IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 15996/17

In the matter between:

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

PLAINTIFFS' HEADS OF ARGUMENT: CLOSING ADDRESS

TABLE OF CONTENTS

"*The extent of capture, corruption and mismanagement in SOEs is best demonstrated at South African Airways, which was placed in business rescue late last year.*"

President Ramaphosa, State of the Nation Address, 13 February 2020

"*SAA belongs to government 100% … they wouldn't allow South African Airways to fail.*"

Ms Dudu Myeni, High Court testimony, 25 February 2020

INTRODUCTION

1 The mismanagement of South African Airways SOC Ltd (SAA) and its current plight are matters of public record. SAA is under business rescue, many of its routes are set to be cancelled, billions of Rand in public funds have been squandered, and thousands of jobs are threatened.

2 This case is a first step towards holding all who are responsible for this disaster to account.

3 The plaintiffs seek an order declaring Ms Dudu Myeni, the former non-executive chairperson of SAA, to be a delinquent director for life in terms of section 162(5) of the Companies Act 71 of 2008.

4 From 2009 to 2017, Ms Myeni was the one constant on a constantly rotating SAA Board.[1] From 2012 until her departure in 2017, she served as its non-executive chairperson.[2]

[1] PoC p 8 para 9; Plea p 101 para 5. See Annexure A to the Opening Statement, which reflects the SAA directors from 2009 to 2017.
[2] Ibid.

5 During her time at SAA, Ms Myeni blocked, delayed and obstructed key initiatives to turn the airline around. In doing so, she broke the law and flouted basic governance principles. The plaintiffs' case focuses on two glaring examples of this misconduct:

5.1 The Emirates deal: Ms Myeni scuttled a non-binding Memorandum of Understanding (MOU) between SAA and Emirates in 2015 which deprived SAA of the opportunity to earn a guaranteed minimum revenue of USD 100 million per year and irreparably harmed SAA's relationship with Emirates, the world's largest international airline.

5.2 The Airbus "Swap Transaction": Ms Myeni took SAA and the country to the brink of financial ruin by improperly obstructing a deal with Airbus to allow SAA to escape an onerous contract for the purchase of aircraft. In doing so, Ms Myeni misrepresented board resolutions, acted without board authority, misrepresented the facts to the Minister of Finance and parliament, and further imperilled SAA's financial position.

6 The plaintiffs contend that Ms Myeni's misconduct in the Emirates and Airbus deals is sufficient for a lifelong declaration of delinquency. However, this is only the tip of the iceberg.

7 To ensure that this trial could be completed in the allotted five weeks, the plaintiffs elected not to lead evidence on three additional causes of action in these proceedings: the 2016 BNP Deal, the 2013 Pembroke Transaction, and the Ernst & Young Report. In doing so, the plaintiffs do not absolve Ms Myeni of her further misconduct nor do they concede any weakness in their case.

8 The plaintiffs maintain that Ms Myeni's misconduct in these and other events must be fully investigated by the appropriate authorities and action must be taken without further delay. The plaintiffs, as non-profit organisations with limited means, cannot do the work of law enforcement.

9 The need for swift action by the authorities is underlined by the shocking evidence that has continued to emerge of Ms Myeni's alleged involvement in further acts of corruption, maladministration, and money laundering at SAA. It is for this reason that the plaintiffs ask that this matter be referred to the National Prosecuting Authority for further investigation and action.

10 In addressing the two causes of action, we have demonstrated that Ms Myeni's conduct satisfies multiple grounds of delinquency under section 162(5)(c) of the Companies Act. The evidence has established four repeated forms of serious misconduct:

10.1 Dishonesty: Ms Myeni repeatedly misrepresented Board resolutions and decisions;

10.2 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,

10.3 Improperly inserting middle-men: Ms Myeni 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.

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

11 In what follows, we address the following issues in turn:

11.1 The relevant legal framework;

11.2 An overview of the evidence;

11.3 The Emirates deal;

11.4 The Airbus “Swap Transaction”;

11.5 The appropriate sanction;

11.6 Costs;

11.7 Conclusion and remedy.

THE LEGAL FRAMEWORK

Delinquency

12 A 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.[3]

13 In ***Gihwala v Grancy Property Ltd***,[4] 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."*[5]

14 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. This was particularly so as SAA received billions in government guarantees, leaving the government liable should SAA have defaulted on any of its liabilities.

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[3] 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 section 162(11)(a).
[4] *Gihwala and Others v Grancy Property Ltd and Others* 2017 (2) SA 337 (SCA).
[5] Ibid at para 144.

15 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.[6] A court only has a discretion in respect of the conditions that may be attached to the order.[7]

16 Section 162(5)(c) identifies the grounds for a 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);*

17 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*

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[6] *Gihwala* at para 140.
[7] Section 162(10) of the Act.

misconduct on the part of a director."[8] Wallis JA explained these grounds as follows:

17.1 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 an unfortunate fall from grace. Only gross abuses of the position of director qualify.*"[9]

17.2 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.*"[10]

17.3 Third, sub-section (iii) applies where "*the director has intentionally or by gross negligence inflicted harm upon the company or its subsidiary*".[11]

17.4 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 —*

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[8] 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".

[9] *Gihwala* at para 143.

[10] 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"

[11] *Gihwala* at para 143.

> *'(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 a creditor, employee or shareholder of the company, or had another fraudulent purpose . . .'*.[12]

18 Wallis JA noted that "*gross negligence*" in sub-sections 162(5)(c)(ii) and (iv) is the equivalent of "*recklessness*".[13] Recklessness and gross negligence have been variously described as involving:

18.1 "*a complete obtuseness of mind or, where there is no conscious risk-taking, a total failure to take care*";[14]

18.2 "*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;[15]

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[12] Ibid.
[13] Ibid at para 144.
[14] *Transnet Ltd t/a Portnet v Owners of the MV "Stella Tingas" and another* 2003 (2) SA 473 (SCA) at para 7.
[15] *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.

18.3 "*carrying [on the business of a company] by conduct which evinces a lack of any genuine concern for its prosperity*";[16]

19 An objective and subjective standard must he applied in assessing gross negligence. This is made clear by section 76(3)(c) of the Companies Act.[17]

19.1 Objectively, Ms Myeni's conduct must be weighed against the standards expected of a reasonable director in her position;

19.2 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 and is, by her own account, a "*corporate governance expert*".

20 In the *KLM Royal Dutch Airlines*,[18] it was held that wilful misconduct under section 162(c)(iv) involves conduct that:

> *"[G]oes far beyond negligence, even gross or culpable negligence, and involves a person doing or omitting to do that which is not only negligent but which he knows and appreciates is wrong, and is done or omitted regardless of the consequences, not caring what the result of his carelessness maybe."*[19]

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[16] *Tsung and Another v Industrial Development Corporation of South Africa Ltd and Another* 2013 (3) SA 468 (SCA) at para 31.

[17] 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.*"

[18] *KLM Royal Dutch Airlines v Hamman* 2002 (3) SA 818 (W)

[19] *KLM Royal Dutch Airlines v Hamman* 2002 (3) SA 818 (W) at para 17, cited with approval in *Msimang NO v Katuliiba* [2013] 1 All SA 580 (GSJ) (27 November 2012).

21 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).

22 To establish these grounds of delinquency, Ms Myeni's conduct must be assessed in light of her duties as a director under the common law, the Companies Act and the PFMA.

Directors' duties

23 Directors of state-owned enterprises (SOEs) are subject to heightened duties. They are not only subject to the duties of ordinary company directors, but they are also subject to further duties under the Public Finance Management Act 1 of 1999 (PFMA).

Directors' duties under the Companies Act and the common law

24 Under the Companies' Act, the board of directors of the company have collective and ultimate responsibility for management of the company in terms of section 66 (1). Section 66(1) provides that:

> "*the business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the function of the company, except to the extent that this Act or the company's memorandum of incorporation provides otherwise.*"

25 However, this collective responsibility is operationalised by converting it into individualised responsibility and liability for each of the board members.

26 The individual duties of all company directors are now partially codified in the Companies Act. In particular, sections 76(2)(a) and 76(3) of the Companies Act entrenches the fiduciary duties of directors and the duties of care, skill and diligence. These provisions provide, in relevant part, that:

> ***76 Standards of directors conduct***
>
> *(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 he company or a wholly-owned subsidiary of the company; or*
>
> *(ii) to knowingly cause harm to the company or a subsidiary of the company; and*
>
> …
>
> *"(3) 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-*
>
> *(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."*

<u>The "business judgment" rule</u>

27 Sub-section 76(4), read with sub-section (5) 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:

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

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

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

28 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

29 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*".[20]

30 The SAA Board is in turn accountable to the "executive authority" under the PFMA. Since December 2014, the Minister of Finance has filled this role.

31 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-

[20] PFMA section 49(2)(a).

(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.

(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.

…"

32 Section 51 sets out the further responsibilities of the Board. 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."*

33 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.[21] 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.*"[22]

34 The SAA Board is also subject to more stringent financial reporting duties than ordinary companies. These duties are set out in detail in sections 55 and 65 of the PFMA. We will return to these duties below.

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[21] PFMA, section 51(1)(b)(ii))

[22] *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.

The duties of executive and non-executive directors

35 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 of all directors – executive and non-executive - are the same.

36 These principles were summarised by Corbett CJ in *Howard v Herrigel And Another NNO*:[23]

> *"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.*

37 This passage makes two key points:

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[23] *Howard v Herrigel And Another NNO* 1991 (2) SA 660 (A) at 678

37.1 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.

37.2 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:

38 This means that when Ms Myeni usurped the functions of an executive director, by involving herself in day-to-day operations, negotiating with suppliers, and making management decisions, her duties did not change, but her conduct is to be judged more stringently.

39 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*".

Collective and individual responsibility of Board members

40 Ms Myeni has repeatedly claimed that all her actions were always taken as part of a "collective", that she therefore cannot be held individually responsible for any wrongdoing, and that it is unfair to single her out in these proceedings.

41 These claims are wrong at the level of law, fact and principle.

42 First, in company law, Board members are both collectively and individually responsible. Collective responsibility means that all directors have a duty to ensure the proper management of the company, but this does not absolve directors of individual liability. As explained above, the collective responsibility of the Board is operationalised by imposing individual duties on directors.

43 Under the Companies Act, individual directors may be held jointly and severally liable for wrongdoing. Section 77(3) of the Companies' Act states that:

> "*a director may be held liable in accordance with the principles of the common law relating to a breach of a fiduciary duty, for any loss, damages or costs sustained by the company as a consequence of any breach by the director of a duty contemplated in section 72, 76(2) or 76(3)(a) or (b).*"

44 Further, section 77(6) expressly states that the "*the liability of a person in terms of this section is joint and several with any other person who is or may be held liable for the same act*."

45 As this Court correctly held in dismissing Ms Myeni's joinder application, a plaintiff is fully entitled to pick its target from a set of joint wrongdoers.[24] This makes it clear that there is nothing in law that precludes the plaintiffs from instituting action against Ms Myeni for the conduct that constitutes a breach of her fiduciary duties as a non-executive director of SAA without joining or seeking relief from any other director who may also have breached his/her own duties in this action.

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[24] Myeni v Organisation Undoing Tax Abuse NPC and Others (15996/2017) [2019] ZAGPPHC 565 (2 December 2019) at para 70, citing Harms, Civil Procedure in the Superior Courts, Last Updated February 2019 564 at B10.2; *Parekh v Shah Jehan Cinemas (Pty) Ltd and Others* 1982 (3) SA 618 (D).

46 Second, in seeking to cast herself as a member of an unindividuated collective, Ms Myeni ignores the fact that she had special obligations as the chairperson of the SAA Board. She was meant to be a leader, not a mere passive bystander.

47 These special obligations of the chairperson are detailed in the "King Codes". These Codes, which are 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 during the relevant events that are covered in this case.

48 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)**

49 In his expert evidence, Mr Carl Stein drew particular attention to principle 2.16 of King III, which sets out the specific responsibilities of the chairperson.

49.1 This prescribes that the chairperson should be an independent, non-executive director.

49.2 The chairperson is responsible for "*setting the ethical tone for the board and the company*".[25]

49.3 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*".[26]

50 Third, at the level of fact, Ms Myeni's claims to be acting as part of a "collective" simply do not withstand scrutiny. She did in fact lead. When she wanted a particular outcome, she flouted basic governance principles and the law in order to achieve her nefarious goals; when she wanted to obstruct an outcome, she took the lead and did so. She therefore cannot seek to hide behind the Board as a "collective".

51 Finally, at the level of principle, "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 Voard who supported her unlawful activities should also face delinquency applications.

52 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.

53 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.

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[25] King III para 40.1
[26] King III para 40.2.

The SAA governance framework

54 At its foundation, SAA is governed by the following documents:

54.1 The Memorandum of Incorporation (MOI) (**SAA Corporate Policy Bundle pp1 – 66**): The preamble of the MOI records that SAA is subject to the provisions of the Companies Act and the PFMA (**p 2**). It provides the framework for SAA's governance.

54.2 The Delegation of Authority Framework, 2011 - 2016 (**SAA Corporate Policy Bundle at p 421**): Clause 3.2 explains that the DoA is the "master policy" guiding decisions within SAA (**p 428**).

54.2.1 Clause 4 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 budge ((**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.

54.2.2 Clause 5, headed "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**).

54.3 The Significance and Materiality Framework (**SAA Corporate Policy Bundle at p 405**): This Framework is required by section 54(2) of the

PFMA, read with Treasury Regulation 28.3.1. Its purpose is to enable the Minister to exercise effective oversight over major transactions (**p 407**) by requiring that certain transactions must be submitted to the Minister for approval (**p 408**) and by providing the procedures that must be followed when approval is needed **(Annexure A, p 410ff)**. It notes that the approval of the Minister is not required for the signing of non-binding memoranda of understanding (**p 419**).

54.4 The Shareholders Compact **(SAA Corporate Policy Bundle pp 469 – 492)**: 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 its Shareholder (**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**). In particular, The role and responsibilities of the Board are enumerated in clause 12 (**p 485**). They include:

54.4.1 That the directors "*shall exercise their skill and fiduciary duties to pursue the objectives and targets as set out in the Corporate Plan*";

54.4.2 That the Board "*accepts the responsibility to direct and guide the business in a proper manner in keeping with good governance practices …*"; and

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

55 SAA's strategy at the relevant time was founded on the following policy documents:

55.1 The Long-Term Turnaround Strategy (LTTS) (**SAA Corporate Policy Bundle pp 67 – 81**): This policy sought to bolster, *inter alia*, SAA's network, alliance and fleet through increasing networks through code-share relationships and embarking on a wide-body fleet replacement plan (**p 72**). In turn, if properly implemented, the LTTS was meant to significantly contribute towards SAA's ongoing Cost Compression Programme which had, at the time of its adoption, already yielded R300 million in savings for SAA in the 2013/2014 financial year (**p77**).

55.2 The Corporate Plan **(SAA Corporate Policy Bundle pp82 – 101)**: In its summary **(p 83)**, the Plan puts "primary emphasises on achieving and maintaining commercial sustainability". Some of the key initiatives and targets included the implementation of the Network and Fleet Plan, which was 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" **(p87)**.

55.3 The Comprehensive Network and Fleet Plan **(SAA Corporate Policy Bundle pp 289 – 397)**: In 2015, following a complete review and analysis of SAA's network and fleet by aviation experts, Royal HaskoningDHV, it was discovered that SAA had the wrong widebody fleet given the current economic (i.e. fuel costs) and competitive environment. As such it was found that the Airbus A330 aircraft would be a cost-effective alternate and thus ideal for SAA's substitution program. In turn, a detailed analysis of SAA's opportunities over the next three years showed that profitability could be restored by 2017 **(p 290)**. The accompanying Fleet Strategy document further emphasised, among other things, the replacement of the existing Airbuses **(SAA Corporate Policy Bundle pp 398-404)**. The Network and Fleet Plan was adopted not only by the board, but by an inter-ministerial committee chaired by then Deputy President Ramaphosa.

55.4 The 90-Day Action Plan (**SAA Corporate Policy Bundle pp 102 – 249)**: in this document, SAA sought to outline the key interventions required, as well as "high priority board driven interventions" **(pp104 – 105).**

OVERVIEW OF THE EVIDENCE

The plaintiffs' evidence

56 The plaintiffs called six witnesses:

56.1 Mr Nico Bezuidenhout, the former Acting CEO of SAA and current CEO of Mango;

56.2 Mr Sylvain Bosc, SAA's former General Manager: Commercial (also referred to as the Chief Commercial Officer) and now Senior Vice President, Europe at Qatar Airways;

56.3 Ms Thuli Mpshe, also a former SAA Acting CEO and General Manager: Human Resources, currently serving as the Acting General Manager: Human Capital (HR) at South African Express;

56.4 Mr Wolf Meyer, former Chief Financial Officer (CFO) of SAA and current CFO of Saudi Arabia Airlines;

56.5 Ms Avril Halstead, a top National Treasury official who previously served as the Chief Director for Sector Oversight, in which role she was responsible for overseeing SOEs;

56.6 Mr Carl Stein, a practising attorney, the author of a leading textbook on company law, and a respected expert on corporate governance.

57 The four former SAA executives testified in detail on their experiences working under Ms Myeni's leadership. They described a consistent pattern of obstruction and interference coupled with victimisation of any executive who dared to defy

her. They were all impressive, credible witnesses whose testimony was supported on each point by contemporaneous documents and correspondence.

58 In the cross-examination of these witnesses, Ms Myeni's counsel repeatedly failed to present a complete or consistent version. The limited version that was presented changed with each witness, and then again as Ms Myeni testified, as was repeatedly noted by the Court. As a consequence, much of the version belatedly divulged in Ms Myeni's testimony was not put to the plaintiffs' witnesses.

59 It is trite that if a defendant wishes to contradict the evidence of an opposing witness or to draw a negative inference or imputation about that witness, that version must be put to the witness in cross-examination to allow him or her an opportunity to respond. The failure to cross-examine fully can be fatal. In ***President of the Republic of South Africa v SARFU***,[27] the Constitutional Court explained these principles as follows:

> "*[61] The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness box, of giving any explanation open to the witness and of defending his or her character. <u>If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct</u>. This rule was enunciated by the House of Lords in Browne v Dunn and has been adopted and consistently followed by our courts."*
>
> *[62] The rule in Browne v Dunn is not merely one of professional practice but "is essential to fair play and fair dealing with witnesses".*

[27] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) at para 63.

> *It is still current in England] and has been adopted and followed in substantially the same form in the Commonwealth jurisdictions.*
>
> *[63] The precise nature of the imputation should be made clear to the witness so that it can be met and destroyed, particularly where the imputation relies upon inferences to be drawn from other evidence in the proceedings. It should be made clear not only that the evidence is to be challenged but also how it is to be challenged. This is so because the witness must be given an opportunity to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and to explain contradictions on which reliance is to be placed."*

60 As a result, Ms Myeni's failure to cross-examine the plaintiffs' witnesses on key issues and the failure to put a version means that the plaintiffs were entitled to assume that this evidence was largely unchallenged.

61 Furthermore, it was not open for Ms Myeni to attempt to attack the character and honesty of those witnesses in circumstances where those imputations had not previously been put to the witnesses.

Ms Myeni's evidence

62 Ms Myeni was the only witness to testify in her defence. Her evidence-in-chief was brief and cursory. It covered only a small portion of the serious allegations that have been levelled against her, leaving much of the plaintiffs' case untouched and therefore uncontested.

63 Ms Myeni portrayed herself as a "*corporate governance expert*" who had done no wrong. She also took no personal responsibility, claiming that at all times she acted "*as a collective*", despite her individual duties as a director, and her special duties as chairperson.

64 Under cross-examination, Ms Myeni was evasive and belligerent towards questions posed by both the Court and plaintiffs' counsel. She also perjured herself on more than one occasion. Ms Myeni's dishonest and misleading claims in these proceedings are addressed in greater detail below.

65 Despite this dishonesty, Ms Myeni made a number of material concessions in respect of *inter alia* her duties in relation to the shareholder, and her duties as outlined in SAA's MOI. For example:

65.1 Ms Myeni readily acknowledged that a non-executive chairperson has no role inserting herself into executive affairs. She testified that:

> "*The Chair of the Board's responsibility starts and ends at the Board … If I were to write to the executives, that means I would be getting into the terrain of the CEO … If I needed to communicate to the group … I needed to communicate through the CEO*"
>
> "*I am mindful of not getting into the space that is not mine*"[28]

65.2 She further acknowledged that it is not the role of the chairperson to be procuring or dealing with suppliers directly:

> *"SAA is amongst 15 other boards that I have served on … I know the role of a non-executive director. It is not the responsibility of a non-exec to find a company to do business with SAA. It is the role of the Board to develop policy …*"[29]

65.3 She acknowledged that existing Board resolutions and section 54(2) approvals could only be changed through a further Board resolution.[30]

65.4 She further emphasised that it would be improper for the Chairperson to sign significant correspondence on key decisions without Board approval:

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[28] Myeni 20.2.2020 [REF].
[29] Myeni 20.2.2020 [REF}.
[30] Myeni 21.2.2020 [REF]; 24.2.2020 [REF].

