

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

CASE NO: 15996/17

In the matter between:

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

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**PLAINTIFFS' OPENING STATEMENT**

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## INTRODUCTION

- 1 The mismanagement of state-owned enterprises (SOEs) has brought this country close to ruin. This Court has repeatedly been called upon to address these problems.<sup>1</sup> Yet the directors responsible for this unlawful conduct have largely evaded legal consequences.
- 2 The plaintiffs seek to reverse this trend.
- 3 They seek an order declaring Ms Dudu Myeni, the former non-executive chairperson of South African Airways SOC Ltd (SAA), to be a delinquent director in terms of section 162(5) of the Companies Act 71 of 2008 (Companies Act).
- 4 This is the first delinquency application of its kind brought by a civil society organisation and a union, involving a former director of a SOE. It will certainly not be the last. It is a matter of unquestionable public importance involving one of the country's most beleaguered SOEs.
- 5 As the evidence will demonstrate, Ms Myeni's time at SAA was marked by decay and financial ruin. It is common cause on these pleadings that:
  - 5.1 At all material times, SAA was technically insolvent.<sup>2</sup>
  - 5.2 As at the date of the summons in 2017, SAA was the recipient of a shareholder guarantee loan of R19.1 billion issued by the state.<sup>3</sup>

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<sup>1</sup> This Court has repeatedly addressed unlawful activities in SoEs and matter related thereto. See, for example, *Passenger Rail Agency of South Africa v Swifambo Rail Agency (Pty) Ltd* 2017 (6) SA 223 (GJ); *President of the Republic of South Africa v Office of the Public Protector and Others* 2018 (2) SA 100 (GP); *Eskom Holdings SOC Limited v McKinsey and Company Africa (Pty) Ltd and Others* (22877/2018) [2019] ZAGPPHC 185 (18 June 2019);

<sup>2</sup> PoC p 10 para 19; Plea p 101 para 11.

<sup>3</sup> PoC p 10 para 18.2; Plea p 101 para 11.

- 6 From her initial appointment as a director in 2009 until her departure in October 2017, Ms Myeni was the constant on a constantly rotating SAA board. The evidence will show that Ms Myeni was involved in a pattern of unlawful and improper activities that harmed SAA, and by extension the South African public.
- 7 This case focuses on Ms Myeni's conduct in four sets of transactions and events:
  - 7.1 The Emirates deal: this involved Ms Myeni's last-minute scuttling of a Memorandum of Understanding between SAA and Emirates in 2015 which deprived SAA of an opportunity to substantially improve its financial position and harmed SAA's relationship with Emirates and the aviation industry globally.
  - 7.2 The Airbus deal: this involved Ms Myeni's improper conduct surrounding SAA's agreement to purchase aircraft from Airbus over the period 2013 to 2015, during which time Ms Myeni repeatedly misrepresented board resolutions, acted without board authority, and further imperilled SAA's financial position.
  - 7.3 The BnP Capital (Pty) Ltd deal: this involved the improper appointment of BNP as a transaction adviser in 2016 to assist in a R15 billion recapitalisation of SAA, the 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.
  - 7.4 The EY report: Ms Myeni and the Board failed to take action to address the findings of an investigation by Ernst and Young Advisory Services

(Pty) Ltd into procurement and contract management at SAA, a draft version of which was received by the board in mid-December 2015.

8 In addressing these four areas, we will demonstrate that Ms Myeni's conduct satisfies multiple grounds of delinquency under section 162(5)(c) of the Companies Act. The events and transactions are complex, but Ms Myeni's actions followed a clear pattern. We will demonstrate four constant themes of serious misconduct:

8.1 Dishonesty: Ms Myeni repeatedly misrepresented Board resolutions and decisions in her dealings with Cabinet ministers and SAA's partners.

8.2 Obstruction and interference: Ms Myeni repeatedly interfered in SAA's operations to delay and obstruct key deals, contrary to SAA's best interests, in a manner that was wilful, alternatively grossly negligent.

8.3 Improperly inserting middle-men: Ms Myeni repeatedly supported the insertion of middlemen into key deals, in breach of SAA's procurement obligations and her fiduciary duties to act in SAA's best interests, using BBEEE as a cover for her nefarious activities.

8.4 Governance: Ms Myeni flouted fundamental governance procedures and principles in the manner in which she managed the affairs of the board.

9 This opening address will deal with three issues:

9.1 First, Ms Myeni's role at SAA;

9.2 Second, the relevant law, which will cover:

- 9.2.1 The test for delinquency under section 162(5) of the Companies Act;
  - 9.2.2 The relevant duties of directors of state-owned enterprises, who are subject to combined duties imposed by the common law, the Companies Act, and the Public Finance Management Act No 1 of 1999 (PFMA);
  - 9.2.3 An overview of the SAA governance framework and key internal instruments;
- 9.3 Third, an overview of the pleadings and the evidence that will be led.

## MS MYENI'S ROLE AT SAA

- 10 Why single out Ms Myeni in this delinquency action? There are at least three good reasons:
- 11 First, Ms Myeni was a constant on a SAA board that underwent significant and frequent upheavals. Ms Myeni's directorships and roles at SAA are common cause:<sup>4</sup>
- 11.1 She was first appointed as a non-executive director of the SAA Board on 28 September 2009.<sup>5</sup>
- 11.2 In December 2012, Ms Myeni became the acting chairperson of the Board.<sup>6</sup>
- 11.3 In January 2015, Ms Myeni was appointed as chairperson of the Board.<sup>7</sup>
- 11.4 In September 2016, Ms Myeni was reappointed as Chairperson of the Board.<sup>8</sup>
- 11.5 Ms Myeni continued to serve as a director and as the Chairperson of the Board until 2018.<sup>9</sup>
- 11.6 For ease of reference, we attach a table reflecting the rotating cast of other SAA directors, marked **Annexure A**.

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<sup>4</sup> PoC p 8 para 9; Plea p 101 para 5.

<sup>5</sup> PoC p 8 para 9; Plea p 101 para 5.

<sup>6</sup> PoC p 8 para 9; Plea p 101 para 5.

<sup>7</sup> PoC p 8 para 9; Plea p 101 para 5.

<sup>8</sup> PoC p 8 para 9; Plea p 101 para 5.

<sup>9</sup> PoC p 8 para 9; Plea p 101 para 5.

- 12 Second, the evidence will show that Ms Myeni was intimately and actively involved in a pattern of unlawful and improper activities during her time at the helm of SAA.
- 13 Third, accountability must start at the top. A chairperson has special duties and responsibilities over and above those of ordinary board members. In addition, each member of a board of directors is required to exercise an independent mind, and therefore it is irrelevant whether Ms Myeni voted with the pack. “Whataboutism” does not excuse Ms Myeni’s conduct. We submit that the appropriate response to her defence that she was only one member of the board is that the other members of the board who supported her unlawful activities should also face delinquency applications.
- 14 In pursuing this delinquency action against Ms Myeni, the plaintiffs do not seek to exonerate other SAA directors and officials who may have been involved in unlawful activities. The authorities must take action against all who are found to be responsible for mismanagement and corruption at SAA.
- 15 The plaintiffs, as private entities, cannot do the work of law enforcement. Instead, they have had to focus their efforts and limited resources on the primary culprit.

## THE LEGAL FRAMEWORK

### *Delinquency*

16 The declaration of delinquency under section 162(5) of the Companies Act has the effect that a person may not serve as a director of a company for a minimum period of seven years.<sup>10</sup>

17 In ***Gihwala v Grancy Property Ltd***,<sup>11</sup> Wallis JA explained that section 162 has a protective purpose:

*“Its aim is to ensure that those who invest in companies, big or small, are protected against directors who engage in serious misconduct of the type described in these sections. That is conduct that breaches the bond of trust that shareholders have in the people they appoint to the board of directors. Directors who show themselves unworthy of that trust are declared delinquent and excluded from the office of director. It protects those who deal with companies by seeking to ensure that the management of those companies is in fit hands. And it is required in the public interest that those who enjoy the benefits of incorporation and limited liability should not abuse their position.”<sup>12</sup>*

18 This protective purpose assumes even greater significance in the case of SOEs. The interests of the entire South African public are at stake, not merely a narrow class of shareholders.

19 Where the grounds for a delinquency order have been established under section 162(5), a court “must” grant this order. It has no discretion in this regard.<sup>13</sup> A court only has a discretion in respect of the conditions that may be attached to the order.<sup>14</sup>

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<sup>10</sup> Section 162(6)(b). Subject to the court’s power to relax the order after three years and place the director under probation in terms of sections 162(11) and 162(12).

<sup>11</sup> *Gihwala and Others v Grancy Property Ltd and Others* 2017 (2) SA 337 (SCA).

<sup>12</sup> *Ibid* at para 144.

<sup>13</sup> *Gihwala* at para 140.

<sup>14</sup> Section 162(10) of the Act.

20 Section 162(5)(c) identifies the grounds for delinquency that are relevant to this applicant:

*(5) A court must make an order declaring a person to be a delinquent director if the person*

...

*(c) while a director*

*(i) grossly abused the position of director;*

*(ii) took personal advantage of information or an opportunity, contrary to section 76(2)(a);*

*(iii) intentionally, or by gross negligence, inflicted harm upon the company or a subsidiary of the company, contrary to section 76(2)(a);*

*(iv) acted in a manner*

*(aa) that amounted to gross negligence, wilful misconduct or breach of trust in relation to the performance of the director's functions within, and duties to, the company; or*

*(bb) contemplated in section 77(3)(a), (b) or (c);*

21 In ***Gihwala***, Wallis JA explained that the four grounds for delinquency under section 162(5)(c) all share the common feature that they involve “*serious misconduct on the part of a director.*”<sup>15</sup> Wallis JA explained these grounds as follows:

21.1 First, in terms of sub-section 162(5)(c)(i):

*“[O]ne starts with a person who grossly abuses the position of director... . We are not talking about a trivial misdemeanour or*

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<sup>15</sup> In *Lewis Group Ltd v Woollam and Others* 2017 (2) SA 547 (WCC) para 18, the court held that “[t]he relevant causes of delinquency entail either dishonesty, wilful misconduct or gross negligence. Establishing so called ‘ordinary’ negligence, poor business decision making or misguided reliance by a director on incorrect professional advice will not be enough”.

*an unfortunate fall from grace. Only gross abuses of the position of director qualify.*<sup>16</sup>

21.2 Second, sub-section (ii) involves:

*“[T]aking personal advantage of information or opportunity available because of the person's position as a director. This hits two types of conduct. The first, in one of its common forms, is insider trading, whereby a director makes use of information, known only because of their position as a director, for personal advantage or the advantage of others. The second is where a director appropriates a business opportunity that should have accrued to the company. Our law has deprecated that for over a century.”*<sup>17</sup>

21.3 Third, sub-section (iii) applies where “*the director has intentionally or by gross negligence inflicted harm upon the company or its subsidiary*”.<sup>18</sup>

21.4 Fourth, sub-section (iv) applies –

*“where the director has been guilty of gross negligence, wilful misconduct or breach of trust in relation to the performance of the functions of director or acted in breach of s 77(3)(a) – (c). That section makes a director liable for loss or damage sustained by the company in consequence of the director having —*

- '(a) acted in the name of the company, signed anything on behalf of the company, or purported to bind the company or authorise the taking of any action by or on behalf of the company, despite knowing that the director lacked the authority to do so;*
- (b) acquiesced in the carrying on of the company's business despite knowing that it was being conducted in a manner prohibited by section 22(1) [A company must not carry on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose];*
- (c) been a party to an act or omission by the company despite knowing that the act or omission was calculated to defraud*

<sup>16</sup> *Gihwala* at para 143.

<sup>17</sup> *Ibid* at para 143. This sub-section is qualified by reference to section 76(2)(a) which provides:

*“(2) A director of a company must -*

*(a) not use the position of director, or any information obtained while acting in the capacity of a director -*

*(i) to gain an advantage for the director, or for another person other than the company or a wholly owned subsidiary of the company; or*

*(ii) to knowingly cause harm to the company or a subsidiary of the company”*

<sup>18</sup> *Gihwala* at para 143.

*a creditor, employee or shareholder of the company, or had another fraudulent purpose . . .*<sup>19</sup>

22 Wallis JA noted that “*gross negligence*” in sub-sections 162(5)(c)(ii) and (iv) is the equivalent of “*recklessness*”.<sup>20</sup> Recklessness and gross negligence have been variously described as involving:

22.1 “*a complete obtuseness of mind or, where there is no conscious risk-taking, a total failure to take care*”;<sup>21</sup>

22.2 “*an entire failure to give consideration to the consequences of one’s actions, in other words, an attitude of reckless disregard of such consequences*”, which includes both foreseen and unforeseen consequences.<sup>22</sup>

22.3 “*carrying [on the business of a company] by conduct which evinces a lack of any genuine concern for its prosperity*”;<sup>23</sup>

23 An objective and subjective standard must be applied in assessing gross negligence. This is made clear by section 76(3)(c) of the Companies Act.<sup>24</sup>

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<sup>19</sup> Ibid.

<sup>20</sup> Ibid at para 144.

<sup>21</sup> *Transnet Ltd t/a Portnet v Owners of the MV “Stella Tingas” and another* 2003 (2) SA 473 (SCA) at para 7.

<sup>22</sup> *Philotex (Pty) Ltd and Others v Snyman and Others; Braitex (Pty) Ltd and Others v Snyman and Others* 1998 (2) SA 138 (SCA) at 143C – 144A; *Transnet Ltd t/a Portnet v Owners of the MV “Stella Tingas”* 2003 (2) (SA 473 (SCA) at para 7; *S v Dhlamini* 1988 (2) SA 302 (A) at 308D–E.

<sup>23</sup> *Tsung and Another v Industrial Development Corporation of South Africa Ltd and Another* 2013 (3) SA 468 (SCA) at para 31.

<sup>24</sup> Section 76(3)(c):

*“Subject to subsections (4) and (5), a director of a company, when acting in that capacity, must exercise the powers and perform the functions of director-*

*...*

*(c) with the degree of care, skill and diligence that may reasonably be expected of a person-*

*(i) carrying out the same functions in relation to the company as those carried out by that director; and*  
*(ii) having the general knowledge, skill and experience of that director.”*

- 23.1 Objectively, Ms Myeni's conduct must be weighed against the standards expected of a reasonable director in her position;
- 23.2 Subjectively, Ms Myeni's conduct must also be weighed against the skills, qualifications and experience she possessed. More is expected of an experienced director, particularly a director who was on the SAA board for more than nine years.
- 24 As noted, breaches of section 77(3) of the Companies Act also provide grounds for delinquency. This includes knowingly acting without the board's authority under section 77(3)(a).
- 25 To establish these grounds of delinquency, Ms Myeni's conduct must be assessed in light of her duties as a director.
- 26 It is useful to refer to some examples of cases that illustrate the type of conduct our courts have declared to be delinquent.

