executives: Mr Nico Bezuidenhout, a former Acting CEO; Ms Thuli Mpshe, also a former Acting CEO and General Manager: Human Resources; Mr Sylvain Bosc, former General Manager: Commercial; Mr Wolf Meyer, former Chief Financial Officer (CFO) of SAA; Ms Avril Halstead, the former Chief Director for Sector Oversight at National Treasury, who was responsible for overseeing SAA; and an expert



witness, Mr Carl Stein, the author of a leading textbook on company law and corporate governance.

- 22 The plaintiffs' evidence stood almost entirely uncontested. As Tolmay J observed, Ms Myeni's counsel failed to put any clear or coherent version to these witnesses.⁶ On that basis, the plaintiffs' evidence had to be accepted as correct.⁷
- 23 Ms Myeni was the only witness to testify in her defence. Her evidence-in-chief was cursory and did not respond to the substance of the allegations against her. Under cross-examination, she proved to be an evasive witness, she was repeatedly trapped in lies, and was generally at a loss to explain her conduct. The High Court correctly found her to be "*a dishonest and unreliable witness*".⁸ Again, Ms Myeni does not seek to appeal these adverse credibility findings.

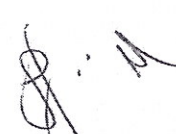
Further applications for leave to appeal

- 24 On 22 December 2020, Tolmay J dismissed Ms Myeni's applications for leave to appeal and to introduce new evidence. Tolmay J simultaneously granted OUTA and SAAPA's section 18(3) interim enforcement application, to ensure that the delinquency order remains in full force and effect pending all further appeals processes.
- 25 On 22 January 2021, Ms Myeni launched an urgent section 18(4) appeal against the interim enforcement order. However, she failed to file her petition in this Court and her rights to seek leave to appeal lapsed.
- 26 On 15 February 2021, Mlambo JP, writing for the full court, struck Ms Myeni's section 18(4) appeal from the roll with costs, on the grounds that the appeal was no longer competent after the lapse of her rights to seek leave to appeal against the main judgment. A copy of this judgment is attached as **SF 5**.

⁶ Main Judgment pp 93-94 paras 234 - 235.

⁷ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) at paras 61 to 63.

⁸ Main Judgment pp 93 paras 233.




- 27 The delinquency order of 27 May 2020 is now in full force and effect. The late filing of Ms Myeni's application for leave to appeal and the condonation application do not suspend anything.⁹ Even if condonation were granted, the section 18(3) interim enforcement order would be in full effect. Accordingly, Ms Myeni has no right to remain on any board of directors and must comply with the order.

MS MYENI'S ONGOING BREACH OF THE DELINQUENCY ORDER

- 28 On 15 February 2021, OUTA and SAAPA's attorneys wrote to Ms Myeni's attorneys seeking an undertaking that Ms Myeni would comply with the delinquency order, immediately resign from all of her remaining directorships, and not accept any further directorships. The undertaking was to be provided by close of business on 18 February 2021. A copy of this letter is attached as **SF 6**.
- 29 On 16 February 2021, Ms Myeni's attorneys responded with various threats of a further appeal of the section 18(3) order and baseless demands. No undertaking was forthcoming. A copy of this letter is attached as **SF 7**.
- 30 On the following day, 17 February 2021, OUTA and SAAPA's attorneys wrote back advising that, in terms of section 18(4) of the Act, only one appeal to "*the next highest court*" was permissible. The request for an undertaking from Ms Myeni to comply with the delinquency order was repeated. A copy of this letter is attached as **SF 8**.
- 31 Ms Myeni failed to provide an undertaking in any form on 18 February 2021. A CIPC search has also confirmed that, to date, Ms Myeni has not resigned from her active directorships, which include the Jacob Zuma Foundation. A copy of the search report is attached as **SF 9**.

⁹ *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 (6) SA 40 (SCA) at para 46; *Panayiotou v Shoprite Checkers (Pty) Ltd* 2016 (3) SA 110 (GJ) at paras 8 – 15.



- 32 Accordingly, Ms Myeni is in wilful breach of the delinquency order. This is against the backdrop of her obstructive conduct in the build-up to the trial, during the trial, and following the judgment.
- 33 Unless and until Ms Myeni complies with the High Court's order, it would not be in the interests of justice for this Court to entertain her applications.
- 34 In **SS v VVS**,¹⁰ the Constitutional Court affirmed that a court may refuse to hear a party and dismiss an application for leave to appeal where they are in breach of a court order, regardless of whether there has been any formal application for contempt. The Court held that:

"It can only be described as unconscionable when a party seeks to invoke the authority and protection of this Court to assert and protect a right it has, but in the same breath is contemptuous of that very same authority in the manner in which it fails and refuses to honour and comply with the obligations issued in terms of a court order."

