IN THE SUPREME COURT OF APPEAL

(HELD AT BLOEMFONTEIN)

SCA Case No:

Gauteng Local Division
Case No: 15996/2017

In the matter between:

DUDUZILE CYNTHIA MYENI	Appellant / Applicant
and	
ORGANISATION UNDOING TAX ABUSE NPC	First Respondent
SOUTH AFRICAN AIRWAYS PILOTS ASSOCIATION	Second Respondent
SOUTH AFRICAN AIRWAYS SOC LIMITED	Third Respondent
AIR CHEFS SOC LIMITED	Fourth Respondent
MINISTER OF FINANCE	Fifth Respondent

NOTICE OF APPLICATION FOR SPECIAL LEAVE TO APPEAL IN TERMS OF SECTION 17(3) READ WITH SECTION 16(1)(b) OF THE SUPERIOR COURTS ACT 10 OF 2013

PLEASE TAKE NOTICE FURTHER THAT the appellant / applicant intends to make an application to this Honourable Court for special leave to appeal in terms of section 17(3) read with section 16(1)(b) of the Superior Courts Act 10 of 2013 ("**the Act**") against the decision of the Full Court of the Gauteng Division of the High Court (per Mlambo JP, Tlhapi and Basson JJ concurring) delivered on 15 February 2021 ("**the Full Court decision**") upon the grounds more fully set out in the supporting affidavit.

PLEASE TAKE NOTICE FURTHER THAT, in the alternative, the appellant / applicant will seek an order that this Honourable Court directs the Full Court of the Gauteng Divsiion to entertain the merits of this appeal and/or the section 18(4)(ii) appeal upon the grounds contained in the relevant notice of appeal.

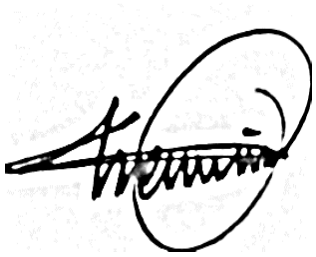
PLEASE TAKE NOTICE FURTHER THAT, in the further alternative, the appellant / applicant, in terms of section 173 of the Constitution, shall seek an order consolidating the present application with the section 17(2)(b) application for leave to appeal and/or the appeal itself previously delivered under the same case number on 3 February 2021.

PLEASE TAKE NOTICE FURTHER THAT the annexed supporting affidavit of **Duduzile Cynthia Myeni**, together with the annexures thereto, will be used in support thereof.

PEASE TAKE NOTICE FURTHER THAT if you intend to oppose the application for special leave to appeal and/or the consolidation application, you are required to so indicate your intention to do so and to deliver your answering afidavit within the time periods prescribed in section 17(3) of the Act, read with the directives of this Honourabloe Court.

KINDLY ENROL THE MATTER ACCORDINGLY

DATED AT **JOHANNESBURG** ON THIS THE **14TH** DAY OF **MARCH 2021.**



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TO: **THE REGISTRAR OF THE**
ABOVE HONOURABLE COURT
BLOEMFONTEIN

AND TO: **THE REGISTRAR OF THE**
ABOVE HONOURABLE COURT
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AIR CHEFS SOC LIMITED	Fourth Respondent
MINISTER OF FINANCE	Fifth Respondent

APPELLANT'S SUPPORTING AFFIDAVIT

I the undersigned

DUDUZILE CYNTHIA MYENI

do hereby under oath and say the following:

1. I am an adult 57-year-old black female who was previously appointed as the first black woman Chairperson of South African Airways SOC Limited ("**SAA**"), the national airline and carrier. Arising from the above summary are the multiple and inherent battles referred to hereunder.

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2. The facts contained herein, unless appears otherwise from the context, fall within my personal knowledge and are to the best of my knowledge both true and correct. Where I make submissions of a legal nature, I do so on the advice of my legal representatives, which advice I accept as correct.

3. I am the appellant and/or applicant in this matter. I will further explain those alternative capacities hereunder.

4. The first respondent is OUTA and the second respondent is SAAPA. I refer to both collectively as "**the respondents**" or simply as "**OUTA**".

5. Irrespective of the citation of the third to fifth respondents herein, the appellant does not seek any relief against them in this court. The third to fifth respondents were cited by the OUTA in the action proceedings in 2017 and since the matter they have never participated in all matters under the above case number. It is only the first and second respondents who are participating in this matter. Therefore, the service of this application on the third to fifth respondents will not be necessary.

Nature of the application

6. The nature of this unusual and combined application can be easily simplified if regard is had to the workings of the relevant appeal sections of the Superior Courts Act 10 of 2013 ("**the Act**"). Those are sections 16, 17 and 18 of the Act, as well as the recent factual history of this matter, which is briefly set out at paragraphs 12 to 30 hereunder.

7. In essence, the primary matter is a section 17(3) application for leave to appeal against the recent decision of the Full Court of the Gauteng Division

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of the High Court (per Mlambo JP, Tlhapi J and Basson J) delivered on 15 February 2021, in terms of which my appeal in terms of section 18(4)(ii) of the Act was struck off the roll.

8. While I am mindful that the said decision is interlocutory in nature, I am advised that it will be argued that in the special and exceptional circumstances of this case, it is in the interests of justice that this application be granted and/or the section 18(4) appeal itself be entertained by this Honourable Court.

9. I therefore herein bring an application for leave to appeal against the Full Court decision in terms of section 17(3) of the Act, read with section 16(1)(b), thereof.

10. For the sake of convenience, cost-saving and relying on section 173 of the Constitution, I further bring to the attention of this Honourable Court that there is a related pending application delivered on 3 February 2021, in terms of section 17(2)(b) of the Act (under SCA Case Number 99/21). In the interests of justice, it would be necessary to deal with the matters jointly.

11. For the sake of word economy, I will not quote all the abovementioned legislative and/or constitutional provisions in full, save where it is absolutely necessary to refer to the legislative test.