*CIPC v Zwane* NGHC Case No. 73548/2013 (8 August 2019)

- 27 This court found a director of NECSA to be a delinquent director in terms of 162(3) of the Companies Act for soliciting and seeking director's emoluments from NECSA without permission from his executive authority, as required to do in terms of a Treasury Circular. His conduct amounted to wilful misconduct and breach of trust in relation to his duties to NECSA. He was disqualified from serving as a director for seven years.

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

28 In *Gihwala*, two directors of a private company were declared to be delinquent on a host of grounds, including the failure to ensure that proper accounting records were kept, failing to maintain a proper share register, concluding loans in breach of section 226 of the old Companies Act in a manner that was grossly negligent, allowing their company to consistently breach an investment agreement to which it was a party, and seeking personal benefits to the exclusion of other partners in a joint venture.

Msimang NO and Another v Katuliiba and Others [2013] 1 All SA 580 (GSJ)

29 The court held that the cumulative effect of the conduct of the two directors in failing to carry out their duties as directors to the company, namely, failing to ensure the timely preparation of annual financial statements for the company and failing to ensure that AGMs were held, justified making an order declaring them to be delinquent directors.

*Kukama v Lobelo and Others (38587/2011) [2012] ZAGPJHC 60 (12 April 2012)*

30 The court found that a director of Peolwane Properties who had used funds destined for Peolwane for the benefit of other companies constituted sufficient grounds for a delinquency order.

***Directors' duties under the Companies Act and the PFMA***

31 Ms Myeni and other directors of SOEs are subject to heightened duties. They are, after all, responsible for public assets. They are not only subject to the duties

of ordinary company directors, but they are also subject to further duties under the PFMA.

### Directors' duties

32 The duties of all company directors are now partially codified in the Companies Act. In particular, section 76(3) of the Companies Act entrenches the fiduciary duties of directors and the duties of care, skill and diligence. It provides, in relevant part, that:

*“[A] director of a company, when acting in that capacity must exercise the powers and perform the functions of director-*

*(a) in good faith and for a proper purpose;*

*(b) in the best interests of the company; and*

*(c) with the degree of care, skill and diligence that may reasonably be expected of a person-*

*(i) carrying out the same functions in relation to the company as those carried out by that director; and*

*(ii) having the general knowledge, skill and experience of that director.”*

33 Section 76(4) of the Companies Act contains the so-called “*business judgment rule*”. In terms of this rule, a director could be protected from an allegation of a breach of the duty to act in the best interests of the company (section 76(3)(b)) and with care, skill and diligence (section 76(3)(c)) where that director has:

33.1 taken reasonably diligent steps to become informed about the matter;

33.2 either had no conflict of interest in relation to the matter or complied with the rules on conflict of interests; and

33.3 had a rational basis for believing, and did believe, that her decision was in the best interest of the company.

34 As the evidence will show, this “*business judgment principle*” offers no shelter to a director such as Ms Myeni. It only protects those who act in good faith and have taken reasonable, diligent steps to become informed. Wilful misconduct, recklessness, and dishonesty are not protected.

#### Special duties under the PFMA

35 The duties of company directors are amplified by the PFMA. SAA is listed as a major public entity in terms of Schedule 2 to the PFMA and its Board is the designated "accounting authority" for the purposes of Chapter 6 of the Act.<sup>25</sup>

36 In terms of section 50 of the PFMA, all members of the SAA board are subject to heightened fiduciary duties:

*“50 Fiduciary duties of accounting authorities:*

*(1) The accounting authority for a public entity must-*

*(a) exercise the duty of utmost care to ensure reasonable protection of the assets and records of the public entity;*

*(b) act with fidelity, honesty, integrity and in the best interests of the public entity in managing the financial affairs of the public entity;*

*(c) on request, disclose to the executive authority responsible for that public entity or the legislature to which the public entity is accountable, all material facts, including those reasonably discoverable, which in any way may influence the decisions or actions of the executive authority or that legislature; and*

*(d) seek, within the sphere of influence of that accounting authority, to prevent any prejudice to the financial interests of the state.*

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<sup>25</sup> PFMA section 49(2)(a).

(2) A member of an accounting authority or, if the accounting authority is not a board or other body, the individual who is the accounting authority, may not-

(a) act in a way that is inconsistent with the responsibilities assigned to an accounting authority in terms of this Act; or

(b) use the position or privileges of, or confidential information obtained as, accounting authority or a member of an accounting authority, for personal gain or to improperly benefit another person.

...”

37 Section 51 sets out the further responsibilities of the board, as the accounting authority. It provides, in relevant part, as follows:

“51 General responsibilities of accounting authorities

(1) An accounting authority for a public entity-

(a) must ensure that that public entity has and maintains-

(i) effective, efficient and transparent systems of financial and risk management and internal control;

...

(iii) an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective;

...

(b) must take effective and appropriate steps to-

...

(ii) prevent irregular expenditure, fruitless and wasteful expenditure, losses resulting from criminal conduct, and expenditure not complying with the operational policies of the public entity; and

(iii) manage available working capital efficiently and economically;

(c) is responsible for the management, including the safeguarding, of the assets and for the management of the revenue, expenditure and liabilities of the public entity;

...

*(f) is responsible for the submission by the public entity of all reports, returns, notices and other information to Parliament or the relevant provincial legislature and to the relevant executive authority or treasury, as may be required by this Act;*

...

*(h) must comply, and ensure compliance by the public entity, with the provisions of this Act and any other legislation applicable to the public entity."*

- 38 We point out that the Board has a statutory obligation to “*ensure compliance*” of the public entity. This means that if, for example, the procurement committees of the SoE do not function properly, the Board bears at least some responsibility.
- 39 The Board has a particular duty to give effect to SAA’s internal policies. In doing so, the Board is specifically enjoined to prevent “*expenditure not complying with the operational policies*” of SAA.<sup>26</sup>
- 40 In ***Allpay I*** the Constitutional Court explained that a public entity’s internal policies are “*not merely internal prescripts that [an entity] may disregard at whim.*”<sup>27</sup> These internal policies have the force of a legal obligation.

#### The duties of executive and non-executive directors

- 41 Ms Myeni was a non-executive chairperson of SAA. The “non-executive” label does not absolve Ms Myeni of any legal responsibility. The legal duties – as opposed to the practical duties – of all directors – executive and non-executive - are the same.

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<sup>26</sup> PFMA, section 51(1)(b)(ii)

<sup>27</sup> *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency 2014 (1) SA 604 (CC) 2014 (1) SA 604 (CC) (AllPay I)* at para 40.

- 42 These principles were summarised by Corbett CJ in *Howard v Herrigel And Another NNO*:<sup>28</sup>

*"In my opinion it is unhelpful and even misleading to classify company directors as 'executive' or 'non-executive' for purposes of ascertaining their duties to the company or when any specific or affirmative action is required of them. No such distinction is to be found in any statute. At common law, once a person accepts an appointment as a director, he becomes a fiduciary in relation to the company and is obliged to display the utmost good faith towards the company and in his dealings on its behalf. That is the general rule and its application to any particular incumbent of the office of director must necessarily depend on the facts and circumstances of each case. One of the circumstances may be whether he is engaged full-time in the affairs of the company: see the Fisheries Development case supra at 165G - 166B. However, it is not helpful to say of a particular director that, because he was not an 'executive director', his duties were less onerous than they would have been if he were an executive director. Whether the inquiry be one in relation to negligence, reckless conduct or fraud, the legal rules are the same for all directors. In the application of those rules to the facts one must obviously take into account, for example, the factors referred to in the judgment of Margo J in the Fisheries Development case and any others which may be relevant in judging the conduct of the director. His access to the particular information and the justification for relying upon the reports he receives from others, for example, might be relevant factors to take into account, whether or not the person is to be classified as an 'executive' or 'non-executive' director.*

- 43 This passage makes two key points:

- 43.1 Both executive and non-executive directors are subject to the same legal duties in respect of the company, including the duties of care, skill and diligence.
- 43.2 Compliance with those duties is a fact-specific inquiry. This requires an assessment of the role actually played by the director, the information available to her, and the information that could have been available:

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<sup>28</sup> *Howard v Herrigel And Another NNO* 1991 (2) SA 660 (A) at 678

- 44 This means that where Ms Myeni chose to usurp the functions of an executive director, by involving herself in day-to-day operations and making management decisions, her conduct is to be judged more stringently, by the standards of conduct reasonably expected of an executive director.
- 45 This is reinforced by section 76(3)(c) of the Companies Act, which makes clear that Ms Myeni's conduct must be weighed against the standards of "*care, skill and diligence that may reasonably be expected of a person ... carrying out the same functions in relation to the company as those carried out by that director*".

### The King Codes

- 46 The "King Codes", commissioned by the Institute of Directors in South Africa (IoDSA), provide guidelines on sound corporate governance. Four sets of King reports and accompanying King Codes have been issued over the years. King III, which was issued in 2009, was applicable at all relevant times in this case, and was expressly incorporated into SAA's MOI and Shareholder's Compact. King IV was issued in 2016.
- 47 In terms of SAA's 2014/2015 Shareholder's Compact, discussed below, SAA bound itself to observe the King III principles. Clause 3.1 of the applicable 2014 / 2015 Shareholder's Compact provided that:

*The Parties are bound by the principles of the Protocol, the South African Airways Act, 2007, the Companies Act, the PFMA and applicable Treasury Regulations in endeavouring to enhance effective business performance and to maintain good corporate governance, including the principles contained in the King Report, within South African Airways." (Corporate Governance Bundle p 474)*

- 48 Principle 2.16 of King III, on the role of the chairperson, is particularly important.

- 48.1 This prescribes that the chairperson should be an independent, non-executive director.
- 48.2 It further provides that “[i]f the board appoints a chairman who is a non-executive director but is not independent or is an executive director, this should be disclosed in the integrated report, together with the reasons and justifications for the appointment.”<sup>29</sup> This requires full disclosure if a chairperson assumes executive functions.
- 48.3 The chairperson is responsible for “*setting the ethical tone for the board and the company*”.<sup>30</sup>
- 48.4 The chairperson must also provide “*overall leadership to the board without limiting the principle of collective responsibility for board decisions, while at the same time being aware of the individual duties of board members*”.<sup>31</sup>

### ***The SAA governance framework***

#### The Memorandum of Incorporation (MOI)

- 49 The preamble of the MOI records that SAA is subject to the provisions of the Companies Act and the PFMA (**SAA Corporate Policy Bundle p 2**).
- 50 Clause 1.12 defines “Corporate Plan” as the three-year Plan of SAA as contemplated in the PFMA which must include, among other things the strategic objectives and outcomes identified and agreed by the Shareholders in the

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<sup>29</sup> King III para 39.

<sup>30</sup> King III para 40.1

<sup>31</sup> King III para 40.2.

Shareholders Compact as well as the Significance and Materiality Framework (**SAA Corporate Policy Bundle p 6**).

51 Clause 3.4 stipulates where SAA requires the written approval of the Minister and clause 3.5 records where it does not (**SAA Corporate Policy Bundle pp 12-13**). Clause 3.6 requires the Board to submit the Shareholders Compact to the Minister on an annual basis (**SAA Corporate Policy Bundle p 14**).

52 Clause 13.1 determines the composition of the Board, which requires a minimum of five directors and a maximum of fifteen directors who are appointed by the Minister in consultation with the Cabinet. The Minister must ensure that the Board is comprised of a majority of non-executive directors and no less than two executive directors, being the CEO and the CFO (**SAA Corporate Policy Bundle p 25**).

53 Clause 13.3.3 reads as follows:

*“The CEO shall be responsible for the day-to-day functions of Company and shall be obliged to comply with any instructions issued by the Board and any directives issued by the Minister to the Board provided that the Board remains accountable for purposes of the PFMA, as contemplated in section 49(1) of the PFMA.”* (**SAA Corporate Policy Bundle p 26**).

#### SAA’s Long-Term Turnaround Strategy (LTTS)

54 The LTTS, which is dated February 2014, lays out SAA’s long-term vision and strategy (**SAA Corporate Policy Bundle pp 67 – 81**). The LTTS is comprised of various building blocks, including the Funding Plan, the Borrowing Plan, the Fleet Plan, the Network Plan, the Corporate Plan, and the Shareholder Compact.

55 The LTTS records that the strategy is built on three key pillars, one of which, “Network, Alliance & Fleet”, includes the imperatives that:

- 55.1 SAA “increase networks through code-share Relationships & Leverage Star Alliance Membership”; and
- 55.2 “wide-body fleet replacement plan” (**SAA Corporate Policy Bundle p 70, repeated on p 72**).
- 56 The LTTS was a central pillar of SAA’s strategic platform. Then Deputy President Ramaphosa convened a series of meetings to discuss and monitor its contents and implementation. This included an inter-ministerial committee comprising six ministers (see invitation at **SAA Corporate Policy Bundle p 806**).

### The Corporate Plan

- 57 The Corporate Plan, which is required by section 52 of the PFMA read with Treasury Regulation 29.1, is dated 23 June 2015, and covers a three-year period. In the summary on **p 83 of the SAA Corporate Policy Bundle**, the Plan puts “primary emphasises on achieving and maintaining commercial sustainability”. Some of the key initiatives include the implementation of the Network and Fleet Plan and achieving R2.2 billion in further cost savings. The Plan envisages SAA achieving a net profit by the third year.
- 58 The “Problem Statement” (**SAA Corporate Policy Bundle p 86**) notes that “the challenges confronting SAA today are broadly similar to those at-play in 2013, save that the gravitas of some of them have increased”, including that SAA continues to be loss-making, which necessitated interventions under the 90-Day Action Plan concluded on 24 March 2015.
- 59 The business initiatives and targets (**SAA Corporate Policy Bundle p 87**) include the new Network & Fleet Plan, which is estimated to achieve R2.5 billion

in annualised earnings improvements during the three-year period; optimisation of Code-Share over the Middle-East; “Resolution to the 2002 Airbus A320 order, cancelling the remaining 10 deliveries scheduled for FY16 and FY17 ... and replacing them with five Airbus A330 aircraft to complement the existing six A330 units within SAA’s fleet”; and “extending the existing Airbus A340 fleet leases for approximately six years”.