> *"I would not sign without making sure that this is aligned with decisions of the Board"*[31]

66 In her evidence and under cross-examination, Ms Myeni belatedly attempted to impugn several documents bearing her name and signature as being "fraudulent" and "suspicious". These documents were specifically the letter to the Board in October 2015 supporting the appointment of Quartile Capital as a transaction adviser **(Airbus Bundle vol 3 pp 208 – 210)** and signed documents in the section 54 application (**Airbus Bundle vol 4 pp 243 – 261; vol 8 pp 682 – 697**)

67 These allegations of fraud and fabrication were not put to any of the plaintiffs' witnesses. Moreover, these belated attempts to attack the veracity of documents in the plaintiffs' trial bundle was also in conflict with the agreement reached by the parties in the pre-trial minute.

68 The parties reached the following agreement on the status of these documents at the further pre-trial conference held on 16 October 2019 (**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.*

[31] Myeni 20.2.2020 [REF].

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."

69 No objection was raised to any of the documents contained in the plaintiffs' trial bundle prior to the commencement of the trial. The belated attempt to introduce objections to specific documents during the course of evidence is not permissible or in keeping with the parties' express agreement.

70 Accordingly, the admissibility of documents cannot now belatedly be attacked. The only issue for determination is what weight is to be attached to the impugned documents. In this regard, Ms Myeni presented no convincing evidence to support her claim that any of the documents in dispute were fraudulent.

THE EMIRATES DEAL

Overview

71 Since the mid-1990s, SAA and Emirates had a successful code-sharing deal. 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.

72 In January 2015, Emirates approached SAA with a proposal for an enhanced commercial relationship.[32] In this proposal, Emirates offered SAA an expanded code-sharing deal and an annual revenue guarantee of approximately USD100,000,000.00 (one hundred million US dollars), which would have supported SAA in operating a profitable daily service between Johannesburg and Dubai.

73 Emirates and SAA were due to conclude a non-binding Memorandum of Understanding (MoU), which would have paved the way for further negotiations of a legally binding deal.

74 The Emirates proposal and the MOU had wide-spread support within SAA. It was consistent with SAA's Long-Term Turnaround Strategy, the Corporate Plan and SAA's Network and Fleet Plan. It also had the approval of all the Board members, except for Ms Myeni.[33]

75 Ms Myeni was the sole voice in opposition to this deal. However, her reasons for opposing the deal changed constantly and do not withstand scrutiny. Over a nine-month period in 2015, Ms Myeni delayed and then ultimately scuttled the

[32] PoC p 27 para 70; Admitted Plea para 110 para 60.
[33] Bezuidenhout 04.02.20 [REF]; Bosc 05.02.20 [REF]; Meyer 14.02.20 [REF].

conclusion of the Emirates MoU, causing great harm and embarrassment to SAA.

76 The stand-out event in this pattern of obstruction was Ms Myeni's last-minute cancellation of the signing of the Emirates MoU in Paris on 16 June 2015. The Acting SAA CEO, Mr Nico Bezuidenhout, and other executives had travelled to Paris for the signing ceremony which had been widely publicised. It is common cause that Ms Myeni ordered Mr Bezuidenhout not to sign shortly before the ceremony.[34]

77 The evidence shows that in the early hours of 16 June 2015, Ms Myeni called Mr Bezuidenhout, ordered him not to go through with the deal, and told him that this was an instruction from President Zuma. This was followed by an SMS the next day repeating the instruction.

78 Following the abortive 16 June 2015 signing ceremony, Ms Myeni continued to block and delay the conclusion of the MOU. All of the executives responsible for negotiations with Emirates were also removed from their positions or forced out of SAA. Ms Myeni's obstruction and delays ultimately led to Emirates breaking off negotiations.

79 As a consequence of Ms Myeni's conduct, SAA lost out on a key opportunity to improve its turnover, at a time when it was functionally insolvent. Its reputation and relationship with the largest international airline was severely compromised.

[34] PoC p 30 para 84; Admitted Plea p 111 para 72.

The issues

80 The central question is whether Ms Myeni's efforts to block the signing of the non-binding MOU, including the events of 16 June 2015, give grounds for a finding of delinquency.

81 The plaintiffs allege that Ms Myeni intentionally or through gross negligence inflicted harm on SAA by obstructing the conclusion of the non-binding MOU, providing grounds for a finding of delinquency under section 162(5)(c)(iii) of the Companies Act. Her conduct also constituted the wilful or grossly negligent breach of her duties to act in good faith and for a proper purpose, to act in the best interests of SAA, and to exercise the required degree of skill, care and diligence. This provides further grounds for a finding of delinquency under sections 162(5)(c)(i) and 162(5)(c)(iv)(aa).[35]

82 There are four primary factual disputes:

82.1 First, the merits of the Emirates proposal and the value of the MOU;

82.2 Second, whether Ms Myeni had any valid reason for instructing Mr Bezuidenhout not to sign the non-binding MOU on 16 June 2015;

82.3 Third, the events of 16 June 2015;

82.4 Fourth, the consequences of Ms Myeni's actions in preventing the signing of the non-binding MOU.

[35] PoC pp 31 – 34 paras 88 – 89; Denied Plea pp 112 para 78 – 79.

Summary of the plaintiffs' evidence

83 Mr Bezuidenhout, Mr Bosc, Ms Mpshe, and Mr Meyer addressed the Emirates deal in their testimony. Their evidence was consistent, credible and was corroborated by a long chain of contemporaneous documents. Together this evidence is damning of Ms Myeni's conduct.

Background to the Emirates proposal

84 In 1995, SAA was the first international airline to enter into a code-sharing relationship with Emirates.[36] At the time, Emirates was a small operator. Over the decades, it has grown to be the largest international airline in the world.

85 As Emirates grew, so did the value of the code-sharing arrangement. It is common cause on the pleadings that this was one of the most profitable areas of SAA's business, generating profits of over R170 million per year.[37] SAA was able to purchase tickets on Emirates flights at reduced rates and to sell these on to its customers for significant gain.

86 As an "end-of-hemisphere" airline, SAA finds itself in a difficult position. Major international destinations are far away and SAA's international fleet consisted of gas-guzzling, four-engined Airbus A340-600 aircraft. SAA's direct flights to major destinations generally pass over the world's biggest travel hub, the Middle-East, which is home to major airlines such as Emirates, Etihad, and Turkish Airlines.

[36] Bezuidenhout 31.1.2020 [REF]; Bosc 5.2.2020 [REF]; 14 March 2015 Presentation, Emirates Bundle vol 2 p 106.
[37] PoC p 27 para 66; Admitted Plea p 109 para 57.

These airlines generally offer cheaper connecting flights, undercutting SAA's direct flights and luring away its passengers.[38]

87 These pressures were increased by the fact that the Department of Transport had granted Emirates a substantial number of weekly flight frequencies to and from South Africa. This was in terms of the bilateral agreements concluded between the UAE and South Africa. In 2010, at the time of the FIFA World Cup, the Department of Transport had increased Emirates' permitted flight frequencies from three weekly flights between Dubai and Johannesburg to four (the so-called "fourth frequency"). This meant that SAA faced stiffer competition on its international routes.

88 As a result of these circumstances, SAA was operating a substantial number of loss-making international routes, particularly to destinations in Asia. By 2013, the airline was losing approximately R300 million to R400 million per year on the Beijing route and approximately R150 million per year on the India route.

89 An enhanced code-sharing relationship between SAA and a Middle Eastern carrier was needed to allow SAA to cancel these loss-making routes, while still offering SAA passengers the ability to connect to destinations in Asia.

90 For this reason, the 2013 LTTS made it a key priority for SAA to "*cease loss making 'own metal services*" and to that end "*increase networks through code-*

[38] Bezuidenhout 31.1.2020 [REF]; Bosc 5.2.2020 [REF].

share relationships".[39] The reference to "own metal services" means SAA operating its own aircraft on routes.

91 Emirates was SAA's first choice partner for an expanded code-sharing relationship. However, Emirates was initially reluctant. Mr Bezuidenhout testified that this was due to a noticeable cooling in the relationship between SAA and Emirates as SAA had previously rebuffed Emirates' requests for greater cooperation and, in Mr Bezuidenhout's words, had shown Emirates "disrespect".[40]

92 SAA was initially forced to look elsewhere for a partner. In 2013, SAA entered into a code-sharing deal with Etihad, Emirate's chief rival, which operates out of Abu Dhabi, just 80km from Emirate's base in Dubai. SAA's first flights to Abu Dhabi commenced in 2015, allowing SAA to cancel its loss-making direct routes to Beijing and Mumbai. This deal made SAA the only airline in the world with a dual code-sharing arrangement with Emirates and Etihad.

93 Mr Bezuidenhout and Mr Bosc confirmed that Abu Dhabi was immediately a loss-making route. These losses were approximately R346 million per annum.[41] This helped to staunch the greater losses previously sustained on the now-cancelled Beijing and Mumbai routes, but it was still a significant drain on SAA's finances, in the order of R3 million per day. SAA urgently needed to staunch these losses.

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[39] Corporate Policy Bundle Vol 1 p 70.
[40] Bezuidenhout 31.1.2020 [REF].
[41] Network and Fleet Plan, Emirates Bundle p 59, table 5-5, first row.

The January 2015 proposal from Emirates

94 While the Etihad deal ran into difficulties, it had the advantage of renewing Emirates' interest in doing a deal with SAA.[42]

95 In mid-January 2015, Emirates approached SAA with the proposal for an enhanced code-sharing arrangement. A copy of this proposal appears in the **Emirates Bundle vol 3 pp 194.119**. This proposal was simultaneously forwarded to National Treasury.

96 Mr Bosc and Mr Bezuidenhout explained that SAA had two key "bargaining chips" going into the negotiations with Emirates. First, Emirates felt threatened by SAA's new code-sharing relationship with Etihad. Second, Emirates also sought SAA's support in ongoing litigation with the Department.[43]

97 In 2013, the DOT had sought to stop Emirate's fourth weekly flight to Johannesburg. At the time, SAA's then CEO, Monwabisi Kalawe, had made a complaint to the DOT over this fourth frequency, questioning the legality of this arrangement. Emirates obtained an interdict to keep the fourth frequency, but the Department of Transport was threatening to appeal.

98 While Emirates sought SAA's support over the fourth frequency, Mr Bezuidenhout, Mr Bosc, Ms Mpshe and Mr Meyer were at pains to emphasise that SAA had no legal power to determine existing route rights or to determine

[42] Bezuidenhout 31.1.2020 [REF].
[43] Bezuidenhout 31.1.2020 [REF]; Bosc 5.2.2020 [REF].

the course of the Department's litigation. At most, SAA could consult with the Department, but it could not dictate outcomes.[44]

The benefits of the Emirates proposal

99 The Emirates proposal offered a range of benefits for SAA. It was modelled on the deal between Emirates and Qantas, another end-of-hemisphere carrier, which had helped to turn that airline around. The key benefit was that Emirates offered SAA an annual minimum revenue guarantee, which was a guaranteed income for SAA to sustain a new route from Johannesburg to Dubai.

100 The Emirates proposal[45] and SAA's own modelling[46] predicted that the minimum revenue guarantee would amount to approximately USD100 million annually, approximately R1,5 billion per annum at prevailing exchange rates at the time.

101 Additionally, Emirates was willing to offer a range of other significant strategic benefits to SAA, including: (a) the ability to code-share on "non-trunk" routes, meaning Emirates flights from Dubai to other destinations in Europe and Asia; (b) the establishment of secondment opportunities for SAA pilots and other staff; (c) training exchanges; (d) assistance with network planning; and (e) potential employment for SAA employees who were facing possible retrenchment at the time. These benefits were all reflected in the draft MOU, as appears at clauses 1 and 2 in **Emirates vol 2 pp 135 – 145**.

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[44] Bezuidenhout 31.1.2020 [REF] ; 3.2.2020 [REF], 4.2.2020 [REF] ; Bosc 5.2.2020 [REF] ; 6.2.2020 [REF].
[45] Emirates Bundle Vol 3 pp 194.119 - 194.133
[46] Emirates Bundle Vol 3 pp194.4 - 194.13; Bosc 6.2.2020 [REF] PM.

102 Mr Bosc and Mr Bezuidenhout further testified that this relationship would have allowed SAA to cancel its loss-making route to Abu Dhabi far sooner.[47]

The Board was apprised of the Emirates proposal

103 Mr Bosc was tasked with leading the discussions with Emirates and drafting the initial memorandum of understanding (MOU).

104 Mr Bezuidenhout, Mr Bosc and Mr Meyer confirmed that the SAA Board was made aware of the Emirates proposal as soon as the proposal was received.[48]

105 The plaintiffs' witnesses testified that, in ordinary circumstances, the negotiation of a non-binding MOU would have been a strictly operational matter, to be handled by the SAA executive. Board involvement would only be required at the final stages of approving a binding agreement, after negotiations had been concluded. This was in terms of SAA's Delegation of Authority Framework, which will be addressed in more detail below. The plaintiffs' witnesses stated that this was confirmed repeatedly by Mr Tony Dixon, the Board's resident governance expert, who emphasised that negotiations with Emirates and the conclusion of a non-binding MOU did not need any Board approval.[49] Mr Dixon was due to testify in this trial, but sadly passed away in December 2019, shortly before the trial was due to commence.

[47] Bezuidenhout 05.02.20 [REF]; Bosc 06.02.20 [REF].
[48] Bezuidenhout 31.1.2020 [REF], 3.2.2020 [REF]; Bosc 5.2.2020 [REF].
[49] Bezuidenhout 3.2.2020 [REF]; Bosc 5.2.2020 [REF].

106 While Board approval was not required as a matter of law, Mr Bezuidenhout nevertheless wished to keep the Board apprised of developments on the Emirates deal, given its importance to the airline and the widespread coverage that it would receive.

107 The conclusion of a non-binding MOU is also a matter that does not require the approval of the shareholder, who at the time was the Minister of Finance. It is common cause on the pleadings that "*[o]n or about 15 February 2015, the Minister of Finance informed Emirates, who in turn informed SAA, that the National Treasury regarded the Emirates proposal as an operational matter in which the executive branch of government could not interfere.*"[50]

Alignment with governance documents

108 While the discussions with Emirates were continuing, SAA was also in the process of preparing its revised Network and Fleet Plan. This was developed with the help of an external consultancy, Royal Haskoning DHV, also known as Intervistas, a leading international expert on these matters. A draft Network and Fleet Plan was prepared in February 2015[51] and the final Network and Fleet Plan was approved on 2 April 2015.[52]

109 The Network and Fleet Plan specifically recommended an enhanced code-sharing arrangement with Emirates.

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[50] PoC p 29 para 73; Admitted Plea p 110 para 61.
[51] Emirates Bundle pp14 – 99.
[52] Corporate Policy Bundle pp 265-397.

109.1 Its recommendations included that SAA add a daily Johannesburg-Dubai route with A340-600 aircraft and expand the code-share alliance with Emirates **(Emirates Bundle Vol 1 p 66)**.

109.2 This recommendation was based on various scenarios and tables set out at **Emirates Bundle Vol 1 pp 55, 58 and 59**, which predicted increased profits of between R123.1 and R181 million per annum from this proposal.

110 On 14 March 2015, Mr Bosc gave a presentation to the SAA Board on the revised SAA Network and Fleet plan. In doing so, he also presented the Emirates proposal to the Board and its advantages. A copy of the presentation appears in **Emirates Bundle Vol 1 pp 100 – 112**.

111 On 2 April 2015, the Board approved the Network and Fleet Plan. A copy of Resolution No 2015/B15, certified by the Acting Company Secretary, Ms Mabana Makhakhe, appears at **Emirates Bundle vol 2 pp 117**.

112 Mr Bosc and Ms Mpshe both testified that they regarded this approval of the Network and Fleet Plan as an approval for the executive and management to pursue an enhanced code-sharing arrangement with Emirates, as recommended in the Network and Fleet Plan.[53]

113 One of the conditions of this approval was that "*an engagement [be] scheduled for the Board with Emirates, after a revised Memorandum of Understanding has been disturbed [sic] to the Board for review"* (**Emirates Bundle vol 2 pp 117**).

[53] Bosc 5.2.2020 [REF]; Mpshe 10.2.2020 [REF].

114 While this resolution refers to a meeting between Emirates and the Board, Mr Bezuidenhout and Mr Bosc testified that it was Ms Myeni who personally insisted on this meeting.[54] They testified that this was highly unusual for a non-executive chairperson to seek to be involved in operational affairs, but they nevertheless acceded to this request and begun making plans with Emirates for a meeting.

Ms Myeni fails to attend meetings with Emirates

115 Two separate meetings were scheduled, but Ms Myeni stood up Emirates on each occasion.

116 The first of these meetings was planned for 5 May 2015. Arrangements were made for Ms Myeni to travel to Dubai to meet with the Sir Tim Clark, President and CEO of Emirates, and the Chairperson of Emirates, Sheikh Ahmed bin Saeed Al Maktoum ("Al Maktoum"), the uncle of Dubai's ruler.

117 This meeting was timed to coincide with the Arabian Travel Market, one of the biggest events on the international aviation calendar. Mr Bezuidenhout testified that he hoped to have concluded a non-binding MOU with Emirates at this event, as it offered an opportunity for SAA to attract substantial publicity.

118 Despite accepting the invitation to this meeting, Ms Myeni cancelled at the last minute. Mr Bezuidenhout testified that Ms Myeni called him shortly before she was scheduled to travel to Dubai and asked him to tell Sheikh Al Maktoum that she was sick.[55]

[54] Bezuidenhout 03.02.20; Bosc 05.02.20 [REF].
[55] Bezuidenhout 31.1.2020 [REF].

119 On 4 May 2015, the day before the scheduled meeting, Myeni wrote a letter to Sheikh Al Maktoum, which appears in the **Emirates Bundle Vol 2 p 117.40**. She said that she would not be travelling to Dubai for the Travel Market due to unspecified "*unforeseen circumstances*".

120 In her testimony, Ms Myeni failed to elaborate on her reasons for not attending this meeting. She simply claimed that "*some commitments emerged*" and that she had "*pressing commitments*".[56] She later claimed that she had unspecified health problems, but no further elaboration was provided.[57]

121 To add to the embarrassment, Ms Myeni's letter proceeded to confuse the Chairman of Emirates, Sheikh Ahmed bin Saeed Al Maktoum, with the Ruler of Dubai, Sheikh Mohammed bin Rashid Al Maktoum Maktoum. Her letter stated that she planned to attend a meeting with Sheikh Al Maktoum when he would be in South Africa for a meeting with King Goodwill Zwelithini (**Emirates Bundle Vol 2 p 117.40**). This appeared to be a reference to a scheduled meeting between King Zwelithini and the Ruler of Dubai, not the Chairperson of Emirates.[58]

122 Mr Bosc and Mr Bezuidenhout proceeded to the Arabian Travel Market and had a courtesy visit with the CEO and the Chairman of Emirates. In their evidence, they noted the deeply awkward and difficult position that Ms Myeni placed them in.[59] It was no simple matter for SAA to obtain a meeting with the CEO and

[56] Myeni 20.2.2020 [REF].
[57] Myeni 26.2.2020 [REF[.
[58] Bezuidenhout 3.2.2020 [REF];
[59] Bezuidenhout 31.1.2020 / 3.2.2020 [REF]; Bosc 5.2.2020 [REF].

Chairperson of largest international airline in the world. To cancel such a meeting at the last minutes was highly disrespectful.

123 The second opportunity was a planned meeting on 12 May 2015 in Cape Town. The President and CEO of Emirates, Sir Clark, had personally sent an invitation to Ms Myeni to attend this meeting in Cape Town. Mr Bezuidenhout again reminded Ms Myeni of this invitation of the day of the meeting, as appears from his email to the Board at **Emirates Bundle vol 2 pp 117.45**:

> *"The Emirates CEO and President welcomed the opportunity to engage with the SAA Board and proposed that he extend an invitation to the Board to attend a dinner, now confirmed and scheduled for 12 May 2015 in Cape Town and to be attended by the SA Minister of Transport (the invitation is in the Chairperson mailbox and attached below)"*

124 Again, Ms Myeni failed to attend the meeting. The other non-executive Board members also failed to attend. Mr Dixon was the only non-executive director to tender his apologies in advance, due to genuine ill-health. The meeting proceeded as a meeting between the two airlines' executive teams.

The draft MOU

125 On 2 May 2015, the draft non-binding MoU was circulated to the SAA Board. A copy of the draft MoU appears at **Emirates Bundle vol 2 pp 135 – 145**. Mr Bezuidenhout and Mr Bosc explained that this version of the draft MoU incorporated minor edits and changes, but was materially similar to the draft circulated on 2 May 2015.

