

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 15996/17

In the matter between:

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| 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:

FIRST DEFENDANT'S APPLICATION FOR LEAVE TO APPEAL

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INTRODUCTION

- 1 Ms Myeni has filed a delayed application for leave to appeal to the Supreme Court of Appeal against this Court's judgment and order of 12 December 2019. In that order, this Court:
 - 1.1 Dismissed Ms Myeni's special plea challenging OUTA's standing;
 - 1.2 Granted OUTA leave to proceed with this action in terms of section 157(1)(d) of the Companies Act 71 of 2008; and
 - 1.3 Ordered Ms Myeni to pay the costs of the previous amendment and joinder applications and the special plea.
- 2 Notably, Ms Myeni has not sought leave to appeal against this Court's previous judgment and order of 2 December 2019, which dismissed Ms Myeni's interlocutory applications to amend her plea and to join a host of other defendants. Yet Ms Myeni seeks to impugn those orders via the back door, claiming that this Court somehow erred in deciding those interlocutory applications before the special plea.
- 3 In what follows, we demonstrate that this application for leave to appeal falls to be dismissed on four grounds:
 - 3.1 First, Ms Myeni has failed to seek condonation for the late filing of this application for leave to appeal.
 - 3.2 Second, this Court's order is not appealable;
 - 3.3 Third, the application for leave to appeal must be dismissed in terms of section 16(2)(a) of the Superior Courts Act as the issue is moot;

3.4 Fourth, there is no merit to the application for leave to appeal.

4 We will conclude by addressing the consequences of this application for leave to appeal and any further petitions on the conduct of this trial.

NO CONDONATION APPLICATION

5 This application for leave to appeal is filed late, without any application to condone the delay. As a matter of fact and law, there is no application before this Court.

6 This Court handed down its written judgment on OUTA's standing on 12 December 2019.

7 In terms of Rule 49(1)(b) of the Uniform Rules, Ms Myeni was required to file an application for leave to appeal within 15 court days, which expired on 9 January 2020. *Dies non* do not apply to applications for leave to appeal.¹

8 Ms Myeni waited until 22 January 2020 to file her application for leave to appeal, nine court days late and just two court days before the trial was scheduled to resume.

9 It is trite that unless and until condonation is sought and granted for the late filing of an application for leave to appeal, there is no application before this Court.² Ms Myeni's right to seek leave to appeal has lapsed and could only be reinstated through

¹ The *dies non* periods prescribed in Rules 6(5)(aa), 19, and 26 of the Uniform Rules of Court only apply to affidavits and pleadings. No *dies non* period is provided for applications for leave to appeal under Rule 49.

² See *Modder East Squatters and Another v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd* [2004] 3 All SA 169 (SCA) at para 46; *Panayiotou v Shoprite Checkers (Pty) Ltd and Others* 2016 (3) SA 110 (GJ) at paras 8, 13 – 14.

a properly motivated condonation application, showing good cause why the 15-day time period in terms of Rule 49(1)(b) could be extended.

- 10 There is no such condonation application before this Court, nor could there be any grounds for condonation. Ms Myeni has known of this Court's judgment and its reasons since 12 December 2019. Once again, Ms Myeni has waited to the last minute to launch applications with the clear intention to cause further disruption and delay to the trial. These "Stalingrad tactics" have been deplored by this Court and should be condemned once again.³

- 11 Ms Myeni's legal representatives did not bother to notify the plaintiffs' legal representatives that they planned to bring a belated application for leave to appeal. Accordingly, when 9 January came and went, the plaintiffs assumed that there would be no appeal and incurred substantial costs in preparing for trial. The many requests the plaintiffs' attorneys made to Ms Myeni's attorneys for a further pretrial conference were ignored and finally spurned.

- 12 In these circumstances, the application for leave to appeal falls to be dismissed and the trial must proceed.

³ *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.

THE TEST FOR LEAVE TO APPEAL

- 13 Even if this Court were to entertain this application for leave to appeal, Ms Myeni's has failed to satisfy the three cumulative requirements for leave to appeal in terms of section 17(1) of the Superior Courts Act:

“(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-

(a)

(i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

(b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and

(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.”

- 14 We begin with the latter requirements before addressing the merits of Ms Myeni's grounds of appeal.