- 35 That is precisely the attitude taken by Ms Myeni, as she approaches this Court seeking an indulgence, in circumstances where she continues to disregard the binding effect of court orders.
- 36 On this ground alone, this Court would be justified in dismissing the condonation and leave to appeal applications, with costs.

NO GROUNDS FOR CONDONATION

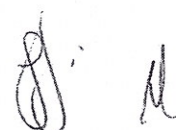
- 37 In addition to Ms Myeni's ongoing breach of the High Court's order, there are no grounds to condone the late filing of her petition. The application neither has merit nor is it in the interests of justice for the application to be heard.
- 38 Tolmay J's order dismissing Ms Myeni's application for leave to appeal was handed down on 22 December 2020. Ms Myeni and her attorneys were fully aware of this order from that date, as they wrote advising of her intention to petition this Court for leave to appeal, in terms of section 17(2)(b) of the Superior Courts Act. A copy of this letter is attached as **SF 10**.

¹⁰ **SS v VV-S** [2018] ZACC 5; 2018 (6) BCLR 671 (CC) at paras 18, 31, 34 – 35.



- 39 In terms of section 17(2)(b), Ms Myeni was required to file her petition to this Court within one month of the dismissal, i.e. 22 January 2021.
- 40 As reflected in Mr Sibuyi's affidavit, Ms Myeni and her legal representatives made no proper efforts to lodge their petition in time. Mr Sibuyi's affidavit confirms that he only contacted Ms Myeni's correspondent attorneys in Bloemfontein with an instruction to lodge the petition on Friday, 22 January 2021 at 15:40, in circumstances where Rule 3(1) of this Court's Rules clearly does not permit the lodging of any documents after 15:00. This is reflected at annexure **TS2** to founding affidavit.
- 41 Ms Myeni does not provide any explanation whatsoever as to the delay in preparing and lodging the petition in the period between 22 December 2020 and 22 January 2021.
- 42 The petition was not lodged on Monday, 25 January 2021. Instead, it transpired that an incomplete petition had been issued to Ms Myeni's correspondent attorneys, as it had not included any proof of service on any of the respondents and the court *a quo*, nor had it included copies of the court orders of 27 May 2020 and 22 December 2020. These are all requirements expressly set out in this Court's Rules.
- 43 Mr Sibuyi's affidavit describes how, as at 28 January 2021, they had not attempted service of the petition on the third to fifth respondents or the court *a quo*, nor had any attempt been made to obtain stamped copies of the abovementioned orders. This is despite having advised of the intention to lodge a petition as early as 22 December 2020.
- 44 Condonation is not a mere formality, nor is it to be had "*merely for the asking*".¹¹ At the very least, it requires a full and frank explanation that accounts for the full period of time. That has not been forthcoming.
- 45 I respectfully submit that the delays outlined in Ms Myeni's application for condonation are inexcusable, and that this Court should not condone Ms

¹¹ *Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SCA) para 6.

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Myeni's conduct in this regard, especially since Ms Myeni is not a lay litigant without adequate legal representation. From the papers filed, it is clear that Ms Myeni has adequate and capable legal representation, including senior counsel and two junior counsel. To this end, her attorneys ought to have been aware of the provisions of the Rules regarding timeframes and requirements for lodging petitions.

- 46 The fact that there was some internal miscommunication between Ms Myeni's attorneys and correspondent attorneys is of no consequence. I respectfully submit that it was apparent, as at 15:40 on 22 January 2021, that Ms Myeni's petition was out of time, long before any issues relating to unreceived emails arose.
- 47 The delay has caused prejudice to OUTA and SAAPA, who were entitled to assume that there was finality to this litigation, following almost four years of obstructions, delays and substantial costs.
- 48 It is not in the interests of justice to entertain this application, given Ms Myeni's ongoing breach of the delinquency order. Ms Myeni also has no prospects in the leave to appeal application, for reasons I will now address.