### Company Secretariat Guidelines

- 60 These guidelines codify some of the Secretariat practices with a view to ensuring consistency, common understanding and effectiveness of the governance structures in order to regulate secretariat functions with a view to ensuring sound decision-making (**SAA Corporate Policy Bundle p 92**). Clause 4 governs agenda and submissions and, given the timeframes prescribed for the submission of draft agendas, reports and so on, it is clear that the guidelines envisage the Board meeting irregularly. This is reinforced by clause 5 (**pp 94-95**) which requires, among other things, that sessions to prepare for the board meeting take place at least 14 days before the actual meeting.
- 61 The guidelines allow for “closed meetings”, only when they have a legitimate purpose and state that they should be “used sparingly” (**p 98**). The chair is required to determine and announce who will remain and the reason, if requested for excluding any person (**p 98**). The taking of decisions through round-robin may only be used in “exceptional circumstances” (**p 99**).

### 90-Day Action Plan

62 The 90-Day Action Plan, dated 2014/2015, was drafted by the then Acting CEO, Nico Bezuidenhout, and records the SAA Group's current crisis (**SAA Corporate Policy Bundle p 103**) and the key interventions required to solve the crisis (**p 104**), as well as "high priority broad driven interventions". The Plan required weekly reporting from the acting CEO to the Board across the 90-Day period, regardless of Board meeting frequency (**p 112**).

63 The reports begin at p 114 and it is evident that management largely achieved its tasks.

### Comprehensive Network and Fleet Plan

64 The Network and Fleet Plan, dated March 2015, (**SAA Corporate Policy Bundle p 289**) is the report of aviation experts, Royal HaskoningDHV, who were hired to create a turnaround plan for SAA. The executive summary of the Plan notes that it is possible for SAA to restore profitability by 2017 by, among other things, implementing R2.5 billion in earning improvements (**p 291**).

65 Two of the key components of the Plan are fleet replacement and code-sharing with Emirates.

### Memorandum from CFO to Board and NT: SAA Fleet Strategy

66 In the Memorandum, which is dated 16 November 2015, the CFO informs the Board and Treasury of the actions to be taken further to the Comprehensive Network and Fleet Plan and emphasises, among other things, the replacement

of the existing Airbuses. This memorandum appears in the **Airbus Bundle pp 262 – 274**.

#### The Significance and Materiality Framework

67 The Framework, dated 29 January 2014, appears in the **SAA Corporate Policy Bundle at p 405**. It is required by section 54(2) of the PFMA, read with Regulation 28.3.1. Its purpose is to enable the Minister to exercise effective oversight (**p 407**) and to outline the obligations of the Board (**p 408**). It notes that the approval of the Minister is not required for the signing of non-binding memoranda of understanding (**p 419**).

#### Delegation of Authority (17 February 2011 – May 2016)

68 This Delegation of Authority is signed by Ms Cheryl Carolus, then Chair of the Board, and appears in the **SAA Corporate Policy Bundle at p 421**. In the introduction, the DoA commits the Board to, among other things, the King Codes on Corporate Governance (**p 427**). Clause 3.2 explains that the DoA is the “master policy” guiding decisions within SAA (**p 428**).

69 Clause (?) determines the matters reserved for Board determination (**p 429**). These include governance, planning and monitoring (**clause 4.2 at p 429**), setting of SAA strategy and business plans, and approval of the budget (**clause 4.2.2.1 at p 431**), and so on. As one would expect, the role of the board is to monitor and guide, not to make implement operational decisions.

70 In terms of clause 4.2.2.34, the Minister authorises the Board to approve any transaction below R100 million (**pp 436-7**). In terms of clause 7.8.3.7, the Board delegates this authority to the CEO (**p 477**).

- 71 Clause 5, Matters Delegated by the SAA Group Broad to the SAA Group CEO, provides as follows:

*“Subject to the matters reserved for the SAA Board of Directors and the principles applicable to the execution of delegated authority herein contained, the Group Chief Executive Officer of SAA shall have all such powers, functions and duties as may be exercised or done by SAA to give effect to the implementation of the SAA Group Strategy ...” (p 442).*

#### Delegation of Authority Framework (27 May 2016)

- 72 This DoA was signed by Ms Myeni. The key difference between the previous DoA and this one is that the latter reduces the delegation to the CEO to R50 million (**SAA Corporate Policy Bundle p 457**).

#### Shareholders Compact

- 73 The Shareholders Compact, applicable to 2014/2015, begins at **p 469 of the SAA Corporate Policy Bundle**. It records that, in terms of the National Treasury Regulations, SAA is required to conclude an annual Shareholders Compact to record the mandatory performance measures and indicators as agreed between the Board and Shareholders (**p 475**). Clause 4.1 enumerates the obligations of the Board and again invokes the provisions of the Companies Act, the PFMA and the King III Code of Corporate Governance (**p 476**).
- 74 The strategic objectives of the Shareholders Compact are itemised in clause 6 and include achievement and maintenance of commercial sustainability; and support of South Africa’s National Development Agenda, which recognises the contribution to the South African economy that SAA should make and acknowledges the importance of Broad-Based Black Economic Empowerment (**pp 478-9**).

75 The role and responsibilities of the Board are enumerated in clause 12 (**p 485**).

They include:

75.1 That the directors “shall exercise their skill and fiduciary duties to pursue the objectives and targets as set out in the Corporate Plan”;

75.2 That the Board “accepts the responsibility to direct and guide the business in a proper manner in keeping with good governance practices ...”;

75.3 “Recognises the importance of speedy decision-making, and will use its best endeavours to prevent undue delays with regard to critical decisions”.

75.4 The Shareholders Compact is signed by Mr Gigaba on behalf of the shareholders and Ms Myeni as chairperson of SAA (**p 486**).

76 Annexure A to the Shareholders Compact notes as one of the key performance areas the “Network and Fleet Optimisation” (**p 487**).

#### Supply Chain Management Policy (September 2011 – January 2016)

77 The SCMP begins at **p 493 of the SAA Corporate Policy Bundle**. The principles are enumerated at **p 505** and include transparency, equal treatment, effectiveness, efficiency, competitiveness and value for money. Clause 6.2.2.1 places the responsibility on the Board to “ensure that SAA is fully aware of and complies with applicable laws, regulations, governance, policies and codes of business practice as it pertains to SCM” (**p 506**). Clause 6.2.2.2 notes that “the board shall remain vested with all powers relating to SCM matters”. (**p 506**).

- 78 The ethical standards are outlined at **p 509**.
- 79 Clause 10.1.1 prescribes that SAA “will do business with suppliers who best meet the set evaluation criteria” (**p 510**).
- 80 The procedures regarding requests for information and requests for proposals are laid out on **p 512 and p 513** respectively.
- 81 The table on **p 514** prescribes that any procurement above R500 000.00 must be subjected to competitive tender process.
- 82 Clause 11.3 prescribes the conditions under which limited or confined bidding may occur (**p 515**). Clause 11.13.1.6 says that “bad planning shall not be acceptable as justification for the use of limited bidding”. Likewise, with regard to emergency purchases, clause 11.14 says that “poor planning on behalf of business is not deemed to be an emergency” (**p 515**). Clause 11.14.4 prescribes that “approved suppliers or those previously used by SAA should be used wherever possible for emergency situations” (**p 516**).
- 83 The acquisition and leases of aircraft is governed by clause 11.16 on **p 516** and gives the responsibility for the tender preparation, evaluation, negotiation, recommendations and contracting to the CFST and Fleet Committee (**p 516**).
- 84 Clause 12.5 prescribes that the bid shall be advertised for at least 14 days before closing time (**p 517**).
- 85 Clause 14.1.2 stipulates that “relevant internal technical expertise must be applied in the evaluation” (**p 519**).

### Supply Chain Management Policy (January 2016 - )

86 The 2016 SCMP, appearing at **SAA Corporate Policy Bundle p 531** is similar to its predecessor, but introduces one remarkable change. Clause 7.3.1.2.1, at **p 536**, authorises the Board to:

*“Procure directly certain Works as and when it is deemed in the best interests of SAA Group, or to dispense with security and/or sensitive subject-matter, or an emergency, or will be impracticable to follow the normal Procurement process contained in this or any other relevant Document and/or as part of discharging statutory or fiduciary and ethical duties at SAA Group”.*

87 Accordingly, Ms Myeni changed SAA’s SCMP to enable the Board to bypass the entire gamut of procurement regulation, with its careful checks and balances, to procure directly whenever it decided it would be “impracticable” to obey the law.

### Treasury Instruction Note 3 of 2016/2017

88 Treasury Instruction Note 3 of 2016/2017, issued by the Chief Procurement Officer and effective from 1 May 2016 (**BNP Bundle p 764**), provides instructions on deviations from the normal bidding process and expansions or variation of orders (**BNP bundle p 767**).

88.1 Clause 8.1 provides that the Accounting Authority may only deviate from inviting competitive bids in cases of emergency and sole supplier status. An *“emergency procurement may only occur where there is a serious and unexpected situation that poses an immediate risk to health, life, property or environment...”*.

88.2 Clause 9 limits the variation of contracts by 15 – 20% of the original contract value and requires the prior written approval of the Treasury.

Financial Risk Management Policy

89 The Financial Risk Management Policy, which begins on **SAA Corporate Policy Bundle p 612**, provided the framework in which, among other things, SAA borrowed money (together with the SAA Borrowing Plan on **p 587**), until the Board insisted that the SAA Treasury use the SCMP to do so.

## THE ISSUES AND THE EVIDENCE

90 We now turn to outline the issues on the pleadings in respect of each of the four focus areas in this case. We deal with the four key areas in chronological sequence, rather than the order in which they are presented in the pleadings. A colour-coded schedule has been prepared reflecting the allegations made in the particulars of claim and the plea side-by-side. This is attached as **Annexure B**.

91 In outlining the issues on the pleadings, it will be helpful to have regard to key documents in the plaintiffs' trial bundle. The parties reached agreement on the status of these documents at the further pre-trial conference held on 16 October 2019. This is reflected in the signed pre-trial minute in the **Pre-trial Bundle at p 18-25**.

*“3.3 Regarding the status of documents contained in the plaintiffs' trial bundle, the parties agreed that:*

*3.3.1 Copies of all documents may be used at the trial.*

*3.3.2 All documents included in the trial bundle will, without further proof, serve as evidence of what they purport to be, without admitting the truth or correctness of the content of any document.*

*3.3.3 All letters, emails, faxes, SMSs and other electronic communications shall be regarded as having been sent by the purported addressor to the purported addressee, and received by the latter on or about the dates reflected therein.*

*3.3.4 Where a document purports by its tenor to have been created or written by a particular person or institution, it shall be regarded as having been so created and written.*

*3.3.5 That the agreement regarding the status of the documents in the consolidated bundle recorded in paragraphs 3.2.1 to 3.2.4 above, be subject to challenge by any party on prior reasonable notice, in which event any documents so challenged shall not be covered by the agreement and ordinary rules of evidence shall apply. Any challenge must identify each document to which objection is made and the basis for the objection.*

*3.3.6 In the absence of agreement to the contrary, no document included in the consolidated bundle shall be regarded as having been adduced in evidence unless and until it has been referred to during the evidence of a witness or in the opening address of a party.”*

92 No objection has been received to any of the documents contained in the plaintiffs' trial bundle.

### **THE EMIRATES DEAL**

93 From 1997, SAA and Emirates had a successful “code-sharing” deal. In essence, this involved SAA purchasing tickets on Emirates flights at cost and then being able to mark-up those tickets and sell them for a profit to the general public. This was one of the most profitable areas of SAA's business, generating profits of over R170 million per year.

94 In January 2015, Emirates approached SAA with a proposal for an enhanced commercial relationship. The benefits included an expanded code-sharing relationship and an annual revenue guarantee of US\$100,000,000.00 (one hundred million US dollars), which would have supported SAA in operating a profitable daily service between Johannesburg and Dubai.

95 To that end, Emirates and SAA were due to conclude a non-binding Memorandum of Understanding (MoU), which would have paved the way for further negotiations of the deal. As the evidence will show, the Emirates proposal had wide-spread support within SAA and had the approval of all the Board members, except for Ms Myeni.

96 For reasons that remain unknown, Ms Myeni was strongly opposed to this deal. She delayed and then ultimately scuttled the conclusion of the Emirates MoU, causing great prejudice and embarrassment to SAA.

- 97 The stand-out event was her last-minute cancellation of the signing of the Emirates MoU on 16 June 2015. The Acting SAA CEO, Mr Nico Bezuidenhout, had travelled to Paris for the signing ceremony. In the early hours of 16 June 2015, Ms Myeni called Mr Bezuidenhout and ordered him not to go through with the deal and told him that this was an instruction from President Zuma.
- 98 These events will be detailed by Mr Nico Bezuidenhout in his testimony. His version is corroborated by contemporaneous documents and correspondence, including an email that he sent directly to Ms Myeni on 20 June 2015, setting out the full chronology of events. This email appears in **Emirates Bundle pp 164 – 169**.
- 99 Ms Myeni's obstruction, evasions and delays ultimately led to Emirates breaking off negotiations. As a consequence, SAA lost out on a key opportunity to improve its turnover, at a time when it was functionally insolvent. This also severely damaged SAA's reputation and its relationship with the largest international airline.

### ***Common cause facts***

100 The following facts are common cause on the pleadings:

100.1 The commercial relationship between SAA and Emirates was one of the most profitable areas of SAA's business.<sup>32</sup>

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<sup>32</sup> PoC p 27 para 65; Plea p 109 para 56.

100.2 As of June 2015, SAA's relationship with Emirates generated a profit of approximately R170 million per annum for SAA.<sup>33</sup>

100.3 On 19 January 2015, Emirates presented a proposal for an enhanced strategic partnership to SAA.<sup>34</sup> A copy of this proposal appears in the **Emirates Bundle pp 194.119.**

100.4 At all material times, in terms of SAA's Shareholders Compact concluded in terms of Treasury Regulation 29.2, SAA and the Minister of Finance agreed that two of the key performance measures and indicators for SAA were commercial sustainability and governance compliance.<sup>35</sup> A copy of this Shareholders Compact appears in the **SAA Corporate Policy Bundle at pp 469 ff**, and the strategic objectives appear at **pp 477 – 478.**

100.5 In 2015, SAA adopted a three-year Corporate Plan which included a Network and Fleet Plan. Ms Myeni oddly denies knowledge of these documents, does not admit them, and puts the plaintiffs to the proof thereof.<sup>36</sup> However, these documents are matters of public record:

100.5.1 The Corporate Plan appears in the **SAA Corporate Policy Bundle at pp 82 ff.**

100.5.2 The final version of the Network and Fleet Plan appears in the **SAA Corporate Policy Bundle at pp 289 – 397.** This

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<sup>33</sup> PoC p 27 para 66; Plea p 109 para 57.

<sup>34</sup> PoC p 27 para 70; Plea para 110 para 60.

<sup>35</sup> PoC p 27 para 67; Plea p 109 para 57.