12. If challenged and/or if otherwise deemed necessary by this Honourable Court, I am advised that the unusual approach prudently adopted herein will be further elaborated upon and justified during written and/or oral argument.

BRIEF OUTLINE OF THE RELEVANT FACTUAL BACKGROUND

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13. In 2017, the respondents instituted a trial action in the High Court, in which they sought an order declaring me as a delinquent director in terms of section 162(5) of the Companies Act 71 of 2008 (**"the Companies Act"**).

14. Pursuant thereto and on 27 May 2020, the Honourable Madam Justice Tolmay declared me a delinquent director based on my alleged conduct as the former non-executive chairperson of SAA.

15. On 18 June 2020, I lodged my application for leave to appeal against the abovementioned decision of Tolmay J. It is of significance herein to underline that the application was brought within the prescribed period and that the provisions of section 18(1) therefore kicked in automatically.

16. On 9 July 2020, the respondents lodged a counterapplication in terms of section 18(1) of the Act for the enforcement of the decision of Tolmay J, together with a conditional challenge on the constitutionality of certain provisions of section 18.

17. On 22 December 2020, Tolmay J dismissed my section 17 application for leave to appeal and upheld the respondents' section 18 counterapplication. The relevant part of the order granted by Tolmay J on that day significantly reads thus:

> "*The application in terms of section 18 for <u>interim</u> enforcement of the court's order as set out in the judgment of 27 May 2020 is granted, and the order granted <u>will be</u> immediately enforceable <u>pending the finalisation of all appeal processes</u>*" (my emphasis).

18. The relevant automatic legal effects of the above decision were:

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18.1. to grant me the right to an automatic appeal to the next highest court on the basis of extreme urgency; and

18.2. (more importantly) to suspend the operation of the 22 December 2020 decision of Tolmay J automatically, pending the outcome of the section 18(4)(ii) appeal, according to the statutory injunction contained in section 18(4)(iv) of the Act.

19. Insofar as it is anticipated that the respondents may contest the above interpretation of the applicable law, I am advised that legal argument will be advanced.

20. On 8 January 2021, I duly exercised my right of automatic appeal by delivering, within the time limits allowed for an application for leave to appeal, a notice of appeal in terms of section 18(4)(ii). A copy thereof is annexed hereto marked "**A**".

21. On 22 January 2021, the respondents were duly served with my section 17(2)(b) petition or application for leave to appeal against the refusal of my original application for leave to appeal by Tolmay J. The application was simultaneously transmitted to my attorneys' Bloemfontein correspondent attorneys for immediate filing.

22. Unfortunately and due to certain logistical problems encountered in the office of the Registrar of this Honourable Court concerning the absence of a stamped copy of the High Court order, the served application was only filed on 3 February 2021. The problems encountered included some misunderstandings on the part of my attorneys as to the method of electronic

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filing which is acceptable to this Honourable Court during the Covid-19 lockdown period. Nevertheless, I and my attorneys accept full responsibility for the lateness. An application for condonation was duly delivered.

23. Meanwhile and on 29 January 2021, my attorneys wrote to the Judge President of the Gauteng Division of the High Court requesting the constitution of a Full Court on the statutory extremely urgent basis referred to in section 18(4) of the Act. As it turned out and unbeknown to me at that stage, the section 17(2)(b) petition had not yet been filed by their Bloemfontein correspondents. Be that as it may, it must be remembered that the operation of the decision of Tolmay J made on 22 December 2020 had already been automatically suspended at the time of the delivery of the notice of appeal, ie on 8 January 2021, by operation of law.

24. The section 18(4)(ii) appeal was duly and urgently heard by the Full Court on 8 February 2021.

25. In their argument, the respondents took the very technical preliminary objection that the Full Court lacked the necessary jurisdiction to hear the merits of the automatic appeal because of the late filing of the petition and/or condonation application and even though the petition had been duly served on the respondents' attorneys. Full arguments were presented in respect of both the technical objection and the merits of the appeal.

26. However, on 15 February 2021, the Full Court did not deal with the merits of the appeal but upheld the technical objection and delivered its decision in the form of a judgment and order that:

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"*1. The application is struck from the roll.*

2. The appellant is to pay the costs, such costs to include the costs of three counsel" (my emphasis).

27. I am advised that it will be argued that the above does not amount to "*the outcome of the automatic appeal*", as envisaged in section 18(4)(iv) of the Act. Accordingly, the decision of Tolmay J remains suspended pending such outcome.

28. This then is an application in terms of section 17(3), read with section 16(1)(b) of the Act, for leave to appeal against the above decision of the Full Court, a copy of which is annexed hereto marked "**B**".

29. This Honourable Court is also referred to the pending application before this court , lodged in terms of section 17(2)(b), a copy of which is not annexed to avoid unnecessary prolixity.

30. I also seek related ancillary and/or consequential relief, as indicated in the notice of application.

31. Against that brief factual summary, I now turn to the legal requirements for the present application.

GROUNDS OF APPEAL

32. Based on the grounds of appeal set out below, there are reasonable prospects that another court would come to a different conclusion.

Anticipated legal objection : Appealability

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33. Given the respondents' penchant for taking technical points in order to nullify the effects of section 18 and thereby unduly and prematurely accelerating my lifetime ban from being a director, I am advised that it would be prudent to anticipate and deal with the possible preliminary objection from them that this application be dismissed on the basis that the decision of the Full Court is not appealable since it is only an interlocutory decision to strike the application off the roll. Ordinarily, such a decision would not have final effect, in that the matter can (theoretically) be re-enrolled before the same court.

34. I am advised that such an approach to the question of appealability would be misplaced for various reasons, including principally that:

34.1. Regarding the important and vexed question of whether I am presently able or not to exercise my rights in terms of section 22 of the Constitution, the effect of the Full Court decision is certainly final.

34.2. In any event, as Mogoeng CJ put it in the leading case on this issue, ie *City of Tshwane v Afriforum*:[1]

> "*Unlike before, appealability no longer depends largely on whether the interim order appealed against has final effect or is dispositive of a substantial portion of the relief claimed in the main application. All this is now subsumed under the constitutional interests of justice standard. The over-arching role of interests of justice considerations has relativised the final effect of the order in the disposition of the substantial portion of what is pending before the (main) court, in determining appealability*" (my emphasis).

