IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 15996/17

In the matter between:

ORGANISATION UNDOING TAX ABUSE	First Plaintiff
SOUTH AFRICAN AIRWAYS PILOTS ASSOCIATION	Second Plaintiff
and	
DUDUZILE CYNTHIA MYENI	First Defendant
SOUTH AFRICAN AIRWAYS SOC LTD	Second Defendant
AIR CHEFS SOC LTD	Third Defendant
MINISTER OF FINANCE	Fourth Defendant

PLAINTIFFS' HEADS OF ARGUMENT: MS MYENI'S INTERLOCUTORY APPLICATIONS

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INTRODUCTION

1 The first defendant, Ms Dudu Myeni, has launched two interlocutory applications: an application in terms of Rule 28(4) to substantially amend her plea and an application for the joinder of other defendants, purportedly brought in terms of Rule 10 (3).

2 On 21 October 2019, this Court directed that these applications are to be decided together with the question of costs in Ms Myeni's abortive postponement application, which was heard on 10 October 2019.

3 Ms Myeni's interlocutory applications are misconceived. They are brought in bad faith, with the intention to cause further delay, and Ms Myeni has once again shown herself to be dishonest and evasive. The applications fall to be dismissed with punitive costs, which should include the costs of the postponement application and all costs occasioned by the delays.

4 These heads of argument address the following issues in turn:

4.1 The relevant background to these applications;

4.2 The section 34 right of access to Court;

4.3 The amendment application;

4.4 The joinder application;

4.5 Punitive costs.

BACKGROUND

5 In the main action, the plaintiffs seek an order declaring Ms Myeni to be a delinquent director in terms of section 162(5) of the Companies Act 71 of 2008 due to her misconduct as chairperson of South African Airways SOC Ltd (SAA).

6 This trial will focus on four sets of transactions and events:

6.1 The Emirates deal: Ms Myeni's last-minute scuttling of a Memorandum of Understanding between SAA and Emirates in 2015.

6.2 The Airbus deal: Ms Myeni's dishonest and unlawful conduct between 2013 and 2015 in attempting to alter SAA's agreements to purchase aircraft from Airbus

6.3 The BnP Capital (Pty) Ltd deal: the improper appointment of BNP as a transaction adviser in 2016 to assist in a R15 billion recapitalisation of SAA, the unlawful extension of its contract to include the sourcing of funds, and Ms Myeni's unsuccessful attempts to secure BNP a hefty R49.9 million cancellation fee.

6.4 The EY report: Ms Myeni's inaction in response to the findings of Ernst and Young Advisory Services (Pty) Ltd into procurement and contract management at SAA.

7 This is the first delinquency application of its kind brought by a civil society organisation and a trade union against a former director of a Stated Owned Enterprise (SOE). It raises issues of unquestionable public importance, given

the public interest in the proper management of SOEs. Ms Myeni admits as much in her plea.[1]

8 Ms Myeni's affidavits start from the false premise that this matter started when her current legal representatives were briefed. However, her interlocutory applications must be seen in the context of the long history of this litigation and her pattern of obstructive conduct. The relevant events are set out in detail in the plaintiffs' affidavits and are not placed in dispute.

9 The plaintiffs issued summons more than two years ago, on 7 March 2017.

10 On 19 June 2017, Ms Myeni filed her plea which was signed by her attorney of record at the time, Mr George Van Niekerk of ENS Africa (ENS).

11 On 28 February 2018, the matter was specially allocated for trial from 7 October 2019 to 1 November 2019.

12 It has now emerged that ENS terminated its mandate on 29 January 2019. Its formal notice of withdrawal was only filed on 7 June 2019 because Ms Myeni failed to provide details of her new attorneys and an address for service.[2]

13 Following ENS's withdrawal, Ms Myeni took no steps to appoint new attorneys or to notify the plaintiffs of a new address. Nor did she pursue a directors' liability

[1] PoC p 10 para 18.1; Plea p 101 para 11.

[2] Mr Van Niekerk's affidavit p 235 para 4.

insurance claim with SAA's insurers to fund her litigation. When the plaintiffs' attorneys contacted her directly, she claimed to have no money to brief lawyers.[3]

14 On 29 August 2019, Lungisani Mantsha Attorneys placed itself on record as Ms Myeni's attorneys but then withdrew less than a month later, on 20 September 2019, stating that they had no financial instructions.[4]

15 At the commencement of the trial on 7 October 2019, Ms Myeni failed to appear in Court. That morning, she called the plaintiffs' attorney, Mr Pandor, and claimed that she had no money to travel to Pretoria. She asked to speak to Her Ladyship Madam Justice Tolmay directly over the telephone, which request was refused.[5]

16 On 8 October 2019, Ms Myeni's former attorney of record, Mr Mantsha, appeared in court, despite having previously withdrawn. He relayed the message that Ms Myeni wished to bring a postponement application. The matter then stood down to 10 October 2019 to allow Ms Myeni time to file a properly motivated application.[6]

17 On 9 October 2019, Ms Myeni filed her postponement application. She again claimed that she was unemployed and unable to afford legal representation.[7] The sole basis of her postponement application was to allow her to pursue a

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[3] Mr Pandor's affidavit, Annexure A p 10 para 8.

[4] Mr Pandor's affidavit p 2 para 6.

[5] Mr Pandor's affidavit pp 4 – 5 para 15.

[6] Interlocutory AA p 205 para 9.

[7] Postponement FA p 50 para 35.11 – 35.12.

directors' liability insurance claim with SAA's insurers to fund her litigation.[8] No mention was made of any intention to bring interlocutory applications.