126 This draft MOU was explicitly made non-binding, as appears from clause 5C (**Emirates Bundle vol 2 p 145)**. As described by Mr Bosc, it was a "framework" to guide further negotiations, leading to a suite of binding agreements.

127 Despite its non-binding nature, Mr Bezuidenhout explained that the conclusion of this MOU was a matter of profound importance for SAA.[60]

127.1 First, this was the necessary first step towards reaching a final agreement, which would give SAA its full package of benefits, including the annual revenue guarantee of approximately USD100 million.

127.2 Second, the MOU would also pave the way towards allowing SAA to terminate its loss-making Abu Dhabi route and to replace this with a profitable Dubai route, securing savings of up to R3 million per day.

127.3 Third, a MOU with the world's biggest international airline would have given SAA a massive reputational boost in the global aviation industry. Mr Bezuidenhout explained that this was particularly important to give SAA an advantage in its negotiations with big banks and financiers over the planned recapitalisation of SAA. He testified that to take a credible financial plan to financiers, SAA needed the Emirates MOU to show concrete proof of its efforts to turn the airline around.

[60] Bezuidenhout 31.1.2020,

Further engagement with the Board

128 On 27 and 28 May 2018, the Board held a special meeting to discuss the Emirates MOU.

128.1 Mr Bezuidenhout circulated a presentation to guide the board's discussion, which appears in the **Emirates Bundle vol 2 at pp 117.119 – 117.132**.

128.2 During this board session, an email from Mr Nick Linnell was tabled by Ms Myeni, raising legal questions about the MoU. Mr Linnell is a non-practicing attorney who was hired by Ms Myeni to advise the Board, despite SAA having a fully competent legal advisory panel. A copy of Mr Linell's e-mail to Myeni, dated 27 May 2015, with comments on the Emirates proposal appears in the **Emirates Bundle vol 2 at pp 119 – 122.** Mr Linell raised no legal objections to the MOU. His email specifically states that "*although the MOU is not legally binding it carries relationship and reputational risks if not pursued … without good reason."* (**p 120, lines 3 - 4, ellipses in the original**).

128.3 An internal SAA legal opinion, prepared by SAA's legal advisory panel, had already been obtained, which indicated that the MOU itself had no binding legal effect. The legal opinions are in **Emirates Bundle vol 3 pp 194.163 - 194.167.**

129 On 28 May 2015, a further Board meeting was held to discuss the MoU. A signed extract of the Board minutes, certified by the Company Secretary, Ms Kibuuka, appears at **Emirates Bundle vol 2 p 123B.** As is reflected in these minutes:

129.1 Mr Bezuidenhout briefed the Board on further developments with the MoU.

129.2 The executive was accused of delays in submitting the draft MoU to the SAA Board and a lack of transparency about the MOU.

129.3 However, Mr Bezuidenhout explained that the Emirates proposal had been discussed extensively by the Board on 14 March 2015 and that the revised MoU was circulated to the Board members on 2 May 2015, following further negotiations with Emirates.

129.4 The minutes further record that Mr Dixon again expressed his "*in principle support for the proposed relationship*" and he made the further telling observation that "*the delay was in fact on the part of the Board who received the MOU on 2 May 2015 and failed to provide comments to management.*"

129.5 These minutes concluded by recording that *"[t]he Chairperson of the Board undertook to provide her decision by 9 June 2015 and no resolution was taken on the matter*".

130 As a matter of law and corporate governance, the Chairperson's approval was not required for the conclusion of the MOU. However, Mr Bezuidenhout testified that he deferred to Ms Myeni as he wished to have the Board's support on such a major deal. Mr Bezuidenhout further testified that Ms Myeni had created a climate of fear, as executives who crossed her were subjected to disciplinary proceedings and victimisation.[61]

[61] Bezuidenhout 3.2.2020 [REF].

131 Having undertaken to give a decision by 9 June 2015, Ms Myeni then sought to create a further obstacle to the conclusion of the MOU.

132 On 30 May 2015, Ms Myeni emailed the Board and the executive proposing the creation of an "Operation Review Committee" (also referred to in the documents as the "EK Advisory Board"), to be made up of a list of middle-managers who she had hand-picked. A copy of this email appears in **Emirates vol 2 p 146.2 – 146.3.**

132.1 Ms Myeni's justification for the creation of this committee is telling:

> *"Following Board discussion as well as the need to speed up the approval of the Emirates Proposal, I have recommended to the CEO that we engage other very senior employees of SAA, to look at the Emirates deal and advise me or us independently."*

132.2 In this passage, Ms Myeni made it clear that she had personally come up with this idea for a committee and that its purpose was to "*advise me or us independently*". Mr Meyer confirmed that he and the Board had not been consulted on the creation of this committee.[62]

132.3 Ms Myeni instructed that the committee's terms of reference were the following:

- "*Assess the proposal and advise us of SAAs Benefit on the deal in pure financial terms*
- *To Assess how this deal will assist SAA in growing business in South Africa and Africa.*
- *Risks not mentioned on the MOU or any document re Emirates and their interest in South Africa.*
- *History of our relationship and it's benefit then and now.*
- *Value proposition in relation to guaranteed revenues- risk Associated with this.*

[62] Meyer 14.2.2020 [REF].

- *Risk of Not taking Emirates as our partner. What are we going to loose?*
- *Etihad - how will we deal with them when they get to know we work with Emirates*
- *While the proposal focusses on pure business and commercial relationship, is the proposal iin* (SIC) *the best interest of SAA or more in Emirates terms and Favour*";

132.4 Ms Myeni was clearly aware of the urgency, as she claimed that his committee would somehow "*speed up the approva*l". Given the urgency, Ms Myeni specifically set a timeline for the committee's report of "*Tuesday or Wednesday next week*", being 3 June 2015.

133 Mr Bosc, Mr Meyer and Mr Bezuidenhout testified on the highly irregular nature of Ms Myeni's conduct in establishing this committee. It is unusual for a non-executive chairperson to constitute his or her own committee. It was even more irregular to constitute a team of middle-managers to second-guess decisions that had already been taken by the executive committee (EXCO).[63]

134 On 3 June 2015, the Operational Review Committee produced its recommendation, which fully supported the conclusion of the Emirates MOU. A copy of the Operational Review Committee's submissions appears at **Emirates Bundle p 130 – 134,** accompanied by minor changes to the MoU at **pp 135 – 145**.

134.1 Its report repeated the findings reflected in the Network and Fleet Plan that the enhanced Emirates code-sharing arrangement would result in significant increases in revenue for SAA (**p 131 para 3(a)**)

[63] Bezuidenhout 03.02.20; 05.02.20 [REF] ; Bosc [REF]; Meyer [REF].

134.2 The Operational Review Committee also emphasised that the Emirates proposal would assist in growing business in South African and Africa**.** The submissions stated **at p 131 para 3(b)**):

> *"It is envisaged that Emirates will place its code on SAA's metal with SAA reciprocating on Emirates' network. The benefits to this level of cooperation are tangible and significant. The SAA network will grow exponentially and become more marketable through access to the Emirates network. The growth to SAA's Johannesburg hub (and consequently its operations as well as those of SA Express through the increased passenger traffic) will be of great benefit to SAA's domestic, regional and international markets. SAA's South American operations, for instance, would benefit from increased passenger traffic flows resulting in the opening of additional destinations. The proposed Stategic Cooperation will also provide SAA with the opportunity to align Emirates' schedule with its own thus generating additional options for passengers through possibilities such as the combination of itineraries between the two airlines."* (Emphasis added)

134.3 Under the heading "*Risks in not taking this offer. What are we going to lose?*" the Operational Review Committee stated at **p 132 para 3(f)**:

> "*The most significant risk lies with losing the opportunity to access the significant commercial and operational benefits extrapolated above. SAA would lose the opportunity to conclude a strategic partnership with the partner identified as the best option to its approved network plan (which simulated and compared how Emirates, Etihad, EgyptAir, and Turkish could benefit SAA's bottom line). The proposed Strategic Cooperation with Emirates would comply with the identified recommendation in the Long Term Turnaround Strategy for SA to establish a mid-hemisphere hub. The Emirates network out of Dubai is unrivalled and would provide SAA with access to a greatly increased number of connection points*." (Emphasis added)

134.4 Under the heading "RECOMMENDATION" the committee concluded that "*Having regard to the above, it is recommended that the Board notes the responses of the Advisory Board and approves the conclusion of the MOU".*

135 On 7 June 2015, Mr Bezuidenhout sent a set of consolidated submissions to the Board on the Emirates deal, attaching the Operational Review Committee's report, an updated MOU, legal reviews, and a report prepared by Deloitte. His submissions appear at **Emirates Bundle vol 2 pp 151 – 152** and the attachments appear at **Emirates Bundle vol 3 pp 194.152 – 194.220.** There was no response from Ms Myeni.

136 On 10 June 2015, Mr Bezuidenhout travelled to Miami for the IATA AGM. He testified that this was another missed opportunity to conclude the Emirates MOU at a major international aviation event, but Ms Myeni had still not provided her decision.[64]

137 On 11 June 2015, Mr Bezuidenhout sent a further email to the Board requesting any feedback on the draft MOU. A copy of his email appears at **Emirates Bundle vol 2 pp 150.** He pleaded with the Board for a response: "*Please may I also request, subsequent to the submission [sent] on 7 June 2015, whether any other concerns exist from the Board?*"

138 Mr Bezuidenhout's email also referred to a SMS from Ms Myeni, in which she requested to meet with the Operational Review Committee. He stated "*I acknowledge your formal request, received via SMS, for you to meet with the SAA Operational team who did the review of the MOU and supported its signature. Is it possible for you to have the meeting after the Supplier Development engagement tomorrow?*". Mr Bezuidenhout further testified in

[64] Bezuidenhout 3.2.2020 [REF].

cross-examination that Ms Myeni refused to attend the meeting with the Operational Review Committee the following day, as she claimed that she was too busy.[65] This was corroborated in Mr Bezuidenhout's later email to the Board on 20 June 2015, which recorded Ms Myeni's refusal to attend the meeting **(Emirates vol 2 p 197**).

139 Mr Bezuidenhout, Mr Bosc and Mr Meyer testified that after the 11 June 2015 email there were no objections from the Board regarding the Emirates MoU.

140 At that time, there were only four non-executive board members: Ms Myeni, Ms Kwinana, Mr Tony Dixon and Dr John Tambi. Dr Tambi, Mr Dixon and Ms Kwinana had all indicated that they had no objections to the MoU, as had Mr Wolf Meyer, the CFO. Ms Myeni was the only hold-out. Mr Bezuidenhout later recorded the approvals received from the other Board members in an email to the Board on 20 June 2015. A copy appears at **Emirates Bundle vol 2 p 164 – 169**.

140.1 Mr Dixon had formally recorded his approval in the Board minutes of 28 May 2015 (**Emirates vol 2 p 123B**);

140.2 Dr Tambi confirmed his approval on 9 May 2015 (**Emirates vol 2 p 167**);

140.3 Ms Kwinana confirmed her approval on 12 June 2015, during a discussion with Mr Bezuidenhout at a SAA Supplier day (**Emirates vol 2 p 167**).

[65] Bezuidenhout 4.2.2020 [REF].

141 Under cross-examination, Ms Myeni claimed to have no knowledge of the attitude of the other Board members. She claimed that if the other Board members approved then she would have approved too. However, when she was repeatedly asked to explain what she did to contact other Board members and to canvass their views, Ms Myeni provided no response.[66]

The events of 16 June 2015: The Paris Air Show

142 SAA had a major opportunity to conclude the non-binding MOU at the Paris Air Show on 16 June 2015. This is one of the premier events in the international aviation calendar and offered SAA a valuable opportunity to publicise its deal with Emirates to the international aviation industry and the international media.

143 Ms Myeni herself acknowledged the importance of this event, stating that "*[These are] big gatherings, global gatherings … some airlines use that event to sign big partnership agreements. Emirates is a big global player, it is loved in the global aviation space. This was going to be a big milestone for SAA*".[67]

144 Ms Myeni further acknowledged that she knew well in advance about the plans to sign the Emirates MOU at this event.[68] At Ms Myeni's request, Mr Bezuidenhout had arranged an invitation for her to travel to Paris to attend the air show. However, on or about 13 and 14 June 2015, the Chair advised that her travel plans had changed and that she could not travel to Paris.[69]

[66] Myeni 26.2.2020 [REF – morning].
[67] Myeni 20.2.2020 [REF].
[68] Myeni 20.02.20; 25.02.20 [REF].
[69] Bezuidenhout 03.02.20 [REF]; Bosc 05.02.20 [REF].

145 The signing ceremony for the non-binding MOU was scheduled to take place on the morning of 16 June 2015 at the Four Seasons Hotel George V in Paris. The Emirates President and CEO, Sir Clark, was to sign on behalf of Emirates. The international media had been invited to the event, which was designed to be a showcase for both airlines.

146 On 15 June 2015, Mr Bezuidenhout, Mr Bosc and Mr Meyer arrived in Paris ahead of the signing ceremony the next day. That afternoon, Mr Bezuidenhout and Mr Bosc met with Emirates representatives. Mr Bezuidenhout advised Emirates that Ms Myeni had still not given her express approval and that he did not want contradict the Chair on the matter. Emirates advised that they would escalate the matter to the "highest office" in South Africa as they felt that SAA had not acted in good faith and had not presented any good reason for not signing the non-binding MoU. Emirates further advised that the failure to make any further progress not only threatened the value proposition for SAA, but would force them to reconsider their existing relationship with SAA (noting that this meant R170m per year to SAA in current profits), as well as re-considering the strategic cooperation agreement signed with Emirates by the Minister of Tourism earlier in May 2015.[70]

147 Mr Bezuidenhout testified that during the early hours of 16 June 2015, he received a call from Ms Myeni in which she stated that there was an instruction from the President not to sign the Emirates MOU.[71] Mr Meyer testified that he was with Mr Bezuidenhout outside the hotel at the time that he received the call

[70] Bezuidenhout 03.02.20 [REF]; Bosc 05.02.20 [REF].
[71] Bezuidenhout 3.2.2020 [REF]; Meyer 14.2.2020 [REF].

and that Mr Bezuidenhout had placed the call on speakerphone. Mr Meyer corroborated Mr Bezuidenhout's evidence of the content of the call.[72]

148 On the morning of 16 June 2015, shortly before the signing ceremony, Ms Myeni again repeated the instruction not to sign. She sent a SMS to Mr Bezuidenhout's wife, again instructing Mr Bezuidenhout not to sign the non-binding MoU. A copy of this SMS appears at **Emirates Bundle vol 2 p 117A**. In her testimony, Ms Myeni admitted sending this SMS.[73] It stated:

> "*Morning Glynis. Hope u are all well. Another call came through 3 mins ago. We do not approve signing any Non-Binding MOU. No approval is given on any commitment on this matter. Best regards."*

149 Mr Bezuidenhout, Mr Bosc and Mr Meyer all testified that they interpreted the reference to "we" in this SMS as a reference to the President. The other Board members had all expressed their approval for the signing of the MOU. Mr Meyer further confirmed that Ms Myeni had taken no steps to consult with him or other SAA Board members before issuing this instruction.[74] As a result, this could not have been an instruction from the Board.

150 On arriving at the hotel, Mr Bezuidenhout took Sir Clark aside and advised him of the latest instruction and that he did not have full Ms Myeni's concurrence on the execution of the MoU. Although irritated by the last minute cancellation, Sir Clark was gracious and told Mr Bezuidenhout that he felt sorry for the SAA team, whose efforts to improve SAA's situation were being hampered.[75]

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[72] Meyer 14.2.2020 [REF].
[73] Myeni 20.02.20 [REF]
[74] Meyer 14.2.2020 [REF].
[75] Bezuidenhout 3.2.2020 [REF].

151 In cross-examination, Mr Bezuidenhout, Mr Bosc and Mr Meyer were questioned on why they did not go ahead to sign the MOU if no Board resolution was required to approve the MOU. Mr Bezuidenhout testified that he was unwilling to defy a direct instruction from the chairperson, particularly given that fact that Ms Myeni had invoked the name of the President and her history of victimising executives who stood in her way.[76] Clause 13.3.3 of the SAA MOI also requires the CEO to follow any instructions from the Board:

> *"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**).

152 Mr Meyer further testified that Mr Bezuidenhout could not be seen to be disobeying direct instructions of the chairperson. This reluctance to disobey Ms Myeni's direct instructions was also echoed by Ms Mpshe.[77]

153 As a result, SAA and Emirates were forced to call off the signing ceremony. Mr Bezuidenhout, Mr Bosc and Mr Meyer all described this as one of the most embarrassing moments of their professional careers. This was also a national embarrassment that was widely reported in the media at the time.

154 The consequence was that SAA not only failed to conclude the MOU, but it also hampered its relationship with Etihad, which was now alerted to the fact that SAA was considering a new deal with Emirates.[78] Mr Bosc testified that this also

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[76] Bezuidenhout 04.02.20 [REF].
[77] Mpshe 10.02.20 [REF].
[78] Bosc 6.2.2020 [REF].

harmed SAA's relationship with other partners, including Lufthansa. In his words, SAA was now seen as a "headless chicken" by its code-share partners.[79] As a consequence, SAA gained none of the benefits of the Emirates deal but suffered all the reputational harms.

The fallout after 16 June 2015

155 The South African media caught wind of the failed deal with Emirates and, on 19 June 2015, a journalist from the Sunday Times contacted SAA, National Treasury and Ms Myeni seeking a response.

156 On 20 June 2015, Mr Bezuidenhout authored an email that addressed the media leak. The email included a comprehensive chronological list of events, including Ms Myeni's instruction not to sign the MoU on 16 June 2015. It appears in **Emirates Bundle pp 164 – 169**. We return to address the contents of this email in greater detail below. For the moment, we point out that Ms Myeni made no attempt to contest the facts recorded here, either at the time or in her testimony.

3 July 2015 meeting

157 On 30 June 2015, Mr Parsons (both Chief Strategy Officer, and Executive in the Chairperson's Office) sent an email indicating that Ms Myeni wanted to meet with the Operational Review Committee. A copy of this email appears at **Emirates Bundle vol 3 pp 179 – 180.**

[79] Bosc 6.2.2020 [REF].

158 On 3 July 2015, the Chair held a meeting with the Operational Review Committee. Mr Bosc scribed notes on the meeting, directly after the meeting, from memory, which appear at **Emirates Bundle vol 3 pp 187 - 188**. Mr Bosc testified that the Chair brought unidentified armed guards to the meeting who confiscated all attendees' mobile phones and laptops before the meeting had started. At the end of the meeting, the Chair instructed her guards to confiscate all the written notes taken by attendees, except the Company Secretary.[80]

159 Mr Bosc testified that Ms Myeni spoke at length at this meeting, stating many facts that were untrue. When Mr Bosc tried to interject, the Chair told him to keep quiet or to leave. Mr Bosc testified that he then kept silent for the duration of the meeting. Mr Bosc recorded that Ms Myeni raised the following objections, which he responded to in detail in his notes:

- *"SAA does not have an African Strategy"*
- *"SAA never engaged with DoT on the matter (Emirates), and the Minister was concerned"*
- *"The MoU was received by SAA's Management in January 2015, but was hidden away from the Board until recently (at that time, which was 3 July 2015"*
- *"Equity talks were sneaked into the MoU"*
- *"SAA hired a consultant to work on the matter"*
- *"The Chair was summoned to meet with an Emirates Chairperson, but did not understand why"*

160 An "Action List" was formulated from the 3 July 2015 meeting, with tasks assigned to different SAA officials and board members. A copy of this Action List appears at **Emirates Bundle vol 2 pp 181 – 186**, reflecting Mr Bosc's comments

[80] Bosc 5.2.2019 [REF].

on the Emirates deal at **p 183.** Mr Bosc testified that Ms Myeni had insisted that three further steps be followed:

> *"• SAA Emirates Review Team should organize a meeting with Emirates after the meeting with the Board and DoT.*
>
> *• The Emirates Team should also meet with the Board*
>
> *• It should also be arranged that the Chairperson of the SAA Board meet with the Chairperson of Emirates."*

161 Mr Bosc testified that these action items were nonsensical. It would be an embarrassment for the Operational Review Committee, as a group of middle-managers, to now meet with Emirates following months of negotiations. The requirement that the Chairperson should meet with the Chairperson of Emirates also made little sense, particularly as Ms Myeni had previously stood him up on 5 May 2015. Mr Bosc made his objections known at **Emirates Bundle vol 2 p 183:**

> *"GM Commercial will gladly arrange another meeting between Emirates Chairperson and SAA Board, subject to both parties' busy schedule.*
>
> *Guidance is requested as to what would be the mandate and purpose*
>
> *of the "Emirates Review Team" to meet with Emirates Team. The MoU has already been amended following the input of the Chair-appointed: Review Team and no further changes have been suggested since then.*
>
> *It would also be hard to justify to Emirates that a team of subordinates be appointed to start negotiations anew, undermining and denying existing leadership mandates (given the fact that SAA's Manco has already approved the non-binding MOU and progressed with the EK team towards its gradual implementation and transcription into a suite of binding agreements. It is feared that the proposed engagement may irremediably damage SAA's leadership credibility and potentially compromise the finalization of this matter.*"

162 On 7 July 2015, Mr Bosc later emailed the action list to Mr Bezuidenhout, indicating that he had tried to answer the tasks assigned to him as best as he could, but that most were "pointless". These action items were simply a repeat of work that had already been done. He also informed Mr Bezuidenhout of the Chair's unethical and unprofessional behaviour at the meeting on 3 July 2015. A copy of his email to Mr Bezuidenhout appears at **Emirates Bundle vol 2 p 194.**

The further attempts to seek Ms Myeni's approval

163 On 6 July 2015, Mr Bezuidenhout attempted to circulate a round-robin resolution to the Board seeking approval for the signing of the MOU. This round-robin was accompanied by a detailed set of submissions, setting out the history of the negotiations, the merits of the proposal, and responses to concerns that had been raised. It also attached the latest version of the MOU. This resolution and the accompanying submissions appear at **Emirates vol 2 pp 191A – 191A** and the accompanying MOU appears at **Emirates vol 2 pp 192A – 192H**.