NO GROUNDS FOR LEAVE TO APPEAL

The insurmountable obstacles to Ms Myeni's application

- 49 Ms Myeni's application for leave to appeal faces three insurmountable obstacles.
- 50 First, Ms Myeni's application presents a scattershot list of grounds of appeal, framed in the vaguest terms, which leave the bulk of the High Court's factual findings and legal conclusions untouched.
- 51 The High Court made multiple findings against Ms Myeni, any one of which is enough to justify the Court's declaration of delinquency for life, including findings of dishonesty, wilful misconduct, and recklessness. To take just two examples of the many uncontested findings:



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

"[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."¹²

51.2 In respect of the Airbus deal, Ms Myeni has never disputed the High 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):

"[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

¹² Judgment p 95 paras 237 – 238 [Caselines p 009-95].

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."¹³

52 In the unlikely event that another court would overturn some of the High Court's findings, these and numerous others would necessarily remain standing, as they were not challenged and are based on Ms Myeni's own evidence. Any one of these findings would be enough to declare Ms Myeni to be a delinquent director.

53 Second, the uncontested evidence against Ms Myeni and her own disastrous testimony will not change on appeal. The High 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."*¹⁴

...

[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.

¹³ Judgment p 103 paras 262 – 263 [Caselines p 009-103].

¹⁴ Main Judgment pp 48 –49 para 115.

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.”¹⁵

- 54 Ms Myeni’s grounds of appeal are silent on these damning findings. In any event, there are no prospects that this Court would overturn the High Court’s findings of fact and its assessment of Ms Myeni’s credibility, on the strict ***Dhlumayo*** test for appellate interference in a trial court’s factual findings.¹⁶
- 55 Third, the relevant law on delinquency is well settled and was never disputed by Ms Myeni in the High Court. The principles were set out in this Court’s authoritative judgment in ***Gihwala***¹⁷ and were analysed at length in the High Court’s judgment.
- 56 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 the High Court’s uncontested findings, Ms Myeni would have been declared a delinquent director even if SAA was a private company.
- 57 In her application for leave to appeal, Ms Myeni now attempts to manufacture legal disputes where none existed in the High Court. She claims that there are unspecified questions of “*vital legal and constitutional importance*” to be resolved in this application. This is plainly an afterthought. Ms Myeni has never contested this Court’s interpretation of the delinquency provisions in ***Gihwala***, nor has she ever challenged their constitutionality. In any event, their constitutionality was conclusively determined in ***Gihwala***.
- 58 Accordingly, the application of the settled and uncontroversial law on delinquency to the uncontested facts does not establish any reasonable prospects of success, let alone any other “*compelling reason*” for leave to appeal under section 17(1)(a) of the Superior Courts Act.

¹⁵ Main Judgment pp 92-94 paras 232 - 235.

¹⁶ *Rex v Dhlumayo and Another* 1948 (2) SA 677 (A) at 705 - 706

¹⁷ *Gihwala and Others v Grancy Property Ltd and Others* 2017 (2) SA 337 (SCA).

No merit to Ms Myeni's grounds of appeal

59 Ms Myeni relies on seven primary grounds of appeal, which were all comprehensively addressed in the High Court's judgment refusing leave to appeal.

First ground: Ms Myeni's misguided attempt to introduce new evidence on appeal

60 Ms Myeni's first ground concerns her failed application to introduce new evidence in the High Court during the leave to appeal proceedings. The High Court's judgment on leave to appeal dealt with this application in detail.¹⁸

61 The sum total of this new evidence was a transcript from the Commission of Inquiry into State Capture in which Ms Kwinana, a former SAA director, testified that she had two interviews with OUTA shortly after she departed SAA in 2016. On the basis of that testimony, Ms Myeni proceeds to concoct a grand conspiracy, without any evidence, alleging that OUTA and Ms Kwinana had struck some form of improper deal.

62 The High Court summarised OUTA's answering affidavit, which refuted Ms Myeni's allegations on every point:

"Ms Fick denied that OUTA struck a deal with Ms Kwinana, relying on illegally obtained evidence, failing to disclose material information to the court and engaging in abuses of process. She dealt with the meetings OUTA had with Ms Kwinana. According to her Ms Kwinana approached OUTA and two meetings were held with her, one on 28 August 2016 and the other on 2 September 2016. She said OUTA found Ms Kwinana to be unreliable and untrustworthy and no deal was struck with her. OUTA filed a complaint against Ms Kwinana with the South African Institute of Chartered Accountants ("SAICA"), which referred the complaint to the Independent Regulatory Board of Auditors. She pointed out that the meetings with Ms Kwinana formed no part of the evidence led against Ms Myeni at the trial and the legal representatives had no contact with Ms Kwinana. A confirmatory affidavit by a Mr Heyneke confirmed the interactions of OUTA with Ms Kwinana, as set out in Ms Fick's affidavit."