18 On the morning of 10 October 2019, the plaintiffs filed an answering affidavit which addressed Ms Myeni's allegations and the grounds for her postponement application in detail. This affidavit demonstrated that Ms Myeni continued to hold at least four directorships, including at least one directorship of a Free State parastatal, and that she has substantial assets, including a mansion in Richards Bay.[9] No replying affidavit was filed in response to this evidence, which therefore stands uncontested.

19 Later that morning, Ms Myeni's counsel abandoned any reliance on her alleged lack of funds. Her counsel now claimed that the sole basis of her postponement application was to allow her legal team to prepare and to bring a series of unspecified interlocutory applications.[10]

20 This Court refused the request for a lengthy postponement and directed that the matter would proceed from 21 October 2019 to 1 November 2019 and again from 25 November 2019 to 6 December 2019.

21 Ms Myeni's legal representatives failed to give any notice of their intended interlocutory applications by the Court-imposed deadline on 14 October 2019.[11]

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[8] Postponement FA p 42 para 9; p 43 para 13; p 49 para 35.10.

[9] Postponement AA pp 93 – 97 paras 29 – 43.

[10] Interlocutory AA p 206 para 12.

[11] Interlocutory AA p 207 para 16.

At a further pre-trial conference on Wednesday 16 October 2019, Ms Myeni's counsel announced, for the very first time, that Ms Myeni intended to amend her plea in its entirety as she claimed that her previous attorneys of record had failed to follow her instructions.[12]

22 Ms Myeni failed to file any interlocutory applications by the indicated deadline of Friday 18 October 2019. Instead, Ms Myeni's legal representatives delivered a partial Rule 28 notice on the evening of Sunday, 20 October 2019, reflecting proposed amendments to Ms Myeni's plea. The plaintiffs filed a notice of objection later that evening.[13]

23 On 21 October 2019, the proceedings resumed and the plaintiffs were ready to proceed with their case. They had made extensive preparations and arrangements with their key witnesses, at great cost. These witnesses included senior airline executives, who had cleared their schedules to testify in the two weeks from 21 October 2019 to 1 November 2019.[14]

24 At the commencement of proceedings on 21 October 2019, Ms Myeni's counsel announced that she intended to seek further amendments to her plea, in addition to those set out in the notice. He also informed the court, for the very first time, that Ms Myeni now wished to bring an application to join all former directors of

[12] Interlocutory AA p 207 para 17.

[13] Interlocutory AA p 208 para 21.

[14] Interlocutory AA p 209 para 23.

SAA during the relevant period. No mention of this application had been made at any previous time.[15]

25 This Court issued directions for the further conduct of the matter, placing Ms Myeni on terms to file all of her interlocutory applications by no later than 4 November 2019.

THE SECTION 34 RIGHT OF ACCESS TO COURT

26 Ms Myeni repeatedly asserts that section 34 of the Constitution affords her a right to pursue her interlocutory applications in any manner and at any time she chooses, irrespective of the prejudice to the plaintiffs and this Court.

27 The Courts have repeatedly rejected such arguments. In *Giesecke & Devrient Southern Africa (Pty) Limited v Minister of Safety & Security*,[16] the SCA held that:

> *"[T]he argument loses sight of s 34 of the Constitution which also entitles both parties to civil proceedings to a fair public hearing. That right is given effect to, inter alia, by the Uniform Rules of Court."*

28 In *Apleni v President of South Africa*[17] this Court added that:

> *"[Section 34] does not say that a person is constitutionally entitled to "Access to Court" irrespective of relevant provisions of substantive or procedural law. Access to Court and related matters, both of a substantive and procedural nature are now regulated by the Superior Courts Act No. 10 of 2013, the Uniform Rules of Court, and relevant Practice Manuals and Directions …"*

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[15] Interlocutory AA p 209 para 24.

[16] *Giesecke & Devrient Southern Africa (Pty) Limited v Minister of Safety & Security* 2012 (2) SA 137 (SCA) at para 24.

[17] *Apleni v President of the Republic of South Africa and Another* [2017] ZAGPPHC 656; [2018] 1 All SA 728 (GP) (25 October 2017) at para 17.

29 The plaintiffs equally have a right to a fair hearing and to demand that Ms Myeni complies with the Rules. As will now be demonstrated, her interlocutory applications are plainly an abuse.

AMENDMENT APPLICATION

30 Ms Myeni's proposed amendments fall into four categories, as illustrated in the colour-coded schedule annexed to these heads of argument as **Annexure A**:

30.1 The withdrawal of admissions: Ms Myeni seeks to withdraw no less than 11 material admissions of fact.

30.2 Elaboration of bare denials: she seeks to expand on her bare denials by impermissibly pleading legal argument and evidence.

30.3 Exceptions and objections: she seeks to introduce exceptions and other objections to the particulars of claim, disguised as amendments to her plea;

30.4 Special plea: she has further sought to retract and then reintroduce her special plea, challenging OUTA's standing.

31 The plaintiffs oppose these proposed amendments on four grounds:

31.1 First, Ms Myeni has failed to provide a full and honest explanation for these proposed amendments, specifically the withdrawal of admissions, thus demonstrating bad faith;

31.2 Second, Ms Myeni has failed to account for her delays in seeking these amendments, which is further confirmation of bad faith;

31.3 Third, the proposed amendments and withdrawal of admissions will cause substantial prejudice to the plaintiffs, which is compounded by the delay;

31.4 Fourth, the proposed amendments do not raise triable issues and are irregular in various respects, as they seek to introduce legal argument, evidence, and exceptions disguised as amendments.