164 That same day, on 6 July 2015, Ms Myeni blocked the attempt to circulate this round-robin and the submissions to the Board. In her email, appearing at **Emirates vol 2 p 192**, she stated:

> *"Dear Acting CEO*
>
> *There is a very clear plan which was communicated with everyone.*
>
> *Barry wrote down items that were meant to be CEO And Chairperson one on one discussion items. I never asked him nor give him instructions on Emirates to send a round robin for Board Approval at all.*
>
> *We will follow the steps as per the attached action list."*

165 The reference to the "action list" was the list of items emanating from the 3 July 2015 meeting, described above, which insisted on various meetings being held before any further action could be taken on the MOU.

166 Having blocked the round-robin resolution, the submissions were then included in the Board packs for the Board's next meeting on 10 July 2015.

The 10 July 2015 meeting

167 The Board met again on 10 July 2015. The minutes are at **Emirates Bundle p 194.222 – 194.223.** Item 4.4 on **p 194.223** concerns Emirates. A complete set of minutes was later introduced into evidence, which appear at **Emirates Bundle p194.222 – 194.230.** Under Item 4.4 it was recorded that:

> "*The Board confirmed that it was satisfied with the draft non-binding Emirates Memorandum of Understanding (MoU) and concluded that the next process as outlined In the action list from the meeting held on Friday 03 July 2015 with the Emirates Operational Review Team should be followed.*"

168 No resolution was taken on this matter. The action list of 3 July 2015 was attached as annexure A to the minutes. This again repeated that the Operational Review Committee was to meet with the Emirates, the DOT and the Board. It again required that a further meeting be arranged between Ms Myeni and the Chairperson of Emirates. Far from being a greenlight to conclude the MOU, as Ms Myeni now claims, this merely placed further hurdles in the way of concluding the Emirates MOU.

169 At no time did Ms Myeni ever revoke her instruction to Mr Bezuidenhout not to sign the MOU, nor did she ever tell the SAA executives that they were free to sign.[81]

170 On 13 July 2015, Mr Soga emailed Mr Bezuidenhout, indicating that his 6 July 2015 submission to the Board had been included in the board pack but had not been considered at the Board meeting on 10 July 2015. He then requested that Mr Bezuidenhout approve the submissions so that they could be circulated again to the Board for approval on a round-robin basis. A copy of Mr Soga's email appears at **Emirates Bundle vol 3 pp 203 – 204**.

171 This email was sent to Mr Bezuidenhout at the end of his tenure, shortly before he went back to Mango. As a result, the Board submissions were not circulated. Mr Bosc followed this up on this on 5 August 2015 in an email to the then Acting CEO, Ms Thuli Mpshe. A copy appears at **Emirates Bundle pp 203**. Mr Bosc stated:

> *"This one fell through the cracks [in reference to the email to Mr Bezuidenhout] … We have ample capacity sitting on the ground all day and a profitable option to use our resources but this is all being blocked by the fact that the Board hasn't considered our submission. Can you please request CoSec [the Company Secretary] to run an urgent round Robin on that one?"*

172 Mr Meyer testified that, to his knowledge, this 6 July 2015 submission was not circulated to the Board at any time after the 10 July 2015 meeting. He further confirmed that it was the duty of the chairperson to ensure that uncompleted

[81] Meyer 14.2.2020 [REF].

items were carried forward to the next Board meeting but, to his knowledge, this was never done.

Further breakdown in negotiations

173 On 21 July 2015, Mr Bosc attended the weekly meeting between SAA management and National Treasury officials. On 27 July 2015, he sent an email to the participants of those weekly meeting, appearing at **Emirates Bundle vol 3 p 200**, in which he again raised the problem of the Board stalling on the MOU.

174 On 7 August 2015, Mr Bosc attended a further meeting with the Department of Transport to discuss the Emirates MOU. He took minutes of the meeting, which appear at **Emirates Bundle vol 3 p 206.** Both Mr Bosc and Ms Mpshe testified that Ms Myeni frequently stated that DoT would be against this Emirates partnership – which was not true. This meeting was organized to clear up those issues.

175 Following this meeting, on 8 August 2015, the Minister of Transport wrote to Ms Myeni expressing support for the MOU. A copy of this letter appears at **Emirates Bundle vol 3 pp 207 – 208.** The Minister stated the following:

> *"With regard to Emirates, Department of Transport has no objections to SAA discussing and / or signing any Memorandum of Cooperation (MOC), which has to do with the national carrier's Turn Around Strategy and intent for Africa. However, the Department regards these matters as operational and commercial for the airline's Management and Board.*
>
> *It is my considered view that this MOC contains a lot of positive and beneficial elements that seek to increase your revenue base and widens the SAA market. I trust the Management and Board has applied due diligence and would advise you to proceed and conclude the deal with Emirates"*

176 On 17 August 2015, Mr Bosc sent an email to colleagues at SAA to update them on progress. A copy appears at **Emirates Bundle vol 3 p 210 – 211.** He referred to the positive meeting with the DoT and indicated that the Minister of Transport would be meeting with the Minister of Finance to discuss these matters. He had been told by DoT representatives that a communication from the Minister of Transport to Ms Myeni would be coming but wasn't sure if a letter had already been sent at the time. He therefore specifically asked the Acting CEO, Ms Mpshe, to check with the Company Secretary whether there had been any official communication from the DoT or National Treasury on the Emirates deal.

177 On 27 August 2015, Mr Bosc sent a follow-up email to Ms Mpshe to find out if there had been any further communication from the Chair about the Emirates MoU. A copy appears at **Emirates Bundle vol 3 p 212**. He wrote the following:

> *"Have we heard anything from the Chair regarding the signing of the MoU" She should have received some letter of info or instruction from NT or DoT by now, I suppose.*
>
> *There is a little impatience growing on the EK side, as there are bilateral discussions scheduled in the next few days or weeks and EK is wondering why on Earth we are still not signing this MoU"*

178 On 30 August 2015, Mr Bosc received a letter from Mr Orhan Abbas of Emirates on an official letterhead, which appears at **Emirates Bundle vol 3 p 213.** Mr Bosc testified that he was surprised to receive this official correspondence, as he had previously been corresponding with Mr Abbas informally. This was a signal of Emirates' strong disapproval.

178.1 Mr Abbas stated that he was writing "*to convey [his] very great concern about the deterioration in the Emirates-SAA commercial partnership.*"

178.2 Mr Abbas cited three causes of this deterioration:

178.2.1 The continued delay in concluding the MoU: "*This is primarily from the continued delay in executing the Emirates-SAA Memorandum of Understanding (now two months after the unfortunate events at the Paris Air Show)*"

178.2.2 The perception that SAA was not assisting in resolving the litigation between Emirates and the Department of Transport over Emirates' traffic rights to operate a fourth daily flight between Dubai and Johannesburg.

178.2.3 The fact that SAA had concluded a binding deal with Jet Airways to direct traffic through Abu Dhabi. Jet Airways was partly owned by Etihad and had deployed significant capacity between Abu Dhabi and India.

178.3 Finally, Mr Abbas concluded by placing SAA on terms that if the MoU could not be resolved, this would jeopardise the existing profitable relationship between SAA and Emirates:

> *"In January, Emirates made a genuine offer of an enhanced strategic commercial partnership with SAA and, over seven months later, this has been a fruitless exercise and quite frankly Emirates have been treated with great disrespect by SM and we now need urgent resolution of the traffic rights matter and the MoU. Our patience is at an end and. if unresolved, this threatens not just the potential for an enhanced strategic commercial partnership but it also threatens our existing commercial relationship that I understand continues to be the most profitable area of your business.*
>
> *It is with great disappointment that I write to you in this manner Sylvain, however you must fully appreciate Emirates' position and the serious point we have reached in our relationship and I*

> *ask you to urgently write to the Department of Transport and request their right of legal appeal over the traffic rights matter to be formally withdrawn. I have written separately to your Shareholder Minister on the matter."*

179 Mr Bosc testified that, following this letter, he had conversations with Emirates' representatives, Mr Abbas and Mr Farooqui. From these conversations it was clear to him that the damage to SAA's relationship with Emirates was far more severe than he had anticipated.[82]

180 On 1 September 2015, Mr Bosc wrote to SAA colleagues, including Ms Thuli Mpshe and Mr Wolf Meyer, to relay his conversations with Emirates. A copy of my email appears at **Emirates Bundle vol 3 p 214.**

180.1 He told his colleagues that at that time he believed there was a 50% chance that Emirates would walk away from both the MoU and from the existing code-sharing relationship.

180.2 He further explained that from his discussions with National Treasury, there was pressure on SAA to terminate its loss-making relationship with Etihad. This would mean that SAA would be without a key link to Asia, in the absence of an enhanced code-share with Emirates.

180.3 He suggested that as a show of good faith, SAA should write to the Department of Transport indicating that SAA would support stopping the litigation against Emirates.

[82] Bosc 6.2.2020 [REF] Morning.

181 Ms Mpshe subsequently wrote to the Department of Transport on 9 September 2015 proposing that the litigation with Emirates come to an end to facilitate the negotiation and finalisation of the MoU. A copy of this letter appears at **Emirates Bundle vol 3 p 218 – 219.**

182 In the meantime, the relationship with Emirates continued to deteriorate. Mr Bosc and Ms Mpshe testified that Ms Myeni had repeatedly told the executive team that the Minister of Finance and the Minister of Transport had some undisclosed concerns about the Emirates deal which had to be resolved before any MOU could be concluded. Mr Bosc confirmed that his team had relayed Ms Myeni's concerns to Emirates to explain the delays in concluding the MOU.[83]

183 On 30 August 2015, Mr Abbas of Emirates had written separately to National Treasury about the MoU.

184 On 2 September 2015, the Minister of Finance responded to Emirates letter which appears at **Emirates Bundle vol 3 p 215**. The Minister informed Emirates that the MoU was an operational matter, that he had not been consulted on the MOU by the SAA Board, and that National Treasury would not get involved. The Minister stated:

> *"As indicated in your correspondence, this is an operational matter which should be dealt with at a management or Board level. The shareholder [the Minister] does not get involved in matters of this nature unless there is a specific issue which may require the shareholder endorsement. In this regard, I have not been consulted by the Board therefore it is assumed that the competency to deal with your request lies squarely with the management or Board level. The shareholder does not get involved in matters of this nature unless there is a specific issue which may require the shareholder*

[83] Bosc 05.02.20; Mpshe 10.02.20

> *endorsement. In this regard, I have not been consulted by the Board therefore it is assumed that the competency to deal with your request lies squarely with the management and the Board of South African Airways."*

185 This response contradicted what Emirates had been told about the reasons for the further delay. The Minister of Finance clearly indicated that National Treasury had no intention of interfering in these matters, giving the lie to Ms Myeni's claim that Treasury's sign-off was required.

186 On 3 September 2015, Mr Bosc again wrote to Ms Mpshe, Mr Meyer and Mr Soga to update them on these issues. A copy of my email appears **Emirates vol 4 p 216**. Mr Bosc highlighted that Treasury's response again showed that there was no basis whatsoever to Ms Myeni's claim that ministerial approval was required for the MoU and that this was now exposed as a stalling tactic. He stated:

> *"You will have noticed (with Hamza's latest message) that Emirates has already lost patience with us. They now have a letter from the Minister of Finance saying that he has not been consulted on the MoU matter and does not wish to be, as this is an operational topic that should be handled by management. Emirates is therefore concerned about the reality of our internal deliberations. I suspect they also see the upcoming AGM as a potential further delay, as SAA is notorious for reshuffling leadership teams in sync with Board nominations ... The only reason for not entering into this MoU, only orally provided by the Chair (and not the Board), was that "Ministers" were "worried" about the potential consequences of the MoU. The Chair also said that she discussed this subject with Minister Nene and that an "interministerial committee" was going to deliberate on the matter and instruct our Board on the way forward.*
>
> *National Treasury confirmed on Tuesday that our Board will not receive any instruction on this operational matter, as it did not solicit one. We also have official proof now that the Chair did not discuss the matter with Minister Nene, contrary to what has been told, and that the "interministerial committee" does not exist*

> *either as a consequence (how could a committee be formed without our Minister having been solicited?).*
>
> *DoT anyhow confirmed during the meeting we held with the DG that they had no issue about the proposed MoU. No other Government Department has any reason to object to this MoU."*

186.1 Mr Bosc concluded by asking Ms Mpshe and Mr Meyer for guidance on the way forward, as it was clear that Ms Myeni was intent on stalling.

187 On 8 September 2015, Mr Abbas of Emirates sent a letter to Ms Mpshe, copying Mr Bosc and the SAA Board. This letter is at **Emirates bundle vol 4 p 217**. This letter made reference to the Minister of Finance's letter on 2 September 2015 and expressed surprise at Treasury's response. He stated:

> *"Quite disturbingly, he [the Minister] also states that he has never been consulted on the matter by the SAA Board which is completely at odds with representations made by SAA to myself and the President of the Emirates Airline, Sir Tim Clark, over several months.*
>
> *Emirates were quite shocked to receive this response (and frankly, so quickly) and I fail to see any remaining issues, in regard to SAA fulfilling its current commercial obligations and requesting that the Department of Transport formally withdraw their right of appeal in regard to Emirates' 4th daily Johannesburg frequency. Likewise, there should be no remaining impediment to immediately executing the Emirates-SAA Memorandum of Understanding to develop an enhanced commercial partnership"*

Mr Abbas expressed his frustration that it had taken eight months to conclude the MOU: "*no concrete agreement has been concluded from SAA's side although both parties have finalized the MOU without any concerns and are in agreement on the contents of the MOU*."

188 In the ensuing months, no further action was taken by the Board on the Emirates deal. The entire SAA team that had been responsible for engaging with Emirates was removed or resigned:

188.1 Mr Bezuidenhout had left SAA at the end of July 2015. He returned to Mango following an acrimonious exchange with Ms Myeni where she accused him of using an e-cigarette to record a meeting and used bogus whistleblower reports to threaten him. Mr Bezuidenhout was later cleared of any wrongdoing.

188.2 Mr Bosc was placed on special leave in early October 2015 pending an investigation into various allegations against him. He, too, was later cleared of all charges at a subsequent disciplinary hearing.

188.3 Ms Thuli Mphse was relieved of her duties as Acting CEO in November 2015 and was then suspended in early 2016. She too was never found guilty of any misconduct.

188.4 Mr Barry Parsons resigned in disgust at the Chair's conduct at the end of September 2015.

189 In his evidence, Mr Bosc underlined the fact that commercial negotiations involve relationships and trust. Following his removal, there was no point of contact for Emirates at SAA and, to his knowledge, no further negotiations took place. The Emirates proposal and the MOU were simply allowed to die away.

190 In the process, SAA lost out on a significant opportunity to advance its commercial relationship with the largest airline in the world.

Ms Myeni's evidence

191 Ms Myeni's version on the Emirates deal has changed with each passing day of the trial. It was not put clearly or consistently to the plaintiffs' witnesses, and has changed in material respects from witness to witness. Ms Myeni's own testimony has also materially contradicted the versions put to the witnesses.

192 During the cross-examination of Mr Bezuidenhout, Mr Bosc and Ms Mpshe, Ms Myeni's counsel was vociferous in putting the version that the Emirates MOU was a "sham" and was "unlawful", as it was allegedly an impermissible attempt to secure Emirates' fourth frequency flight to Johannesburg. It was further claimed that the MOU contained no material benefits for SAA. As a result, Ms Myeni's counsel claimed that the Board had legitimately opposed the MOU because of these concerns.

193 In her evidence, Ms Myeni's testimony contradicted the version put by her counsel. She now claims that on 10 July 2015, the Board fully approved the Emirates MOU, giving the executives the greenlight to conclude the deal. She claims to have no knowledge why the deal was not signed after that date.

194 Ms Myeni stated that she instructed Mr Bezuidenhout not to sign the MOU on 16 June 2015 simply because the Board had not yet had an opportunity to study the Operational Review Committee's recommendations and did not want to the "rushed". On this version, she had no substantive objections to the MOU.

195 On her version, she had never told Mr Bezuidenhout not to sign because of the President's instructions. Instead, she claimed that she was speaking on behalf of the Board.

196 Under cross-examination, Ms Myeni could not answer the simple question whether she had taken any steps to consult with the Board members before issuing her instruction. She claimed that she would not have issued this instruction if she had known that the other Board members approved of the MOU. However, Ms Myeni provided no indication that she made any efforts to contact the other Board members to canvass their views.[84]

First issue: The merits of the Emirates proposal

197 The benefits of the Emirates' proposal have already been addressed in detail above. In short, this offered the opportunity to expand the existing code-sharing arrangement, which was already the most profitable part of SAA's business. It came with the added offer of a minimum revenue guarantee, estimated at USD100 million per annum (over R1,5 billion at present exchange rates). Furthermore, the commencement of SAA flights to Dubai would also have allowed SAA to cancel the loss-making Abu Dhabi route, saving over R300 million per year.

198 The conclusion of the non-binding MOU would have paved the way towards the conclusion of a legally binding agreement to secure these benefits. The MOU

[84] Myeni 26.2.2020 [REF].

itself would have given SAA a significant boost to its international credibility with financiers at a time when the airline was in desperate need of finding additional finance to keep the airline afloat.

199 In the cross-examination of the plaintiffs' witnesses, Ms Myeni's counsel had previously presented the version that the Emirates MOU was a "sham", was somehow "unlawful", and was devoid of benefits to SAA.

200 In her examination-in-chief and under cross-examination, Ms Myeni claimed that she did support the conclusion of the non-binding MOU and that from 10 July 2015, the SAA executives were free to conclude this MOU

201 This contradicts the version put by her counsel. If Ms Myeni truly believed that the MOU was a "sham", was "unlawful", and was devoid of benefits, as her counsel previously claimed, why did she allegedly approve it on 10 July 2015, as she now claims? Ms Myeni could give no answer despite extensive questioning under cross-examination.[85]

202 As a result, it must be concluded that the Emirates proposal was one of considerable value and was in the interests of the company. The failure to sign the non-binding MOU was a massive loss to SAA, which inflicted substantial harm by depriving it of valuable opportunities to turn around the business and leaving it saddled with the loss-making Abu Dhabi route.

[85] Myeni 25.2.2020 [REF].

203 The only question that remains is whether Ms Myeni had any valid reason for instructing Mr Bezuidenhout not to sign the MOU on 16 June 2015 and for further obstructing its conclusion.

Second issue: No valid reason to obstruct the signing of the non-binding MOU

204 Ms Myeni has failed to provide any sensible explanation for her repeated obstruction of the signing of the non-binding MOU and her instruction to Mr Bezuidenhout not to sign the MOU on 16 June 2015.

205 Mr Bezuidenhout, Mr Bosc, Ms Mpshe and Mr Meyer all testified that they remain baffled by Ms Myeni's opposition to Emirates MOU, as she failed to articulate any clear or consistent objections. Ms Myeni's plea and her testimony have done little to clarify matters.

206 On the most charitable reconstruction of her version, Ms Myeni's justification for blocking the signing of the MOU now appears to be as follows:

206.1 First, a formal resolution of the Board was required to approve the signing of the non-binding MOU with Emirates.

206.2 Second, Ms Myeni and the Board were concerned that the MOU would unlawfully grant Emirates a fourth daily frequency to Johannesburg;

206.3 Third, the Board appointed an Operational Review Committee to interrogate the draft MOU;

206.4 Fourth, the Board did not have the time to consider the Operational Review Committee's report before 16 June 2015 and to pass a resolution;

206.5 Fifth, Ms Myeni instructed Mr Bezuidenhout not to sign the non-binding MOU on behalf of the Board, because they needed more time to consider the matter.

207 Ms Myeni's new version simply does not withstand scrutiny, nor does it offer any bona fide justification for blocking this significant deal. It has all the hallmarks of an intentional fabrication. We address each element of her version in turn.