[1] 2016 (6) 279 (CC) at paragraph [40]

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34.3. In support of the above approach, Mogoeng CJ cited and relied on the dictum of Moseneke DCJ in the other leading Constitutional Court decision on the subject of appealability commonly known as the *OUTA* case, more particularly the dictum at paragraph [25] of *OUTA*, which states:

> "*Whether an interim order has a final effect or disposes of a substantial portion of the relief sought in a pending review is a relevant and important consideration. Yet, it is not the only or always decisive consideration. It is just as important to assess whether the temporary restraining order has an immediate and substantial effect, including whether the harm that flows from it is serious, immediate, ongoing and irreparable*"[2] (my emphasis).

34.4. In addition, the above important consideration and binding dicta and crucially in the present case, a point which must never be lost is that the purpose of section 18(4)(iv) is clearly to neutralise and reverse the ordinary interlocutory nature of a section 18(3) order. Subsection 18(4)(iv) effectively declares that, in spite of its interlocutory nature, such an order is suspended pending the outcome of the automatic appeal. This gives such an order an added quality statutorily prescribed or presumed finality.

35. For all the above reasons, read together with the interests of just considerations dealt with in the rest of this affidavit, there should be no technical impediment against the appealability of the Full Court decision,

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[2] *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) at paragraph [25]

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which is the subject matter of the present application for special leave to appeal.

36. I therefore now proceed to deal with the merits and legal effect of the section 18(4)(ii) decision of the High Court, in support of the section 17(3) application for special leave to appeal against it. It is on the basis of these grounds that the prospects of success in the present appeal may be gauged.

Grounds of appeal against the Full Court decision : The merits

37. The erroneous reference in the order to the appeal as an "application" is telling of a deeper error by the Learned Judges in that they regarded the proceedings as if they constituted an application in terms of section 18(1), read with sections 18(3) and 18(5), of the Act.

38. In actual fact, the proceedings were a section 18(4) appeal and had nothing to do with section 18(5) of the Act. Section 18(5) specifically refers to sections 18(1) and 18(2) of the Act, to the deliberate and specific exclusion of section 18(4). This was the first fundamental interpretational error committed by the Learned Judges which had a material bearing on their incorrect decision.

39. Section 18(4) circumscribes a standalone automatic appeal, which is triggered by the sole jurisdictional requirement of the existence of a court decision holding "*otherwise than section 18(1) (of the Act)*". This requirement was satisfied, in the circumstances, by the existence of the 22 December 2020 decision of Tolmay J. The merits of the automatic appeal accordingly ought to have been entertained and adjudicated.

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40. In this regard, the Learned Judges further erred by failing to address the argument pertinently raised by the appellant that the suspension of the Tolmay J order did not arise from the operation of section 18(1) or the common law but from the specific provisions of section 18(4)(iv) that:

> "*such an order (ie the 22 December 2020 order) will be automatically suspended pending the outcome of such appeal (ie the automatic appeal)*" (my emphasis).

41. In the premises, any reliance on or reference to section 18(5) was grossly misplaced and constituted a gross misdirection. The same is true in respect of any reliance placed on the case of *Panayiotou*,[3] which is distinguishable on the facts in that, for example, the respondent had taken further steps. The court also left the door open for the invocation of public policy considerations "*to construe ... a harm deserving of protection in the context of (the) circumstances*". It will alternatively be argued that *Panayiotou* was wrongfully and rigidly decided. Further alternatively, the decision is inapplicable insofar as it deals with the different issue of the interpretation of section 18(5).

42. The Learned Judges further erred in purporting to distinguish the binding authority of the *Ntlemeza*[4] decision of the SCA on the tenuous basis that in the present case, the appeal had "lapsed". The two cases raise the exact same legal issue, namely whether the appeal court can have jurisdiction in the absence, technically speaking, of a pending application for leave to appeal. That question was, with respect correctly, answered in the affirmative in *Ntlemeza*, whereas the Learned Judges herein answered the

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[3] *Panayiotou v Shoprite Checkers (Pty) Limited and Others* 2016 (3) SA 110(GP)
[4] *Ntlemeza v Helen Suzman Foundation* 2017 (5) SA 402 (SCA)

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same question in the negative. This offends against the principle of *stare decisis.*

43. The Full Court further breached the *stare decisis* rule in that it ought to have found that it was bound by the following dicta of the Constitutional Court in *Tasima*[5] (per Petse J, as he then was):

43.1. "*... it is necessary to emphasise that all the subsections of section 18 are interlinked and must therefore be read contextually.*"[6]

43.2. "*What ultimately happens to the suspended operation or execution of a judgment subject to appeal process would be determined by the outcome of the appeal. If the appeal is unsuccessful, the suspension would cease, unless of course, as noted in Ntlemeza, 'a further application for leave to appeal is made*"'[7] (my emphasis).

43.3. "*Accordingly, the sole purpose of the Basson ... order relative to section 18(3) was to regulate the interim position between the litigants from the time when that order was made until the final determination of the underlying dispute between the parties by this Court.*"[8]

44. The Learned Judges further erred in taking into account a completely irrelevant consideration, namely the prospects of success of the condonation application and, in so doing, not giving any reasons. The only prospects of success to be taken into account related to the merits of the appeal against

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[5] *Department of Transport v Tasima (Pty) Limited*2018 (9) BCLR 1067 (CC)
[6] *Tasima (supra)* at paragraph [49]
[7] *Tasima* at paragraph [52]
[8] *Tasima* at paragraph [54]

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the main judgment, which is one of the four factors or legal requirements which must be satisfied in section 18 applications.

45. Crucially, it must be recalled and noted that the order of Tolmay J on 21 December 2020 postulates "*the finalisation of all appeal processes*". A purposive interpretation thereof ought properly to include the section 17(2)(b) application, irrespective of its slightly late filing.