Relevant legal principles

32 This Court has a discretion to refuse or grant amendments under Rule 28 of the Uniform Rules, but it is a discretion that must be exercised on proper principles.[18] These principles were summarised by the Constitutional Court in *Affordable Medicines Trust and Others v Minister of Health and Others*:[19]

> "*[9] … [A]mendments will always be allowed unless the amendment is* mala fide *(made in bad faith) or unless the amendment will cause an injustice to the other side which cannot be cured by an appropriate order for costs, or 'unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed'.*"

33 The courts have further emphasised that proposed amendments must raise a triable issue that sufficiently important to justify the prejudice and costs to the other parties and the Court.[20]

34 Therefore, Ms Myeni bears the onus to prove that:

34.1 She seeks amendments in good faith;

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[18] *Caxton Ltd and Others v Reeva Forman (Pty) Ltd and Another* 1990 (3) SA 547 (A) at 565.

[19] *Affordable Medicines Trust And Others v Minister of Health and Others* 2006 (3) SA 247 (CC) at para 9.

[20] *Caxton Ltd And Others v Reeva Forman (Pty) Ltd And Another* 1990 (3) SA 547 (A) at 565, citing De Villiers JP in *Krogman v Van Reenen* 1926 OPD 191 at 195.

34.2 The amendments will not result in injustice or prejudice to the plaintiffs and that any prejudice could be cured by a suitable costs order;[21] and

34.3 The proposed amendments raise triable issues of sufficient importance to justify the prejudice.

35 The withdrawal of admissions requires special scrutiny. While the test to be applied is the same as for other amendments, it is far more difficult to satisfy this test. In *President Versekeringsmaatskappy Bpk v Moodley*[22] this Court explained this as follows:

> *"The approach is the same [as for other admissions], but the withdrawal of an admission is usually more difficult to achieve because (i) it involves a change of front which requires full explanation to convince the court of the bona fides thereof, and (ii) it is more likely to prejudice the other party, who had by the admission been led to believe that he need not prove the relevant fact and might, for that reason, have omitted to gather the necessary evidence."*

36 This requires a defendant to provide a full and honest explanation of the circumstances surrounding the making of an admission and the reasons for seeking its withdrawal.[23]

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[21] *Union Bank of South Africa Ltd v Woolf* 1939 WLD 222 at 225; *Trans-Drakensberg Bank Ltd v Combined Engineering (Pty) Ltd* 1967 (3) SA 632 (D) at 640H; *Euroshipping Corporation of Monrovia v Minister of Agriculture* 1979 (2) SA 1072 (C) at 1090B; *Thekweni Properties (Pty) Ltd v Picardi Hotels Ltd (and Others as Third Parties)* 2008 (2) SA 156 (D) at 158E–F, overruled on appeal, but not on this point, in *Picardi Hotels Ltd v Thekwini Properties (Pty) Ltd* 2009 (1) SA 493 (SCA).

[22] *President Versekeringsmaatskappy Bpk v Moodley* 1964 (4) SA 109 (T) at 110H–111A.

[23] *Bellairs v Hodnett and Another* 1978 (1) SA 1109 (A) at 1150; *Northern Mounted Rifles v O'Callaghan* 1909 TS 174; *Frenkel, Wise & Co Ltd v Cuthbert* 1946 CPD 735.

First objection: No proper explanation for proposed amendments

37 Ms Myeni fails to offer any adequate or honest explanation for her sudden change in stance and her attempts to withdraw material admissions.

38 First, Ms Myeni has been dishonest in attempting to blame her former attorneys, ENS, for alleged errors and omissions in the plea.

39 She asserts that her former attorneys failed to follow her instructions in preparing the plea and were responsible for making factual admissions and bare denials in error.[24] In her reply, she goes as far as to accuse her former attorneys of engaging in a "*frolic of their own*".[25] These are serious allegations of professional misconduct which cannot be made lightly.

40 Ms Myeni's former attorney of record, Mr Van Niekerk, has filed a detailed affidavit responding to these allegations in full.[26] Mr Van Niekerk confirms that:

40.1 The plea was prepared on Ms Myeni's express instructions, based on extensive consultations, and that she was repeatedly asked to confirm the correctness of the plea, which she did.

40.2 Any shortcomings in the plea were due to Ms Myeni's refusal to offer full cooperation.

[24] Amendment FA p X paras 21 – 23.

[25] Reply p 338 para 24.3.

[26] Mr Van Niekerk's affidavit pp 234 – 243.

40.3 She was specifically asked to confirm her admissions and was expressly advised of the shortcomings of the bare denials of assertions in the particulars of claim in those instances where she declined to elaborate.

41 In her replying affidavit, Ms Myeni makes no genuine attempt to respond to Mr Van Niekerk's evidence of the drafting process, the consultations, and her approval of the plea. Mr Van Niekerk's version of events therefore stands substantially uncontested.

42 Instead, Ms Myeni continues to defame her former attorneys and seeks to have all of this evidence struck out due to alleged breaches of legal professional privilege.[27]

43 This attack is misconceived as Ms Myeni has waived privilege by accusing her attorneys of breaching their duties and by seeking to give evidence regarding her instructions. The Courts have repeatedly held that "*when a client alleges a breach of duty by the attorney, the privilege is waived as to all communications relevant to that issue*".[28]

44 In *S v Tandwa*,[29] the Supreme Court of Appeal applied this principle in circumstances where a party accused his former advocate of incompetence. The Court held that the advocate was fully entitled to submit an affidavit in response

[27] Reply pp 336 – 339 paras 19 – 26.
[28] Wigmore,*Evidence in Trials at Common Law* (revised by JT McNaughton, 1961) vol 8 2328. Cited with approval in *S v Tandwa and Others* [2007] ZASCA 342008 (1) SACR 613 (SCA) at paras 18 – 20; *S v Boesman* 1990 (2) SACR 389 (E) 394G-H.