No Board resolution was required

208 Ms Myeni went back and forth on the question whether a formal Board resolution was indeed required for the conclusion of the non-binding MOU.[86] This led to a farcical exchange.[87] Under cross-examination on 25 February 2020, Ms Myeni first insisted that a resolution was required; her counsel interjected to say that this was not her version; after which Ms Myeni claimed that Board approval was required, but not a formal resolution. Ms Myeni finally settled on the version that a resolution was needed. The next day, Ms Myeni reversed course. Ms Myeni's confusion on such an essential question is itself indicative of a gross lack of care.

209 As a matter of law and governance, no Board resolution was in fact required for the signing of a non-binding MOU with Emirates. The MOU merely paved the way to further negotiations. A formal Board resolution and other approvals would

[86] Myeni 25.2.2020 [REF – 14:15 pm].
[87] Myeni 25.2.2020 {REF – 14:00 pm].

only have been needed after the negotiations, at the point where SAA and Emirates were seeking to conclude legally binding agreements.

210 Clause 5.1 of the SAA Delegation of Authority Framework, makes clear that the SAA CEO had "*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*" (Corporate Policy Bundle p 442)

211 The SAA Group Strategy was reflected in the Long Term Turnaround Strategy (LTTS), the Corporate Policy, the Network and Fleet Plan, and the 90-Day Turnaround Strategy, which were all in favour of an enhanced code share with Emirates. As Mr Bezuidenhout describes it, these documents were his "marching orders" and he was fully entitled to conclude a non-binding MOU to give effect to these orders.

212 Mr Bezuidenhout, Mr Bosc and Mr Meyer further testified that it was standard practice for the executives to conclude non-binding MOUs of this nature and that this did not ordinarily require Board approval. As an example, the plaintiffs' witnesses repeatedly drew comparison between the Emirates MOU and an MOU concluded between SAA Technical a US-based supplier, ARR, which was signed at the Paris Airshow on 16 June 2015 without any Board resolution. That deal has subsequently come under intense scrutiny in the Commission of Inquiry into State Capture.

213 Clause 4.2.2.34 of the SAA Delegation of Authority Framework only requires formal Board approval for "*entering into, varying in any material respect, or*

termination of any Alliances" **(Corporate Policy Bundle vol4 p 436)**. However, the conclusion of a non-binding MOU was merely the start of negotiations. Board approval would only have been required once a full suite of legally binding agreements had been negotiated.

214 In his cross-examination of the plaintiffs' witnesses, Ms Myeni's counsel faintly suggested that the MOU was in fact a legally binding partnership. However, clause 5C of the MOU explicitly stated that it is not legally binding, subject only to requirements of confidentiality and certain administrative matters (**Emirates Bundle vol 2 p 143)**.

215 The non-binding nature of this MOU was further confirmed by SAA's own legal department in a memorandum to the Board dated 15 May 2015 (**Emirates Bundle vol 3 p 194.163 – 194.167)** and 2 June 2015 (**Emirates Bundle vol 3 p 194.168 – 194.174)**. This was also confirmed by Ms Myeni's own personal legal adviser, Mr Nick Linnell, in an email dated 27 May 2015 (**Emirates Bundle vol 2 p 120)**.

216 Therefore, as a self-described "corporate governance expert", Ms Myeni could not plausibly or in good faith claim that the non-binding MOU required a formal resolution for its execution.

<u>Concern over the "fourth frequency"</u>

217 In the cross-examination of the plaintiffs' witnesses, Ms Myeni's counsel repeatedly put the version that Ms Myeni's concern over the Emirates MOU was

focused on the issue of Emirates' "fourth frequency" flight between Johannesburg and Dubai.

218 The evidence shows that this alleged concern over the fourth frequency is a recent contrivance.

219 Mr Bezuidenhout testified that Ms Myeni had never raised the issue of the fourth frequency with him personally. He testified that the two primary concerns that Ms Myeni relayed to him were: a) the mistaken belief that Emirates sought to buy SAA, and b) the belief that Emirates was somehow involved in the illegal trade of South African wildlife.[88]

220 In her examination-in-chief, Ms Myeni insisted that her concern was over the fourth frequency. Ms Myeni further claimed that this concern over the fourth frequency was set out in detail in her email to the Board on 2 May 2015.[89] In her evidence, she described this as a comprehensive email that fully set out her concerns "*in black and white*".[90]

221 The difficulty facing Ms Myeni is that her email of 2 May 2015 made no mention of the fourth frequency, nor did any of her later correspondence or discussions. Ms Myeni's email of 2 May 2015 stated the following:

> "*Good morning Colleagues.*
>
> *Please find the attached revised MOU with emirates. I have asked the Acting CEO some questions and await his response.*

[88] Bezuidenhout 31.1.2020 [REF].
[89] Myeni 20.02.20 [REF].
[90] Myeni 20.2.2020 [REF].

Given the urgency of our travel to Dubai, I have decided to forward the same questions to Sylvain, something I prefer not to do, to write directly to the Executives.

One concern on this MOU, over and above what I will forward to you is that Emirates is noe [sic] going to enjoy 8 frequencies. SAA is giving them more frequencies yet we complain that our business is shrinking. I urgently need to know why we want to give more to them and not claim the same to them over and above code share. We are giving them more.

Dr Tambi. Why are we allowing Emirates to fly into the Country different destinations, instead of getting into ORT only. We keep saying our local routes are not profitable yet it is the very executives that open these routes to foreign carriers. Is there anything that i need to know that I don't know.?

I will not allow other carriers to enjoy many internal or domestic frequencies at the expense of SAA.

Sylvain must know our concerns and he must be part of continuing to grow SAA and not to allow competitors to take advantage. Why would we shrink SAA and give Emirates 8 frequencies.

I have been asked to go to Dubai on Monday without having seen this document. There is urgency for us to go to Dubai. It is

important to have an urgent Board meeting before we go. We need your approval as the Board. I need to inform a National Treasury.

We must all be aligned. It is important.

Ms Dudu Myeni"

222 The underlined passage in this email reflects the nub of Ms Myeni's concern: she was concerned about flights to other destinations, beyond OR Tambo in Johannesburg. At no point in this email did Ms Myeni express any concern about Emirates' fourth daily flight to Johannesburg. Instead, her concerns related to the mistaken belief that SAA was somehow giving Emirates new rights to fly domestic routes within South Africa, "*instead of getting into ORT*" (meaning OR Tambo).

223 Not only does this email conflict with Ms Myeni's alleged concern over the fourth frequency, but it also reflected her profound lack of understanding of how frequencies work:

223.1 First, SAA was not "giving" Emirates any new frequencies. It had no such power in law to do so. Emirates' frequencies were granted by the Department of Transport.

223.2 Second, Emirates already had eight existing frequencies, allowing it to operate international flights between Dubai and three international airports in South Africa: Johannesburg, Cape Town, and Durban. The MOU did nothing to change this.

223.3 Third, Emirates never had permission to operate domestic routes between airports in South Africa, nor did the MOU suggest that it would be given domestic routes. Ms Myeni's confusion on this point beggars belief.

224 In short, Ms Myeni's obstruction of the execution of the MOU was, at best for her, based on her ignorance of flight frequencies. Her failure to acquaint herself with such a fundamental issue before using it as a means of obstruction demonstrates a reckless lack of care.

225 Ms Myeni's alleged concern over the fourth frequency also does not feature in any of the other official Board documents and correspondence at the time:

225.1 This concern does not appear in the list of issues outlined in the minutes of the Board meeting of 27 and 28 May 2015, appearing at **Emirates Bundle 2A and 123B** respectively,

225.2 This concern also does not feature in the terms of reference that Ms Myeni personally set for the Operational Review Committee. Ms Myeni's email of 30 May 2015, setting out these terms of reference, appears at **Emirates Bundle p 146.2**.

226 In any event, any concern that Ms Myeni or other Board members may have held over the impact of the MOU on the fourth frequency was simply unfounded.

226.1 Contrary to what was claimed, there was nothing in the Network and Fleet Plan that made an enhanced code-sharing relationship conditional on removing Emirates' fourth frequency. Much was made of footnote 26 in the "Recommendations" (**Emirates Bundle vol 1 p 66**). However, the suggestion that Emirates' frequencies between Dubai and Johannesburg should be reduced to three only applied to the profitability of operating a A340-600 aircraft between Dubai and Johannesburg (see **p 41**). Nowhere was it stated that the profitability of the enhanced code-share was dependant on Emirates losing its fourth frequency. On the contrary, Mr Bosc, Mr Bezuidenhout, and Ms Mpshe testified that SAA stood to gain substantially from the enhanced codeshare, which would now allow SAA to obtain USD 100 million per annum, at minimum, and to enjoy a greater share in the profits from Emirates' flights. In addition, there was the possibility that SAA would be able to use the fourth frequency for its own flights between Johannesburg and Dubai.

226.2 There was also nothing in the non-binding MOU that purported to grant Emirates flight frequency rights. The non-binding MOU merely provided that SAA would offer support to Emirates' existing frequencies. Again,

SAA could merely advise and consult with the DOT, but it could not dictate to the DOT on the flight frequencies or what to do in the existing litigation (**Emirates Bundle p 139, clause 2H).**

226.3 The MOU was not legally binding and did not commit SAA to any specific course of action. The MOU was merely the framework for future negotiation.

226.4 Furthermore, the Department of Transport was in fact fully in support of the Emirates MOU, as reflected in the Minister's letter of 7 August 2015.

226.5 In any event, SAA's obligation to provide support and assistance on regulatory matters was already contained in the initial 1997 code-share agreement, appearing at **Emirates Bundle p 117.93**. Article 9 of this 1997 agreement provided that "*The Carriers will work together and use their best endeavours to secure all government and other approvals necessary to implement this Agreement*".

227 To this day Emirates has retained its four daily frequencies to Johannesburg. Yet SAA has obtained none of the benefits that were envisaged had it concluded an enhanced code-sharing arrangement with Emirates.

228 As a consequence, this alleged concern over the fourth frequency has no substance whatsoever and provided no rational grounds for opposing the non-binding MOU. The inference can be drawn that Ms Myeni's new-found concern over the fourth frequency is a bad faith attempt to invent a justification where none existed at the time.

The Operational Review Committee was created solely by Ms Myeni

229 There is also no substance to Ms Myeni's claim that the Board appointed the Operational Review Committee to interrogate the MOU. Ms Myeni unilaterally created this committee, which comprised mostly of people who had no expertise whatsoever to determine the merits and shortcomings of the MOU.

230 The minutes of the 27 and 28 May 2015 Board meeting contain no indication whatsoever that the Board was in favour of appointing such a committee.

231 Ms Myeni's email of 30 May 2015 reflects the first mention of this committee. As her email makes clear, this was a committee established at her behest, consisting of individuals that she had personally selected, which would operate according to terms of reference that she had personally set.

232 Mr Meyer confirmed in his evidence that there had been no prior consultation with the Board before this committee was established. This was not challenged in cross-examination.

There was ample opportunity to consider the Operational Review Committee's report

233 Ms Myeni's claim that the Board required more time to consider the Operational Review Committee report does not hold water. Even if some formal Board approval or resolution was required for the signing of the MOU – which, as a matter of law, it was not – there was ample time for the Board to deliberate and to give its approval.

234 The Operational Review Committee produced its report on 3 June 2015, two working days after it was established. It was unanimous in supporting the MOU. There was nothing more for the Board to discuss, particularly as the Board had been aware of the Emirates proposal since January 2015 and had been given a copy of the draft MOU on 2 May 2015. The evidence has established that the minor amendments suggested by the Operational Review Committee did not change the substance of the MOU. Ms Myeni even conceded in cross-examination that the Operational Review Committee's report "*covered all the concerns that we had*".[91]

235 On 7 June 2015, Mr Bezuidenhout circulated the report together with a comprehensive set of submissions to the Board. He circulated this again on 11 June 2015 and pleaded with Ms Myeni and the Board to tell him if there were any objections: "*Please may I also request, subsequent to the submission [sent] on 7 June 2015, whether any other concerns exist from the Board?*". His correspondence appears at **Emirates Bundle vol 2 pp 150 – 152**. There was no response.

236 Ms Myeni now claims that the two-week period between 3 June 2015 and 16 June 2015 did not afford enough time as no Board meeting was planned.

237 However, Ms Myeni had ample powers under the SAA MOI to convene an urgent Board discussion either in person (clause 13.11.1), electronically (clause

[91] Myeni 26.2.2020 [REF].

13.11.4), or by means of round-robin resolution (clause 13.11.9), if any Board decision was required. See **Corporate Policy Bundle vol 1 pp 33 – 34**.

238 Ms Myeni conceded under cross-examination that any approval for the MOU could easily have been done via round-robin resolution. She stated that "*"It could have been round-robinned"*.[92]

239 Mr Stein's expert evidence further confirmed that it is the chairperson's duty to provide leadership to the Board and to convene Board urgent meetings when necessary. This is reinforced by clause 12.2.3 of the SAA Shareholder's Compact, which states that the Board "*recognises the importance of speedy decision-making, and will use its best endeavours to prevent undue delays with regard to critical decisions*" (**Corporate Policy Bundle p vol 5 p 485)**. Yet Ms Myeni took no steps to expedite the matter.

240 Ms Myeni's inaction at this critical time stands in stark contrast with her rapid activity when it suited her. For example, on 16 November 2015, in a single day, Ms Myeni was able to circulate a Board submission to amend the Swap Transaction, prepare and approve a section 54 application, and submit this application to the Minister (**Airbus Bundle vol 4 p 243 – 261**).

241 By contrast, Mr Meyer confirmed that ahead of the 16 June 2015 signing date, Ms Myeni made no attempt to convene any Board discussion. Nor did she

[92] Myeni 26.2.2020 [REF – morning].

provide any response to Mr Bezuidenhout's emails, as confirmed in Mr Bezuidenhout's testimony.

The Board supported the signing of the MOU

242 The undisputed evidence of the plaintiffs' witnesses is that all of the Board members, except for Ms Myeni, had expressed their approval for the signing of the MOU ahead of the 16 June 2015 signing ceremony. Mr Dixon, Mr Tambi, Ms Kwinana and Mr Meyer had stated that they supported the MOU and had raised no objections.

243 It is therefore false for Ms Myeni to now claim that she was somehow acting on behalf of the Board in instructing Mr Bezuidenhout not to sign the MOU, or that Mr Bezuidenhout did not have the support of the Board.

244 When Ms Myeni was confronted with evidence of the approvals given by other Board members, she claimed that she had no knowledge of the other Board members' views and would have approved the signing of the MOU if she had been told that they approved. When pressed on what steps she had taken to speak with other Board members ahead of the critical 16 June 2015 signing date, Ms Myeni failed to provide any response. She said that it was Mr Bezuidenhout's responsibility to have told her. The only plausible inference is that she took no steps at all.

245 On Ms Myeni's own version, this meant that the disaster of 16 June 2015 and all the negative consequences for SAA could have been averted had she simply

bothered to pick up the phone to speak to the other Board members and to obtain their views. Yet, on her own version, she took no steps to do so. That amounts to reckless conduct.

Summary

246 In summary, Ms Myeni had no reasonable grounds to block the signing of the Emirates MOU on 16 June 2015 or thereafter. This leads to the inevitable conclusion that Ms Myeni breached her fiduciary duty to act in good faith, for a proper purpose, and in the best interests of SAA.

247 This duty has been described as "*the fundamental duty which qualifies the exercise of any powers which the directors in fact have*".[93]

248 This duty has an undeniably subjective component, "*[b]ut in deciding whether the duty has been observed the Court may properly consider whether in the circumstances a reasonable man could have believed that the particular act was in the interests of the company.*"[94]

249 In ***Mbethe v United Manganese of Kalahari (Pty) Ltd***,[95] the Supreme Court of Appeal again approved this subjective / objective test for good faith. There the Court was concerned with the requirement of good faith in bringing a derivative

[93] Henochsberg on the Companies Act, 71 of 2008 p 296 ff. Cited with approval in *CDH Invest NV v Petrotank South Africa (Pty) Ltd and Another* 2018 (3) SA 157 (GJ) at para 47, upheld in *CDH Invest NV v Petrotank South Africa (Pty) Ltd* 2019 (4) SA 436 (SCA).
[94] Ibid.
[95] *Mbethe v United Manganese of Kalahari (Pty) Ltd* 2017 (6) SA 409 (SCA)

action under the Companies Act, but the principles are of broad application. The SCA held as follows:

> *[20]… In our law it would not be a matter of mere assertion by an applicant that he possesses the requirement of good faith. Although the test for good faith is subjective, relating as it does to the state of mind of an applicant, it is nevertheless subject to an objective control. The state of mind of an applicant has to be determined by drawing inferences from the objective facts, as revealed by the evidence.*
>
> *[21] The appellant states that he has acted in good faith in order to protect the interests of the respondent. The respondent denies this and alleges that the appellant lacks an honest purpose in seeking leave to institute a derivative action in the name and on behalf of, the respondent. The dispute is whether the appellant has misrepresented his state of mind. In R v Myers 1948 (1) SA 375 (A) at 383 it was held that absence of reasonable grounds for belief in the truth of what is stated, may provide cogent evidence that there is in fact no such belief. …*
>
> *[22] The enquiry is whether the evidence reveals reasonable (and therefore objective) grounds for the appellant's statement that he acts in good faith. If it is found that none, or insufficient, reasonable grounds are present to support his statement, this may establish an absence of good faith on his part. In addition, if the evidence establishes the presence of a collateral or ulterior purpose on the part of the appellant, … this may also constitute cogent evidence of the absence of good faith on the part of the appellant."* (Emphasis added)

250 In this case, Ms Myeni has demonstrated no reasonable grounds whatsoever for decision to block the signing of the Emirates MOU. This itself establishes bad faith and a failure to act for proper purposes.

251 In addition, Ms Myeni's constantly shifting versions and her inability to answer direct questions on her motivations must lead to the conclusion that her reasons for opposing the deal were a deliberate and dishonest concoction. Such wilful misconduct is, by itself, grounds for a finding of delinquency under section 162(5)(c) of the Companies Act.

Third issue: The events of 16 June 2015

252 It is common cause that Ms Myeni instructed Mr Bezuidenhout not to sign the MOU on 16 June 2015.[96] Ms Myeni has further admitted that she did so through a call to Mr Bezuidenhout and later by SMS, shortly before the scheduled signing ceremony.

253 The only relevant factual dispute is whether Ms Myeni told Mr Bezuidenhout not to sign because of an instruction from President Zuma.[97]

254 We emphasise, however, that Ms Myeni's instruction to Mr Bezuidenhout was already improper and delinquent, regardless of whether she ever claimed to be acting on President Zuma's instructions. It has already been established that Ms Myeni had no valid reason to block the signing of the Emirates MOU, that she was not acting on behalf of the Board in issuing such an instruction, and that she was engaging in a frolic of her own. Whether or not Ms Myeni in fact invoked President Zuma's name is a matter of aggravation which does not change the conclusion that there was serious misconduct.

255 Mr Bezuidenhout and Mr Meyer have testified that Ms Myeni stated that President Zuma had instructed SAA not to sign the Emirates MOU. In her plea and in her testimony, Ms Myeni admitted that President Zuma did not have the authority to give such an instruction.[98] However, Ms Myeni denies that she acted on the President's instructions or that she ever told Mr Bezuidenhout that

[96] PoC p 30 para 82; Admitted Plea p 111 para 70.
[97] PoC p 30 para 83; Denied Plea p 111 para 71.
[98] Plea p 111 para 73.

President Zuma gave such an instruction. On her version, she was speaking for the Board.

256 This dispute over what was said on the call must be resolved in the plaintiffs' favour. The test for resolving two irreconcilable versions in opposing testimony is well-established. In ***Stellenbosch Farmers' Winery Group Ltd and Another v Martell ET CIE And Others*** **2003 (1) SA 11 (SCA) at para 5**, the SCA explained this test as follows:

> "*The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.*"

257 Applying this test of a) credibility; b) reliability; and c) probabilities, the evidence of Mr Bezuidenhout and Mr Meyer must be preferred.

258 Mr Bezuidenhout's testimony was undeniably credible and reliable. His testimony on the events of 16 June 2015 was corroborated by Mr Meyer, who was present with him at the time of the call and listened in when Mr Bezuidenhout placed the call on speakerphone. Mr Meyer's credibility and reliability are also beyond reproach. By contrast, Ms Myeni has proved to be an unreliable, evasive and uncreditworthy – and in fact dishonest - witness.

259 Ms Myeni's counsel sought to make much of Mr Bezuidenhout's email to Ms Myeni and the Board on 20 June 2015, in which he detailed the events of 15 and 16 June 2015. Ms Myeni's counsel sought to claim that because Mr Bezuidenhout did not explicitly record any reference to an instruction from President Zuma, this meant that Mr Bezuidenhout is making this up.