46. Finally and in a nutshell, the Learned Judges misconstrued and misinterpreted the following words and/or phrases found in section 18 of the Act:

46.1. The opening words of section 18(5), namely: "***For the purposes of subsections (1) and (2)***". These words expressly exclude any reference to section 18(4). The only interpretation thereof is that section 18(5) does not apply to section 18(4) appeals but to the main appeal, which is referred to in subsections (1) and (2).

46.2. The opening words of section 18(4), namely: "***If a court orders otherwise, as contemplated in subsection (1)***". These words clearly indicate that the jurisdictional prerequisite for section 18(4) is merely the making of a decision, such as the one made by Tolmay J on 22 December 2020, and not necessarily the timeous lodgment of a section 17 petition.

46.3. More specifically, the word "***outcome***" found in section 18(4)(iv). This word means that the automatic suspension of the <u>main</u> judgment subsists until the final decision in respect of the execution order (ie the

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Tolmay J order). This then begs the question whether the striking off order constitutes an "***outcome***" as envisaged in the subsection. I am advised that it will be argued that the answer to that question is in the negative. If that is found to be indeed so, then the execution order remains suspended to date.

47. Given the failure and/or refusal of the Learned Judges to adjudicate upon the merits of the statutory automatic appeal, the next highest court which must afford me that statutory right is the SCA.

48. In any event and in the event that this defence is raised, I am advised that it will be argued that the view that my automatic right of appeal is confined to the Full Court is incorrect and an unjustifiable infringement of the full right of appeal, which originates from section 34 of the Constitution. Accordingly and even if the Full Court had entertained the merits of the automatic appeal, its decision would still be appealable, as in the case of any other Full Court appeal decision.

49. Alternatively and arguably, this Honourable Court may well exercise its discretion in favour of remitting the matter back to the Full Court.

50. I am advised that full legal arguments will be advanced at the hearing in respect of all of the legal issues raised above.

51. The bottom line is that my statutory right of automatic appeal, granted by the legislature in section 18(4)(ii) of the Act, has not yet been exercised and has effectively been unconstitutionally denied, based on a technicality which is irrelevant upon a proper interpretation of the legislative scheme.

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52. Based on the legal and constitutional grounds of appeal set out above, there is a reasonable prospect that another court would come to a different conclusion. Furthermore, the issues raised are of huge general public importance and are likely to arise in many cases in the future. The matter also raises many unanswered questions regarding the operation of section 18 of the Act. Most of the issues are *res nova.*

53. That being the case, it is in the interests of justice that special leave to appeal be granted.

54. In this regard, the decision of the Full Court must be regarded as any other appeal decision of a Full Court of the High Court. Section 17(3), read with section 16(1)(b), of the Act (under the SCA Case Number 99/21) was specifically designed to cater for appeals against such decisions.

55. It is a requirement of such an application that exceptional circumstances must exist and it must be in the interests of justice that the application be granted. I now proceed to deal with those two issues, which are overlapping to a certain extent.

SPECIAL / EXCEPTIONAL CIRCUMSTANCES AND INTERESTS OF JUSTICE

56. In addition to the factors already canvassed above in respect of both the peculiar factual background of this matter and the complex and novel legal issues raised therein, I wish to add or re-emphasise the following:

56.1. The issues in the underlying appeal dealing with the provisions of the Companies Act regarding delinquent directors are in themselves of special general public importance. The issues are raised in the

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unprecedented context of state-owned enterprises. It also implicates section 22 of the Constitution.

56.2. This matter presents an opportunity for a comprehensive judicial determination of some of the most frequent problems associated with the application of section 18.

56.3. The matter also arguably raises the important issue of whether or not there is only one appeal opportunity allowed in respect of section 18 and in contrast to all other "ordinary" appeals which may be pursued up to the Constitutional Court. Such an interpretation is unduly restrictive and would constitute an unjustifiable infringement of section 34 of the Constitution.

56.4. Ironically, the respondents themselves had raised a constitutional challenge against certain aspects of section 18 of the Act, conditional upon leave to appeal being granted. Leave to appeal was refused and the said constitutional challenge therefore fell by the wayside. Should leave to appeal be granted in this and the related section 17(2)(b) application, this will have the effect of revising the respondents' application to declare section 18 unconstitutional. Although I continue to oppose the said conditional application, it is undeniable that it does raise very pertinent issues and concerns about the aspect of section 18 identified for nullification.

56.5. Given the reality that our courts on a daily basis are faced with applications for leave to appeal brought by unsuccessful litigants and/or applications to execute court decisions brought by successful

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litigants, the necessary clarity in respect of this relatively new area of the law is exceptionally desirable. This matter provides the rare opportunity to deal with the issues comprehensively and conclusively by this Honourable Court and possibly the Constitutional Court. It will serve the public interest to do so.

56.6. This particular matter has gained a high national profile, mainly due to the fact that it involves one of the largest and most important public companies, the national airline and its first ever black woman board chair, who is in jeopardy of an unprecedented lifetime ban from ever holding a directorship if the main judgment of Tolmay J is not successfully appealed against. Given my current age, this sanction is disturbingly inappropriate, even in the unlikely event of the declaration of delinquency being upheld by this Court and/or the Constitutional Court, as the case may be.

57. In all the circumstances, it is in the interests of justice, as well as the administration of justice, that this application be granted so that the normal consequences of the section 17(2)(b) application should follow, irrespective of the fact that the said application was served on time but filed a week or so late.

THE ALTERNATIVE PRAYER TO ENTERTAIN THE MERITS OF THE APPEAL(S)

58. This prayer is first and foremost aimed at the usual and commendable procedure adopted by this court to deal simultaneously with the application for leave to appeal and the appeal itself.

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59. However, in this particular case, it would arguably be open for this court also to entertain the merits of the section 18(4) appeal itself instead of remitting it back to the Full Court.