[29] *S v Tandwa and Others* [2007] ZASCA 342008 (1) SACR 613 (SCA) at paras 18 – 20;

to these allegations, as privilege had been imputedly waived. Cameron JA, Mlambo JA and Hancke AJA explained this conclusion as follows:

> *"[18] Since accused 1 has nowhere expressly consented, the admissibility of his advocate's affidavit depends on whether he waived his right to legal professional privilege. In* Peacock v SA Eagle Insurance Co Ltd *and* Harksen v Attorney-General Cape*, the courts drew a distinction between implied and imputed waiver of legal professional privilege. Implied waiver occurs (by analogy with contract law principles) when the holder of the privilege with full knowledge of it so behaves that it can objectively be concluded that the privilege was intentionally abandoned. Imputed waiver occurs where – regardless of the holder's intention – fairness requires that the court conclude that the privilege was abandoned. Implied waiver entails an objective inference that the privilege was actually abandoned; imputed waiver proceeds from fairness, regardless of actual abandonment.*
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> *[19] In propounding a doctrine of imputed waiver (which may also be termed fictive or deemed waiver), the judges in* Peacock *and* Harksen *drew on a passage from Wigmore, much-cited in our courts, that enjoins 'fairness and consistency' in inferring the extent of an implied waiver of attorney/client privilege. Wigmore in the same paragraph goes on to conclude that it is a 'fair canon of decision' that 'when a client alleges a breach of duty by the attorney, the privilege is waived as to all communications relevant to that issue'.*
>
> *[20] The canon seems to us to be clearly right. Where an accused charges a legal representative with incompetence or neglect giving rise to a fair trial violation, it seems to us most sensible to talk of imputed waiver rather than to cast around to find an actual waiver. Even without an express or implied waiver, fair evaluation of the allegations will always require that a waiver be imputed to the extent of obtaining the impugned legal representative's response to them. Rightly therefore, counsel on appeal accepted that the advocate's affidavit was admissible in assessing the accused's claims." (Emphasis added)*

45 In *Tandwa*, the SCA approved of the High Court's judgment in *S v Boesman*.[30] There the Court admitted evidence from advocates who were accused of making admissions in error. Zietsmann J held as follows:

> *"[W]here, as has happened in this case, the accused have elected to give evidence concerning the instructions given by them to their*

[30] *S v Boesman* 1990 (2) SACR 389 (E) 394G-H.

> *counsel, and where they seek to withdraw admissions made by their counsel on their behalf on the ground that their counsel acted contrary to their instructions in making the admissions, they have waived the privilege attaching to the communications made by them to their counsel in that regard, and the element of fairness referred to in the passage in Wigmore, quoted by Rumpff JA in Wagner's case, requires that the State should be allowed to call the counsel concerned to give evidence concerning such communications."*

46 These principles apply with equal force here. Ms Myeni cannot in one breath accuse her former attorneys of failing to follow her instructions but then seek to suppress any evidence that reveals the true facts.

47 Ms Myeni's dishonesty provides sufficient reason to dismiss this application in its entirety. Dishonesty is, after all, the hallmark of bad faith.[31]

48 Second, Ms Myeni fails to give any proper explanation as to why specific admissions were made and why she now seeks to withdraw them, beyond her attempts to blame her former attorneys.

49 In *Bellairs v Hodnett*,[32] the Appellate Division emphasised that the withdrawal of admissions requires "*a satisfactory explanation of the circumstances in which the admission was made and the reasons for now seeking to withdraw it."* If no satisfactory explanation is provided, that is the end of the matter.[33]

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[31] *Public Protector v South African Reserve Bank* [2019] ZACC 29; 2019 (9) BCLR 1113 (CC) at para 71. Mogoeng CJ wrote in dissent, but there was no disagreement over this principle: ""*[71] A proper starting point is in my view to remind ourselves of what the ordinary meaning of bad faith is. A dictionary meaning is "[i]ntent to deceive". The meaning of bad faith or malicious intent is generally accepted as extending to fraudulent, dishonest or perverse conduct; it is also known to extend to gross illegality.*""

[32] Bellairs v Hodnett 1978 (1) SA 1109 (A) at 1150F–H

[33] *Frenkel, Wise and Co Ltd v Cuthbert; Cuthbert v Frenkel, Wise and Co Ltd* 1946 CPD 735 at 749: *"[T]he enquiry into whether or not the application to amend is bona fide – in other words, whether a satisfactory explanation has been given – is the first enquiry and, if it is found that the applicant for the amendment does not clear this hurdle, there is no need to consider the second leg of prejudice."*

50 This means that it is not enough for an applicant merely to assert that an admission is made in error. The error must be fully explained to satisfy the court that the attempted withdrawal of the admission is made in good faith, rather than simply to secure a tactical advantage.[34]

51 The eleven admissions that Ms Myeni seeks to withdraw all relate to material facts which were plainly within Ms Myeni's knowledge. These were not legal issues. It would have been a simple matter for Ms Myeni to identify these alleged errors in her plea, if the admissions were indeed made in error.