259.1 In the relevant passages of this email, Mr Bezuidenhout stated the following:

> *"In the early hours of 16 June I received a call from the SAA Chair, advising that the Chair had received a call from the President on this matter, to which I provided the background that Emirates had threatened to escalate but obviously such escalation would not be through me;*
>
> *By 08h00 on 16 June the Emirates business representative in SA confirmed the escalation to the President, shortly after which I received the SMS from the Chair that I am not to execute the non-binding MoU.*
>
> *Upon Sir Tim Clark's arrival, I asked for time alone with him and advised him that I do not have full Board concurrence on execution of the MoU. After a robust discussion lasting approximately 45 minutes, Sir Clark agreed to keep the proposition on the table and not tothreaten the existing SAA revenue streams from the existing codeshare agreement. He also noted that he had met the President during his visit to SA mid-June. I agreed to take further steps to understand what reluctance may exist in strengthening the SAA/Emirates relationship. With that the meeting concluded and I proceeded*

> *to join Zuks and the Europe team in accepting the SAA and Mango Skytrax awards. I responded to the Chair's SMS confirming that I had not contradicted her direct instruction not to sign the MoU - the MoU remains outstanding. The Emirates business representative also then advised of dialogue with the Chair pertaining to the Emirates escalation to the President"* (**Emirates Bundle vol 2 p 168**)

259.2 As is clear from this passage, Mr Bezuidenhout recorded the fact that Ms Myeni had received a call from President Zuma. This much was admitted by Ms Myeni in her testimony.

259.3 As to why Mr Bezuidenhout did not expressly record Ms Myeni's words in relaying an instruction from President Zuma, Mr Bezuidenhout explained that he felt it unnecessary to conclude this detail as Ms Myeni knew full well what she had said on the call. As Mr Bosc asked rhetorically, why would Mr Bezuidenhout need to tell Ms Myeni exactly what she had said to him?

260 Mr Bezuidenhout, Mr Bosc, Ms Mpshe, and Mr Meyer further testified that Ms Myeni was often in the habit of invoking the name of the President and Cabinet Ministers to support her claims. She was, after all, the chairperson of the Jacob Zuma Foundation for the duration of her tenure as chairperson of SAA and remains in that position. Under cross-examination, Mr Bosc recalled one such incident where Ms Myeni instructed him to investigate opening a route to Khartoum, Sudan, and told him to do so on the President's instructions. This is an instance where similar fact evidence of Ms Myeni's previous invocations of

the President's name has high probative value and is clearly relevant, as it relates to Ms Myeni's pattern of conduct in managing SAA's affairs.[99]

261 Ms Myeni's counsel also attempted to make something of Mr Bosc's testimony that there had been another call earlier in the evening, when Mr Meyer was not present. Ms Myeni's counsel sought to suggest that this cast doubt on Mr Bezuidenhout and Mr Meyer's version of the call in the early hours of 16 June 2015.

261.1 Mr Bosc was not with Mr Bezuidenhout in the early hours of the morning of 16 June 2015, and could not testify on whether he received any further calls.[100] He testified to a call Mr Bezuidenhout received from Ms Myeni earlier that evening.

261.2 In any event, whether or not Mr Bosc was correct in recalling an earlier call on the evening of 15 June 2015, this had no bearing on what occurred during the call in the early hours of the morning on 16 June 2015.

262 Therefore, we submit that the plaintiffs have established, on a balance of probabilities, that Ms Myeni did indeed invoke the President's name in instructing Mr Bezuidenhout not to sign the non-binding MOU.

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[99] See *Savoi and Others v National Director of Public Prosecutions* 2014 (5) SA 317 (CC) at para 55*:* "*The real question should be whether, when looked at in its totality, evidence of similar facts 'has sufficient probative value to outweigh its prejudicial effect' and that is a matter of degree in each case.*" Zeffert, Paizes & Skeen *Law of Evidence* 251: "*[t]he relevance of similar fact evidence depends upon the argument that the same conditions are likely to produce the same results.*"

[100] Bosc 06.02.20

263 This leaves two possibilities. Either Ms Myeni was being dishonest in telling Mr Bezuidenhout that the President had given an instruction not to sign; or Ms Myeni was indeed following the unlawful dictates of the President. On either scenario, this was serious misconduct which aggravates the already established delinquency.

Fourth issue: The consequences of Ms Myeni's conduct

264 The plaintiffs pleaded that as a result of Ms Myeni's actions in preventing Mr Bezuidenhout from signing the Emirates MoU:[101]

264.1 SAA's relationship with Emirates was severely compromised;

264.2 SAA forfeited significant financial and strategic benefits;

264.3 SAA suffered significant reputational harm internationally.

265 In her plea, Ms Myeni baldly denied these consequences.[102] It was only during the course of her examination-in-chief that something resembling a version began to emerge. According to Ms Myeni's new version, the events of 16 June 2015 were not significant, there was still an opportunity to conclude the Emirates MOU after 16 June, Ms Myeni and the Board approved the MOU on 10 July 2015, and she cannot understand why the executive did not conclude the MOU after that date.

[101] PoC p 30 para 86; Denied Plea p 112 para 75.
[102] Denied Plea p 112 para 75.

266 While the events of 16 June 2015 did not bring a complete end to negotiations with Emirates, the damage to SAA was incalculable. All of the SAA executives testified that the aborted signing ceremony was a national embarrassment that undermined SAA's international reputation and eroded the trust that had been established with Emirates. In addition, this tarnished SAA's reputation with Etihad and other code-share partners, as the press reports on SAA's failed deal with Emirates signalled to them that SAA was not a reliable partner.

267 SAA also lost a valuable opportunity to conclude the MOU and to capitalise on the international media attention. This was vital to boosting SAA's fundraising efforts at a time when it was in dire need of further financing and was looking to recapitalise R15 billion in debt.

268 Mr Bezuidenhout and Emirates had planned to conclude the final agreement before July 2015. That is why, in his submission to the Board of 6 July 2015, Mr Bezuidenhout tells Ms Myeni that, by preventing the signing of the MOU on 16 June, she had already cost SAA R18m, based on a calculation of R3m per day (**Emirates Bundle vol 2 p 191G**).

269 As a result, it must be concluded that Ms Myeni wilfully or through gross negligence caused substantial harm to SAA, providing further grounds for delinquency under section 162(5) of the Companies Act.

270 It is no defence for Ms Myeni to now claim that her conduct on 16 June 2015 did not definitively end all discussions with Emirates. As the evidence shows, Ms Myeni continued to block the conclusion of the MOU after 16 June 2015, in a

manner that was consistent with her obstructive tactics before the Paris signing ceremony. As Mr Bezuidenhout testified, the Emirates deal suffered "*death by a thousand cuts*" due to Ms Myeni's continued interference.

271 In summary, Ms Myeni's pattern of deliberate, obstructive conduct pre- and post-16 June 2015 was clear:

271.1 Ms Myeni had known about the Emirates proposal from the outset in January 2015 and was made aware of its importance.

271.2 The importance of the Emirates deal was again underlined in the presentation to the Board on 14 March 2015 and in Mr Bezuidenhout's email of 12 May 2015 (**Emirates vol 2 p 117.44 – 45**).

271.3 At first, Ms Myeni insisted that she and the Board meet with representatives of Emirates, as reflected in the resolution of 2 April 2015.

271.4 Having demanded a meeting with Emirates, Ms Myeni then stood up the Emirates Chairperson and CEO, first at the Arabian Travel Market on 5 May 2015 and second at a meeting scheduled for 12 May 2015 in Cape Town.

271.5 On 28 May 2015, Ms Myeni formally undertook to reach a decision by 9 June 2015, as reflected in the minutes.

271.6 On 30 May 2015, Ms Myeni then created a further roadblock by insisting on the creation of an Operational Review Committee to advise her on the Emirates MOU, which committee consisted of a group of middle-managers

that she had personally selected, with terms of reference that she personally drafted.

271.7 On 3 June 2015, the Operational Review Committee approved the MOU and recommended that it be concluded. Yet Ms Myeni took no further action to bring this to the Board's attention, nor did seek to circulate a resolution.

271.8 On 7 June 2015, Mr Bezuidenhout circulated the Operational Review Committee report to the Board together with further submissions on the resolution. He emphasised the urgency of the matter, with the 16 June 2015 deadline looming.

271.9 On 11 June 2015, Mr Bezuidenhout again emailed the Board requesting that the Board members raise any objections to the MOU. This was again met with silence. Ms Myeni had requested to meet with the Operational Review Committee in person, but then claimed to be too busy to meet after Mr Bezuidenhout arranged a meeting for the next day.

271.10 After the Paris embarrassment, Ms Myeni summoned the Operational Review Committee to a further meeting on 3 July 2015. She now demanded that an "Action List" be followed, which included the committee meeting with Emirates and a further meeting to be arranged between Ms Myeni and the Emirates Chair.

271.11 On 6 July 2015, Mr Bezuidenhout attempted to submit further submissions to the Board together with a round-robin resolution to approve

the MOU. Ms Myeni blocked this by preventing the submissions and round-robin from being circulated to the Board members.

271.12 On 10 July 2015, the Board discussed the Emirates matter, but Mr Bezuidenhout's submissions and draft resolution were not addressed. No resolution was taken on the MOU, but the Board instead insisted that the items in the 3 July 2015 "Action List" must now be followed.

271.13 Ms Myeni subsequently claimed that the Minister of Finance and Minister of Transport had concerns about the MOU which needed to be addressed.

271.14 However, both Ministers sent correspondence confirming that they had no objections to the MOU and regarded this as a purely operational matter, to be handled within SAA.

271.15 Ms Myeni and the Board took no further action on the Emirates MOU from that point onwards.

271.16 All of the key executives who were responsible for negotiating with Emirates were either removed from their positions or forced to resign, leaving no further executives to advance the Emirates deal.

272 Ms Myeni's new version is that she and the Board gave full approval for the signing of the MOU at their meeting of 10 July 2015 does not withstand scrutiny. Ms Myeni's counsel failed to put this version to Mr Bezuidenhout, Mr Bosc, or Ms Mpshe during their testimony. That alone should lead to an inference that this was a belated concoction.

273 The full minutes of the 10 July 2015 meeting give the lie to Ms Myeni's claims. Rather than giving the executives the greenlight to conclude the MOU, the Board minutes reflected Ms Myeni's insistence that the 3 July 2015 "Action List" had to be followed. This placed further unnecessary hurdles in the path of the deal, including the requirement that yet another meeting should be arranged between Ms Myeni and the Emirates Chairperson. **(Emirates Bundle pp194.222 – 194.230)**

274 The only witness who was given the opportunity to respond to Ms Myeni's new version on 10 July 2015 meeting was Mr Meyer. He rubbished Ms Myeni's claims that these minutes reflected Ms Myeni's approval. He again confirmed that at no point did Ms Myeni expressly revoke her instruction not to sign the MOU, nor did she ever express her support.[103]

275 Mr Meyer further confirmed that Ms Myeni made no attempt to place Mr Bezuidenhout's 6 July 2015 before the Board. As Chairperson, it was her responsibility to do so, but this was never done.

276 In this light, Ms Myeni's belated attempt to use the 10 July 2015 minutes to suggest that she was now supportive of the MOU is plainly dishonest. This confirms that her opposition to the Emirates deal was in bad faith and not for a proper purpose.

[103] Meyer 18.2.2020 [REF].

Conclusions on Ms Myeni's delinquency

277 In summary, Ms Myeni's conduct in blocking the Emirates deal satisfies multiple grounds of delinquency under section 162(5)(c) of the Companies Act. Not only did she deliberately or through gross negligence inflict substantial harm on SAA, but her belated attempts to justify her conduct show that she acted dishonestly, in bad faith and not in the best interests of SAA.

THE AIRBUS "SWAP TRANSACTION"

278 The second cause of action concerns Ms Myeni's efforts to obstruct the conclusion of the "Swap Transaction" in 2015. This was an agreement between SAA and Airbus in 2015 to cancel a legacy contract for the purchase of 10 Airbus A320-200s and to substitute this with a new deal for SAA to lease five Airbus A330-300 aircraft directly from Airbus.

279 This swap was necessary to allow SAA to escape the onerous pre-delivery payments (PDPs) and inflated prices under the old contract. Time was of the essence, as the PDPs were coming due and SAA was liable to pay over a billion Rand to Airbus in 2015, money which it did not have at the time. If SAA defaulted on any PDPs, it faced the risk of triggering cross-default clauses on other loans and leases, with the effect that billions of Rand in debt would fall due immediately. This would have had a significant knock-on effect on other government debts.

280 It is common cause that the Board resolved to approve the Swap Transaction on 31 March 2015. The Minister of Finance gave his approval conditionally on 30 July 2015 and unconditionally on 11 September 2015.

281 After receiving ministerial approval, the only outstanding requirement was for the Board to ratify the signatories for the execution documents. This was a mere formality that ought to have been concluded in no more than a day.

282 However, Ms Myeni then sought to obstruct and delay the conclusion of the deal, aided and abetted by Ms Kwinana and Dr Tambi. They did so by improperly

seeking to introduce an unidentified "African Aircraft Leasing Company" into the deal, without Board approval. These actions were taken in the face of repeated warnings from other Board members, SAA executives and the Minister of Finance of the impending catastrophe facing SAA if the Swap Transaction was not concluded in time.

283 It was only through the intervention of the then Minister of Finance, Minister Gordhan, and dedicated Treasury officials in December 2015 that the Swap Transaction was concluded in time and SAA escaped financial disaster.

The issues

284 The plaintiffs' case turns on four primary forms of misconduct:

284.1 First, Ms Myeni was dishonest and reckless in sending a letter to Airbus on 29 September 2015, in which she sought to change the nature of the deal by inserting an "African Aircraft Leasing Company", in the absence of any Board resolution or section 54 approval to this effect.[104]

284.2 Second, Ms Myeni's 16 November 2015 application to the Minister of Finance to amend the existing section 54(2) approval for the Swap Transaction was also dishonest, reckless and in breach of legal obligations imposed by the Significance and Materiality Framework.[105]

[104] PoC paras 121 - 126; Denied Plea paras 93 – 97.
[105] PoC paras 133 – 134, 137 – 140; Denied Plea paras 103 – 104, 107 – 108.

284.3 Third, in delaying the conclusion of the Swap Transaction, Myeni was reckless as to financial ruin that SAA and the country were facing at the time.[106]

284.4 Fourth, Ms Myeni's conduct contributed to SAA failing to comply with its statutory obligations, including the preparation of annual reports.[107]

Summary of the plaintiff's evidence

285 Four of the plaintiffs' witnesses testified on the Swap Transaction. Mr Bosc, Mr Meyer and Ms Mpshe related their experiences of Ms Myeni's repeated obstruction of the deal. Ms Halstead, the Chief Director of Sector Oversight at National Treasury, testified on her involvement in the Treasury team that was supporting SAA. She was involved in preparing all correspondence from the Minister of Finance, which reflected the Minister's increasingly exasperated efforts to convince Ms Myeni to act in the best interests of SAA and the country.

286 All four witnesses expressed their growing shock and dismay at Ms Myeni's conduct. They testified that Ms Myeni played the leading role in driving the attempted amendments to Swap Transaction, jeopardising the deal and SAA's finances.

[106] PoC para 142; Denied Plea para 109.
[107] PoC para 143; Denied Plea para 109.

Background

287 The history of SAA's dealings with Airbus are common cause on the pleadings.[108] In 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).

288 In 2009, SAA approached Airbus to revise the 2002 Agreement. This led to the 2009 Revised Agreement (**Airbus Bundle vol 1 pp A 1 – A198**), which included the following terms:

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

288.2 In exchange, Airbus would agree to postpone the pre-delivery payments (PDPs) to Airbus.

289 In 2013, SAA did a deal to acquire the first ten A320 aircraft through a novation of the 2009 Revised Agreement and a sale-and -leaseback transaction with Pembroke Aircraft Leasing ("Pembroke"), the aircraft financing arm of Standard Chartered Bank. This was referred to as the "Pembroke deal".

290 SAA still had to pay for the remaining ten aircraft under the 2009 Revised Agreement, which were scheduled for delivery from Quarter 2 of 2015 until Quarter 4 of 2017. PDPs were coming due in 2015 and SAA was facing substantial liability.

[108] PoC pp 35 - 36 para 90 – 95; Plea p 112 para 80.

The need for the Swap Transaction

291 As part of the 90-day Action Plan, the then Acting CEO, Mr Bezuidenhout, tasked the CFO, Mr Meyer, and the GM: Commercial, Mr Bosc, with renegotiating the onerous Airbus contract.

292 These negotiations were driven by two imperatives. First, SAA was in a dire financial position. It was cash-strapped and did not have the money to pay the remaining PDPs and final delivery payments on the remaining 10 A320 aircraft, which amounted to billions of Rand. Second, the original contract locked SAA into a purchase price for the A320 aircraft which now was far in excess of the market value of the aircraft. This would mean that SAA would have to write off over USD 10 million on the delivery of each aircraft, which would have resulted in a substantial impairment of SAA's balance sheet.

293 Mr Meyer and Mr Bosc spent months working on the deal, supported by their team at SAA. In late 2014, they travelled to Toulouse, France where they spent a full week negotiating better terms for SAA.[109]

294 The outcome of these negotiations was the proposed Swap Transaction. In terms of this deal, SAA and Airbus would agree to cancel the purchase of the remaining 10 Airbus A320-200s and to substitute this with a new deal for SAA to lease five Airbus A330-300 aircraft directly from Airbus.

[109] Mr Bosc 6.2.2020 [REF]

295 This deal would have significant benefits for SA, as was captured in Mr Meyer's submissions to the Board on 27 March 2015 (**Airbus Bundle vol 1 pp 78 - 81**). In summary:

295.1 The Swap transaction would allow SAA to escape the onerous contract with Airbus and the outstanding PDPs.

295.2 In addition, SAA would receive refunds on the PDPs that it had already paid under the deal. This was estimated to have a positive cash flow impact of USD 106 million over three years, over and above the cost of outstanding PDPs that would be avoided (**p 80, "Financial implications"**)..

295.3 The Swap transaction would also allow SAA to avoid impairing its balance sheet by a further USD 106 million as a result of the price escalations on the A320s (**p 80, "Financial implications"**).

295.4 The added benefit was that this deal would give SAA access to more fuel-efficient widebody aircraft in the form of A330-300s which were needed to replace the inefficient and expensive A340-600 aircraft. This was consistent with SAA's Network and Fleet Plan, which had specifically recommended that SAA "*[r]eplace four A340-600 aircraft with five A330-300 aircraft"*. **(Emirates Bundle p 66, "Near-Term Actions with a change in fleet").**

296 In her plea, Ms Myeni admitted that the Swap Transaction would indeed have significant benefits as it would, *inter alia*, alleviate SAA's liquidity problems

associated with the 2009 Revised Agreement and allow SAA to procure A330-300 aircraft instead of A320 aircraft.[110]

Approvals for the Swap Transaction

297 On 31 March 2015, the SAA Board unanimously resolved to approve the Swap Transaction.[111] Confirmation of this resolution appears at **Airbus Bundle vol 4 p 286G**.

298 A condition of the conclusion of the Swap Transaction was that SAA would obtain the necessary governance approvals,[112] which included an approval from the Minister of Finance, in terms of section 54(2) of the PFMA and SAA's Significance and Materiality Framework.

299 On 12 May 2015, Ms Myeni submitted the section 54 application to the Minister on behalf of SAA (**Airbus Bundle vol 2 pp 117.1 – 117.7**). Ms Myeni's covering letter reflected that this deal had the full support of the Board and was aligned with SAA's objectives and policies. She also alluded to the fact that SAA officials had worked with Treasury officials since January 2015 to ensure that they were fully up to speed. Ms Myeni stated:

> "*With reference to our various discussions, regarding our efforts to achieve commercial sustainability, SAA has developed an opportunity to cancel the outright purchase of the second ten Airbus A320 aircraft (from the 2002 legacy order) and replace this with five Airbus A330-300 aircraft. This amended transaction will deliver a far batter financial outcome, as well as equipping SAA with aircraft required to support delivery of the Network Plan.*

[110] PoC p 42 para 114; Admitted Plea p 113 para 87.
[111] PoC p 41 para 112; Admitted Plea p 113 para 87.
[112] PoC p 42 para 115; Admitted Plea p 113 para 88.

> *Attached herewith is a Section 54 PFMA application, which fully details the commercial rationale and strategic considerations for the amendment 01 the original A320 purchase transaction. Since January, we have engaged with the Department's officials to ensure they have been fully briefed and also had the opportunity to engage directly with Airbus. This intervention is also outlined in our 2015 Corporate Plan.*
>
> *We therefore request. Honourable Minister, that you favourably consider this application in order to further support the turnaround of our business*."