¹⁸ Leave to appeal judgment pp 3 - 12 paras 4 – 23.

63 The High Court proceeded to dismiss Ms Myeni's application for two primary reasons:

63.1 First, the Court was *functus officio*. Ms Myeni had failed to demonstrate any legal basis for the admission of new evidence in an application for leave to appeal, either under section 19(b) of the Superior Courts Act,¹⁹ section 173 of the Constitution, or the common law.²⁰

63.2 Second, even if the Court was empowered to admit new evidence, Ms Myeni failed to satisfy the stringent test for introducing new evidence on appeal.²¹ Ms Myeni could have called Ms Kwinana as a witness if she believed that her testimony was relevant. Moreover, as the High Court concluded, Ms Kwinana's evidence "*does not have any bearing on the question of whether Ms Myeni should have been declared a delinquent director or not.*" It further held that "*[t]he evidence of Ms Kwinana would not likely have changed the outcome of the matter. The evidence is not weighty, material and even if believed, would not have had any impact on the outcome of the trial.*"²²

64 In this application, Ms Myeni not only asks this Court to conclude that the High Court was wrong, but she also asks this Court to grant leave to appeal based on her intention to bring a fresh application to introduce new evidence, which is not currently before the Court, at some unknown time. This is the self-same evidence which the High Court has already concluded would have had no bearing on its judgment and order. This ground of appeal is manifestly hopeless.

Second ground: OUTA's public interest standing

65 Ms Myeni's second ground of appeal is that the High Court erred in holding that OUTA had established public interest standing to bring the delinquency application under section 157(1)(d) of the Companies Act.

¹⁹ Leave to appeal judgment p 7 – 8 at paras 14 - 17

²⁰ Ibid p 11 at paras 19 – 20.

²¹ Ibid p 10 at para 18.

²² Ibid.

- 66 This point was fully addressed in the High Court's judgment of 12 December 2019, dismissing Ms Myeni's special plea. Ms Myeni previously brought an application for leave to appeal against this judgment, which was dismissed by the High Court on 28 January 2020. These judgments speak for themselves. I have previously attached them as **SF 2** and **SF 3**, as Ms Myeni failed to disclose them to this Court.
- 67 No petition was ever lodged in this Court against the judgment dismissing the special plea. The High Court rightly concluded that it was impermissible for Ms Myeni to attempt to revive this issue again in yet another application for leave to appeal.²³
- 68 In any event, the question of OUTA's standing would have had no practical effect on the delinquency order.²⁴ This is because it was always common cause that the second plaintiff, SAAPA, had standing under section 162(2) of the Companies Act to seek a delinquency order, as it is a registered trade union.

Third ground: Non-joinder of SAA Directors

- 69 Ms Myeni also attempts to resurrect her complaints about the non-joinder of other SAA directors. This was comprehensively addressed in the High Court's judgment of 2 December 2019, which Ms Myeni has again failed to attach to her papers. I previously attached a copy as **SF 1**.
- 70 Ms Myeni elected not to appeal that judgment in her two previous applications for leave to appeal in the High Court, heard in late January 2020, before the trial was due to begin. The High Court correctly held that "*this issue cannot be raised*" again.²⁵
- 71 In any event, the non-joinder point has always been baseless. The test for non-joinder is clear: a party need only be joined as a matter of necessity where the relief sought cannot be sustained and carried into effect without directly

²³ Leave to appeal judgment p 14 para 28.

²⁴ Judgment of 22 January 2020 at p 6.

²⁵ Leave to appeal judgment p 14 para 29.

prejudicing the interests of that other party.²⁶ But the delinquency order sought by OUTA and SAAPA was solely directed at Ms Myeni. No other SAA directors' rights were affected.

Third ground: Emirates "fact-based findings"

72 Ms Myeni's "fact-based" grounds of appeal in respect of the Emirates deal leave all of the High Court's other findings untouched.²⁷ 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."²⁸

73 Instead of addressing these factual findings, Ms Myeni's grounds of appeal are confined to two narrow points.

74 First, Ms Myeni alleges that the sole basis of the plaintiff's pleaded case was that she blocked the signing of the Emirates MOU on 16 June 2015 on the instructions of President Zuma.