<sup>36</sup> Plea p 109 paras 58 – 59.

specifically recommended at **p 349** that SAA “expand *[its] codeshare alliance with Emirates*”.

100.6 On 2 April 2015, the SAA Board, led by Ms Myeni as Chairperson, approved the Network and Fleet Plan. A copy of this resolution appears at **Emirates Bundle p 117**. In terms of this resolution, the SAA board would meet with Emirates representatives for the purpose of pursuing the Emirates proposal, subject to, inter alia, the submission of a revised Emirates memorandum of understanding (MoU) to the SAA Board.<sup>37</sup>

100.7 The revised Emirates MoU was circulated to the Board on 2 May 2015.<sup>38</sup> A copy of the draft MoU appears at **Emirates Bundle pp 163A – 163I**. This version of the draft MoU incorporates edits and changes, but was materially similar to the draft circulated on 2 May 2015.

100.8 On 30 May 2015, Ms Myeni appointed an Operational Review Committee to advise the Board on the Emirates proposal.<sup>39</sup> The Operational Review Committee’s report, which recommended signing the draft Emirates MoU, appears at **Emirates Bundle p 146.1-146.3**

100.9 On 16 June 2015, and hours before Mr Bezuidenhout was due to sign the Emirates MOU, Ms Myeni instructed him not to sign the MoU.

100.10 As a result of Ms Myeni's instruction, Mr Bezuidenhout did not sign the Emirates MoU.

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<sup>37</sup> PoC p 29 para 74; Plea p 110 para 62.

<sup>38</sup> PoC p 29 para 75; Plea p 110 para 63.

<sup>39</sup> PoC p 29 para 77; Plea p 110 para 65.

***The key issues***

101 There are five primary disputes of fact and law on the pleadings.

102 First, Ms Myeni continues to dispute the merits of the Emirates proposal, without providing any clarity on the precise nature of her objections or concerns.

102.1 The plaintiffs plead that:

102.1.1 The Emirates proposal presented an opportunity for SAA to achieve the objectives of its Network and Fleet Plan; and contribute significantly to achieving and maintaining SAA's financial sustainability.<sup>40</sup>

102.1.2 More particularly, the Emirates proposal presented an opportunity for SAA to: protect and maintain the existing relationship between SAA and Emirates; ensure greater access and connectivity to global flight routes for SAA; widen SAA's markets; facilitate the expansion and growth of SAA; and create direct financial gain for SAA of approximately USD100 million per annum.<sup>41</sup>

102.1.3 The Emirates MoU was designed to achieve these objectives.<sup>42</sup>

102.2 In response, Ms Myeni pleads that:

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<sup>40</sup> PoC p 28 para 71; Denied Plea p 110 para 61.

<sup>41</sup> PoC p 28 para 72; Denied Plea p 110 para 61.

<sup>42</sup> PoC p 29 para 76; Plea p 110 para 64.

102.2.1 The Board had unspecified “grave concerns” with regard to the Emirates proposal. She pleads that<sup>43</sup>

- (a) The Board was concerned that the alleged benefits did not clearly outweigh the negative implications and that the negative implications had not been properly considered and dealt with.
- (b) The Board was also uncomfortable with the motivation for the proposal furnished to the Board by the executive management which was not sufficiently detailed.
- (c) Accordingly the Board approved the transaction in principle, subject to the concerns being properly investigated and satisfactorily addressed.

102.2.2 Ms Myeni further pleads that the SAA CEO, Mr Bezuidenhout, acting alone, wanted the transaction with Emirates to be concluded by 16 June 2015.<sup>44</sup>

102.3 The plaintiffs will demonstrate that the Emirates proposal and the resulting draft MoU had widespread support. The contemporaneous documents and correspondence will show that this was supported by:

102.3.1 The Network and Fleet Plan, adopted by the Board on 2 April 2015 which appears in **SAA Corporate Policy Bundle at**

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<sup>43</sup> Plea p 111 para 68.2.

<sup>44</sup> Plea p 111 para 69.2.

**pp 289 – 397**. As indicated above, this specifically recommended at **p 349** that SAA “expand [its] codeshare alliance with Emirates”.

102.3.2 The Operational Review Committee, set up by Ms Myeni, conducted a detail review and recommended that SAA conclude the Emirates MoU. As already indicated, a copy of the Operational Review Committee’s submissions appear at **Emirates Bundle p 146.1 – 146.3**.

102.3.3 The executive management of SAA, including its CEO, Mr Bezuidenhout; the CFO, Mr Meyer, and the Chief Commercial Officer, Mr Sylvain Bosc.

102.3.4 The evidence will further show that all the board members, except Ms Myeni, expressed support for the MoU.

102.4 The plaintiffs will call three primary witnesses to confirm these benefits:

102.4.1 SAA’s former Acting CEO, Mr Nico Bezuidenhout, who returned to Mango in June / July 2015, shortly after the Emirates MoU was blocked.

102.4.2 Mr Sylvain Bosc, SAA’s former Chief Commercial Officer;

102.4.3 Ms Thuli Mpshe, the former SAA Acting CEO, who took over from Mr Bezuidenhout in July 2015.

103 Second, there is a dispute whether the Emirates MoU had the support of the Operational Review Committee and the Board, to the extent that the Board’s approval of this non-binding MoU was necessary at all.

103.1 The plaintiffs plead that:

103.1.1 On 7 June 2015, Mr Bezuidenhout informed the SAA Board that: the Operational Review Committee, appointed by Ms Myeni, recommended that SAA conclude the deal with Emirates on the basis of a revised MoU; and the scheduled date for concluding the MoU with Emirates was 16 June 2015.<sup>45</sup> A copy of his email appears in the **Emirates Bundle 194..1**. The annexures to Mr Bezuidenhout's email appear at **pp 194.152 – 194.220**, which include a legal opinion and a full review prepared by Deloitte.

103.1.2 The executive of SAA handled the Emirates MoU and kept the Board apprised of all developments.<sup>46</sup>

103.1.3 The Board members approved of the Emirates MoU before the signature date on 16 June 2015.<sup>47</sup>

103.2 Ms Myeni disputes this version and avers that Mr Bezuidenhout, as a member of the Board, knew that the Board had not yet fully approved the Emirates MoU and that he was not mandated by the Board to sign it.<sup>48</sup>

103.3 The plaintiffs will demonstrate that the non-binding MoU was an operational matter which did not require Board approval in its detail.

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<sup>45</sup> PoC p 29 para 78; Denied Plea p 110 para 66.

<sup>46</sup> PoC p 29 para 79; Plea p 111 para 67.

<sup>47</sup> PoC p 29 para 80; Denied Plea p 111 para 68.1.

<sup>48</sup> Plea p 111 para 70.

103.4 In any event, this MoU had the support of the Operational Review Committee and the majority of the Board members. It was Ms Myeni who delayed and obstructed the conclusion of the Emirates MoU and prevented the Board from voting on a formal resolution to approve the Emirates MoU.

103.5 Mr Bezuidenhout, Mr Bosc and Ms Mpshe will confirm these facts in their evidence.

104 Third, there is a dispute over Ms Myeni's reasons for stopping the signing of the Emirates MoU on 16 June 2016.

104.1 The plaintiffs allege that Ms Myeni was acting on President Zuma's instructions, as relayed to Mr Bezuidenhout by Ms Myeni in the telephone call in the early hours of 16 June 2016.<sup>49</sup>

104.2 While Ms Myeni admits that she instructed Mr Bezuidenhout not to sign the MOU, she avers that she did so on behalf of the Board.<sup>50</sup> She admits that President Zuma did not have the authority to give such an instruction not to sign the MoU,<sup>51</sup> but denies that she acted on his instructions.

104.3 Mr Bezuidenhout will testify on Ms Myeni's instructions to him. Mr Wolf Meyer, the SAA CFO at the time, was with Mr Bezuidenhout when he received Ms Myeni's call and will corroborate Mr Bezuidenhout's version. Their version is corroborated by Mr Bezuidenhout's email to Ms Myeni on 20 June 2015 , which appears in **Emirates Bundle pp 164 – 169**.

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<sup>49</sup> PoC p 30 para 83; Denied Plea p 111 para 71.

<sup>50</sup> Plea p 111 para 70.

<sup>51</sup> Plea p 111 para 73.

104.4 Mr Bosc and Ms Mpshe will testify that Ms Myeni said that the government was not happy with the MoU, but this turned out to be a lie.

105 Fourth, Ms Myeni continues to dispute the harms caused by her actions in blocking the conclusion of the Emirates MoU.

105.1 The plaintiffs plead that as a result of Ms Myeni's actions in preventing Mr Bezuidenhout from signing the Emirates MoU:<sup>52</sup>

105.1.1 SAA's relationship with Emirates was severely compromised;

105.1.2 SAA forfeited significant financial and strategic benefits, including those benefits listed at paragraphs 71 and 72 of the PoC;

105.1.3 SAA suffered significant reputational harm internationally; and

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

105.2 Ms Myeni baldly denies these harms.<sup>53</sup>

105.3 Mr Bezuidenhout, Mr Bosc, Ms Mpshe and Mr Meyer will confirm the harms and lost opportunities as a result of Ms Myeni's actions. They will testify that in their opinion, SAA had good prospects of improving its

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<sup>52</sup> PoC p 30 para 86; Denied Plea p 112 para 75.

<sup>53</sup> Denied Plea p 112 para 75.

financial position had the Emirates deal been concluded. The expert witness will testify that, at the level of corporate governance, Ms Myeni's conduct amounted to recklessness, deliberate obstruction of the SAA's executives' mandates and bringing the good name and reputation of SAA into disrepute.

106 Fifth, the plaintiffs contend that Ms Myeni's actions were in breach of her legal duties and establish grounds for delinquency.

106.1 The plaintiffs plead that Ms Myeni knew, alternatively ought to have known, that:

106.1.1 she was obliged to act in accordance with the Board's resolution to adopt the Network and Fleet Plan;

106.1.2 to the extent that the Board's approval of the MoU was necessary at all, she was obliged to act in accordance with the Board's approval of the signing of the Emirates MoU;

106.1.3 by following the dictates of President Zuma, she failed to exercise her independent and unfettered discretion as she was obliged to do; and

106.1.4 preventing Mr Bezuidenhout from signing the Emirates MoU would lead to harms to SAA.

106.2 The plaintiffs further plead that Ms Myeni acted in breach of her duties under the PFMA and the Companies Act.<sup>54</sup>

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<sup>54</sup> PoC p 31 para 88; Denied Plea p 112 para 78.

106.3 On this basis, the plaintiffs plead that her conduct establishes grounds for delinquency.<sup>55</sup> Her conduct certainly constituted a gross abuse of her fiduciary duties to act in SAA's best interests. Ms Myeni's disregard for the consequences of her actions is further indicative of wilful misconduct, or at the very least gross negligence.

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<sup>55</sup> PoC p 31 para 89; Denied Plea p 112 para 79.

## **THE AIRBUS DEAL**

107 The second focus area concerns SAA's dealings with Airbus for the purchase of new A320-200 aircraft. The plaintiffs focus on two transactions:

107.1 The 2013 Pembroke Deal; and

107.2 The 2015 Swap Transaction.

108 In both transactions, the plaintiffs will show that Ms Myeni adopted a practice of misrepresenting board resolutions and acting without board authorisation in her dealings with members of Cabinet and Airbus.

109 In respect of the Swap Transaction, the plaintiffs will further demonstrate that her obstructive conduct and interference in operational matters jeopardised SAA's financial position, impaired its reputation, and prevented SAA from complying with its statutory duties.

### ***Background to these transactions***

110 The relevant background to these transactions is common cause on the pleadings:<sup>56</sup>

110.1 In or about February 2002, before Ms Myeni's tenure as a board member, SAA entered into a purchase agreement with Airbus for fifteen A320-200 aircraft (the 2002 agreement).

110.2 In or about October 2009, and after Ms Myeni had been appointed to the Board, SAA approached Airbus to revise the 2002 Agreement.

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<sup>56</sup> PoC pp 35 - 36 para 90 – 95; Plea p 112 para 80.

110.3 One of the reasons SAA approached Airbus to revise the 2002 Agreement was that it had become unaffordable and threatened to undermine the going concern assessment of SAA.

110.4 On 2 October 2009, SAA and Airbus concluded the 2009 Revised Agreement, subject to the approval of the SAA Board and the Minister of Public Enterprises. (**Airbus Bundle pp A 1 – A198**)

110.5 The 2009 Revised Agreement included the following terms:

110.5.1 SAA would increase its order from fifteen to twenty aircraft;  
and

110.5.2 in exchange, Airbus would agree to postpone the pre-delivery payments to Airbus.

110.6 On April 2010:

110.6.1 the Minister of Public Enterprises formally approved the 2009 Revised Agreement of October 2009; and

110.6.2 the Board, including Ms Myeni, resolved to approve the 2009 Revised Agreement.

### ***The Pembroke agreement***

111 On 27 May 2013 the SAA Board resolved that the first ten A320 aircraft were to be acquired through a novation and sale and leaseback transaction with Pembroke Aircraft Leasing (“Pembroke”), the aircraft financing arm of Standard Chartered Bank. This resolution appears at **Airbus Bundle p 11C**.

112 In effect, this meant that Pembroke would step into SAA's shoes by purchasing the ten aircraft from Airbus. Pembroke would then lease the aircraft back to SAA. This would relieve SAA of the financial burden it was facing under the 2009 Airbus Agreement.

113 The plaintiffs will establish that Ms Myeni engaged in two primary acts of misconduct:

113.1 First, that Ms Myeni misrepresented board resolutions in a letter to the Minister of Public Enterprises on 20 June 2013, by claiming that only two A320-200 aircraft would be financed by Pembroke Capital, despite the board resolution of 27 May 2013 approving Pembroke financing for ten aircraft.<sup>57</sup> A copy of this letter appears at **Airbus Bundle p 549**.

113.2 Second, that Ms Myeni made impermissible attempts to force the company secretary to amend the board minutes<sup>58</sup> and to convince the members of the Board to overturn the 27 May 2013 resolution.<sup>59</sup>

114 The CIPC has already issued a compliance notice on 28 November 2016 which held that Ms Myeni's letter of 20 June 2013 to the Minister constituted a breach of sections 73(7), 73(8) and 76(3) of the Companies Act and stipulated as remedial action that Ms Myeni should notify the SAA Board and the Minister of CIPC's conclusion. A copy of this letter and compliance notice appears at **Airbus Bundle pp 408 – 412**.

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<sup>57</sup> PoC paras 96 – 97; Plea para 80.

<sup>58</sup> PoC paras 98 – 99; Plea para 81.

<sup>59</sup> PoC paras 102 – 103; Plea para 81.