300 On 30 July 2015, the Minister of Finance conditionally approved the Swap Transaction in terms of section 54(2) of the PFMA, subject to receiving additional information on the deal.[113] A copy of his letter to Ms Myeni appears at **Airbus Bundle vol 3 p 155B.**

301 On 30 July 2015, the Acting Chief Executive Officer and the Chief Financial Officer of SAA had already signed the execution documents in terms of SAA's Delegation of Authority Framework, 2012.[114]

302 On 11 September 2015, the Minister of Finance unconditionally approved the Swap Transaction in terms of section 54(2) of the PFMA.[115] His letter confirmed that the outstanding information had now been provided to the Treasury team. A copy of his letter appears at **Airbus Bundle vol 3 pp 163 – 164.**

303 After the Minister's unconditional approval, the only outstanding task remaining was for the SAA Board to ratify the signatories to the execution documents. Mr

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[113] PoC p 42 para 117; Plea p 113 para 90 (no knowledge).
[114] PoC p 42 para 116; Plea p 113 para 89.
[115] PoC p 42 para 118; Plea p 113 para 90 (no knowledge).

Meyer testified that this ought to have been a mere formality, which should have taken no time at all.

The going concern guarantee

304 The swift conclusion of the Swap Transaction was not only necessary to rescue SAA's financial position, but it also became a key condition for SAA to receive any further going concern guarantees from the government.

305 In December 2014, at the time that the Minister of Finance took over as the executive authority responsible for SAA, SAA's financial position was extremely weak. Ms Halstead testified that SAA had been technically insolvent since at least 2012/ 2013 (i.e. its liabilities exceeded its assets) and its financial position continued to deteriorate.[116]

306 This situation meant that SAA was reliant on government guarantees to remain afloat. Ms Halstead explained that a guarantee is an undertaking that if SAA were to default on its debts then the government would be liable to pay its creditors. Without these guarantees, SAA would not have been able to sign off on its financial statements as a "going concern" and would face liquidation. These guarantees were also necessary to give comfort to its lenders. In their absence, no lender would have been willing to touch SAA.[117]

307 In August 2015, SAA had submitted an application for a R5 billion increase in their government guarantee facility. Ms Halstead and Mr Meyer confirmed that

[116] Halstead 12.2.2020 [REF].
[117] Halstead 12.2.2020 [REF].

the requested amount was premised on SAA concluding the A320/A330 swap transaction.

308 On 14 September 2015, Minister Nene wrote to Ms Myeni in response to SAA application (**Airbus Bundle vol 3 p 164.1**). The Minister refused to consider Ms Myeni's application until seven key actions were taken, which included the conclusion of the Swap Transaction. He set a deadline for 18 September 2015 for this matter to be concluded. He stated the following:

> *"There are numerous matters which remain outstanding which could assist in improving the financial performance of SAA, and I require the comfort that SAA has finalised the following matters before the request for the going concern guarantee will be considered:*
> *…*
> *7. Conclusion of the A320/A330 swap transaction.*
>
> *I am aware that by not approving the going concern guarantee SAA's 2014/15 Annual Financial Statements cannot yet be signed as a going concern off by the Board or the airline's external auditors. Therefore, to avoid unnecessary delays, I require that SAA finalise the matters listed above by 18 September 2015."*

309 Ms Halstead explained that the 18 September 2015 deadline was set based on the deadlines prescribed under the PFMA for the finalisation and tabling of financial statements and annual reports. In terms of section 65(2) of the PFMA, the Minister was required to table SAA's financial statements in Parliament by 30 September 2015. This could not be done if they had not been finalised and the going concern guarantee was a prerequisite for their finalisation. Section 55(1)(d) of the PFMA required that SAA ought to have already completed its financial statements by 31 August 2015. She testified that the delay was negatively impacting the confidence of lenders. It also meant that the AGM could not be held.

310 Ms Myeni failed to meet this 18 September 2015 deadline and there was still no ratification of the deal.

Ms Myeni, Ms Kwinana and Dr Tambi obstruct the conclusion of the Swap Transaction

311 By September 2015 the board consisted of five members: Ms Myeni, Ms Kwinana, Dr Tambi, Mr Dixon and Mr Meyer. The Acting CEO at the time, Ms Mpshe, ought to have been regarded as a Board member in terms of the MOI, but Ms Myeni took the view that she was not a proper Board member and she was apparently excluded from Board decisions.

312 Despite approving the Swap Transaction on 31 March 2015 and supporting the section 54 application to the Minister, Ms Myeni, Ms Kwinana and Dr Tambi now began questioning the transaction.

313 On 7 September 2015, shortly before confirmation of the Minister's unconditional approval, Ms Myeni had sent an email to Mr Meyer and the other Board members setting out queries about the Swap Transaction. Mr Meyer replied on 13 September 2015, providing detailed responses. A copy of Ms Myeni's email with Mr Meyer's line-by -line responses appears at **Airbus Bundle vol 3 pp 166 – 174.**

314 As reflected in Mr Meyer's correspondence, he expressed his bafflement as to why Ms Myeni was raising these issues now, after she had already approved the transaction on 31 March 2015 and signed off on the section 54 application to the

Minister. The conclusion of the deal was now urgent and merely required a round-robin to ratify the signatories.

315 On 16 September 2015, Mr Meyer sent a follow-up email to the Board emphasising the urgency of concluding the Swap Transaction and explaining the risks of further delays. A copy appears at **Airbus Bundle vol 3 pp 174A – 174B**. He stated:

> *"Presumably you have received my response to your questions following your quick review done and I trust that I have addressed all the issues of concern. You have already approved this transaction and had signed the Section 54 letter to the Minister, where after he approved the transaction. However Chair, I feel oblige to caution that we are running the risk of this Swap transaction being cancelled after today and that we would have to revert back to the original legacy transaction with disastrous consequences for SAA. This would mean that, over the next two years, SAA will recognise an impairment of at least R1.4bn on the income statement and will forfeit cash refunds of circa R1.4bn, which means that we also need to increase our funding requirement substantially to meet our PDP obligations. It would also mean that SAA will not meet its obligations in terms of the 90 Day Action Plan savings that was committed to in the Corporate Plan.*
>
> *…*
>
> *I once again appeal to you, in the interest of your fiduciary duty as director, to meet the last Condition Precedent of this transaction, being your approval of the signing authority of the execution documents."*

316 Rather than simply ratifying the signatories, Ms Myeni, Ms Kwinana and Dr Tambi then started engaging directly with Airbus representatives in an attempt to renegotiate the deal. All of the witnesses, including the expert, Mr Stein, noted that this was highly irregular for non-executive directors to attempt to meet directly with suppliers.

317 On 24 September 2015, Ms Kwinana and Dr Tambi met with Mr Hadi Akoum, the Airbus Vice President of Sales in Africa, in Johannesburg. Mr Meyer testified that neither he nor Mr Dixon were made aware of this meeting.

318 On 25 September 2015, Mr Akoum sent an email directly to Ms Myeni following this meeting, addressing her on first-name terms ("Dear Dudu"). Mr Akoum's email appears at **Airbus Bundle vol 3 176B**. Mr Akoum indicated that it was urgent that SAA conclude the Swap Transaction as Airbus had production deadlines. Mr Akoum further warned Ms Myeni that "*If you decide to go back to the 320 deal, an important amount of PDP's will be required almost immediately as some aircraft will have to be delivered in the near future.*"

319 On 25 September 2015, Mr Dixon responded expressing his concern that the other Board members had met directly with Airbus, without his knowledge. His email appears at **Airbus Bundle vol 3 p 176A**. Mr Dixon also emphasised that, in his view, Board approval had already been granted for the Swap Transaction and that there was no reason for further delays. He stated:

> *"I must say it came as a complete surprise to me to learn that there was a meeting with Airbus and Board members yesterday as I was totally unaware of this but it could be that I was left out of the loop for a reason.*
>
> *I must say that while this worries me, I am even more concerned to learn that this is still an outstanding matter as I was under the impression from the last Board meeting that the resolution authorising you to sign was only to be withheld until the following Monday as National Treasury were going to visit Airbus that weekend to ensure that we were getting the best deal."*
>
> *…*
>
> *It seems to me that Airbus have gone out of their way to allow us to escape from the onerous A320 deal to what I see as a much more attractive swap to A330 -300's with considerable savings for SAA, I*

therefore cannot for the life of me see why the Board would want to put us at the risk of reverting to the original A320 contract.

I am also not a fan of brinkmanship with suppliers as it can come back and bite you hard; so in the absence of any valid argument coming out of yesterday's meeting as to why it would not be in SAA best interests I would strongly support that we accept the deal offered before we lose it all together. I believe that I have already signed a resolution to this effect some time ago but if not please get back to me and I will get this to you or Ruth."

320 On Sunday 27 September 2015, Mr Meyer emailed Ms Myeni and the other Board members again, following further discussions with Mr Akoum of. A copy appears at **Airbus Bundle vol 3 pp 176G – 176H.**

320.1 Mr Meyer relayed a text message he had received from Mr Akoum, which stated: "*"Hi Wolf, no feedback from Dudu or board members. We will send a default notice next week for the outstanding A320 POP's. Sorry, regards Hadi.*"

320.2 Mr Meyer again repeated that further delay in concluding the Swap Transaction would have "horrendous" implications for SAA:

First of all from a cash flow point of view, we immediately need to find R240m to catch up on PDP's to escape a default call on the A320 transaction, which, with the delays in our current funding RFP, the airline can ill-afford. Secondly we need to budget for another R1.2bn in PDP's over the next 18 months. Should we not be able to secure the R240m within the given time frame, SAA runs the risk of cross defaults being triggered. This means that all our lease and debt agreements have cross default clauses which stipulate that should there be a default on any of SAA's debt, all debt will become immediately payable to lessors and banks!

320.3 Mr Meyer further reminded the Board that the delay would also result in SAA failing to meet its targets and undertakings in the 90-Day Action Plan, the Corporate Plan and the Shareholder's Compact:

> "*With regard to SAA's 90 Say Action Plan, this transaction and anticipated savings was the core of the Plan. This has been communicated to the media already in March this year, together with all the other estimated savings. Furthermore, SAA's budget and three-year forecast in the Corporate Plan was based on the premise that the transaction would proceed, as approved by the Board and the Minister. Some of the targets in the Shareholder's Compact have been calculated based on the impact of this material transaction.*"

321 Despite Mr Meyer's dire warnings and the Minister's instruction to conclude the Swap transaction by 18 September 2015, there was still no ratification.

322 When asked in cross-examination why there was a delay, Ms Myeni failed to offer any direct or coherent answer. She initially suggested that she wanted to ratify, but was held back by other Board members. When pressed further, she then suggested that there were unspecified concerns over the Swap transaction and that the Board wanted to explore all options.[118] She refused to give any clear answer on where she stood on the transaction and why she took no proactive steps to expedite matters.

323 Mr Meyer testified that far from being a neutral, it was Ms Myeni who took the lead in blocking its finalisation and attempting to renegotiate the deal with Airbus. This was most evident from Ms Myeni's correspondence directly with Airbus.

<u>The 29 September 2015 letter to Airbus</u>

324 On 29 September 2015, Ms Myeni sent a letter to the President and CEO of Airbus, Mr Fabrice Bregier, seeking unilaterally to change the agreed Swap

[118] Myeni 21.2.2020 [REF]; 24.2.2020 [REF].

Transaction.[119] A copy of this letter appears at **Airbus Bundle vol 3 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."*

325 Mr Bosc, Mr Meyer and Ms Mpshe testified that this letter took them by complete surprise. Ms Myeni had made no attempt to consult with them, other Board members, or members of EXCO before sending this letter.

326 They were adamant that there was no Board resolution to change the nature of the transaction and the Chairperson did not have the authority to change such a deal without such approval. There was also no "African Aircraft Leasing Company" in place to engage with Airbus. Moreover, Airbus' tight production schedules did not permit an airline to dictate delivery periods, as Ms Myeni attempted to do.

327 All of the witnesses were unanimous that it is unheard of for a non-executive chairperson to take the step of writing directly to the head of a major supplier to attempt to renegotiate a deal that was already approved. Mr Bosc emphasised

[119] PoC p 42 para 121; Admitted Plea p 113 para 93.

that the negotiation process up to that point had taken more than nine months of hard work, meticulous planning and negotiation involving hundreds of people at SAA, Treasury and Airbus, many of whom were specialists. He stressed that the acquisition of aircraft is a highly complex and specialised task – it cannot be done overnight by non-specialists.[120] Ms Myeni's attempt to insert herself in the negotiations in this manner was itself grossly negligent.

328 Not only did Ms Myeni seek to change the nature of the transaction but she also went directly to the President and CEO of Airbus, who had not previously been involved in the negotiations. In Mr Bosc's words, Ms Myeni's letter was " *possibly the most unprofessional letter Mr Fabrice Bregier has ever received in his career*".[121]

329 It bears emphasis that it is common cause on the pleadings that at the time that Ms Myeni sent this letter the SAA Board had not decided to amend the terms of the Swap Transaction,[122] nor had the Minister approved this substantial amendment of the Swap Transaction.[123]

<u>The "special" meeting of 28 and 29 September 2015</u>

330 On 28 and 29 September 2015, around the time that Ms Myeni sent the letter to Airbus, a meeting was held at the InterContinental Hotel at OR Tambo involving SAA management and some members of the Board. Ms Myeni has sought to

[120] Bosc 6.2.2020 [REF].
[121] Bosc 6.2.2020 [REF].
[122] PoC p 43 para 122; Plea p 114 para 94.1.
[123] PoC p 43 para 123; Plea p 114 para 95.

characterise this as a Board meeting, but all of the plaintiffs' witnesses insisted that it was nothing of the sort.

331 Mr Bosc testified that members of senior executives of SAA had initially been summoned to this meeting by Ms Myeni. At the last minute, the venue was changed from the SAA headquarters to the InterContinental Hotel, forcing all of the senior executives to pack up and travel to the hotel.

332 Mr Bosc, Ms Mpshe and Mr Meyer attended this meeting. They described it as a two-day "monologue" during which Ms Myeni spoke at great length, reflecting her personal views on a range of topics.[124] No agenda had been circulated in advance, as Ms Myeni had rejected the one proposed by the executive. There were no meeting packs, no submissions, no votes, and no resolutions passed.

333 A set of draft minutes from this meeting appear at **Airbus Bundle vol 3 pp 178 – 188**. Mr Meyer, Mr Bosc and Ms Mpshe all confirmed that these draft minutes were not an accurate reflection of the meeting and that, to the best of their knowledge, these minutes were never approved. There is no sign of any resolutions emanating from this meeting. None have been discovered by Ms Myeni or SAA.

334 On 3 November 2015, Ms Mabana Makhakhe, the Deputy Company Secretary, emailed a copy of these draft minutes to Board members seeking their approval. A copy of her email appears at **Airbus Bundle vol 4 pp 216 – 217.**

[124] Bosc 6.2.2020 [REF].

335 In response to this email, Mr Bosc immediately emailed Mr Viwe Soga, Head of Legal at SAA, to ask that these draft minutes be corrected as they were wrong. Mr Bosc followed this up with a more detailed email setting out his concerns. This email exchange appears at **Airbus Bundle vol 4 pp 218 -221.** Mr Bosc made the following objections to the minutes:

335.1 This was not a Board meeting, but a meeting between ExCo and some members of the Board;

335.2 It was not a properly constituted Board meeting – two out five board members were absent (Mr Dixon and Dr Tambi) and only two non-executive directors were present (Ms Myeni and Ms Kwinana);

335.3 There was no agenda for this meeting or submissions to the Board;

335.4 There was no vote on any resolution;

335.5 No documents were submitted to the meeting for consideration;

335.6 Ms Myeni addressed the meeting at some length, reflecting her personal views, but this was not a reflection of the Board's views.

335.7 No resolution was passed on the Swap Transaction.

336 Both Ms Mpshe and Mr Meyer testified that they fully concurred with Mr Bosc's objections to the draft minutes and adopted his views as their own.[125]

[125] Mpshe 10.2.2020 [REF]; Meyer 14.2.2020 [REF].

337 Mr Bosc, Ms Mpshe and Mr Meyer further confirmed in their testimony that the portions of these draft minutes that deal with the Swap Transaction are false:

337.1 At paragraph 3.1 (g) **(p180),** the draft minutes state that "*It was agreed that the response to the Minister should state that the structure of the A320 transaction was being reviewed by the Board and it was observed that the local aircraft leasing company was a better option for SAA.*"

337.2 They confirmed that the Board did not reach any such agreement, nor was there a resolution to this effect. Instead, it was Ms Myeni who raised the issue of a local aircraft leasing company, but declined to give any further details as she feared that information may be leaked to the media.[126]

337.3 Under the heading "Local Aircraft Leasing Company" (**p 181**) it is stated that:

> *"The Board requested Management to direct Members to individuals or Institutions which could unlock opportunities for SAA. In particular it was stated that there was a need to. access the Department of Trade and Industry (DTI) National Industrial Participation Programme (NIPPs) funding for the local aircraft leasing company. It was stated that the idea was to request DTI through one of its entities to hold a majority stake in the aircraft leasing company together with the Public Investment Corporation (PIC) and the Development Bank of Southern Africa (DBSA)."*

337.4 The witnesses confirmed that the Board made no such request at the meeting. There was also no resolution passed to amend the Swap Transaction or to overturn the resolution of 31 March 2015.

[126] Mpshe 10.2.2020 [REF].

338 On this basis, there are no grounds for Ms Myeni to claim that this meeting provided her with the authority to send the letter to Airbus.

Airbus' reaction

339 Ms Myeni's letter of 29 September 2015 had an immediate reaction from Airbus. On 1 October 2015, Mr Jerome Charieras of Airbus sent an email to Mr Meyer and Ms Mpshe explaining the consequences of the Board's failure to approve the Swap Transaction. His email appears at **Airbus Bundle vol 3 p 196F**. He stated:

> *"Based on the Letter from South African Airways Chair received yesterday by Airbus it seems that the Board hasn't approved A320 swap by A330-300 yet.*
>
> *As explained in Hadi Akoum letter dated 27th September 2015, SM is forcing us to go back to the A320 agreement until the A330 contract is approved.*
>
> *Therefore, you are going to receive a request for the outstanding PdPs of US$ 16,873,719.74 and another PdPs request for the soon to come November 2015 PdPs of US$ 22,421,660.91.*
>
> *These PdPs will be added to the already received PdPs and should SAA decided to move forward with the A330 agreement returned to SAA based on the documents signed on 30th July 2015."*

340 On 5 October 2015, Mr Bregier sent a letter to Ms Myeni expressing his surprise at her letter of 29 September 2015. A copy of his response appears at **Airbus Bundle vol 3 pp 196A – 196B**.

340.1 Mr Bregier indicated that, in Airbus' view, the transaction was already on the verge of completion following the signing of the transaction documentation on 31 July 2015 and the fact that both the SAA Board and the Minister had already approved the transaction:

> *"Firstly let me express how delighted I was when informed of the successful conclusion of the extensive negotiations and subsequent signing of all the transaction documentation on the 31st of July 2015. This highlighted to me the value and importance of the relationship between our respective organisations - as demonstrated by Airbus' willingness to respond positively to your request for such a swap which, I understand. results in a significant cash and EBIT benefit for SAA.*
>
> *I was therefore somewhat surprised to receive your letter wherein you state that there has been a delay in reaching a decision on this swap. Airbus understands that not only has the SAA board already approved this transaction. but that unconditional ministerial approval was obtained through the Section 54 approval issued on the 14th of September 2015."*

340.2 Mr Bregier further indicated that Airbus would not permit the introduction of an "African Aircraft Leasing Company" at this stage, as Airbus had strict procurement requirements. A leasing company could only be introduced after Airbus had concluded a full request for proposals ("RFP") process:

> *I have been informed by my teams that SAA follows the highest level of procurement and compliance regulations. I am sure you will agree that Airbus, as a publicly listed entity, must also ensure such levels of compliance. To this end. Airbus has well defined processes with regards to the sell-down of any lease commitments we make, which includes a tightly controlled RFP process.*
>
> *I note your desire to use an African Aircraft Leasing Company and Airbus is heartened to hear that a new lessor will be created which will further the development of the aviation sector in Africa.*
>
> *Airbus will be happy to include such lessor in the RFP process and will consider its offer accordingly in conjunction with other offers received . <u>However, sell-down to a specific lessor was never part of the agreement between Airbus and SAA. Therefore it cannot be entertained at such a late stage as a condition to this transaction which would severely compromise Airbus' ethics and compliance guidelines.</u>"*

340.3 Mr Bregier concluded with the thinly veiled threat that any further delays would result in Airbus taking steps to "*preserve its rights*" – which was a

reference to its rights to demand payment of the PDPs in terms of the 2009 Revised Agreement. Mr Bregier stated:

> *"You also mention a delay in delivery. Please note that Airbus has very tight industrial constraints and as a result, delaying delivery is not a simple matter. Airbus has informed SAA on multiple occasions of the urgency to conclude this transaction due to the industrial planning required.*
>
> *Without immediate closure, Airbus will be forced to take appropriate actions in order to preserve its rights.*
>
> *Please rest assured that Airbus is undertaking something quite extraordinary by agreeing to this swap transaction. I trust that you will take all necessary actions to analyse this transaction in the coming days.*
>
> *I look forward to hearing at the successful speedy conclusion of this swap shortly from my team and to the continuing strong relationship between SAA and Airbus."*

341 As a result, Airbus had made its position clear: it was not willing to consider the insertion of an African Aircraft Leasing Company as a precondition for the conclusion of the Swap Transaction. It was, however, open to the inclusion of such a company in a future RFP process that was envisaged after the Swap Transaction was concluded. In the meantime, any further delays in concluding the Swap Transaction would mean that SAA would be held liable for the outstanding PDPs under the existing agreement, amounting to almost USD40 million by the end of November 2015.