75 This is an intentional misrepresentation of the pleadings. The plaintiffs' case never relied solely or even primarily on President Zuma's instructions to Ms Myeni. The focus was 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. I attach the relevant extract from the particulars of claim as Annexure **SF 11**. I draw particular attention to paragraphs 86 and 87 where the plaintiffs pleaded:

²⁶ *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 653; *Gordon v Department of Health, Kwazulu-Natal* 2008 (6) SA 522 (SCA) at para 9; *Absa Bank Ltd v Naude* NO 2016 (6) SA 540 (SCA) at para 10.

²⁷ Application for leave to appeal, paras 4 – 5 [Caselines pp 010-4 – 010-5].

²⁸ Judgment p 55 para 132 [Caselines p 009-55].

"86. As a result of Ms Myeni preventing Mr Bezuidenhout from signing the Emirates MoU:

86.1 SAA's relationship with Emirates was severely compromised;

86.2 SAA forfeited significant financial and strategic benefits, including those benefits listed at paragraphs 71 and 72 above;

86.3 SAA suffered significant reputational harm internationally; and

86.4 Emirates threatened to reconsider the entire strategic cooperation agreement signed between Emirates and the South African Minister of Tourism in mid May 2015.

87. Ms Myeni knew, alternatively ought to have known, that:

...

87.3 preventing Mr Bezuidenhout from signing the Emirates MoU would lead to the harm outlined at paragraph 86 above."

76 In any event, as the High Court found, the plaintiffs proved that Ms Myeni told Mr Bezuidenhout that the instruction emanated from President Zuma.²⁹ Whether President Zuma actually gave such an instruction is neither here nor there. If there was no such instruction, Ms Myeni was lying to Mr Bezuidenhout. If there was such an unlawful instruction, Ms Myeni was guilty of a serious breach of her fiduciary duties. In either event, Ms Myeni was guilty of serious misconduct that warranted a finding of delinquency.

77 The second complaint is that the High Court somehow "disregarded" the Board minutes of 10 July 2020, which allegedly provided Board authorisation to conclude the Emirates MOU. Far from it, the High Court addressed the point in detail in the main judgment:

"[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

²⁹ Main Judgment pp 53 – 54 paras 127 – 129.

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."

- 78 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."³⁰

- 79 The "action list" referred to in this item was a series of non-sensical demands issued by Ms Myeni, in which she placed further hurdles in the way of the conclusion of the Emirates MOU, effectively killing any further negotiations.

Fourth ground: Section 54 of the PFMA

- 80 The fourth ground relates to the dishonest statements made to the Minister of Finance concerning the Airbus deal. The evidence established that Ms Myeni signed and submitted an application in terms of section 54 of the PFMA to the Minister on 16 November 2015, seeking approval for the amendment of the swap transaction to facilitate the introduction of a non-existent African Aircraft Leasing company. This section 54 application was riddled with dishonest claims and deliberately withheld material information.
- 81 Ms Myeni does not deny that the section 54 application was dishonest. Instead, she now claims that she cannot be held responsible for its contents merely because she signed this application. This is wrong in both law and fact.

³⁰ An extract of the minutes appears at Trial Bundle: Emirates Bundle pp 194.222 – 194.223.

82 At the level of law, while the SAA board is the “*accounting authority*” for the purposes of section 54, each member of the board is individually responsible for breaches of fiduciary duties. Section 50(2) of the PFMA is clear that “[a] *member of an accounting authority ... may not act in a way that is inconsistent with the responsibilities assigned to an accounting authority in terms of this Act*”.

83 It is also important to emphasise that by 16 November 2015, the SAA board had only three members: Ms Myeni and her supporters, Ms Kwinana and Dr Tambi. All dissenting board members had been forced out. Ms Myeni’s constant appeals to the “*collective*” decisions of the board ring hollow.

84 Ms Myeni’s denials of any responsibility for the contents of the section 54 application are also entirely false. The admitted documentary evidence, as confirmed by the unchallenged evidence of the plaintiffs’ witnesses, shows that Ms Myeni was directly involved in the preparation of these documents:

84.1 Ms Myeni signed the covering letter to the section 54 application, in which she fully endorsed its contents, repeated many of the dishonest claims contained in the application, and added her own.³¹

84.2 The section 54 application form contains only two signatures: Ms Myeni’s and Mr Zwane’s, the new Acting CEO.³² There were no signatures from any other members of EXCO or the Company Secretary, as would be expected in such an application. Mr Zwane had been appointed just three days before, after Ms Mphse had been forced out.

84.3 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.³³

³¹ Trial Bundle: Airbus Bundle vol 4 p 243 – 245.

³² Trial Bundle: Airbus Bundle vol 4 p 250.