60. Legal argument in this regard will be advanced at the hearing.

THE FURTHER ALTERNATIVE PRAYER FOR CONSOLIDATION

61. This prayer is intended for the convenience of the court and the parties and is based on the inextricable links between the section 17(2)(b), section 17(3) and/or section 18(4) matters. It would be convenient for the same judges to deal with the different facets of this matter holistically rather than in a piecemeal fashion.

62. Whether or not it will be granted or necessary is a matter purely within the discretion of this court, based upon a consideration of the facts and circumstances pleaded hereinabove.

63. The alternative prayers are sought by the invocation of the court's powers as set out in section 172 of the Constitution, read with section 173 thereof, where applicable.

64. In the circumstances, I seek the following order(s):

64.1. Granting special leave to appeal against the decision of the Full Court;

64.2. Setting aside the decision of the Full Court;

64.3. Alternatively to 62.2: directing the Full Court to hear the automatic appeal on the merits;

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64.4. Further alternatively: consolidating the adjudication of this application with the pending application in terms of section 17(2)(b) of the Act; and/or

64.5. Costs in the appeal.

WHEREFORE I pray that it may please the above Honourable Court to grant the relief sought in the notice of application to which this affidavit is attached and/or at paragraph 62 of this affidavit.

DEPONENT

I HEREBY CERTIFY that the deponent has acknowledged that she knows and understands the contents of this affidavit, which was signed and sworn before me at RIBAY on this the 14 day of **March** 2021, the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

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COMMISSIONER OF OATHS

SOUTH AFRICAN POLICE SERVICES
COMMUNITY SERVICE CENTRE
14 MAR 2021
RICHARDS BAY
KWAZULU-NATAL

ANNEXURE "A"

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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No.: 15996/2017

In the matter between:

DUDUZILE CYNTHIA MYENI	Appellant
and	
ORGANISATION UNDOING TAX ABUSE NPC	First Respondent
SOUTH AFRICAN AIRWAYS PILOTS ASSOCIATION	Second Respondent

NOTICE OF EXTREME URGENT APPEAL IN TERMS OF SECTION 18(4)(II) OF THE SUPERIOR COURTS ACT 10 OF 2013

KINDLY TAKE NOTICE THAT the appellant hereby files her notice of appeal to the Full Court in terms of section 18(4)(ii) of the Superior Courts Act 10 of 2013 ("the **Act**") against the judgment and order of this court granted by Tolmay J on 22 December 2020 regarding the appliation brought in terms of section 18(1) and (3) of the Act.

KINDLY TAKE NOTICE THAT copies of both the aforesaid section 18 judgment and order, as well as the main judgment and order dated 27 May 2020, will form part of the record to e filed herein.

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KINDLY TAKE NOTE THAT the appeal will be heard by the Full Court of the above Honourable Court as a matter of extreme urgency and on a date to be determined by the Registrar on the grounds of appeal set out hereunder:

FIRST GROUND: NO EXCEPTIONAL CIRCUMSTANCES

1. The learned judge erred in her conclusion that the respondents had in fact established exceptional circumstances to succeed with their application for an order declaring that the order of 27 May 2020 be operational and enforceable.

2. The learned judge ought properly to have found that there were no exceptional circumstances in light of, *inter alia*, the following considerations:

    2.1. The appellant is no longer a board member or non-exeuctive director of Centlec, a state-owned entity, nor is she a board member of any state-owned entity and therefore no public interest demands the application of the order of 27 May 2020.

    2.2. The appellant's term as a board member of Centlec ended in November 2020.

    2.3. Accordingly, the fundamental basis for the judgment of Tolmay J has been removed or substantially ameliorated.

3. The learned judge erred in finding that exceptional circumstances exist because of the public interest and based on the findings made in the judgment, as the appellant disputed and continues to dispute the allegations that her involvement in the Emirates MOU and the Airbus Swap Transaction demonstrated her failure and disegard to follow principles of corporate governance. Her alleged

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mismanagement of SAA as a state-owned enterprise leading to the order declaring her a delinquent director for the remainder of her life is the subject matter of the proposed appeal in terms of the rules of this Honourable Court.

4. The learned judge erred in finding that the manner in which the appellant presented her case is a contributing factor that supports a finding on exceptional circumstances and that she put an incomplete version to the court. The court failed to apply the same standard in testing the evidence placed by the respondent as the witnesses of the respondent failed to provide a complete version when questioned by the appellant's counsel on facts that were instrumental in the court declaring the appellant to be a deliquent director for the remainder of her lifetime. In fact the learned judged disregarded crucial evidece by the appellant that disproved allegations made by the respondents.

5. The learned judge erred in finding that exceptional circumstances existed based on the finding that the appellant was not a reliable witness, as this was not a factor relevant in the determination of whether or not the requirements of section 162(5)(c) read with sections 76 and 77 of the Companies Act in order to declare a director delinquent.

SECOND GROUND: IRREPARABLE HARM

6. The learned judge erred in finding that no irreparable harm would accrue to the appellant. The sanction constitutes a *prima facie* violation of the appellant's rights as enshrined in section 22 of the Constitution, which provides that:

> *"Every citizen has the right to choose their trade, occupation or profession freely.*

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The practice of a trade, occupation or profession maybe regulated by law".

7. The learned judge erred in finding that the appellant will suffer no irreparable harm if the source of her living which she procures from being remunerated as a board member of any entity is removed for the next estimated two to three years while the appeal is under way; and/or

8. The learned judge erred in finding that the respondents will suffer no irreparable harm if the order of 27 May 2020 is suspended pending the finalisation of the appeal.

THIRD GROUND: NO REGARD FOR PROSPECTS OF SUCCESS ON APPEAL

9. There is binding authority of the Supreme Court of Appeal to the effect that the prospects of success on appeal must be evaluated as a requirement for the granting of an application in terms of section 18(1) of the Superior Courts Act.

10. The learned judge erred in not taking this requirement into account and/or not finding the respondents' failure to deal with the requirement ought to properly have been fatal to its section 18(1) application in so far as the respondent is the onus-bearing party, which onus, it is common cause, is a "heavy" onus.