THE ORDER IS NOT APPEALABLE

- 15 This Court's order of 12 December 2019 is not appealable as it does not satisfy the requirements of section 17(1)(c) of the Superior Courts Act.
- 16 In *Zweni v Minister of Law and Order*,⁴ the Appellate Division held that a judgement or order will be appealable only if it has three characteristics: (i) it must be final in effect and not susceptible to alteration by the court of first instance ; (ii) it must be definitive of the rights of the parties in the sense that it grants definitive and distinct relief; and (iii) it must have the effect of disposing of at least a substantial portion of the relief claimed in the proceedings.
- 17 The *Zweni* test is not "exhaustive" or "cast in stone".⁵ In *Philani-Ma-Afrika*,⁶ the SCA added that the interests of justice are paramount in determining whether orders were appealable in light of the unique facts of the case.
- 18 As the Constitutional Court held in *Mathale*,⁷ "*generally it is not in the interests of justice for interlocutory relief to be subject to appeal as this would defeat the very purpose of that relief*".
- 19 Even where an order may be of final effect, it is generally not in the interests of justice to allow piecemeal appeals. The Supreme Court of Appeal has repeatedly affirmed this principle:

⁴ *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532I – 533B, 536A-C.

⁵ *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) at 10F – 11C.

⁶ *Philani-Ma-Afrika v Mailula* 2010 SA 573 (SCA) at para 20; approved in *ITAC v SCAW SA (Pty) Ltd* 2012 (4) SA 618 (CC) at para 52

⁷ *Mathale v Linda and Others* 2016 (2) SA 461 (CC) at para 25.

“[P]iecemeal appellate disposal of the issues in litigation [is] not only expensive, but ... generally all issues in a matter should be disposed of by the same court at the same time. Thus even if, technically, an order is final in effect, it may be inappropriate to allow an appeal against it when the entire dispute between the parties has yet to be resolved by the court of first instance.”⁸

- 20 These principles are reflected in section 17(1)(c) of the Superior Courts Act, which requires that where a decision does not dispose of all of the issues in the case, leave to appeal should only be granted where this would lead to a “*just and prompt resolution of the real issue between the parties*” as required under section 17(1)(c) of the Superior Courts Act.
- 21 Applying these principles, it is clear that the order of 12 December 2019 is not appealable.
- 22 This Court’s order is indeed interlocutory in nature and is not finally determinative of the parties’ rights in the main action. The plaintiffs’ entitlement to relief under section 162 of the Companies Act remains to be decided in the trial. This Court repeatedly emphasised this point throughout its judgment:

“[F]or purposes of this judgment I am of the view that this Court need not interpret the wording of these sections nor venture into the merits and decide at this point whether OUTA will ultimately be entitled to the relief claimed in terms of section 162. This should in my view only be dealt with at the trial.”⁹

⁸ *Health Professions Council of South Africa and Another v Emergency Medical Supplies and Training CC t/a EMS* 2010 (6) SA 469 (SCA) at para 16. See also *SABC SOC Ltd v Democratic Alliance* 2016 (2) SA 522 (SCA) at paras 66 – 67.

⁹ Judgment p 8 para 17.

- 23 Even if this Court's order was somehow final in effect, an appeal would not dispose of the issues in the main action nor would it bring about the prompt resolution of the real dispute between the parties.
- 24 This is because there is more than one plaintiff in this matter seeking the same relief – the South African Airways Pilots Association (SAAPA) is the second plaintiff which also asks the court to declare Ms Myeni to be a delinquent director. There is no dispute that SAAPA has standing under section 162(2) to pursue this delinquency application. Every notice, every pleading, every affidavit and every submission has been made in the name of both plaintiffs. If OUTA were to be excluded from the proceedings for any reason, the matter would go on unaffected.
- 25 This Court acknowledged that *“SAAPA will be entitled to the relief [under section 162], if it succeeds in proving its case ... In this regard there may at least be one plaintiff who will be entitled to the relief”*.¹⁰
- 26 This Court further noted that OUTA's presence will have no material impact on the further conduct of the trial as OUTA and SAAPA *“are represented by the same legal representatives and [OUTA's] case and that of SAAPA is based on exactly the same facts and even the same particulars of claim. Consequently the same witnesses will probably be called to prove the case.”*¹¹
- 27 Accordingly, it cannot be in the interests of justice to grant leave to appeal on a piecemeal issue that will not assist in resolving the core disputes between the parties.

¹⁰ Judgment p 12 para 30.

¹¹ Judgment p 14 para 33.

THE RELIEF SOUGHT IS MOOT

28 For the same reasons, Ms Myeni's application for leave to appeal is moot and falls to be dismissed in terms of section 17(1)(b) of the Superior Courts Act, read with section 16(2)(a). Section 16(2)(a) provides that:

“(i) When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.

“(ii) Save under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs.”

29 Given that SAAPA's standing is not disputed, any decision on appeal concerning OUTA's standing would have no practical effect or result on the conduct of the trial or the relief sought.

30 Ms Myeni has herself conceded that this is a moot issue. The heads of argument in support of her special plea correctly noted that: “[i]n the circumstances however, the above point [on OUTA's standing] is moot as the Second Plaintiff does have standing under Section 162.”¹²

31 Ms Myeni has previously sought to argue that OUTA's presence or absence in the proceedings could have some impact on costs. This was disputed, but in any event section 16(2)(a)(ii) of the Superior Courts Act makes clear that the practical effect of an order must be determined “*without reference to any consideration of costs*”.