- 114.1 Ms Myeni complied with the remedial action under protest by notifying the SAA Board and the Minister, albeit denying that she had breached the Companies Act. This is confirmed in Ms Myeni's own affidavit and attached correspondence, at p 417 (para 2).
- 114.2 On this basis, CIPC issued a compliance certificate on 25 January 2017. This appears at Airbus Bundle p 421.
- 114.3 Ms Myeni subsequently filed an application in the Companies Tribunal to review the CIPC compliance notice. However, the Companies Tribunal held that it had no power to consider the application as a compliance certificate had already been issued. ***Myeni v CIPC Unreported Case No: CT006MAR2017 on 29 June 2017.***
- 115 On its own, we submit that the 20 June 2013 letter provides grounds for a finding of delinquency. But this was not an isolated occurrence. When viewed in light of Ms Myeni's further misrepresentations and false statements that came after, it is clear that there was a pattern of dishonest conduct.

#### Common cause facts

116 The following facts are admitted on these pleadings:

- 116.1 In May 2013, the Chief Financial Officer of SAA, Mr Wolf Meyer, requested approval by the Board, led by Ms Myeni as Chairperson, of a draft application to the Minister of Public Enterprises in terms of section 54(2) of the PFMA:<sup>60</sup> Section 54(2) requires an accounting authority to

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<sup>60</sup> PoC p para 96; Plea p 112 para 80.  
Section 54:

*“promptly and in writing inform the relevant treasury of the transaction and submit relevant particulars of the transaction to its executive authority for approval of the transaction”*, among other things, to acquire or dispose of a significant asset. A copy of Mr Meyer’s 27 May 2013 submissions to the Board appear at **Airbus Bundle pp 11(1) – 11(9)**. In these submissions, Mr Meyer motivated for:

116.1.1 the delivery of the first ten of the twenty A320-200 aircraft in terms of the 2009 Revised Agreement; and

116.1.2 with Pembroke financing the first ten of the twenty A320-200 aircraft.

116.2 On 27 May 2013, the SAA Board, led by Ms Myeni as Chairperson, approved the Board's Pembroke resolution. This resolution appears at **Airbus Bundle p 11C**. This resolution included:<sup>61</sup>

116.2.1 the draft section 54(2) application; and

116.2.2 the fact that Pembroke would finance the first ten of the twenty new Airbus A320-200 aircraft.

116.3 Significantly, Ms Myeni admits that the Board of SAA did not in July 2013 or at any other time overturn the Board’s Pembroke resolution.<sup>62</sup>

116.4 A special meeting of the Board was called in early 2014 and Ms Myeni did not attend the meeting.<sup>63</sup> The significance of this meeting is that the

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<sup>61</sup> PoC p 36 para 97; Plea p 112 para 80.

<sup>62</sup> PoC p 37 para 104; Plea p 112 para 82.

<sup>63</sup> PoC p 37 paras 105 – 106; Plea p 113 paras 83.1, 84.1.

directors at the time sought to discuss Ms Myeni's misconduct. In January 2014, six non-executive directors of SAA signed a letter to Minister Gigaba, setting out their complaints about Ms Myeni's leadership. This letter appears at **Airbus Bundle pp 12 – 21**. Their complaints included Ms Myeni's misrepresentation of the Board's resolution and her improper attempts to amend this resolution.

### The key disputes

117 There are three primary issues in dispute.

118 First, the primary issue is whether Ms Myeni knowingly misrepresented Board resolutions and acted without Board authority in her 20 June 2013 letter to Minister Gigaba, alternatively was grossly negligent in sending this letter.

118.1 The plaintiffs plead that:

118.1.1 On or about 23 June 2013, Ms Myeni submitted a section 54(2) application to the Minister of Public Enterprises.<sup>64</sup>

(a) A copy of Ms Myeni's letter to the Minister, dated 20 June 2013, appears at **Airbus Bundle p 549**.

(b) This letter was in fact an update on the section 54 application that Ms Myeni had previously submitted on 30 May 2013, appearing at **Airbus Bundle p 526 – 527 at 527**.

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<sup>64</sup> PoC p 37 para 100; Plea p 112 para 81.

118.1.2 In the 20 June 2013 letter, and notwithstanding the Board's Pembroke resolution, Ms Myeni recorded, inter alia, that the Board had resolved to finance only two aircraft with Pembroke.<sup>65</sup>

Ms Myeni's letter at **Airbus Bundle p 549** stated:

*"We would like to update the Minister on the award of the sale-and-leaseback of aircraft to Pembroke Capital. Whilst reference is made to ten (10) aircraft in the previous correspondence, the Board has subsequently resolved to transact on two (2) aircraft with Pembroke to allow SAA to further explore engaging local financiers, such as the Development Bank of South Africa, Public Investment Corporation, Shariah Bank and others."*

118.1.3 Ms Myeni knew, alternatively, ought reasonably to have known that her representation to the Minister of Public Enterprises was fraudulent, alternatively false.<sup>66</sup>

118.2 Ms Myeni baldly denies these allegations.

118.3 In the later litigation before the Companies Tribunal, Ms Myeni admitted that she sent the 20 June 2013 letter to the Minister, as appears from Ms Myeni's affidavit at **Airbus Bundle p 325, para 8**.

118.4 The plaintiffs will show that Ms Myeni was in no doubt as to the content of the 27 May 2013 resolution and that her misrepresentations were deliberate. This is confirmed by:

118.4.1 Her letter to the Minister of 30 May 2013, which correctly recorded the resolution of 27 May 2013 that Pembroke would be financing 10 aircraft. (**Airbus Bundle p 526 – 527 at 527.**)

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<sup>65</sup> PoC p 37 para 101; Plea p 112 para 81.

<sup>66</sup> PoC p 37 para 107; Plea p 113 para 85.

118.4.2 A subsequent meeting on 2 June 2013, where the Board members affirmed the 27 May 2013 resolution. The relevant minutes appear at **Airbus Bundle pp 538, Item 8.**

118.4.3 Ms Myeni made matters worse for herself when she sent a further letter on 11 July 2013 to the Minister suggesting that the Board had decided to “revert” to ten aircraft, when there was no such resolution. This letter appears at **Airbus Bundle pp 550 – 552.**

118.5 At best for Ms Myeni, her 20 June 2013 letter was grossly negligent, as she displayed a total failure of care in failing to check the precise content of the Board’s resolution or was reckless as to the truth.

118.6 The plaintiffs will call Mr Wolf Meyer, SAA’s CEO and a Board member at the time to confirm that Ms Myeni’s 20 June 2013 letter to the Minister was not supported by any board resolutions. His evidence will be supported by the Company Secretary at the time, who will confirm that Ms Myeni sent the letter of 20 June 2013 without even checking its contents with him.

119 Second, whether Ms Myeni made deliberate, alternatively grossly negligent, attempts to undermine and alter Board resolutions and minutes.

119.1 The plaintiffs plead that:

119.1.1 Notwithstanding the Board's Pembroke resolution of 27 May 2013, Ms Myeni wrote to the company secretary of SAA on 2 June 2013 and requested the company secretary to record in

the minutes of the Board meeting of 27 May 2013 that the Board had resolved that only two aircraft were to be financed by Pembroke.<sup>67</sup>

119.1.2 The company secretary refused to amend the minutes according to Ms Myeni's request.<sup>68</sup>

119.1.3 In July 2013, Ms Myeni requested the other non-executive Board members of SAA to overturn the Board's Pembroke resolution.<sup>69</sup> A copy of this draft round-robin resolution, sent on 5 July 2013, appears at **Airbus Bundle pp 11J(1) – 11J(3)**.

119.1.4 All of the directors, except Ms Yakhe Kwinana, refused.<sup>70</sup>

119.1.5 Ms Myeni knew, alternatively, ought reasonably to have known that her request to the company secretary to amend the minutes amounted to an attempt unlawfully and unilaterally to amend a board resolution.<sup>71</sup>

119.2 Ms Myeni again denies any attempts to interfere.

119.3 The plaintiffs will call the Company Secretary at the time, who will testify that he sent the round-robin resolution to the Board members on 5 July 2015 on Ms Myeni's insistence. He will confirm that Ms Myeni's account of the Board meeting on 2 June 2013 was false and that her attempts to subvert the 27 May 2013 resolution were improper.

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<sup>67</sup> PoC p 36 para 98; Plea p 112 para 81.

<sup>68</sup> PoC p 36 para 99; Plea p 112 para 81.

<sup>69</sup> PoC p 37 para 102; Plea p 112 para 81.

<sup>70</sup> PoC p 37 para 103; Plea p 112 para 81.

<sup>71</sup> PoC p 37 para 107; Plea p 113 para 85.

119.4 The account of Ms Myeni's improper attempts to undermine the 27 May 2013 resolution is supported by the letter to Minister Gigaba in January 2014, signed by six non-executive directors of SAA, who complained about Ms Myeni's misrepresentation of the Board's resolution and her improper attempts to second-guess the 27 May 2013 resolution. This letter appears at **Airbus Bundle pp 12 – 21**.

120 Third, the legal conclusions flowing from these events are also placed in dispute.

The plaintiffs plead that:

120.1 Ms Myeni acted in breach of her duties as a board member under the PFMA and the Companies Act and knew, alternatively, ought to have known that she acted unlawfully.<sup>72</sup>

120.2 Her conduct provides grounds for a finding of delinquency under section 162(5) of the Companies Act.<sup>73</sup>

### ***The Swap Transaction***

121 The "Swap Transaction" was an agreement to cancel the purchase of the remaining 10 Airbus A320s and to substitute this with a new deal for SAA to lease five Airbus A330 aircraft directly from Airbus.

122 This was necessary to allow SAA to escape the onerous pre-delivery payments (PDPs) and inflated prices under the 2009 Airbus Agreement. Time was of the

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<sup>72</sup> PoC p 38 paras 108 – 109.

<sup>73</sup> PoC pp 39 - 41 para 110.

essence, as the PDPs had become due and SAA was liable to pay hundreds of millions of Rand to Airbus.

123 It is common cause that the Board resolved to approve the Swap Transaction on 31 March 2015 (**Airbus Bundle p 286G**). This document is confirmation of the March 31 resolution. The evidence will show Minister of Finance approved this transaction conditionally in July 2015 (**Airbus Bundle p 155A – 155B**), and unconditionally on 11 September 2015 (**Airbus Bundle 164.1 – 164.2**).

124 Despite these approvals, Ms Myeni then improperly sought to change the nature of the deal, by unilaterally attempting to introduce an unidentified “African Aircraft Leasing Company”, without Board approval. Her conduct delayed the conclusion of the deal considerably and placed SAA at risk of defaulting on its financial commitments.

125 It was only through the intervention of the Minister of Finance, Minister Gordhan, in December 2015 that the Swap Transaction was concluded and SAA escaped substantial liability.

126 Our case on the Swap Transaction turns on three primary forms of misconduct:

126.1 First, Ms Myeni was dishonest, alternatively grossly negligent, and acted without Board authority in sending a letter to the Airbus CEO on 29 September 2015 (dated 17 September 2015) in which she sought to change the nature of the deal by inserting an “African Aircraft Leasing Company” as a middleman.<sup>74</sup> A copy of Ms Myeni’s letter appears at **Airbus Bundle p 177**.

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<sup>74</sup> PoC paras 121 - 126; Plea paras 93 – 97.

126.2 Second, Ms Myeni failed to disclose material facts and failed to comply with the SAA Significance and Materiality Framework in her 16 November 2015 application to the Minister of Finance to amend the existing section 54(2) approval for the Swap Transaction.<sup>75</sup>

126.3 Third, in delaying the conclusion of the Swap Transaction, Myeni risked causing substantial financial harm to SAA<sup>76</sup> and caused SAA to fail to comply with its statutory obligations, including the preparation of annual reports and financial statements.<sup>77</sup>

### The common cause facts

127 The following facts are admitted:

127.1 On 31 March 2015, the SAA Board, led by Ms Myeni as Chairperson, resolved to approve the Swap Transaction between SAA and Airbus in terms of Written Resolution 2015/827: Approval of the Airbus A320 Swap Transaction".<sup>78</sup> **(Airbus Bundle p 286G)**

127.2 The main terms of the Swap Transaction amended the 2009 Revised Agreement as follows:<sup>79</sup>

127.2.1 SAA's purchase of the remaining ten A320 aircraft from Airbus would be cancelled;

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<sup>75</sup> PoC paras 133 – 134, 137 – 140; Plea paras 103 – 104, 107 – 108.

<sup>76</sup> PoC para 142; Plea para 109.

<sup>77</sup> PoC para 143; Plea para 109.

<sup>78</sup> PoC p 41 para 112; Plea p 113 para 87.

<sup>79</sup> PoC p 41 para 113; Plea p 113 para 87.

127.2.2 SAA would instead lease five Airbus A330-300s on an operating lease basis from Airbus for twelve years; and

127.2.3 should SAA default on the Swap Transaction, SAA would be subject to a cross default clause with regard to all of its transactions with Airbus.

127.2.4 These terms were reflected in the Letter of Intent concluded between SAA and Airbus in April 2015, appearing at **Airbus Bundle pp 82 – 116.**

127.3 The Swap Transaction would, *inter alia*:<sup>80</sup>

127.3.1 alleviate SAA's liquidity problems associated with the 2009 Revised Agreement; and

127.3.2 allow SAA to procure A330-300 aircraft instead of A320 aircraft, which would be more cost efficient.

127.4 A condition of the conclusion of the Swap Transaction was that SAA would obtain the necessary governance approvals.<sup>81</sup> The documentary evidence will show that these approvals were granted, despite Ms Myeni's claims to have no knowledge of these matters:

127.4.1 On 30 July 2015, the Minister of Finance conditionally approved the Swap Transaction in terms of section 54(2) of the

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<sup>80</sup> PoC p 42 para 114; Plea p 113 para 87.

<sup>81</sup> PoC p 42 para 115; Plea p 113 para 88.

PFMA.<sup>82</sup> A copy of this letter to Ms Myeni appears at **Airbus Bundle p 155B.**

127.4.2 On 11 September 2015, the Minister of Finance unconditionally approved the Swap Transaction in terms of section 54(2) of the PFMA.<sup>83</sup> A copy of his letter to Ms Myeni appears at **Airbus Bundle pp 163 – 164.**

127.5 On 30 July 2015, the Acting Chief Executive Officer and the Chief Financial Officer of SAA signed the execution documents in terms of SAA's Delegation of Authority Framework, 2012.<sup>84</sup>

127.6 In September 2015, Ms Myeni sent a letter to Airbus, dated 17 September 2015, seeking to change the nature of the Swap Transaction.<sup>85</sup> A copy of this letter, sent on 29 September 2015 but dated 17 September 2015, appears at **Airbus Bundle p 177.** The meaning of this letter is placed in dispute, as we will address below.