FOURTH GROUND

11. Irrespective of and/or in addition to the above, the learned judge failed to adequately give reasons for the decision as specifically compelled by section 18(4)(i) of the Superior Courts Act. This failure has the effect of curtailing the appellant's automatic right of appeal and section 34 of the Constitution of the Republic of South Africa.

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KINDLY PLACE THE MATTER ON THE ROLL ACCORDINGLY.

DATED AT **JOHANNESBURG** ON THIS THE **21ST** DAY OF **JANUARY 2021**.

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TO: **THE REGISTRAR OF THE ABOVE HONOURABLE COURT**
PRETORIA

AND TO: **JENNINGS INCORPORATED**
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ANNEXURE "B"

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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 15996/2017

(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHERS JUDGES: YES/~~NO~~
(3) REVISED

.....
SIGNATURE

15 February 2021
DATE

In the matter between:

DUDUZILE CYNTHIA MYENI APPELLANT

and

ORGANISATION UNDOING TAX ABUSE NPC FIRST RESPONDENT

SOUTH AFRICAN AIRWAYS PILOTS' ASSOCIATION SECOND RESPONDENT

Section 18 of Superior Courts Act – execution of principal judgment and order – 18(4)(ii) – automatic right of appeal against execution of principal judgment and order – preliminary point on jurisdiction – failure to timeously lodge petition to SCA – right of appeal lapsed – no existing

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right of appeal – suspended judgment non-existent – condonation application to SCA – principal judgment and order executable and final pending condonation application – application premature – appeal struck from the roll

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JUDGMENT

THE COURT

INTRODUCTION

[1] On 27 May 2020 Tolmay J declared Ms. Dudu Myeni ("the appellant") to be a delinquent director in terms of section 162(5) of the Companies Act[1] based on the finding that the appellant has seriously misconducted herself during her tenure as the former non-executive chairperson of South African Airways SOC Ltd ("the principal order.")

[2] When Tolmay J made her order declaring the applicant a delinquent director, the order immediately came into operation on the date of the order (27 May 2020) and could be executed. When the applicant filed her application for leave to appeal on 18 June 2020 – which was well within the prescribed time period for the filing of an application for leave to appeal[2] – the principal order was immediately suspended pending the outcome of the application for leave to appeal. On 9 July 2020 the respondents (the Organisation Undoing Tax Abuse NPC and the South African Airways Pilots' Association) filed their counter-application in terms of section 18 of the Superior Courts Act[3] for the enforcement of the principal order pending the outcome of the decision in the application for leave to appeal.

[3] On 22 December 2020, Tolmay J dismissed the appellant's application for leave to appeal and simultaneously upheld the respondents' counter-application in terms of section 18(1) and 18(3) of the Superior Courts Act. The relevant parts of her order read as follows:

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[1] Act 71 of 2008.
[2] In terms of Rule 49(1)(b) of the Uniform Rules of Court and section 17 of the Superior Courts Act.
[3] Act 10 of 2013.

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"2. The application for leave to appeal is dismissed with costs, on a party and party scale;

3. The application in terms of section 18 for *interim* enforcement of the court's order as set out in the judgement of 27 May 2020 is granted; and the order granted will be immediately enforceable pending the finalisation of all appeal processes."

[4] The appellant now brings an appeal in terms of section 18(4) of the Superior Courts Act against the order of Tolmay J dated 22 December 2020. This section provides for an automatic statutory appeal which is to be heard with extreme urgency.

SECTION 18(1) OF THE SUPERIOR COURTS ACT

[5] It is a trite principle that, in terms of the common law, the noting of an appeal suspends the operation and execution of a judgement pending the outcome of the appeal.[4] Section 18(1) of the Superior Courts Act, whilst restating the common law position,[5] provides that a party in whose favour judgment was given, may apply to the High Court in terms of section 18(3) for an order that the execution and operation of the decision not be suspended pending the decision of the application or appeal, but that the order be executed. A court may grant an order to execute under exceptional circumstances and, in addition, where the applicant 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 (section 18(3)). Section 18 of the Superior Courts Act reads as follows:

> **"18 Suspension of decision pending appeal**
>
> (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.

---

[4] *Ntlemeza v Helen Suzman Foundation and Another* 2017 (5) SA 402 (SCA) *ad* para 19 with reference to the decision *in South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A).
[5] *Ibid ad* para 28.

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(2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not 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.

(4) If a court orders otherwise, as contemplated in subsection (1) —

(i) the court must immediately record its reasons for doing so;

(ii) the aggrieved party has an automatic right of appeal to the next highest court;

(iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and

(iv) such order will be automatically suspended, pending the outcome of such appeal.

(5) For the purposes of subsections (1) and (2), a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules."

[6] On 29 January 2021 the appellant's legal representative (Mr. Mabuza) wrote to the Judge President seeking the constitution of a Full Court and an urgent enrolment and hearing of the section 18(4) appeal by the Full Court. Mr. Mabuza stated in his letter that a petition had been lodged in the Supreme Court of Appeal ("SCA") and that, that "court is accordingly seized with that issue". In a letter to the Judge President, the respondents' attorneys responded stating that Ms. Myeni "had failed to file any application for leave to appeal in the Supreme Court of Appeal (SCA) within the one month period specified under section 17(2)(b) of the Superior Courts Act", that the Registrar of the SCA and the appellant's own correspondent attorneys had confirmed that no petition had in fact been lodged in the SCA and that consequently "the order granted by Tolmay J on 27 May 2020 is now in full force and effect." Mr. Mabuza responded to this letter admitting that no petition had in fact been filed in the SCA due to unspecified "logistic problems", but noted that a petition for leave to appeal together with an application for condonation would be filed in the SCA the next day.

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[7] It is therefore common cause before us that the application for leave to appeal to the SCA was not filed timeously in terms of the one-month period for an application for leave to appeal to the SCA specified under section 17(2)(b) of the Superior Courts Act. It is also common cause that in terms of section 17(2)(b) of the Superior Courts Act, this period expired on 22 January 2021.