52 Taking just one example, Ms Myeni's admissions on the BNP deal illustrate the deficiencies in her explanation:

52.1 Ms Myeni had previously admitted that BNP did not have a valid financial service provider licence when it was appointed to source R15 billion in funds for SAA[35] and that no due diligence was conducted on BNP at the time.[36]

52.2 An admission of these facts could not have been lightly made. They were clearly matters within Ms Myeni's knowledge as chairperson of SAA at the time.

52.3 In her notice of amendment, Ms Myeni now attempts to withdraw these admissions and to change her version entirely, as she seeks to claim that

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[34] *Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 632 (D) at 640 and the cases cited therein.

[35] Pleadings Bundle: PoC p 18 para 46; Plea p 106 para 35.1.

[36] Pleadings Bundle: PoC p 18 para 48.4; Plea p 107 para 40.

she had no knowledge whatsoever of BNP's status and no knowledge whether due diligence was conducted.[37]

52.4 This about-turn required a detailed explanation, which is simply not forthcoming. In the absence of such an explanation, the Court can only infer that Ms Myeni elected not be truthful in respect of one of the two contradictory versions.

53 Ms Myeni now reveals the real reason for her attempt to withdraw these admissions: this is a tactical move to avoid their legal implications. She states: *"I was none the wiser on the legal implications of how some of the admissions and denials had been framed in the plea"*,[38] and now claims that "*my new legal representatives are entitled to give different advice over what should and should have not been admitted from their own perspective.*"[39]

54 Such tactical manoeuvres are impermissible. Amendments are meant to facilitate the pursuit of truth, not to allow parties to escape the consequences of the truth.

55 Third where a litigant seeks to blame their legal representatives for alleged errors, they must explain in detail why no blame is to be attributed to themselves. The Appellate Division's warning in *Saloojee and Another, NNO v Minister of Community Development*[40] is directly on point here:

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[37] First amendment notice paras 18 – 19.

[38] Amendment FA p 182 para 22.

[39] Reply p 336 para 19.

[40] *Saloojee and Another, NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 141.

> *"There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations ad misericordiam should not be allowed to become an invitation to laxity… . If he relies upon the ineptitude or remissness of his own attorney, he should at least explain that none of it is to be imputed to himself. That has not been done in this case."*

56 Ms Myeni offers no explanation as to why she made no attempt to correct what she claims are patent factual errors in her plea, errors that are entirely at odds with what she now says is the truth.

57 In these circumstances, Ms Myeni has failed to take this Court into her confidence and has offered an untruthful and incomplete explanation. The only conclusion that can be drawn is that Ms Myeni seeks these amendments in bad faith, in an attempt to escape the legal consequences of her admissions, and as a means to draw out the proceedings even further.

Second objection: No proper explanation for the delay

58 Ms Myeni also fails to offer any satisfactory explanation for her delay in seeking amendments.

59 The case law is clear that unexplained delays are indeed relevant in assessing whether amendments are sought in good faith and whether this will prejudice the other side.[41] In *Zarug v Parvathie NO*[42] Henochsberg J held that: "*if the*

[41] *Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 632 (D) at 640.

[42] *Zarug v Parvathie NO* 1962 (3) SA 872 (D) at 876C, approved in this Division in GMF Kontrakteurs (Edms) Bpk And Another v Pretoria City Council 1978 (2) SA 219 (T) at 222.

application for amendment is not timeously made, some reasonably satisfactory account must be given for the delay."

60 Ms Myeni gives no genuine explanation as to why she did not take steps to correct her plea at any earlier stage, in the two-and-half years since her plea was filed; in the eighteen months since this matter was set down for trial; and in the nine months since her former attorneys terminated their mandate in January 2019.

61 Even if the Court accepted Ms Myeni's excuse that it was only when her current legal representatives appraised the papers that she understood the alleged shortcomings in her plea, she has failed to offer a genuine explanation regarding the delay. Ms Myeni knew as early as 29 January 2019 that her insurance company would no longer cover her legal costs and that ENS had withdrawn. Her current attorneys were appointed on 29 August 2019. Ms Myeni is silent as to what steps she took in this seven month period. The fact that her current legal representatives only had sight of her papers after the trial was set down is therefore entirely her own fault.

62 The true explanation for the delay is that Ms Myeni only sought to introduce amendments at the point that this Court refused to grant her a lengthy postponement on 10 October 2019. Ms Myeni now alleges that this Court was "*unreasonable*" in refusing her a long delay.[43] The amendments were plainly a stratagem to engineer a further postponement, which largely succeeded.

[43] Reply p 329 para 10.

63 These are "*Stalingrad tactics*" which have been repeatedly condemned by the courts in the context of criminal trials.[44] Such tactics equally have no place in civil matters.

Third objection: Prejudice

64 The prejudice to the plaintiffs and the public interest is manifest and could not be cured by costs or a further postponement.

65 First, Ms Myeni's proposed amendments go to material issues which would require the plaintiffs to redo a substantial portion of their trial preparation, to reopen consultations with key witnesses, and to gather fresh evidence.

65.1 On the BNP deal, Ms Myeni seeks to retract admissions regarding the flawed procurement process.[45] By seeking to place the entire procurement process into dispute, Ms Myeni would force the plaintiffs to subpoena further evidence, find new witnesses who can establish that the proper processes were not followed, and call expert witnesses to testify on the requirements of proper procurement in these circumstances. This is a minefield of factual and legal issues which will substantially prolong the

[44] *Democratic Alliance v President of the Republic of South Africa and Others; Economic Freedom Fighters v State Attorney and Others* [2018] ZAGPPHC 836; [2019] 1 All SA 681 (GP) at paras 1 – 2; *Moyo v Minister of Justice and Constitutional Development and others; Sonti v Minister of Justice and Correctional Services and others* [2018] ZASCA 100; 2018 (8) BCLR 972 (SCA) at para 169, "*'Stalingrad defence'. . . has become a term of art in the armoury of criminal defence lawyers. By allowing criminal trials to be postponed pending approaches to the civil courts, justice is delayed and the speedy trials for which the Constitution provides do not take place. I need hardly add this is of particular benefit to those who are well-resourced and able to secure the services of the best lawyers.*'

[45] Pleadings Bundle: PoC pp 11 – 18, paras 23, 29, 31, 34, 46; Plea pp 102 – 107 paras 14, 20, 22, 25, 35, 40.

trial and will force the plaintiffs to incur substantial new costs which were never anticipated.