¹² Ms Myeni's heads p 7 para 36

32 Again, it cannot be in the interests of justice to grant leave to appeal on this moot issue,¹³ which would only result in a proliferation of piecemeal hearings and delaying tactics.

NO MERITS TO THE APPLICATION FOR LEAVE TO APPEAL

33 On the merits, Ms Myeni has demonstrated no reasonable prospects of success or any other compelling reason to grant leave to appeal, as required under section 17(1)(a) of the Superior Courts Act.

34 This Court's dismissal of the special plea was based on three key conclusions:

34.1 First, on a proper interpretation of section 157(1)(d) of the Companies Act, a party may seek leave to bring a delinquency application in the public interest.

34.2 Second, there is no hard-and-fast requirement that a party seeking leave in terms of section 157(1)(d) should bring a formal application in every case;

34.3 Third, OUTA had established grounds for public interest standing on the pleadings.

35 Ms Myeni's application for leave to appeal makes no attempt to address this Court's reasoning and these conclusions. Instead, Ms Myeni raises only two narrow grounds of appeal:

35.1 First, she claims that this Court somehow erred in its interpretation of section 162 of the Companies Act.

¹³ *Radio Pretoria v Chairperson, ICASA and Another* 2005 (4) SA 319 (CC) para 22; *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* 2007 (1) SA 343 (CC) para 27.

35.2 Second, she claims that this Court further erred in deciding the special plea after disposing of the other interlocutory applications.

First ground: Section 162 of the Companies Act

36 Ms Myeni's first ground proceeds from the mistaken premise that this Court "*interpret[ed] section 162 of the Companies Act 71 of 2008 ... to mean that the Plaintiff has locus standi to bring application [sic] in terms of section 162*".

37 At no point in the judgment did this Court hold that section 162 of the Companies Act gives OUTA standing. Instead, this Court held that OUTA has standing under section 157(1)(d) of the Companies Act which provides extended standing for parties who act in the public interest.

38 This Court's reasoning in support of its interpretation of section 157(1)(d) stands unchallenged:

38.1 First, section 157(1)(d) must be interpreted in a purposive and contextual manner that takes account of the objectives of the Companies Act, which include the promotion of the Bill of Rights, transparency, and high standards of corporate governance.¹⁴

38.2 Second, the wording of sections 156 and 157(1) demonstrates that "*a person who qualifies under section 157 [has] the right to approach the Court to address any alleged contravention of the Act or to enforce any provision any provision*

¹⁴ Judgment pp 5 – 6 paras 10 – 13.

or right in terms of the Act, except for a right as envisaged in section 165.”¹⁵

Sections 156 and 157 provide that:

“156. A person referred to in section 157(1) may seek to address an alleged contravention of this Act, or to enforce any provision of, or right in terms of this Act, a company's Memorandum of Incorporation or rules, or a transaction or agreement contemplated in this Act, the company's Memorandum of Incorporation or rules, by-

...

(c) applying for appropriate relief to the division of the High Court that has jurisdiction over the matter; ...

157. (1) When, in terms of this Act, an application can be made to, or a matter can be brought before, a court, the Companies Tribunal, the Panel or the Commission, the right to make the application or bring the matter may be exercised by a person-

(a) directly contemplated in the particular provision of this Act;

...

(d) acting in the public interest, with leave of the court.”

38.3 Third, where the Act seeks to restrict the expanded grounds of standing under section 157 it does so expressly, as in the case of section 157(3) which limits standing to bring derivative actions under section 165.¹⁶

38.4 Fourth, while section 162(2) of the Act identifies specific persons who have standing to seek a delinquency order, this provision must be read together with sections 156 and 157.¹⁷

39 This Court's reasoning is bolstered by section 157(1)(a) which indicates that where specific provisions of the Companies Act identify categories of persons with standing,

¹⁵ Judgment pp 6 – 7 paras 14 – 17.

¹⁶ Judgment p 7 para 16.

¹⁷ Judgment p 8 para 19.

this is not intended to be exhaustive. The other categories of persons under subsections 157(1)(b), (c) and (d) also have standing, in addition to those who are “*directly contemplated in the particular provision*” of the Act.

40 Ms Myeni’s failure to engage with this Court’s careful interpretation of section 157(1) of the Companies Act demonstrates that there are no reasonable prospects that another Court would come to a different conclusion.

Second ground: The sequence of applications

41 Ms Myeni’s second ground of appeal is that this Court ought to have heard and decided her special plea before deciding her other interlocutory applications for amendments and joinder of other parties.

42 Ms Myeni did not seek to advance this argument at the hearing of the special plea or in her heads of argument. In any event, this argument is entirely without merit.