127.7 It is common cause that at the time that Ms Myeni sent this letter to Airbus:

127.7.1 The SAA Board had not decided to amend the terms of the Swap Transaction.<sup>86</sup>

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<sup>82</sup> PoC p 42 para 117; Plea p 113 para 90 (no knowledge).

<sup>83</sup> PoC p 42 para 118; Plea p 113 para 90 (no knowledge).

<sup>84</sup> PoC p 42 para 116; Plea p 113 para 89.

<sup>85</sup> PoC p 42 para 121; Plea p 113 para 93.

<sup>86</sup> PoC p 43 para 122; Plea p 114 para 94.1.

127.7.2 The Minister had not approved an amendment of the Swap Transaction.<sup>87</sup>

127.8 In or about October 2015, Airbus sent letters to Ms Myeni warning that the delays occasioned by her proposed amendments to the Swap Transaction might lead SAA to incur contractual penalties.<sup>88</sup> Copies of this correspondence appear at **Airbus Bundle pp 196A – 196B** (1 October 2015); **Airbus Bundle p 196E**(5 October 2015) and **Airbus Bundle 197** (14 October 2015).

127.9 On 10 October 2015, a meeting was held between representatives of Airbus and certain SAA Board members to discuss amendments to the Swap Transaction.<sup>89</sup>

127.10 On 15 October 2015, the Chief Financial Officer of SAA informed the Director-General of the National Treasury that the delay occasioned by the SAA Board's failure to sign-off on the Swap Transaction was impairing SAA's ability to meet its cash flow obligations.<sup>90</sup> A copy appears in the **Airbus Bundle pp 202 – 203**.

127.11 On 16 November 2015, Ms Myeni submitted an application to amend the existing section 54(2) approval.<sup>91</sup> This amendment application appears at **Airbus Bundle pp 243 – 261**.

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<sup>87</sup> PoC p 43 para 123; Plea p 114 para 95.

<sup>88</sup> PoC p 46 para 127; Plea p 114 para 98.

<sup>89</sup> PoC p 46 para 128; Plea p 114 para 99.

<sup>90</sup> PoC p 46 para 130; Plea p 115 para 101.

<sup>91</sup> PoC p 47 para 132; Plea p 115 para 103.1.

127.12 The Minister of Finance declined the request for approval on 3 December 2015.<sup>92</sup> This letter appears at **Airbus Bundle pp 286(8) – 286(11)**.

127.13 On or about 21 December 2015, the Minister of Finance directed the Board to conclude the Swap Transaction with Airbus in line with the section 54(2) approval which had been granted in July 2015.<sup>93</sup> This Minister's letter appears at **Airbus Bundle pp 286A – 286E**.

### The key disputes

128 First, whether Ms Myeni knowingly misrepresented Board resolutions and acted without Board authority, alternatively acted with gross negligence, in her dealings with Airbus.

128.1 The plaintiffs plead that Ms Myeni's September 2015 letter to Airbus misrepresented that the SAA Board had approved amendments to the Swap Transaction to introduce an African Aircraft Leasing Company.<sup>94</sup>

128.2 Ms Myeni pleads that the letter dated 17 September 2015 to Airbus stated that SAA wishes to test whether it is not to the ultimate benefit of SAA and South Africa to use a local leasing company and requested a 30 day extension for this purpose before signing off on the transaction.<sup>95</sup> She pleads further that her letter did not represent that the Board had decided to amend the Swap Transaction.<sup>96</sup>

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<sup>92</sup> PoC p 48 para 135; Plea p 115 para 105.

<sup>93</sup> PoC p 48 para 136; Plea p 116 para 106.

<sup>94</sup> PoC p 43 paras 123 – 125; Plea p 114 para 96.

<sup>95</sup> Plea p 113 para 93.

<sup>96</sup> Plea p 114 para 94.2.

128.3 The contents of Ms Myeni's letter give the lie to her claims. A copy appears at **Airbus Bundle p 177**. Ms Myeni stated that:

*"On behalf of the Board of South African Airways, I would like to apologise for the delay in reaching a decision on the A320 / A330 swap transaction. You will appreciate that this is a complex transaction and the full Board had to be satisfied that the approved deal is in the best interests of the company and the government of the Republic of South Africa at this point of time.*

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

*I trust you will find the above in order."*

128.4 As just outlined above, Ms Myeni admits that when she sent this letter:

128.4.1 The SAA Board had not decided to amend the terms of the Swap Transaction.<sup>97</sup>

128.4.2 The Minister had not approved an amendment of the Swap Transaction.<sup>98</sup>

128.5 On the clear terms of the letter, Ms Myeni's representations to Airbus were therefore false. There was no resolution by the SAA Board to "*do this transaction slightly differently*".

128.6 We will demonstrate that Ms Myeni could have been in no doubt about the true nature of the Swap Transaction, as approved in the Board resolution of 31 March 2015. This was deliberate dishonesty and a gross abuse. At best for Ms Myeni, this letter was grossly negligent.

<sup>97</sup> PoC p 43 para 122; Plea p 114 para 94.1.

<sup>98</sup> PoC p 43 para 123; Plea p 114 para 95.

128.7 This will be confirmed in the evidence of Mr Wolf Meyer, the CFO at the time, and Mr Sylvain Bosc, the Chief Commercial Officer.

129 The second issue is whether Ms Myeni's 16 November 2015 application to the Minister to approve the section 54(2) approval contained misrepresentations and omitted material facts in a manner that was dishonest or grossly negligent.

129.1 The plaintiffs plead that:

129.1.1 In Ms Myeni's letter to the Minister on 16 November 2015, Ms Myeni:<sup>99</sup>

- (a) stated, alternatively implied, that the Board had duly approved the proposed amendments she requested of the Minister;
- (b) failed to say that the Board had already unanimously approved the original Swap Transaction on 31 March 2015.
- (c) stated, alternatively implied that, in approving the proposed amendments, SAA had followed due processes under the Significance and Materiality Framework in terms of National Treasury Regulation 28.3;
- (d) requested approval to amend the Swap Transaction by inter alia involving an African aircraft leasing company;

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<sup>99</sup> PoC p 47 para 133; Plea p 115 para 103.

- (e) relied on an unsolicited proposal Ms Myeni had received from Mr M Mngadi of Nedbank in respect of the financing and leaseback of five aircraft from Airbus;
- (f) failed to include the contents of the legal opinion of 6 November 2015 to the effect that SAA was required to execute the Swap Transaction without the proposed amendments;
- (g) failed to inform the Minister of Finance of the advice of senior SAA management that the delay of the Swap Transaction caused by the proposed amendments threatened SAA's solvency and liquidity as well as its Network and Fleet Plan; and
- (h) failed to inform the Minister of Finance that Airbus did not agree to the proposed amendments.

129.1.2 SAA had not followed due process in terms of the Significance and Materiality Framework in terms of National Treasury Regulation 28.3 with regard to the proposed amendments.<sup>100</sup>

129.1.3 By not following proper process in applying to amend the section 54(2) approval of the Minister of Finance of 11 September 2015, Ms Myeni caused SAA to breach the Significance and

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<sup>100</sup> PoC p 48 para 134.2; Plea p 115 para 104.

Materiality Framework in terms of National Treasury Regulation  
28.3.<sup>101</sup>

129.1.4 Ms Myeni's section 54 amendment application was further in breach of her fiduciary duties under the Companies Act and the PFMA, particularly as she failed to disclose all material facts to the Minister that were relevant to a decision and acted in a manner that was wilful or grossly negligent.<sup>102</sup>

129.2 Ms Myeni pleads that:<sup>103</sup>

129.2.1 Her letter to the Minister seeking the amendment of the section 54(2) approval was supported by the Board;

129.2.2 The letter indicated what the objections were to the originally approved transaction and why the proposed amendments were favoured by the Board.

129.2.3 The executive of SAA was also in favour of the letter being written.

129.3 The plaintiffs will call Ms Avril Halstead, the then Chief Director: Sector Oversight at Treasury, to testify on the required procedures for section 54 approval, Treasury's interactions with Myeni, and Treasury's efforts to direct Myeni to conclude the Swap Transaction in the interests of protecting SAA's finances.

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<sup>101</sup> PoC p 48 para 137; Plea p 116 para 107.

<sup>102</sup> PoC pp 48 – 50 paras 138 – 139; Plea p 116 para 107.

<sup>103</sup> Plea p 115 para 103.2 – 103.

130 Third, the plaintiffs will prove that Ms Myeni's conduct delayed the conclusion of the Swap Transaction, causing great financial risks to SAA and resulting in SAA breaching its legislative obligations.

130.1 The plaintiffs plead that:

130.1.1 Ms Myeni led the Board at all relevant times.<sup>104</sup>

130.1.2 The Swap Transaction could not be executed until Ms Myeni signed the execution documents.<sup>105</sup>

130.1.3 Ms Myeni failed and/or refused to sign the execution documents promptly.<sup>106</sup>

130.1.4 Ms Myeni's proposed amendments to the Swap Transaction caused the delay of the conclusion of the Swap Transaction.<sup>107</sup>

130.1.5 Ms Myeni's conduct in attempting to renegotiate the Swap Transaction further delayed its implementation.<sup>108</sup>

130.1.6 On 6 November 2015, Ms Myeni received legal advice to the effect that:<sup>109</sup>

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<sup>104</sup> PoC p 41 para 112; Plea p 113 para 87.

<sup>105</sup> PoC p 42 para 119; Plea p 113 para 91.

<sup>106</sup> PoC p 42 para 120; Plea p 113 para 92.

<sup>107</sup> PoC p 46 para 129; Plea p 115 para 100.

<sup>108</sup> PoC p 51 para 141; Plea p 116 para 109.

<sup>109</sup> PoC p 46 para 131; Plea p 115 para 102.

- (a) SAA was obliged to perform in terms of the Swap Transaction (note, this is clearly a reference to the 2009 Revised Transaction); and that
- (b) SAA would be prejudiced by further delays of the Swap Transaction.

130.1.7 By delaying the implementation of the Swap Transaction, Ms Myeni exposed SAA to the following risks:<sup>110</sup>

- (a) defaulting on its guarantee repayments as well as the breach of the Swap Transaction itself;
- (b) triggering of cross-defaults on other leasing arrangements; and
- (c) the breach of warranties and exposure in respect of acceleration clauses.

130.1.8 Due in part to the failure to conclude the Swap Transaction timeously, SAA:<sup>111</sup>

- (a) was prevented from finalising SAA's 2014/15 financial statements as it was not a going concern;
- (b) could not hold the Annual General Meeting; and
- (c) could not table SAA's audited financial statements in Parliament timeously.

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<sup>110</sup> PoC p 51 para 142; Plea p 116 para 109.

<sup>111</sup> PoC p 52 para 143; Plea p 116 para 109.

130.2 Ms Myeni issues bare denials to these allegations. She further pleads that:

130.2.1 The Swap Transaction was subject to ratification by the Board.<sup>112</sup>

130.2.2 She was not obliged to sign the execution documents in relation to the Swap Transaction.<sup>113</sup>

130.3 The evidence of Mr Wolf Meyer, Mr Sylvain Bosc and Ms Avril Halstead will establish that SAA faced substantial risks as a result of the delays, that Ms Myeni was at all times made aware of the dire consequences of her obstruction and delays, and that her conduct was reckless and grossly negligent, at the very least.

130.4 The plaintiffs will further rely on the expert evidence of Mr Carl Stein who will testify that, at the level of corporate governance, Ms Myeni grossly abused her position as a director in order to knowingly cause harm to SAA, acted in a manner that amounted to gross negligence, wilful misconduct or breach of trust and failed to properly discharge her fiduciary duties.

131 Finally, the plaintiffs will prove that in acting in this manner, Ms Myeni's conduct breached the requirements of the PFMA and the Companies Act, establishing grounds for delinquency.<sup>114</sup>

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<sup>112</sup> Plea p 113 para 90.

<sup>113</sup> Plea p 113 para 92.

<sup>114</sup> PoC pp 44 – 45 paras 125 – 126; Plea p 114 paras 96 – 97. PoC pp 48 – 50 paras 138 - 140; Plea p 116 paras 106 – 108. PoC pp 52 – 54; paras 144 – 146; Plea p 116 paras 109 – 110.

## **BNP CAPITAL DEAL**

132 The third component of this case focuses on the insertion of a questionable middleman, BNP Capital, into SAA's plans for the recapitalisation of R15 billion of SAA's debt.

133 SAA's dealings with BNP Capital had four distinct phases:

133.1 Before the appointment of BNP, the Board cancelled the RFP that would have resulted in three of the major banks providing the funding needed to service SAA's debts, which were rapidly maturing;

133.2 The appointment of BNP as a transaction adviser in the R15 billion restructuring of SAA's debt, without following a proper procurement process;

133.3 The extension of BNP's contract to include the sourcing of R15 billion for SAA, with a substantial commission, again in breach of procurement requirements; and

133.4 The proposed payment of a cancellation fee of R49.9 million to BNP, at a time when BNP did not have a valid Financial Services Provider licence.

134 The plaintiff's primary witness on the BNP Capital deal is Ms Cynthia Stimpel, former Group Treasurer at SAA. Ms Stimpel was intimately involved in SAA's debt restructuring plans. She watched in increasing alarm as the SAA Board, led by Ms Myeni, approved the appointment of BNP as a transaction adviser, extended its contract to include the sourcing of funds, and then was poised to pay a hefty cancellation fee to BNP. Ms Stimpel submitted whistleblower reports to National Treasury, the Public Protector and OUTA. It was through her

intervention that OUTA launched an urgent application to stop the BNP deal from proceeding, thereby saving SAA tens millions of rands.

135 Ms Avril Halstead will also testify that the appointment of a transaction advisor was unnecessary. All it did was to put an expensive middleman between SAA and the funder. She will also testify to the fact that the BnP proposal raised obvious red flags, including that the interest rates they offered were significantly below those of all the major banks.

136 At each phase, the plaintiffs will prove that Ms Myeni, as a member of the SAA Board, acted unlawfully and in breach of her obligations under the PFMA and her duties as a director. She excluded the SAA Treasury from the process so that she could manipulate more compliant individuals. The plaintiffs will further demonstrate that these breaches involved gross abuses, gross negligence and / or wilful misconduct.

***First phase: scuppering of the appointment of the major banks to fund SAA:***

137 One of the excuses for awarding BnP a lucrative contract to source funds for SAA without any procurement process whatsoever, was that it was a situation of emergency, as SAA's loans were maturing. However, the emergency was entirely created by the Board. The highly experienced Treasury Department had in June 2015 (**BNP bundle, item 8, Vol. 2, pg 154**) issued an RFP to major banks. The Board intervened and had this RFP withdrawn. On the Board's insistence, a further RFP for a higher amount of R15 billion was then issued in 23 September 2015 (**BNP Bundle, Item No: 18, Vol 2, pg 184 - 185**).