³³ Trial Bundle: Airbus Bundle vol 4 p 256 at 261.

84.4 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 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.

Fifth ground: Airbus “fact-based findings”

85 On the Airbus transaction, Ms Myeni again does not dispute the bulk of the High Court's further findings leading to the conclusion of delinquency. Ms Myeni's notice of appeal instead throws up a series of disconnected and largely incomprehensible grounds of appeal against Tolmay J's “*fact-based findings*”. They are all fully addressed in the High Court's judgment refusing leave to appeal.³⁴ I need only address one of these grounds to demonstrate how baseless they are.

86 Ms Myeni again 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.

87 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 of SAA. Ms Myeni's letter stated:

“On behalf of the Board of South African Airways, I would like to apologise for the delay in reaching a decision on the A320 / A330

³⁴ Leave to Appeal Judgment pp 17 – 18 paras 35 – 37.



swap transaction. You will appreciate that this is a complex transaction and the full Board had to be satisfied that the approved deal is in the best interests of the company and the government of the Republic of South Africa at this point of time.

I am pleased to inform you that SAA has decided to do this transaction slightly differently, by engaging an African Aircraft Leasing Company to engage directly with you. As there has been a delay in reaching this decision, SAA is agreeable to extending the delivery dates by a month or two. This company will then work directly with SAA going forward,

I trust you will find the above in order.”

- 88 As the High Court found, Ms Myeni’s own testimony confirmed that she signed this letter and approved of its contents.³⁵ It was also common cause on the pleadings that there was no board resolution or Ministerial approval authorising this change in the deal.³⁶ The High Court was therefore correct in concluding that the plaintiffs established “*incontrovertibly*” that Ms Myeni’s letter contained false statements. This letter, was at the very least, grossly negligent, as it completely misrepresented the facts to Airbus and was sent without any board authority.³⁷

Sixth ground: Sanction

- 89 Ms Myeni next takes issue with the imposition of a lifetime declaration of delinquency.³⁸ In determining the duration of this declaration, the High Court was exercising a “*true discretion*” which cannot be easily overturned on appeal.³⁹ Ms Myeni has failed to establish any permissible grounds for another court to interfere with this true discretion.
- 90 Ms Myeni’s belated attempt to rely on the section 22 right of freedom of trade, occupation or profession to resist this sanction is equally unfounded. No such ground was ever pleaded in the High Court.

³⁵ Main Judgment p 64 para 155.

³⁶ Main Judgment p 65 para 158.

³⁷ Main Judgment p 97 para 244.

³⁸ Application for leave to appeal para 15.8 [Caselines p 010-9].

³⁹ *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.

- 91 In any event, this Court already addressed this issue in *Gihwala*.⁴⁰ There Wallis J expressed doubt as to whether being a director qualifies as “an occupation, trade or profession”.⁴¹ In any event, the bar to establishing a breach of section 22 is set high: the interference must be “either capricious or arbitrary”.⁴² Ms Myeni has failed to establish that there is anything capricious or arbitrary about the High Court’s judgment and order.
- 92 In any event, the sanction of lifelong delinquency is no corporate death sentence. As the High Court emphasised, the 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.⁴³
- 93 Ms Myeni further suggests that the High Court erred in referring her case to the NPA for further investigation. Ms Myeni again fails to engage with the High Court’s judgment, which clearly explained that the proven breaches of sections 50, 51, and 55 of the PFMA constitute criminal offences under section 86(2) of that Act, which, at the very least, warrant further criminal investigations.⁴⁴

Seventh ground: Alleged bias

- 94 Lastly, Ms Myeni persists in alleging bias, based solely on the allegation that the judgment is a “carbon copy” of the plaintiffs’ heads of argument and submissions. This complaint is again addressed in full by the High Court in refusing leave to appeal.
- 95 It is entirely misleading for Ms Myeni to allege that the judgment is simply a reproduction of the heads. The claim that “7%” of the judgment is the Court’s own words is also utterly false. The material part of the Court’s reasoning is to be found at paragraphs 231 to 285 of the judgment, which sets out detailed factual and legal conclusions. These were plainly the Court’s own conclusions.

⁴⁰ *Gihwala and Others v Grancy Property Ltd and Others* 2017 (2) SA 337 (SCA) at para 146.

⁴¹ *Ibid.*

⁴² *Ibid.* Citing *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) at para 60.

⁴³ Main Judgment p 108 para 274.

⁴⁴ Main Judgment p 3 para 6.