43 Ms Myeni’s argument hinges on three false premises:

43.1 First, that the amendment and joinder applications were only opposed by the First Plaintiff, OUTA,

43.2 Second, by deciding those interlocutory applications in OUTA’s favour, this Court somehow predetermined OUTA’s standing, as a finding that OUTA lacked standing would somehow have invalidated this Court’s decision on the interlocutory applications.

43.3 Third, this invalidates this Court’s dismissal of the special plea.

- 44 The first premise is frankly dishonest. Ms Myeni knows full well that the interlocutory applications were opposed by both plaintiffs at all times. This is reflected in:
- 44.1 The notices of objection to Ms Myeni's proposed amendments, which were clearly labelled "*Plaintiffs' notice of objection*" and further stated that the "*The Plaintiffs take objection ...*".¹⁸
- 44.2 The answering affidavit filed on behalf of both plaintiffs in the interlocutory proceedings, which were again prominently labelled "*Plaintiffs' answering affidavit*"¹⁹ and concluded "*For these reasons, the plaintiffs oppose Ms Myeni's interlocutory applications and seek an order that these ... applications be dismissed with punitive costs....*".²⁰
- 44.3 The heads of argument in the interlocutory applications, which were again filed in the name of both plaintiffs, plural.
- 45 The second premise is equally false. There is nothing in this Court's judgment on OUTA's standing which in any way suggests that this Court's findings were influenced, let alone predetermined, by this Court's previous dismissal of Ms Myeni's interlocutory applications. Those interlocutory applications lacked merit and would have been dismissed regardless of OUTA's participation in the proceedings.
- 46 As a consequence, the fact that the interlocutory applications were decided first can have no bearing on this Court's dismissal of the special plea and its decision to grant OUTA leave to participate in these proceedings in the public interest.

¹⁸ Plaintiffs' notice of objection to amendments, Interlocutory Notices Bundle p 16; Plaintiffs' further notice of objection to amendments, Interlocutory Notices Bundles p 41.

¹⁹ Plaintiffs' Answering Affidavit p 203.

²⁰ Plaintiffs' Answering Affidavit p 229 para 92.

THE TRIAL MUST GO ON

47 There are no grounds to delay these trial proceedings any further pending the outcome of this leave to appeal application or any speculative further applications that may be filed by Ms Myeni.

48 As emphasised above, as a matter of fact and law, there is no application for leave to appeal presently before this Court. The trial must proceed.

49 Ms Myeni's application for leave to appeal does not suspend this Court's order granting OUTA leave to participate in the main action.

49.1 In terms of section 18(2) of the Superior Courts Act, an application for leave to appeal does not suspend an interlocutory order, unless a formal application is brought in terms of section 18(3) which demonstrates exceptional circumstances and the presence of irreparable harm.²¹

49.2 In any event, it is trite that unless and until condonation is granted, a late application for leave to appeal does not suspend any judgment or order.²²

²¹ Section 18(2) provides:

"(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."

²² *Modder East Squatters and Another v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd* [2004] 3 All SA 169 (SCA) at para 46; *Panayiotou v Shoprite Checkers (Pty) Ltd and Others* 2016 (3) SA 110 (GJ) at paras 8, 13 – 14; *Chief of the South African National Defence Force & Others v SANDU & Others* Unreported Case No 38818/2015 on 18 September 2019 (GP) per Raulinga J at paras 10 – 11.

- 50 Even if this Court were to entertain Ms Myeni's application, there are no grounds to stay the trial pending the outcome of that application or any future appeals. The onus is on Ms Myeni to bring a formal application to stay these proceedings, which again requires the demonstration of exceptional circumstances.²³ There are no such exceptional circumstances in this case, particularly as one, the outcome of any appeal on OUTA's standing could have no impact on the course of the trial or the final relief sought and two, Ms Myeni has no prospects of success in the appeal application.
- 51 Ms Myeni is once again using transparent delaying tactics, to the plaintiffs' prejudice. The plaintiffs have again expended substantial costs and time in preparing for trial, which has now been set down for five weeks from 27 January 2020. Witnesses have been subpoenaed, airline executives and government officials have cleared their busy schedules in order to testify, and two witnesses have made arrangements to travel to South Africa from France and Saudi Arabia. It bears repeating that the plaintiffs are both non-profit entities who cannot endure further wasted costs.
- 52 For all the reasons advanced above, we emphasise that the interests of justice weigh heavily in favour of this matter proceeding without any further delays.

CAROL STEINBERG
CHRIS McCONNACHIE
NADA KAKAZA

Plaintiffs' counsel
Chambers, Sandton
27 January 2020

²³ *Clipsal Australia (Pty) Ltd v Gap Distributors (Pty) Ltd* [2009] ZASCA 49, [2009] 3 All SA 491 (SCA) at paras 18 – 19.