- 138 On 27 November 2015, the Treasury Team made recommendations to the Board based on the responses. They had recommended Seacrest, subject to a due diligence and, in the alternative, three of the major banks. **(BNP bundle, Item No. 30, Vol. 2, pg 229 – 237)**
- 139 When the due diligence process revealed that Seacrest was going to source the funding from Grissag, a Russian bank with a location in the rural Free State, the Treasury Department wanted to award the contract to the alternative winners, the three major banks. The Board agreed that Grissag Bank did not meet the required standards, but instead of awarding the contract to the major banks, cancelled the RFP on 3 December 2015, notwithstanding the fact that the loans required servicing urgently.
- 140 The Board resolution on 3 December 2015 appears at **BNP bundle, Item No. 34, Vol. 2, pg 242:**
- 141 Prior to this Board meeting, on 2 December 2015, the Board received a letter from the Free State Development Corporation, offering R14 billion in financing.
- 142 The Board's 3 December 2015 resolution sought to award the contract to the FSD, without any procurement process. The mandate of the Free State Development Corporation is to support small enterprises (using the public purse), not to fund major SOEs. They were also going to source the money from Grissag. The Minister eventually had to step in to stop this deal, as appears from a letter from Minister Gordhan dated 25 May 2016 at **BNP bundle, Item 85, Vol 5, pg. 474.**

143 Ms Cynthia Stimpel, the SAA Group Treasurer, will address these events in her testimony. Her evidence will be supported by the evidence of Mr Wolf Meyer, the CFO, who was involved in the debt restructuring plans prior to his departure from SAA on 12 November 2015.

### ***Second phase: Appointment of transaction adviser***

#### Common cause facts

144 The following facts are admitted on the pleadings:

144.1 On 15 January 2016, the Chief Financial Officer of SAA sent a request for the approval of the appointment of a transaction adviser regarding SAA's R15 billion debt restructuring to the Board. The Board, with Ms Myeni as Chairperson, authorised the publication of the RFI on Transaction Advisory Services.<sup>115</sup> **(BNP Bundle p 264 at p 273 para 4.11 )**

144.2 On 7 February 2016, SAA published the Request for Information on Transaction Advisory Services (Ref: GSM010/2016).<sup>116</sup> **(RFI advertisement in the Sunday Times, BNP Bundle p 275)**

144.3 The bidding process for the RFI closed on 16 February 2016.<sup>117</sup>

144.4 The RFI was not advertised for 14 days before the closing day for submissions.<sup>118</sup>

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<sup>115</sup> PoC p 11 para 23; Plea p 102 para 104.

<sup>116</sup> PoC p 11 para 24; Plea p 102 para 15.

<sup>117</sup> PoC p 12 para 27; Plea p 103 para 18.

<sup>118</sup> PoC p 12 para 29; Plea p 103 para 20.1.

- 144.5 BNP submitted a bid.<sup>119</sup>
- 144.6 The other entities who submitted bids included Deloitte & Touche, Regiments Capital (Pty) Ltd, Basis Point Capital Investment Holding (Pty) Ltd, Cinga Holdings (Pty) Ltd, Nisela Capital (Pty) Ltd and Nedbank Ltd.<sup>120</sup> Ms Myeni pleads that by 16 February 2016, SAA had received bids from fourteen entities.<sup>121</sup>
- 144.7 On 11 March 2016, SAA sent out the Transaction Adviser Request for Proposals.<sup>122</sup> **[We do not appear to have a copy of the RFP]**
- 144.8 The Transaction Adviser RFP was only sent to those entities that responded to the RFI.<sup>123</sup>
- 144.9 The scope of the Transaction Adviser RFP did not extend to the sourcing of funds for SAA.<sup>124</sup>
- 144.10 The submission period for the Transaction Adviser RFP closed on 18 March 2016.<sup>125</sup>
- 144.11 The RFP was not advertised for 14 days before the closing day for submissions.<sup>126</sup>
- 144.12 BNP again submitted a bid. A copy of BNP's bid submission, dated 18 March 2016, appears as **BNP bundle, Item 46, Vol 4, pg. 353 - 405D.**

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<sup>119</sup> PoC p 12 para 30; Plea p 103 para 21.2.

<sup>120</sup> PoC p 12 para 31; Plea p 103 para 22.

<sup>121</sup> Plea p 103 para 21.2.

<sup>122</sup> PoC p 12 para 32; Plea p 104 para 23.

<sup>123</sup> PoC p 12 para 34; Plea p 104 para 25.1.

<sup>124</sup> PoC p 12 para 35; Plea p 104 para 25.1.

<sup>125</sup> PoC p 12 para 36; Plea p 104 para 25.1.

<sup>126</sup> PoC p 12 para 37; Plea p 104 para 25.1.

144.13 The Board resolved to award the Transaction Adviser contract to BnP.<sup>127</sup>

**[BNP Bundle vol 5 p 454]**

144.14 On 25 May 2016, SAA sent a letter of award to BnP.<sup>128</sup> A copy of this letter, dated 20 March 2016, appears at **BNP Bundle vol 3 p 207**.

144.15 On 21 April 2016, the Board resolved to approve Written Resolution 2016/B11 (“B11”) which approved the extension of the scope of the Transaction Adviser to include sourcing funding of R15 billion for SAA.<sup>129</sup>

**BNP Bundle vol 5 p 426**

### The issues in dispute

145 There are two key disputes in respect of this first phase of the deal.

146 First, whether Ms Myeni and the Board breached procurement laws in their appointment of BNP as a transaction adviser and the extension of the contract to include the sourcing of funds:

147 The plaintiffs plead that:

147.1 The scope of the RFI did not extend to the sourcing of funds for SAA.<sup>130</sup>

147.2 The SAA Treasurer advised the Board that SAA did not require a transaction advisor.<sup>131</sup>

147.3 SAA did not, in fact, require a transaction adviser.<sup>132</sup>

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<sup>127</sup> PoC p 13 para 41; Plea p 104 para 29.1.

<sup>128</sup> PoC p 13 para 39; Plea p 104 para 27.

<sup>129</sup> PoC p 13 para 41; Plea p 104 para 29.

<sup>130</sup> PoC p 12 para 25; Plea p 102 para 16.2.4.

<sup>131</sup> PoC p 11 – 12 para 28.1; Plea p 103 para 19.

<sup>132</sup> PoC p 11 – 12 para 28.2; Plea p 103 para 19.

147.4 The RFI did not indicate that the RFP would be restricted to those who had responded to the RFI.<sup>133</sup>

147.5 The letter of award recorded an all-inclusive cost to SAA that was higher than the cost proposed in BnP's bid.<sup>134</sup>

147.6 The 21 April 2016 Board Resolution (B11) to extend the scope of the Transaction Adviser's contract was made:

147.6.1 without any recommendation from the SAA Bid Adjudication Committee to extend the Transaction Adviser contract;

147.6.2 without any competitive process;

147.6.3 without a due diligence on BnP; and

147.6.4 approving a fee for BnP which was significantly higher than the market related fee for such services.

147.7 The Board, led by Ms Myeni, breached SAA's SCM Policy in various respects:<sup>135</sup>

147.7.1 SAA published an RFI that did not indicate that the RFP would be restricted to respondents to the RFI, as contemplated in clause 11.3.2 of the SCM Policy;

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<sup>133</sup> PoC p 12 para 33; Plea p 104 para 24.1

<sup>134</sup> PoC p 13 para 40; Plea p 104 para 28.

<sup>135</sup> PoC pp 14 – 15 para 43; Plea p 105 para 31.

147.7.2 SAA did not first endeavour to satisfy the tender through existing contracts, as set out at clause 11.1 of the SCM Policy;

147.7.3 SAA published an RFI and RFP which violated clause 12.5.1 of the SCM Policy as it was not advertised for 14 days;

147.7.4 SAA published an RFP which violated clause 11.12 read with clause 11.10 of the SCM Policy, which require a competitive open bid process for a transaction of this value;

147.7.5 SAA sought to extend the scope of the Transaction Adviser agreement unlawfully and in violation of the SCM Policy, especially in respect of the following clauses:

(a) clause 6.2.5.2, in that the BAC did not first recommend the award of the bid to the Board;

(b) clause 11.12, in that the extension of the scope of the transaction advisor agreement amounted to the granting of new services without an open and competitive tender process; and

(c) clause 7.1.1 of the SCM Policy, in that SAA failed to ensure fair dealing and integrity in the conduct of all procurement activities;

147.8 Ms Myeni denies these allegations and pleads that:

147.8.1 The transaction advisory services contemplated in the RFI included the sourcing of funds for SAA.<sup>136</sup>

147.8.2 The debt needed to be restructured urgently, since there was debt that would be maturing.<sup>137</sup>

148 Second, there is a dispute over Ms Myeni's degree of responsibility and fault in committing these breaches:

148.1 The plaintiffs plead that Ms Myeni "led" the Board at all relevant times.<sup>138</sup> Ms Myeni baldly denies this.<sup>139</sup>

148.2 The plaintiffs further plead that the Board, led by Ms Myeni, breached procurement laws in a manner that was wilful and / or grossly negligent.<sup>140</sup>

149 In response, Ms Myeni pleads that:

149.1 It is the function of management and the administrative staff, if it is necessary to shorten the period for advertising, to ensure that that is properly and correctly done as provided for in clause 12.5 of the SCM Policy.<sup>141</sup>

149.2 It is the function of management and the administrative staff to ensure that advertisements comply with the prescribed requirements pertaining

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<sup>136</sup> PoC p 11 para 26; Plea p 102 para 16.2.4.

<sup>137</sup> Plea p 103 para 20.2.1.

<sup>138</sup> PoC p 11 para 23; Plea p 102 para 14.

<sup>139</sup> Plea *ibid*.

<sup>140</sup> PoC pp 14 – 15 para 43; Plea p 105 para 31. PoC pp 104 - 106 paras 42 – 45; Plea p 105 paras 31 – 34.

<sup>141</sup> Plea p 103 p 20.2.2.2.

to that particular type of advertisements or as agreed with the Head of Global Supply Measurement as provided for in clause 12.5 of the SCM Policy.<sup>142</sup>

149.3 Board Resolution B11 of 21 April 2016 was motivated and recommended to the Board by the Chief Executive Officer and Chief Financial Officer of SAA.<sup>143</sup>

149.4 Ms Myeni further alleges that she cannot be held responsible for decisions of the Board: “[D]ecisions of the Board are taken by majority vote, unless specifically otherwise required, each member of the Board, including First Defendant, has one vote and First Defendant cannot be held responsible for how other members of the Board voted on Written Resolution No 2016/B11 or with regard to any other decision of the Board”<sup>144</sup> and further “First Defendant is not responsible for the decisions of the Board taken by majority vote, merely because she was the chairperson of the Board, as if these were *her decisions*.”<sup>145</sup>

150 The evidence of Ms Cynthia Stimpel and Mr Solly Tshitangano, a former chief director in the Office of the Chief Procurement Officer of the National Treasury, will show that the appointment of BNP was indeed irregular and that Ms Myeni and the other Board members failed to conduct the necessary oversight and control, either wilfully or in a manner that was grossly negligent.

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<sup>142</sup> Plea p 104 para 25.2.

<sup>143</sup> Plea p 104 para 29.2.1.

<sup>144</sup> Plea p 104 para 30.2.

<sup>145</sup> Plea p 105 para 32.1.2.

151 The fact that Ms Myeni did not act alone does not absolve her of delinquency.

The delinquency of the Board as a whole is no defence.

***Third phase: The resolution extending the transaction adviser contract to source funding***

Common cause facts

152 The following facts are admitted or are not in dispute:

152.1 On 26 April 2016, the Financial Services Board suspended BnP's Financial Services Provider licence in terms of section 9 of the FAIS Act.<sup>146</sup> A letter from the FSB confirming the suspension appears at **BNP Bundle vol 6 p 526 at 527.**

152.2 On 24 May 2016, the Board resolved by round robin resolution to approve the confinement and award of the contract for the sourcing of funds for the SAA Group, to BnP.<sup>147</sup> **BNP Bundle vol 5 p 454.**

152.3 BnP did not have a Financial Services Provider licence at the time.<sup>148</sup>

152.4 SAA had not conducted a proper due diligence on BnP.<sup>149</sup>

152.5 Ms Myeni was the first director on the Board to cast a vote in favour of the BnP extension resolution on 20 May 2016.<sup>150</sup>

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<sup>146</sup> PoC p 18 para 46; Plea p 106 para 35.

<sup>147</sup> PoC p 18 para 47; Plea p 36.2.1.

<sup>148</sup> PoC p 18 para 48.3; Plea p 107 para 39.

<sup>149</sup> PoC p 18 para 48.4; Plea p 107 para 40.

<sup>150</sup> PoC p 19 para 49; Plea p 107 para 42.

152.6 On 25 May 2016, and as a result of the BnP extension resolution, SAA formally appointed BnP to source funds for SAA:<sup>151</sup>

152.6.1 at an estimated total cost of R256,500,000.00 (inclusive of VAT);

152.6.2 calculated at 1.5% of the funding sourced on behalf of SAA through BnP.

152.6.3 This letter of award appears at **BNP Bundle vol 5 p 458**.

#### The issues in dispute

153 Again, the two issues in dispute are whether there were breaches of procurement law and Ms Myeni's degree of fault in committing these breaches.

154 First, in respect of the breaches of procurement law:

154.1 The following allegations made by the plaintiffs are placed in dispute:

154.1.1 The Board passed the 24 May 2016 BnP extension resolution despite the fact that:

154.1.2 confining the bidding process to BnP as sole bidder breached the SCM Policy;<sup>152</sup>

154.1.3 the scope of the Transaction Adviser services had never included the sourcing of funds;<sup>153</sup>

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<sup>151</sup> PoC p 18 para 50; Plea p 107 para 42.

<sup>152</sup> PoC p 18 para 48.1; Plea p 106 para 37.

<sup>153</sup> PoC p 18 para 48.2; Plea p 106 para 38.