65.2 In respect of the Airbus / Pembroke deal, Ms Myeni had previously admitted that on 27 May 2013 the Board resolved to finance ten aircraft through Pembroke Capital and that the Board did not at any time overturn this resolution.[46] This is significant, as it demonstrated that Ms Myeni's letter to the Minister in June 2013 was incorrect in claiming that the Board had resolved to finance only two aircraft. Ms Myeni now seeks to withdraw these admissions in their entirety and even goes so far as to place the Board resolution of 27 May 2013 in dispute.[47] This too will require the plaintiffs to subpoena further documents and call further witnesses who can authenticate the relevant board resolutions and minutes.

65.3 In respect of the Airbus Swap Transaction, Ms Myeni seeks to withdraw her admissions that there was no Board approval or ministerial approval for the insertion of a middleman at the time that she wrote to the Airbus CEO in September 2015.[48] She now seeks to change her version entirely by claiming that there was Board and Ministerial approval at the time for the insertion of a middleman.[49] This too will require the plaintiffs to gather further evidence and to interview new witnesses to determine precisely what the Board had decided at the time.

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[46] Pleadings Bundle: PoC pp 36 – 37, paras 96 – 97, 104; Plea p 112 para 80, 82)

[47] Second amendment notice, paras 1 – 2.

[48] Pleadings Bundle: PoC p 43 paras 122 – 123; Plea p 114 paras 94 – 95

[49] Second amendment notice para 4.

66 The time and effort required to respond to these proposed amendments would place significant strain on the plaintiffs. Neither plaintiff is a for-profit company. In the case of OUTA, the funding for this action was raised on the basis on an appeal to ordinary citizens to reach into their pockets to enable the litigation.

67 Second, the plaintiffs have already expended significant time, energy, and resources in preparing for this trial on the basis of the pleadings as they stand. If this Court grants the amendments, and the withdrawal of the admissions in particular, the plaintiffs have a new case to meet.

68 Third, the application for amendments has already resulted in the trial being postponed and has deprived the plaintiffs of a hearing on the dates that were specially allocated. This has disrupted the plaintiffs' preparations and has resulted in substantial wasted costs.

69 Fourth, a costs order would not cure this prejudice. On Ms Myeni's own version, she claims to be unemployed[50] and to have no money to travel from Richards Bay to Pretoria,[51] let alone satisfy a substantial costs order that would be occasioned by this application.

[50] Postponement FA p 50 paras 35.11 and 35.15.

[51] Postponement FA p 47 para 34; FA p 50 para 35.15.

Fourth objection: Impermissible attempt to introduce exceptions, objections, legal argument and evidence

70 The bulk of Ms Myeni's proposed amendments do not raise "*triable issues*" that necessitate an amendment and the prejudice that will follow.

71 First, Ms Myeni seeks to introduce exceptions and technical objections to the plaintiffs' particulars of claim, accusing the plaintiffs *inter alia* of failing to plead a cause of action and making scandalous and vexatious allegations.[52] This is plainly impermissible.

71.1 If Ms Myeni wished to raise these objections, she was required to bring exceptions, applications to strike out, or notices of an irregular step before filing her plea.[53]

71.2 She cannot seek to use the Rule 28 amendment procedure to introduce such exceptions and objections via the back door, long out of time. This is a textbook example of an abuse of process.[54]

72 Similarly, Ms Myeni has sought to use her proposed amendments to plead evidence and to advance argument at some length.[55] This too is in breach of the

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[52] See, for example, first amendment notice, paras 16, 23, 24, 27, 28, 29, 31; second amendment notice paras 3, 6, 10, 11, 12, 13, 15, 16.

[53] Uniform Rules 23, 30, 30A.

[54] *Beinash v Wixley* 1997 (3) SA 721 (SCA) at 734: *"It can be said in general terms … that an abuse of process takes place where the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective. …".*

[55] See, for example, First amendment notice paras 16, 23, 24, 27, 28, 29, 31; Second amendment notice paras 1, 2, 3, 4, 5, 8, 9, 10, 12, 14.

rules of pleading and would likely give rise to an irregular step and further disputes.[56]

73 Ms Myeni's contradictory stance on her special plea is equally underserving of an amendment. On 7 November 2019, Ms Myeni delivered a third Rule 28 notice in which she sought to reintroduce her special plea challenging OUTA's standing in these proceedings. She had previously sought to delete this special plea in its entirety and her counsel informed this Court that Ms Myeni had abandoned this challenge. This about-turn remains unexplained. In any event, Ms Myeni now stands by her special plea and no amendment is required.

[56] Rule 18(4): (4) "*Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto*."