This was preceded by a summary of the undisputed legal framework and the undisputed facts.

- 96 The irony is that Ms Myeni has never disputed this summary, and in fact fully embraces it in her application to this Court.⁴⁵ Yet it is this self-same summary which she now alleges is evidence of bias.
- 97 Ms Myeni levels these attacks in circumstances where she and her legal team failed to offer any assistance to the High Court. As the High Court noted, transcripts were not available at the end of the trial and the parties were directed to file full heads when the transcripts arrived. Ms Myeni's counsel failed to file any further heads of argument. It was left to OUTA and SAAPA to assist the Court by filing comprehensive heads, which set out a detailed summary of the five weeks of evidence, cross-referenced to and supported by the transcripts and trial bundles on every point. The High Court cannot be faulted for finding assistance in these undisputed summaries.
- 98 At the level of law, Ms Myeni has no prospects whatsoever of overcoming the strict "*double reasonableness*" test for bias and the presumption of judicial impartiality.⁴⁶ The High Court's judgment addresses this fully, with detailed reference to the Constitutional Court's judgment in *Stuttafords Stores*⁴⁷ and the Canadian Supreme Court's leading judgment on so-called "*judicial copying*" in *Cojocaró*.⁴⁸
- 99 In any event, bias must be assessed by considering the conduct of the trial in its totality. The record shows that the High Court went out of its way to accommodate Ms Myeni at every turn, despite her reprehensible behaviour. The Court granted an initial postponement when Ms Myeni failed to appear, it entertained endless interlocutory applications and applications for leave to appeal, and it repeatedly reminded Ms Myeni's counsel of the need to put a version to the plaintiffs' witnesses when he failed to do so. During Ms Myeni's

⁴⁵ Leave to appeal FA p 4 para 10 and para 13.

⁴⁶ *President of the RSA v South African Rugby Football Union* 1999 (4) SA 147 (CC) at para 48.

⁴⁷ *Stuttafords Stores (Pty) Ltd and Others v Salt of the Earth Creations (Pty) Ltd* 2011 (1) SA 267 (CC).

⁴⁸ *Cojocaró v British Columbia Women's Hospital & Health Care Centre* 2013 SCC 30; [2013] S.C.R. 357 at paras 18 – 20, 34 – 37.

cross-examination, the Court went as far as to allow Ms Myeni to take time to find new documents, which had never been discovered, to assist in her testimony. No reasonable person having observed the trial and the High Court's scrupulous fairness could ever reach a conclusion of bias.

RESPONSES TO INDIVIDUAL PARAGRAPHS IN MS MYENI'S AFFIDAVITS

100 I now turn to address some of the allegations made in the answering affidavit, *ad seriatim*, to the extent necessary.

101 Any allegation that is not addressed and which is inconsistent with what is set out above or the High Court record must be taken to be denied.

Condonation Application

102 **Ad paragraphs 1 to 4**

102.1 Save to deny that all of the allegations made in Ms Myeni's affidavit in the condonation application are true and correct, I note the contents of these paragraphs.

103 **Ad paragraphs 5 to 6**

103.1 The contents of these paragraphs are noted.

104 **Ad paragraphs 7**

104.1 The delay of more than 7 court days remains entirely inexcusable, for the reasons set out above.

105 **Ad paragraphs 8 to 21**

105.1 I deny that Ms Myeni has offered an acceptable – or in fact any – explanation for the delays, for all the reasons addressed above.

106 **Ad paragraphs 22 to 24**

106.1 The contents of these paragraphs are denied. If the matter was of such importance to Ms Myeni and her legal representatives, they would have



ensured that her application was filed timeously, well ahead of the 22 January 2021 deadline.

107 Ad paragraphs 25 and 29

107.1 I deny that Ms Myeni has any prospects of success, for the reasons explained in detail above.

108 Ad paragraphs 26 to 28

108.1 Save to admit that OUTA and SAAPA received a copy of Ms Myeni's unfiled petition on 22 January 2021, the contents of these paragraphs are denied. I have addressed the issues of prejudice above.

108.2 Once OUTA and SAAPA's legal representatives confirmed that the petition had not, in fact, been filed in this Court on time, they were entitled to assume that this matter was over and that the delinquency order was in full force and effect.

109 Ad paragraphs 30 to 31

109.1 The contents of these paragraphs are denied. As demonstrated above, it is not in the interests of justice to condone Ms Myeni's further delays, in circumstances where she remains in wilful breach of the delinquency order.