154.1.4 there was no evidence that BnP had the capability to source funds for SAA;<sup>154</sup>

154.1.5 the SAA Treasurer had received quotations for the sourcing of funds at a lower cost than the quotation from BnP from three of South Africa's biggest banks, which were existing service-providers of SAA.<sup>155</sup> (**BNP Bundle pp 444 – 445**)

154.1.6 Ms Myeni again seeks to defend this decision, pleading that:

154.1.7 The confinement and award of the contract for the sourcing of funds were occasioned by urgency as is provided for in clause 11.13 of the SCM Policy.<sup>156</sup>

154.1.8 The scope of the Transaction Adviser was validly extended by the Board in terms of B11.<sup>157</sup>

155 Second, in respect of Ms Myeni's degree of culpability:

155.1 The plaintiffs plead that Ms Myeni knew, alternatively, ought to have known that she and the Board were acting unlawfully<sup>158</sup> and that her conduct constituted a gross abuse of the position of a director, was wilful and / or grossly negligent.<sup>159</sup>

155.2 Ms Myeni pleads that:

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<sup>154</sup> PoC p 18 para 48.5; Plea p 107 para 41.

<sup>155</sup> PoC p 18 para 48.6; Plea p 107 para 41.1 (no knowledge).

<sup>156</sup> Plea p 106 para 37.2.

<sup>157</sup> Plea p 106 para 38.2.

<sup>158</sup> PoC p 19 – 23 paras 51 – 53; Plea p 107 – 108 paras 44 – 47.

<sup>159</sup>

155.2.1 In respect of the Board resolution of 24 May 2016:<sup>160</sup>

(a) The resolution was motivated and recommended to the board by SAA's Global Supply Management, and in particular:

- The Commodity Manager, Silas Matsaudza;
- The Chief Procurement Officer (acting), Lester Peter;
- The Chief Financial Officer (interim), Phumeza Nhantsi;
- and
- The Chief Executive Officer (acting), Musa Zwane.

(b) In terms of the motivation and recommendation to the Board, the signatories thereto, being the persons referred to above, verified that the submission is in line with the SCM Policy.

(c) Ms Myeni, as she was entitled to do, accepted this verification by SAA's Global Supply Management as correct.

(d) A copy of these submissions appears at **BNP Bundle vol 5 p 441.**

155.2.2 Ms Myeni had no knowledge at the time if a due diligence had been conducted and relied on information and recommendations furnished to the Board by the executive of SAA.<sup>161</sup>

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<sup>160</sup> Plea p 106 para 36.2.2.

<sup>161</sup> Plea p 107 para 40.

155.2.3 There was no valid impediment, to her knowledge and as far as she is aware, to the knowledge of the Board, when the appointment of BnP was made.<sup>162</sup>

155.2.4 She first became aware of the fact that BnP's Financial Services Provider licence had been suspended during July 2016, after the Board's resolution.<sup>163</sup>

155.2.5 Ms Myeni cannot be held responsible for resolutions of the Board taken by majority vote, each member of the Board having one vote.<sup>164</sup>

156 Again, the evidence of Ms Cynthia Stimpel will establish that the confinement and award of the contract to BNP for the sourcing of funds was in breach of basic procurement laws and that Ms Myeni and the Board were again wilful or, at the very least, grossly negligent in approving this unlawful conduct.

157 To make matters worse for Ms Myeni, the evidence will demonstrate that she again lied to the Minister of Finance about the appointment of a transaction adviser to source funds. In a letter dated 23 June 2016, Ms Myeni told the Minister that "*the process to appoint a transaction advisor (TA) is progressing well.*" She made no mention of the fact that the Board had long since resolved to appoint BNP Capital as a transaction adviser and had awarded it the further contract to source funds. Ms Myeni's lack of candour is again revealing. Her letter to the Minister appears at **BNP Bundle vol 5 pp 497 – 500**.

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<sup>162</sup> Plea p 107 para 43.

<sup>163</sup> Plea p 106 para 35.2.

<sup>164</sup> Plea p 108 para 45.

***Fourth phase: The cancellation of the sourcing of funds agreement***

158 The following facts are admitted:

158.1 BnP sought a cancellation fee of R49.9 million in the event of the cancellation of the sourcing-of-funds agreement.<sup>165</sup> This appears from the following correspondence:

158.2 BnP's letter of 25 May 2016, at **BNP Bundle p 460**, in which BNP initially sought a cancellation fee of 50% of the total value of the contract amounting to over R125 million.

158.3 In a letter dated 31 May 2016, BNP again sought agreement on a 50% cancellation fee. **BNP Bundle p 477.**

158.4 In a further letter dated 1 July 2016, BnP then revised its proposal and instead sought a R49,9 million cancellation fee. **BNP Bundle vol 6 p 502.**

158.5 It is common cause that the original agreement between SAA and BnP did not make provision for a cancellation fee.<sup>166</sup>

158.6 On 7 July 2016, draft written resolution No 2016/B24 ("B24") was circulated to the Board by way of a round robin procedure in respect of the proposed cancellation fee of R49.9 million to BnP (*Note: the PoC mistakenly refers to Resolution B25, but it is common cause that this is a reference to draft resolution B24*).<sup>167</sup> **(BNP Bundle vol 6 p 513)**

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<sup>165</sup> PoC p 23 para 56; Plea p 108 para 49

<sup>166</sup> PoC p 23 para 57; Plea p 108 para 49.

<sup>167</sup> PoC p 23 para 59; Plea p 108 para 51.

158.7 Ms Myeni voted in favour of draft resolution B24.<sup>168</sup> A copy of Ms Myeni's email approval, sent at 11:41 pm on 7 July 2016, appears at **BNP Bundle vol 6 p 514.**

158.8 However, the board did not approve draft resolution B24 and it was not carried.<sup>169</sup>

158.9 SAA cancelled the sourcing of funds agreement with BnP on 20 July 2016. The cancellation letter appears at **BNP Bundle p 530.**

159 The following allegations made by the plaintiffs are disputed:

159.1 The cancellation fee of R49.9 million was excessive and irregular in the circumstances.<sup>170</sup>

159.2 The following SAA officials advised the Board that the cancellation fee as proposed by B24 was irregular and unlawful:

159.2.1 the Chief Financial Officer; and

159.2.2 the chairperson of the audit and risk committee.

159.3 Ms Myeni was the sole member of the board to vote in favour of resolution B24. Ms Myeni claims to have no knowledge of how the other board members voted.<sup>171</sup>

160 The following allegations made by Ms Myeni are placed in dispute:

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<sup>168</sup> PoC p 24 para 61 ; Plea p 108 – 109 para 53.

<sup>169</sup> PoC p 24 para 61 ; Plea p 108 – 109 para 53.

<sup>170</sup> PoC p 23 para 58; Plea p 108 para 50.

<sup>171</sup> Plea p 108 – 109 para 53.

160.1 Payment of the cancellation fee was motivated and recommended to the board, in a written submission dated 4 July 2016, by the Acting Chief Executive Officer, Musa Zwane and the Interim Chief Financial Officer, Phumeza Nhantsi.<sup>172</sup> These submissions appear at **BNP Bundle p 511**.

160.2 Ms Myeni accepted the submissions by the Acting Chief Executive officer, Mr Zwane, and the Interim Chief Financial Officer, Ms Nhantsi.<sup>173</sup>

161 The evidence of Ms Stimpel will demonstrate that there was no lawful basis for the approval of a cancellation fee and that there was no reasonable basis for Ms Myeni to rely on Board submissions.

### **Summary**

162 In sum, the essential facts on the BNP deal are common cause. The central dispute is two-fold:

162.1 First, whether Ms Myeni and the Board acted unlawfully and in breach of their duties in approving the appointment of BNP as a transaction adviser and the extension of the contract to include the sourcing of funding.

162.2 Second, and most significantly, whether Ms Myeni's involvement in this unlawful conduct and her support of the cancellation fee constitutes grounds for a finding of delinquency, involving gross abuses, wilful misconduct or, at the very least, gross negligence.

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<sup>172</sup> Plea p 108 – 109 para 52.2.

<sup>173</sup> Plea p 109 para 54.

163 As already outlined, Ms Myeni does not deny supporting the BNP deal and the payment of a cancellation fee.<sup>174</sup> Her defence is that she was part of a collective, that she made decisions based on board submissions prepared by executives, and that she could not be expected to interrogate these submissions further.<sup>175</sup> Accordingly, she contends that there are no grounds for a finding of delinquency.

164 The plaintiffs will show that:

164.1 The Board, led by Ms Myeni, breached SAA's SCM Policy and the PFMA in various respects by failing to exercise proper oversight.

164.2 Ms Myeni's failure to interrogate board submissions and to detect patent unlawfulness was wilful or, at the very least, grossly negligent in the circumstances. There was no reasonable basis for her to rely on the board submissions in this case, without interrogating the matter further.

164.3 Ms Myeni cannot escape responsibility by appealing to a collective: she was a member of the Board and is responsible for her role in these unlawful acts. Even if this were not the case, she was the sole director to approve the patently unlawful cancellation fee;

164.4 Ms Myeni's conduct warrants a finding of delinquency in terms of section 162(5)(c) of the Companies Act.<sup>176</sup>

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<sup>174</sup> See, for example, PoC paras 41, 49, 61; Plea paras 29, 42 and 53.

<sup>175</sup> See, for example, Plea paras 29, 36, 41 and 52.

<sup>176</sup> PoC p 16 – 17 para 44; Denied Plea p 105 para 33.

## THE EY REPORT

165 A report prepared by Ernst & Young (EY) in December 2015 identified substantial problems in procurement and contract management practices at SAA, yet Ms Myeni and the Board took no action to give effect to its recommendations.

166 The common cause facts are that:

166.1 On 28 July 2015, SAA instructed EY to conduct an investigation into the procurement and contract management practices at SAA and its subsidiaries.<sup>177</sup>

166.2 On 10 December 2015, EY sent a draft report to SAA, including to the Board.<sup>178</sup>

166.3 The EY Report identified, inter alia, the following concerns:<sup>179</sup>

166.4 overpayment in respect of SAA's contract with Kintetsu World Express South Africa (Pty) Ltd ("KWE"), concluded informally in 28 August 2014, as well as evidence of possible collusion between SAA officials and KWE;

166.4.1 overpayment in respect of SAA's contract with Societe Internationale de Telecommunications Aeronatiques, concluded in September 2013;

166.4.2 failure to follow correct tender processes and overpayment in respect of Air Chefs' contract with ADJ Maintenance CC in August 2013;

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<sup>177</sup> PoC p 56 para 147; Plea p 116 para 111.

<sup>178</sup> PoC p 56 para 148; Plea p 116 para 111.

<sup>179</sup> PoC p 56 para 149; Plea p 116 para 112.

- 166.4.3 failure to follow correct tender processes and overpayment in respect of Air Chefs' contract with Vizzini Motors (Pty) Ltd;
- 166.4.4 failure to follow correct tender processes and overpayment in respect of Air Chefs' contract with First Garment Rental (Pty) Ltd ("First Garment") concluded in September 2012;
- 166.4.5 overpayment under, and questionable existence of, Air Chefs' informal "consultancy agreement" with First Garment;
- 166.4.6 conflict of interest and overpayment in respect of South African Airways Technical SOC Ltd's ("SAAT's") contract with Mtha Aviation (Pty) Ltd;
- 166.4.7 overpayment in respect of SAAT's contract with Savuka Property Care Services CC;
- 166.4.8 failure to manage expenditure in respect of SAAT's contract with KWE as well the questionable nature of some of the services paid for by SMT; and
- 166.4.9 informal and suspicious nature of SAAT's contract with AAR Corporation, which contract appears to have been prompted by SAA and resulted in the resignation of Mr Parsons from the Board.

166.5 From December 2015, Ms Myeni had knowledge of the draft EY Report.<sup>180</sup>

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<sup>180</sup> PoC p 57 para 150; Plea p 116 para 113.

166.6 Ms Myeni knew that the Board ought to have taken steps to address the problems raised in the report.<sup>181</sup>

166.7 The Board had not, at the date of summons, addressed the concerns in the report.<sup>182</sup>

167 The following allegations made by the plaintiffs are placed in dispute:

167.1 The draft EY report, produced in December 2015, recommended that SAA should take immediate steps to remedy each of the above issues.<sup>183</sup>

167.2 As Chairperson of the Board, Ms Myeni knew, alternatively ought to have known, that each of the concerns the EY Report identified had a negative impact on the operational and/or financial success of SM and its subsidiaries.<sup>184</sup>

167.3 To date, Ms Myeni and the Board have taken no material steps to address or remedy any of the issues and concerns raised in the EY Report.<sup>185</sup>

167.4 Ms Myeni consequently breached the PFMA and her duties under the Companies Act.<sup>186</sup>

167.5 Ms Myeni's conduct provides grounds for a finding of delinquency under section 165(2)(c).<sup>187</sup>

168 The following allegations made by Ms Myeni are placed in dispute:

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<sup>181</sup> PoC p 58 para 154; Plea p 116 para 117.1.

<sup>182</sup> PoC p 58 para 154; Plea p 116 para 117.1.

<sup>183</sup> PoC p 57 para 150; Denied Plea p 116 para 113.

<sup>184</sup> PoC p 57 para 153; Denied Plea p 116 para 116.

<sup>185</sup> PoC p 58 para 155; Denied Plea p 117 para 117.2.

<sup>186</sup> PoC p 58 para 156; Denied Plea p 117 para 118.

<sup>187</sup> PoC pp 58 – 59 paras 157 – 158; Denied Plea pp 117 paras 118 – 119.

168.1 Ms Myeni alleges that on several unspecified occasions she raised the concerns in the EY report with the members of the Board and with management of SAA and requested the Board to discuss the EY Report and the executive to implement the recommendations, but the Board and executive resisted her efforts.<sup>188</sup>

### ***The key issues***

169 The central issue is whether Ms Myeni took any action to raise the EY Report with the Board and whether she and the Board made any effort to implement its recommendations.

170 The plaintiffs will call a representative of EY to confirm the draft and final EY reports and to speak to the veracity and significance of its findings. The plaintiffs will also call members of the SAA Board at the time to testify on Ms Myeni's failure to raise or to give meaningful effect to this report.

### **CONCLUSION**

171 Each one of the four legs of the plaintiff's case, if proved, satisfies the requirements for a finding of delinquency under section 162(5)(c) of the Companies Act. In fact, multiple discrete actions on Ms Myeni's part within each leg would alone satisfy the requirements, if proved. One letter in which she deliberately lied to the Minister or one instance of stopping an advantageous transaction on the instruction of the President would suffice.

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<sup>188</sup> Plea p 117 para 117.2.

172 These breaches collectively, however, are relevant to this Court's order, as in terms of section 162(6)(ii), this Court has a discretion to order the declaration of delinquency to subsist for longer than the seven-year minimum. We will submit that on the evidence there are ample grounds for a lifelong delinquency order.

**CAROL STEINBERG**

**CHRIS McCONNACHIE**

**NADA KAKAZA**

**Plaintiffs' counsel**

**Chambers, Sandton**

**27 January 2020**