JOINDER APPLICATION

74 Ms Myeni's brings a further application in terms of Rule 10(3) to join some 28 other SAA directors.

75 Ms Myeni claims that the other directors must be joined because the issues in dispute stem (in part) from actions or resolutions of the board.[57] As such, she seeks to join all individuals that have served on the SAA board during her tenure, on the basis that they all "*acted as a collective as a board of directors*"; and that this would result in circumstances where they "*could be sued on substantially the same questions of facts and law*".[58]

76 Her application is fatally defective in two respects.

77 First, Ms Myeni's reliance on Rule 10(3) is incompetent. This Rule permits a plaintiff to join several co-defendants in the same action on grounds of convenience where the plaintiff's claims raise substantially the same questions of law or fact. It does not give defendants any corresponding right or power to apply to join co-defendants on mere grounds of alleged convenience.[59]

[57] Joinder application, p 193 para 14.

[58] Ibid para 16.

[59] On the distinction between joinder of necessity and joinder of convenience, see *Rosebank Mall (Pty) Ltd v Cradock Heights (Pty) Ltd* 2004 (2) SA 353 (WLD) at para 11.

78 This reflects the fact that, under the common law, a defendant's rights to insist on the joinder of other parties is narrowly confined. In *Burger v Rand Water Board and Another*[60] Brand JA explained this as follows:

> *"[A defendant's] right to demand joinder is limited to specified categories of parties such as joint owners, joint contractors and partners, and where the other party(ies) has (have) a direct and substantial interest in the issues involved and the order which the Court might make.'*

79 Second, even if Ms Myeni's application were viewed charitably as raising an argument of non-joinder, this argument is bad in law.

80 Non-joinder arises where another party has a direct and substantial interest in the matter, which is determined by the relief that is sought. A party can only be said to have a direct and substantial interest in the matter if the relief cannot be sustained and carried into effect without prejudicing their interests.[61]

81 In *Amalgamated Engineering Union v Minister of Labour,*[62] the Appellate Division explained further that "*[t]he question of joinder should … not depend on the nature of the subject-matter of the suit … but… on the manner in which, and the extent to which, the Court's order may affect the interests of third parties.*" (Emphasis added)

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[60] *Burger v Rand Water Board and Another* 2007 (1) SA 30 (SCA) at para 7.

[61] *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.

[62] *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 657.

82 This means that the relief is decisive, not the facts or issues in dispute. Even where a Court may be called on to make findings that are adverse to another party this does not establish grounds for non-joinder if the relief sought does not adversely impact on that party's interests.[63]

83 Therefore, Ms Myeni's attempt to join the other SAA directors fails for three simple reasons:

83.1 The only relief sought by the plaintiffs is to have Ms Myeni declared to be a delinquent director;

83.2 No relief is sought against other SAA directors;

83.3 Consequently, none of the other SAA directors have a direct and substantial interest in the relief sought by the plaintiffs.

84 This conclusion would not change even if the evidence ultimately reveals that other SAA directors were complicit in Ms Myeni's unlawful conduct and that there are grounds to pursue further delinquency applications in future. No such relief is sought in the proceedings and there is no need to join those directors.

85 In any event, any delinquency claims against Ms Myeni's co-directors have prescribed in terms of section 162(2)(a) of the Companies Act, which provides that a delinquency claim must be brought within 24 months after the director vacated his or her position.[64] This has two consequences for the current matter.

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[63] *Gordon v Department of Health, Kwazulu-Natal* 2008 (6) SA 522 (SCA) at para 10; *Judicial Service Commission and Another V Cape Bar Council And Another* 2013 (1) SA 170 (SCA) at paras 15 – 17.

[64] Section 162(2)(a):

First, whatever the outcome of this trial, Ms Myeni's co-directors cannot face delinquency claims. Secondly, if this Court found that the plaintiffs could not institute a delinquency action against Ms Myeni without joining her co-directors, the current trial could not proceed.

86 The plaintiffs are fully entitled to choose their defendant from a group of potential wrongdoers. That is so in run-of-the-mill civil cases involving joint wrongdoers and the principle is of equal application here.[65]

87 For these reasons, Ms Myeni's joinder application is yet another misguided attempt to obstruct and delay these proceedings. Again, these are "Stalingrad tactics", which must be condemned.

"A company, a shareholder, director, company secretary or prescribed officer of a company, a registered trade union that represents employees of the company or another representative of the employees of a company may apply to a court for an order declaring a person delinquent or under probation if-

(a) the person is a director of that company or, within the 24 months immediately preceding the application, was a director of that company;…"

[65] Harms *Civil Procedure in the Superior Courts*, Last Updated: February 2019 - SI 64 at B10.2 Direct and Substantial Interest: "e) *if parties have a liability, which is joint and several, the plaintiff is not obliged to join them as co-defendants in the same action but is entitled to choose his target".* Citing *Parekh v Shah Jehan Cinemas (Pty) Ltd* 1982 (3) SA 618 (D).

PUNITIVE COSTS

88 We submit that Ms Myeni's interlocutory applications ought to be dismissed with punitive costs, to be taxable immediately, including the costs of three counsel. The applicants are also entitled to the costs in the postponement application on a punitive scale.

89 The Constitutional Court recently summarised the relevant principles on punitive costs in *Public Protector v South African Reserve Bank*:[66]

> *"[221] … The punitive costs mechanism exists to counteract reprehensible behaviour on the part of a litigant. As explained by this Court in* Eskom*, the usual costs order on a scale as between party and party is theoretically meant to ensure that the successful party is not left "out of pocket" in respect of expenses incurred by them in the litigation. Almost invariably, however, a costs order on a party and party scale will be insufficient to cover all the expenses incurred by the successful party in the litigation. An award of punitive costs on an attorney and client scale may be warranted in circumstances where it would be unfair to expect a party to bear any of the costs occasioned by litigation."*
>
> *[222] The question whether a party should bear the full brunt of a costs order on an attorney and own client scale must be answered with reference to what would be just and equitable in the circumstances of a particular case. A court is bound to secure a just and fair outcome."*

90 In this case, justice and equity requires that the plaintiffs be fully indemnified, to the greatest extent possible, from the costs occasioned by Ms Myeni's conduct.