110 Ad paragraphs 32 to 33

110.1 I deny that Ms Myeni has demonstrated any entitlement to condonation.

110.2 OUTA and SAAPA seek an order dismissing the condonation application, with costs.

Leave to appeal application

111 Ad paragraphs 1 to 7

111.1 Save to deny that all of the allegations made in Ms Myeni's founding affidavit are true and correct, I note the contents of these paragraphs.

112 Ad paragraph 8

112.1 I deny that there are any complex questions of "*vital legal and constitutional importance*" to be resolved in this application, for the reasons addressed above.

113 Ad paragraph 10

113.1 I note that Ms Myeni relies on the factual summary contained in the High Court's judgment and raises no material disputes regarding these factual findings.

114 Ad paragraph 12

114.1 The question of OUTA and SAAPA's public interest standing was conclusively determined by the High Court in its judgment of 2 December 2019. While Ms Myeni applied for leave to appeal against that judgment, leave to appeal was dismissed on 23 January 2020 and no petition was ever lodged in this court. In any event, SAAPA is a SAA trade union and its standing was not based on public interest.

115 Ad paragraph 13

115.1 I again note that Ms Myeni relies on the factual summary contained in the judgment. I again deny that this matter raises a "*plethora of novel legal and constitutional issues*".

116 Ad paragraphs 14 to 18

116.1 I note the contents of these paragraphs. The full and complete litigation history is set out in detail above.

117 Ad paragraphs 20 to 30 (Introduction of new evidence)



117.1 I have addressed Ms Myeni's attempt to introduce new evidence in the High Court above. This ground is hopeless and provides no basis for granting leave to appeal.

118 Ad paragraph 31 (Public interest standing)

118.1 The contents of paragraph are denied. I have addressed Ms Myeni's opposition to OUTA's public interest standing above.

119 Ad paragraphs 32 to 33 (Joinder of SAA directors)

119.1 The contents of these paragraphs are denied. I have addressed Ms Myeni's arguments on joinder above.

120 Ad paragraphs 34 to 38 (Section 54 of the PFMA)

120.1 Save to note Ms Myeni's admission that she signed the section 54 application to the Minister, I once again deny the suggestion that she was not responsible for its contents.

120.2 I further deny that any genuine constitutional issue is raised in this regard. Ms Myeni made no attempt to advance any constitutional arguments in the High Court. Moreover, the degree of Ms Myeni's involvement in the preparation of the section 54 applications and the material misrepresentations contained therein was a pure question of fact.

121 Ad paragraph 39 (Fact-based findings on the merits)

121.1 I deny that Ms Myeni has demonstrated any reasonable prospects of overturning the High Court's findings of fact. I again note that Ms Myeni has elected not to appeal against the vast majority of the High Court's factual findings any one of which would be individually sufficient to sustain an order of delinquency.

122 Ad paragraph 40 to 41



122.1 The contents of this paragraph are denied. I have addressed Ms Myeni's grounds of appeal in respect of the Emirates and Airbus deal above.

123 Ad paragraphs 43 to 55 (The Emirates MOU)

123.1 I have addressed Ms Myeni's grounds of appeal in respect of the Emirates deal above. I again deny Ms Myeni's attempts to misrepresent the pleadings.

124 Ad paragraphs 56 to 61 (The Airbus deal)

124.1 I deny that Ms Myeni has demonstrated any prospects of success in overturning the High Court's findings in respect of the Airbus deal. I have addressed these grounds of appeal above.

125 Ad paragraphs 62 to 66 (Apprehension of bias)

125.1 I deny that Ms Myeni has satisfied the strict test for establishing bias, for the reasons set out above.

126 Ad paragraphs 67 to 74 (Sanction)

126.1 I have addressed the grounds of appeal related to the sanction above.

127 Ad paragraphs 75 to 77


127.1 The contents of these paragraphs are denied.

128 On this basis, OUTA and SAAPA seek an order dismissing the applications condonation and leave to appeal with costs, including the costs of three counsel.



STEFANIE FICK

The Deponent has acknowledged to me that she knows and understands the contents of this affidavit, that she does not have any objection to taking the oath, and that she considers it to be binding on her conscience, and which affidavit was signed and sworn to or before me at **Johannesburg** on this 03 day of March 2021, the regulations contained in Government Gazette Notice No. R1258 of July 1972 as amended by Regulation No. 1648 dated 19 August 1977, by GN R1428 of July 1980 and by GN R774 of 23 April 1982, having been complied with.



COMMISSIONER OF OATHS

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