PRELIMINARY POINT

[8] The respondents raised a preliminary point, as foreshadowed in their attorney's letter referred to above, arguing that, by virtue of the fact that no application has been filed in the SCA, there is currently no pending application for leave to appeal against Tolmay J's delinquency order of 27 May 2020. The effect thereof, so argument went, is that the belated petition (coupled with an application for condonation) does not have the effect of suspending the delinquency order. This, they argued, means that the delinquency order granted by Tolmay J is now in full force and effect and that we were incompetent to hear this urgent appeal in terms of section 18(4) against the section 18(3) order which it was submitted had now been rendered moot: The argument was further that, until the appellant is granted condonation in the SCA for the late filing of the petition, the section 18(4) appeal was thus premature.

[9] It is necessary to deal with this preliminary point first. Only in the event that it is decided that the preliminary point is without substance, will we proceed to deal with the requirements set out in section 18 and determine whether Tolmay J was correct that there are exceptional circumstances justifying the granting of the execution order.

THE RESPONDENTS' SUBMISSIONS

[10] The appellant took issue with the preliminary point and, relying mainly on the decision in *Ntlemeza v Helen Suzman Foundation and Another*,[6] submitted that the fact that an application for leave to appeal had not been filed timeously did not prevent this court from hearing the present application.

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[6] *Supra* note 4.

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[11] In *Ntlemeza*, the SCA was similarly seized with an automatic appeal against an execution order made by a full court of the High Court.[7] In that matter, the High Court presided over the review application to have General Ntlemeza's appointment set aside. The High Court set aside the appointment of General Ntlemeza on grounds of unfitness ("the principal order"). Subsequently, General Ntlemeza applied for leave to appeal the principal order. The respondents in turn filed a counter-application for a declarator that the operation and execution of the principal order not be suspended by virtue of any application for leave to appeal or any appeal.

[12] The full court dismissed the application for leave to appeal and upheld the counter-application and ordered that the principal order be executed in full during the appeal process ("the execution order"). The date of the execution order was 12 April 2017 the reasons of which were provided on 10 May 2017. General Ntlemeza exercised his automatic right to appeal the execution order "to the next highest court" (the SCA) as provided for in section 18(4)(ii).

[13] The question on appeal before the SCA was whether General Ntlemeza ought to be permitted to continue in his post as National Head of the Directorate for Priority Crime Investigation pending the finalisation of an application for leave to appeal filed in that court. The point was raised on behalf of General Ntlemeza that, because at the time when the application in terms of section 18(3) was made to the High Court there was no appeal pending against the principal order, the respondents' application for execution was premature. It was submitted that the jurisdictional point was dispositive of the appeal before the SCA.

[14] The SCA considered the power granted to the court in terms of section 18 taking into consideration the general inherent power granted to courts in terms of section 173 of the Constitution[8] to regulate their own process. The court held as follows:

> "[29] The preliminary point on behalf of General Ntlemeza .... does not accord with the plain meaning of s 18(1). As pointed out on behalf of HSF and FUL, and following on

[7] Because a full bench was constituted to hear the review and the application to execute the principal order, the automatic appeal had to be brought before the SCA in terms of section 18(4).
[8] Act 108 of 1996.

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what is set out in the preceding paragraph, s 18(1) does not say that the court's power to reverse the automatic suspension of a decision is dependent on that decision being subject to an application for leave to appeal or an appeal. It says that, unless the court orders otherwise, such a decision is automatically suspended."

[15] It is so that in the *Ntlemeza* matter, General Ntlemeza had not yet filed an application for leave to appeal to the Supreme Court of Appeal at the time the execution order in terms of section 18 was granted. To recap, the section 18 execution order was granted on 12 April 2017. The application for leave to appeal against the High Court's execution order was filed a day later namely on 13 April 2017. The application for leave to appeal against the principal order was filed on 21 April 2017 (which was well within the time limit prescribed by the Rules).[9] General Ntlemeza filed his application for leave to appeal the 12 April order within the period allowed in section 17(2)(b). The urgent appeal in terms of section 18(4) was heard by the SCA on 2 June 2017. In the present matter, the applicant's right to file an application for leave to appeal to the SCA has lapsed.

[16] The difference between the factual matrix in the *Ntlemeza* matter and the present matter is obvious: In the *Ntlemeza* matter, the application for leave to appeal against the principal order was filed well within the one-month time period stipulated in section 17(2)(b) of the Act. Also, at the time when the urgent appeal served before the SCA, the application for leave to appeal the principal order had, as already mentioned, been filed well within the prescribed time limits which is not the case before us.

[17] Mr. Mpofu for the appellant submitted, with reference to *Ntlemeza*, that this court should take into account that the parties in the present matter have always anticipated that there would be further appeals in the present matter. Because further appeal processes were anticipated in the present matter, the fact that the application for leave to appeal to the SCA was not filed in time should not stand in the way of this court hearing the present urgent appeal.

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[9] *Ntlemeza supra* note 4 *ad* para 33.

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[18] This argument is misconceived. Section 18(1) provides that "...unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an appeal for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal." The quoted passage denotes that the existence of an application for leave to appeal or an ongoing appeal process is a prerequisite for an application in terms of section 18 to arise. Put differently, the wording of section 18(1) signifies that in the absence of an application for leave to appeal or an appeal, the judgment and order in question are not suspended and are in fact deemed final. The fact that the noting of an appeal suspends the execution of a judgment appealed against logically means that in the absence of such an appeal, the judgment is not suspended and is in fact deemed executable and thus, final. Given that section 18 exists to regulate the position when an application for leave to appeal or an appeal against a judgment is pending, it stands to reason that where no such application for leave to appeal or appeal is pending, the purpose of section 18 ceases to exist and as such, the judgment and order are deemed final and executable for all intents and purposes.