91 Ms Myeni has repeatedly proved herself to be dishonest and has failed to take this Court into her confidence. We have tabulated five sets of false statements

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[66] *Public Protector v South African Reserve Bank* [2019] ZACC 29; 2019 (9) BCLR 1113 (CC) at paras 221 – 222.

and misrepresentations in an accompanying table, marked **Annexure B**. In summary:

91.1 First, in the postponement application, Ms Myeni falsely claimed that she had no money to travel to Court.[67] She failed to disclose that she earned over R4,3 million in directors' remuneration during her time at SAA[68] and an additional R3,45 million from her time as a director on the Mhlathuze Water Board,[69] not to mention her undisclosed earnings from other directorships. She also failed to provide a full and frank account of her true financial position, including the fact that she owns a bonded property worth over R3,7 million.[70] Faced with this evidence, she elected not to file any replying affidavit in the postponement application.

91.2 Second, Ms Myeni repeatedly claimed that she is unemployed,[71] despite evidence that she holds no less than four active directorships, including her ongoing role as deputy chairperson of Centlec, a State Owned Entity, which paid her R274,364.00 in 2018 alone.[72] Ms Myeni's affidavit mentioned all of her other directorships, but studiously avoids any reference to Centlec.[73] Again she elected not to reply.

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[67] FA p 11 para 34.

[68] See Plaintiffs' Answering Affidavit (AA) under the heading "SAA Remuneration".

[69] Ibid.

[70] AA under the heading "Property".

[71] FA p 14 para 35.11 and 35.15.

[72] AA under the heading "Current directorships".

[73] FA pp 15 – 17 para 35.

91.3 Third, Ms Myeni failed to disclose the true facts concerning her insurance claim.[74] Correspondence from SAA's insurers, AIG, dated 10 October 2019, now confirms that Ms Myeni had insurance cover from May 2017.[75] However, she breached the terms of the insurance cover by failing to notify the insurers of her change in attorneys and by failing to seek her insurers' approval for further costs. AIG's letter confirms that Ms Myeni was personally notified of those terms in May 2017.[76] At best for Ms Myeni, she failed to take this Court into her confidence by failing to disclose the true facts surrounding her insurance application. The more likely explanation is that she has once again been deliberately untruthful. Ms Myeni's latest replying affidavit makes no attempt to address the substance of the AIG letter, beyond claiming that her dealings with SAA's insurers are somehow protected by the right to privacy.[77] That is an astonishing proposition.

91.4 Fourth, Ms Myeni has been intentionally dishonest about her dealings with her former attorneys, ENS, as demonstrated above.

91.5 Fifth, Ms Myeni has also failed to reveal that her former attorneys in fact terminated their mandate on 29 January 2019.[78] Again, Ms Myeni entirely failed to mention this, resulting in the false impression that she had legal representation until June 2019.

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[74] Postponement FA p 42 para 9; p 43 para 13; p 49 para 35.10; Postponement AA pp 83 – 92.

[75] AA pp 223 – 224 paras 68 – 69; AIG Letter Annexure G2 pp 322 – 325.

[76] Ibid at paras 3 and 5.

[77] Reply pp 336 - 337 paras 31 – 32.

[78] AA Interlocutory pp 222 para 66;

92 Ms Myeni's has further demonstrated an attitude of arrogance and defiance towards the proceedings of this Court, demonstrated by no less than seven incidents:

92.1 On her own version, she took no care in preparing and approving the plea.

92.2 She then made no efforts to replace her attorneys after they terminated their mandate in January 2019.

92.3 At the time, she took no steps to inform her insurers of the change in her legal representation, nor did she seek their approval, resulting in her insurers refusing to cover her costs.

92.4 She did not bother to come to court nor to send a legal representative on the day the trial was supposed to start.

92.5 Her initial excuse for her behaviour was that she is impecunious. When the plaintiffs produced evidence of her board positions and considerable assets, she stopped relying on this excuse.

92.6 It was only when this Court made it clear that the trial would proceed that she conjured up legal representatives and tried to amend her careless plea.

92.7 In doing so, she defamed her previous attorney by suggesting that – either through negligence or dishonesty – he did not faithfully record her instructions in the plea.

93 Ms Myeni's deliberately obstructive and dilatory conduct has severely prejudiced the plaintiffs and has led them to incur substantial costs in preparing for trial and in defending these applications. Ms Myeni has made no tender of costs, as would be expected in a case where a party seeks an indulgence. Such costs are also the default order under Rule 28(9).[79]

94 On the contrary, Ms Myeni expresses outrage towards this Court for unreasonably denying her an indefinite or lengthy postponement and against the plaintiffs for opposing her amendment applications.

95 We submit that the plaintiffs are entitled to have the costs decided now, before this litigation proceeds further, to ensure that they are fully indemnified against the substantial costs that have already been incurred by Ms Myeni's tactics. This Court is best placed to determine these issues now, while these matters are fresh.

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20 November 2019

[79] *Amod v South African Mutual Fire And General Insurance Co Ltd* 1971 (2) SA 611 (N) at 619 – 620, citing Myers v Abramson 1951 (3) SA 438 (C) at 455.

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** Most important cases (will be provided to the Court at the hearing)