[19] As such, an important question would then be what effect would the lodging of the petition after the right to appeal has lapsed then have on the principal judgment's order. Having regard to the case law, in light of the belated petition now filed by the appellant, the principal judgment's order continues to remain operational for the mere fact that the service of an application to condone the late filing of the petition to the SCA does not suspend the operation and execution of any order.[10] To conclude otherwise would give rise to an untenable situation in law where, after an order has been operational for a number of months, a party could simply bring a condonation application which would result in such an order suddenly being suspended. Such a situation would clearly give rise to far reaching consequences that this court cannot condone.

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[10] See *Panayiotou v Shoprite Checkers (Pty) Ltd and Others* 2016 (3) SA 110 (GJ) and *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).

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[20] In *Ntlemeza*, the SCA did take into account that, because further appeal processes were always highly likely and always in prospect,[11] the fact that an application for leave to appeal had not been filed at the SCA at the time of the hearing of the application to execute – the one before the High Court having been dismissed – did not curtail the court's power in terms of section 18, to reverse the automatic suspension of a decision. This was because the court's power in terms of section 18(1) was not dependant on that decision being subject to an application for leave to appeal.[12] In *Ntlemeza* the following was further stated in this regard –

> "[32] There can be no doubt that an application by HSF and FUL for leave to execute, had there not been one earlier, could have been brought and would have been competent after the application for leave to appeal was filed in this court. Courts must be the guardians of their own process and be quick to avoid a toing and froing of litigants. The High Court's order achieved that end. A proper case had been made out by HSF and FUL for anticipatory relief. The High Court reasonably apprehended on the evidence before it that further appeals were in the offing and issued an order that sought not just to crystallise the position but also to anticipate further appeal processes. For all the reasons aforesaid there is no merit in the preliminary point."

[21] Returning to the present matter: Whilst it is correct that in the present matter, as in *Ntlemeza*, further appeal processes have been anticipated (as is also evidenced from a reading of the execution order by Tolmay J), the difference is that, in the present matter, the application for leave to appeal (the petition) to the SCA of the principal order was filed out of time. In *Ntlemeza* the application for leave to appeal was filed shortly after the execution order was made and within the prescribed time period.

[22] What is the effect thereof? We have already referred to the submission on behalf of the respondents that the failure of the applicant to file the application for leave to appeal to the SCA within the prescribed one-month period has the effect that, by operation of law, the order by Tolmay J dated 27 May 2020 is now in full force and effect. On a proper application of the law, this submission is correct.

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[11] *Ntlemeza supra* note 4 *ad* para 31.
[12] *Ibid ad* para 29.

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[23] This issue was also pertinently considered by the High Court in *Panayiotou v Shoprite Checkers (Pty) Ltd and Others.*[13] The court in that matter pointed out that, in terms of section 18(5) of the Superior Courts Act, and as a matter of fact and of law, "a decision becomes the subject of an application for leave to appeal or of an appeal as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules". Section 18 thus contains "the conditions necessary for a judgment of the High Court to be suspended, pending a petition to the Supreme Court of Appeal for leave to appeal..."[14]

[24] For a decision to become the subject of an application for leave to appeal, the application must have been lodged in terms of the Rules (section 18(5) of the Superior Courts Act). Although section 18(4) grants an automatic right of appeal to be heard urgently, it does not dispense with the requirement to comply with the time periods prescribed by the rules for the launch of an application for leave to appeal to the SCA.

[25] Where an application for leave to appeal is filed out of time, all that is before the SCA is a condonation application. The court in *Panayiotou*, with reference to a plethora of authority,[15] explains:

> "[12] It has been argued that s 18(5) is prescriptive and that the text emphasises that the application for leave to appeal be lodged with the registrar 'in terms of the rules'. Accordingly, it is argued, until (and only if) condonation is granted can the petition be 'lodged'. All that is before the Supreme Court of Appeal at present is an application for condonation, whose fate is uncertain. In support of this proposition reference was made to several authorities.

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[13] *Supra* note 10.
[14] *Ibid ad* para 9.
[15] Reference is made, *inter alia*, to the well-known decision in *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae); President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, amici curiae) supra* note 10 *ad* para 46: "The second was based on uniform rule 49(11), which provides that where an appeal has been noted or an application for leave to appeal made, the operation and execution of the order is suspended. In this case, as will appear soon in more detail, the 'Modder East Squatters' lodged their application for leave to appeal together with an application for condonation some 18 months after the order had issued. The right to apply for leave to appeal by then had lapsed. Rule 49(11) presupposes a valid application for leave to appeal to effect the suspension of an order.[15] In this case there was none."

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[13] The failure to serve notices of appeal or court records within the prescribed periods is commonplace. The result of such failures is that the appeals lapse and require condonation to revive them."

CONCLUSION

[26] The application for leave to appeal in the present matter has lapsed. In order for the application for leave to appeal to be revived, condonation will have to be granted by the SCA. Until such time, there is no application as contemplated by section 18(5) of the Superior Courts Act, and the ineluctable consequence is that the section 18(4) appeal is not competent. We further hold the view that, although the length of the delay in filing the application for leave to appeal to the SCA is negligible, having read the principal judgment of the court *a quo* and the judgment in the application for leave to appeal, the prospects of the appellant succeeding with her condonation application to the SCA are rather slim.

[27] The appeal must clearly be struck off. In respect of costs, both parties were *ad idem* that this is a self-standing application and that costs should follow the result.

ORDER

[28] In the event the following order is made:

1. The application is struck from the roll.
2. The appellant is to pay the costs, such costs to include the costs of three counsel where so employed.

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JUDGE PRESIDENT OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT

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V TLHAPI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

AC BASSON
JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Delivered: This judgment was prepared and authored by the Judges whose names are reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 15 February 2021.

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	ADV. N KEKANA
Instructed by:	MABUZA ATTORNEYS
Counsel for the Respondents:	ADV. C STEINBERG
	ADV. C MCCONNACHIE
	ADV. N KAKAZA
Instructed by:	JENNINGS INC.
Date of hearing:	8 February 2021
Date of judgment:	15 February 2021

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