<u>The appointment of a transaction adviser</u>

342 Rather than heeding Airbus' warnings, Ms Myeni, aided by Ms Kwinana and Dr Tambi, then sought to use these warnings as a pretext to push through the unlawful appointment of a "transactional adviser".

343 On 5 October 2015, Ms Myeni received Mr Bregier's letter via email. Ms Myeni then circulated this letter to Ms Kwinana and Dr Tambi, excluding Mr Dixon and Mr Meyer. The email trail appears **Airbus Bundle vol 3 pp 193 – 194.**

344 The next day, at 9:25 pm on 6 October 2015, Ms Kwinana wrote to Ms Myeni and the Board, suggesting that SAA must urgently procure a transactional advisor to assist in making a decision. Her email is at **Airbus Bundle vol 3 pp 192 -193.** She makes specific reference to the "*questions and concerns that you [Ms Myeni] raised*". **(p 192 – 193)**

345 At 10:03 pm, just half-an-hour later, Ms Myeni responded to Ms Kwinana's email stating the following:

> *Dear Chairperson of Audit and Risk*
>
> *I support this and would rather try and expedite this by writing to the entire board.*
>
> *I know that 2 members of the board, being Mr Dixon and the CFO approved this long ago. But after the EXCO mentioned that they had never interrogated the swap at the EXCO meeting, it was evident that this was only done by a few people and then round robined this to the rest of the EXOC members. There was absolutely no ownership of these huge numbers at EXCO level. Can this stand public scrutiny?*
>
> *I take your advice and will send a memo to the Board*
>
> *Regards."* (**Airbus Bundle vol 3 p 192**)

346 Mr Dixon and Mr Meyer were strongly against a transactional advisor, as appears from their emails at **Airbus Bundle pp 189 – 191**. In his correspondence and his testimony, Mr Meyer also strongly disputed that the Swap Transaction had only been approved by two board members and was not interrogated by EXCO.

The Swap Transaction had, in fact, received unanimous Board approval on 31 March 2015.

347 On 7 October 2015, Mr Meyer responded pointing out that "*[t]he Chair already indicated to Airbus that the Board supports the transaction and that it was only the South African lease vehicle issue being the stumbling block and now this? We are losing all credibility*". **(Airbus Bundle vol 3 p 190 – 191)**

348 On the same day, Mr Dixon responded recording his strong objections to the appointment of a transaction adviser, as appears in his email at **Airbus Bundle vol 3 p 190**. Mr Dixon further pointed out that there was nothing stopping the Board from exploring the option of a local leasing company after the Swap transaction was concluded:

> *"It would to me be far more disadvantageous to SAA to have to revert to the original deal than to have a potentially temporary lease agreement In Euro's.*
>
> *Once we have the lease agreement in place we can look for potential local funders by following the approved RFP processes and seeing if It is possible to reduce the cost further by doing so. As I said before I have my doubts about this as local interest rates are much higher than Europe's and while there might be scope to fix our future liability in Rand this wlll have the exchange risk built into the model which will make It considerably more expensive but let's explore the market and see."*

349 On 8 October 2015, Mr Meyer sent a further email to the Board again emphasising that no transaction adviser was needed. He further advised that the delays in concluding the Swap would impact on SAA's cash flow and would potentially trigger cross-default clauses **(Airbus Bundle vol 3 p 189)** Mr Bosc responded to add that SAA had already consulted no less than four transaction

advisors on this deal. As a result, this latest delaying tactic was "*beyond embarrassment*" (**Airbus Bundle vol 3 p 189**).

350 Following this exchange, Ms Myeni circulated a letter to the Board in which she personally recommended the appointment of Quartile Capital as the transaction adviser. A copy of this letter appears in **Airbus Bundle pp 208 – 210.** This was the "*memo to the Board*" that she had promised in her email of 6 October 2015, at **Airbus Bundle vol 3 p 192**.

351 During Ms Mpshe's testimony on 10 February 2020, Ms Myeni's counsel raised a belated objection to this letter, claiming that it was an unsigned, undated letter which was inadmissible. This objection was long out of time as the admissibility of this letter had already been determined by agreement between the parties in the pre-trial minute of 16 October 2019. In response to the objection, this Court ruled that in the absence of any reasonable notice of the objection, the document was admissible and that the only issue is the weight to be given to the document, which is a matter for argument.[127]

352 That objection has now been overtaken by events. The plaintiffs subsequently subpoenaed the signed version from SAA which has now been produced by SAA's Company Secretary, Ms Kibuuka. The signed version, bearing Ms Myeni's signature, is dated 12 October 2015.

[127] Mpshe 10.2.2020 [REF].

353 Ms Myeni's letter is highly significant as it demonstrates that she indeed played a leading role in attempting re-engineer the Swap Transaction and unlawfully appointing a transaction adviser.

354 In this letter, Ms Myeni repeated her false claim that the Swap Transaction did not enjoy full Board and EXCO support. She stated:

> *"During the past few weeks there have been numerous discussions and documents circulated regarding the proposed transaction. The board and executives have not been unanimous on the matter and there are aspects of the transaction that are either not fully understood or not fully supported and properly interrogated by all relevant business units, as we understood clearly on 28/29 September."* (**Airbus Bundle vol 3 p 208*, first para)***

And further:

> *"As I understand the responses to Ms Kwinana's proposal there was broad agreement for the engagement of a transactional adviser – as long as the cost was not a material cost to the company or be cost/beneficial. That can be clearly helpful to SAA as we are currently relying on one source, being the CFO and those brought to negotiate with numbers with."* (**Airbus Bundle vol 3 p 209*, first para)***

355 Ms Myeni's further indicated that she was aware of some unidentified "*third party [that] has indicated that it wishes to make a funding proposal of the swap transaction … This consortium comprises both private and state controlled financial institution.*" (**P 208, second para)**

356 Most significantly, Ms Myeni then stated that she had personally "*approached Quartile Capital"* to be the transactional adviser on the Swap Transaction and that she had *"considered them as they are perceived to be independent and credible*" **(p 209, third para)**. She sought to justify this extraordinary and unlawful step by claiming that there was now "*urgency*" which was "*largely*

dictated by circumstances which are outside the control of the Board" **(p 209, second para**).

357 Both Mr Meyer and Ms Halstead testified that this attempt to procure the services of a transactional adviser directly, without any open and competitive tender process was manifestly unlawful. There had also been no application to Treasury to permit a deviation from normal procurement procedures.[128] Furthermore, the alleged urgency had in fact been engineered by Ms Myeni, Dr Tambi and Ms Kwinana by continuing to delay the conclusion of the Swap Transaction.

358 This appointment of a transaction adviser appears to have been confirmed on 23 October 2015, when the Board resolved "*to approve the engagement of a competent transactional adviser to deliver, validate and / or enhance the A320 / A330 swap transaction, and the R15 Billion Funding Requirement and RFP."* This resolution further provided that "*management should explore the option of negotiating a reasonable success fee based on the savings realised*". A copy of this resolution appears at **BNP Bundle p 185B**.

359 Mr Meyer raised his objections to the appointment of a transaction adviser in a letter to the Board, dated 26 October 2015. A copy appears at **Airbus Bundle pp 205 – 208**. He specifically noted that no proper procurement process had been followed and that there was no non-disclosure agreement with Quartile Capital. He also made reference to a report on the Swap Transaction which had

[128] Halstead 12.2.2020 [REF].

been prepared by Quartile Capital, in its capacity as a transaction adviser. He remarked as follows:

> *Report from the transaction adviser*
>
> *I have reviewed the New Airbus A320/AS30 Swap transaction proposal from Quartile Capital. I initially wanted to comment on it, but as a I progressed reading it, I realised, with respect to Mr Motloba that he displayed very little aptitude with regard to grasping the current transaction structure as well as SAA's hedging policies. Surprisingly, recommendations made by Mr Motloba clearly reflected the sentiments expressed by the Board in last Sunday's newspaper article, which questions the independence and integrity of the advisor."*

360 Mr Meyer's email and his testimony are conclusive proof that Quartile Capital was indeed involved at the time, contrary to Ms Myeni's claims to know nothing about its role.

The 10 October 2015 meeting

361 On 10 October 2015, certain members of the Board met with Mr Hadi Akoum of Airbus to again discuss the Swap Transaction. Ms Kwinana, Dr Tambi, Mr Dixon and Mr Meyer attended the initial meeting.[129]

362 Mr Meyer testified that after he and Mr Dixon left the initial meeting, Ms Myeni and Mr Motloba of Quartile Capital arrived and conducted a second meeting with Mr Akoum. Mr Meyer further testified that he had seen Mr Motloba of Quartile Capital in the lobby of the hotel on his way to the meeting and was aware of his presence.

[129] PoC p 46 para 128; Plea p 114 para 99.

363 On 14 October 2015, Mr Akoum wrote directly to Ms Myeni, again on first name terms. A copy of this letter appears at **Airbus Bundle pp 197 – 198.** In this letter, Mr Akoum referred to the private meeting with Ms Myeni on 10 October 2015.

363.1 He again indicated that Airbus rejected SAA's request to entertain a sale-down of the lease transaction to the African Aircraft Leasing Company as a precondition for the Swap Transaction.

363.2 Instead Airbus suggested to sell SAA the five A330's. SAA would then enter into a sale and leaseback with the African Aircraft Leasing Company. This meant SAA would immediately be liable to pay PDP's to the value of USD17 million and an additional USD100m within 30 days of execution of the deal. Mr Akoum demanded a response by 16 October 2015.

364 Mr Meyer testified that he was startled by Mr Akoum's letter, as he had not been consulted on any proposal to purchase the five aircraft directly from Airbus. He was alarmed because SAA did not have the USD 117 million that would now be required in 30 days under a sale agreement.[130]

<u>Further warnings to Ms Myeni and the Board</u>

365 Later that day, also on 14 October 2015, Mr Meyer wrote to Ms Cynthia Stimpel, SAA Treasurer, indicating that he had not been party to the discussions with Airbus about the direct purchase of the A330s, that this would have significant financial implications, that SAA did not have the liquidity required for this new

[130] Meyer 14.2.2020 [REF].

deal, and that we would have to write to National Treasury immediately to alert them to this new development and the financial implications. A copy of his email appears at **Airbus Bundle vol 3 pp 199 – 200**.

366 On 15 October 2015, Mr Meyer sent a letter to the Director General of National Treasury, Mr Lungile Fuzile, where he explained that in light of these new developments and the delay in concluding the Swap Transaction, SAA would likely be unable to meet its debt obligations. He attached Mr Akoum's letter of 14 October 2015 to alert Treasury to the danger. A copy of this letter appears at **Airbus Bundle vol 3 pp 202 – 203.**

367 Ms Halstead testified that had it not been for Mr Meyer's correspondence, Treasury would likely have been entirely unaware of Airbus' position and the risk of over USD 100 million in PDPs. Ms Myeni certainly did not volunteer this information to the Minister at the time.[131]

368 Mr Meyer testified that he sent this letter to Treasury because he was aware that Ms Myeni would not do so, despite the obligation on the Board to alert Treasury to any potential defaults on SAA's obligations in terms of SAA's Guarantee Framework Agreement.[132]

369 Mr Meyer's warnings to Treasury were echoed in a memorandum prepared for the SAA Board on 6 November 2015. Ms Mpshe submitted this memorandum to the Board, reflecting a legal opinion on the consequences of further delays in

[131] Halstead 12.2.2020 [REF].
[132] Meyer 14.2.2020 [REF].

the conclusion of the Swap Transaction. A copy appears at **Airbus Bundle vol 4 pp 236A – 236M**. The key conclusions at **p 236L** recorded that:

> *"SAA is financially distressed and currently trading under Insolvent circumstances and consequently trading recklessly. While the Correspondence does not induce a new risk with respect to the reckless trading and financial distress, it introduces a new risk of a breach of an agreement and consequently a potential trigger of material adverse effect and potential cross default under the funding and aircraft lease agreements. This exacerbates an already weak financial position and compounds SAA's financial issues. SAA has always had this PDP liability under the Purchase Agreement. The Correspondence accelerates the issue.*
>
> *The Companies Act requires the Board to file for business rescue or liquidations.*
>
> *Alternatively, any creditor or employees may appty to court to place SAA under business rescue. Creditors may also apply to court for liquidation of SAA. Failure to comply with these provisions of the Companies Act can result in s1atutory sanctions and a possible fine or imprisonment against a person found guilty of an offence to defraud a creditor, employee or shareholder.*
>
> *Under the Purchase Agreement Airbus can take action - including to terminate the Purchase Agreement, retain all existing PdPs paid by SAA and seek damages against SAA in an English court. Additionally, SAA Is required to notify its lessors and lenders of potential events of default arising under other loan/lease and material contracts, which can result in enforcement action by relevant lenders/lessors/other counterparties. The Board should consider alternative options to remedy the situation and workshop these with ExCo."*

Ms Myeni again provided no response to these warnings.

<u>The Minister's repeated warnings</u>

370 While these events were unfolding, Minister Nene was in regular correspondence with Ms Myeni. His correspondence reflected Treasury's increasing concern at the dangers facing SAA.

371 On 29 September 2015, Ms Myeni wrote to the Minister, indicating that a local leasing company was being explored for the Swap Transaction. A copy of this letter was never discovered, but its tenor is apparent from the Minister's reply.

372 The Minister responded to Ms Myeni in a letter dated 30 September 2015. His letter appears at **Airbus Bundle vol 8 pp 669 – 670**. He required that any amendment to the approved Swap Transaction should leave SAA in a better financial position. He also required that SAA submit details, including a comprehensive business case for the proposed alternatives for his consideration. Minister Nene concluded his letter by highlighting the grave consequences of SAA's delays in finalising its financial statements, which was in large part caused by the delay in concluding the Swap Transaction:

> "*I am disappointed by the delays from SAA which has prevented the annual financial statements (AFS) being concluded and consequently the convening of the Annual General Meeting (AGM). This is contributing to an erosion of trust from stakeholders, including lenders as well as Parliament, where the submission of the AFS will now have to be delayed.*" (**p 670**)

373 On 20 October 2015, Minister Nene sent a further letter to Ms Myeni, appearing at **Airbus Bundle vol 3 p 204**. He noted that since his letter of 30 September, Ms Myeni had failed to provide any further feedback on outstanding matters before the going concern guarantee would be considered. He further emphasised that "*no funding allocation will be made to SAA*" given the tight fiscal position at the time.

374 On 3 November 2015, Minister Nene sent a further letter to Ms Myeni addressing the delays in concluding the Swap Transaction. This letter is at **Airbus Bundle vol 4 p 221.1**. Minister Nene referred to a meeting held with Ms Myeni on 2 November 2015, where her proposed changes to the Swap Transaction were

discussed. Minister Nene again expressed his frustration that the Swap Transaction had still not been concluded, which was holding up consideration of the government guarantee and was preventing SAA from finalising its financial statements and holding its AGM:

> *"As highlighted in our meeting on 2 November 2015, I am extremely disappointed that, in more than three weeks, SAA has not responded to the issues raised in my letter of 30 September 2015 by urgently concluding all the outstanding matters and providing me feedback in this regard. These matters should be finalised before the going concern request is considered. In line with the Board's commitment in our meeting, I will expect the response on or before 9 November 2015. As I have indicated previously, the lack of urgency from the airline is eroding trust from stakeholders, including lenders and Parliament. I trust that the finalisation of these matters will receive your immediate attention.*
>
> *Given the delay in providing a response, it will not be possible to conclude on the matter of the going concern application and hence finalise the Annual Financial Statements (AFS) or hold the Annual General Meeting (AGM) before the scheduled meeting with the Standing Committee on Finance (SCOF) on 10 November 2015. SM's 2014/15 AFS were supposed to have been tabled in Parliament by 30 September 2015 and the SCOF had specifically required that this matter be finalised before the November meeting."*

375 On 9 November 2015, Ms Myeni submitted the business case that had been requested by Minister Nene, setting out the proposed changes to the Swap Transaction (**Airbus Bundle Vol 4 p 236N**). Ms Myeni signed the business case. Its original author remains a mystery. Mr Meyer testified that he had never seen this business case, he was not consulted on its contents, and this was not discussed at Board level. This was despite the fact that he was still the CFO at the time and he would ordinarily have been directly involved in preparing such documents.[133]

[133] Meyer 14.2.2020 [REF].

376 Ms Halstead testified that her team at Treasury conducted an analysis of this business case that highlighted many gaps, flaws and misstatements. She pointed out that:[134]

376.1 Ms Myeni's proposals were contradictory and ambiguous so that it was not clear what option the airline intended pursuing: an outright purchase of the A330 aircraft; an outright purchase of the A330 aircraft, which would then be sold and leased back from a local lessor; or a direct purchase by the lessor of the A330 aircraft from Airbus, which would then be leased to SAA;

376.2 All of the possible options that SAA may have been contemplating reflected a material amendment to the original swap transaction, requiring that they seek approval from the Minister of Finance in terms of Section 54(2) of the PFMA. No such application had been submitted.

376.3 As a result of Mr Meyer's warnings, Treasury was aware that should SAA be responsible for purchasing the A330 aircraft, USD117 million in PDPs would be payable within 30 days. However, Ms Myeni's business case claimed that no PDPs would be payable at all, which was entirely false.

376.4 SAA claimed that due process would be followed to secure a local leasing company and possible financiers, but no procurement process had been commenced, which would have taken many months to reach finality. A proper process could not be completed in 30 days.

377 The Minister wrote to Ms Myeni on 10 November 2015 and again on 12 November 2015, indicating that the business case provided little in the way of

[134] Halstead 12.2.2020 [REF].

concrete information that would be required to make an informed decision **(Airbus Bundle pp 237 – 238 and 238A - 238B)**.

378 In his letter of 10 November 2015, Minister Nene highlighted the ongoing "*serious corporate governance and fiduciary failure on the part of the Board*" by failing to conclude the Swap Transaction:

> *"On 10 November 2015 I received correspondence from you regarding the options that the airline could pursue In terms of the A320/A330 swap. However this was not a formal Section 54 application. The risks associated with the transaction have not been adequately addressed. As a result the Annual Report cannot be finalized and tabled in Parliament which is a serious corporate governance and fiduciary failure on the part of the Board of SAA. Parliament is therefore not in a position to exercise Its oversight role with regard to SAA."* (**Airbus Bundle vol 4 p 237**)

379 In his letter of 12 November 2015, the Minister further advised Ms Myeni that the changes to the Swap Transaction that she was considering would constitute a significant amendment to the transaction and would therefore require that SAA reapply for approval in terms of Section 54(2) of the PFMA. He underlined that this application should be submitted by 16 November 2015 failing which no further discussions or applications relating to the amendment of the transaction structure would be entertained and SAA would be required to implement the transaction structure in line with the approval that had already been granted. He directed that SAA was to provide the following information in a section 54 application:

379.1 All costs that the airline would incur in respect of the transaction including the lease rate at which the local leasing company has committed to lease the aircraft to SAA, financing costs that would be incurred, return conditions, penalties, cabin configuration etc.;

379.2 In the event of an outright purchase, the expected residual value of the aircraft at the end of a 12 year period with an explanation of how this value was estimated;

379.3 Cash flow and profitability projections over the full life time of the transaction and the approach to ensure that SAA will have the cash resources available to meet all payments when they fall due;

379.4 Background information regarding the company from which the aircraft would be leased, including a financial and legal due diligence;

379.5 The process followed in selecting the company from which the aircraft would be leased through a procurement process that is in line with all legislative requirements; and

379.6 All related legal agreements.

The section 54 amendment application

380 At this time, all of the senior executives and Board members who were opposed to Ms Myeni's plans were removed from office or were forced to resign:

380.1 As already indicated above, Mr Bosc was placed on "special leave" in early October 2015 and Ms Mpshe was removed from her position as Acting CEO on 13 November 2015.

380.2 Mr Meyer tendered his resignation on 12 November 2015 and left the SAA offices on the same date, as his working relationship with Ms Myeni had become intolerable. He had been repeatedly threatened with

investigations and disciplinary charges, but he was not facing any charges at the time. Previous investigations initiated on Ms Myeni's apparent insistence had cleared him of any wrongdoing.

380.3 Mr Dixon had also resigned shortly before Mr Meyer, as he had become increasingly alarmed by the corporate governance failures under Ms Myeni's watch.

381 Mr Bosc, Ms Mpshe and Mr Meyer testified that they played no role in preparing the section 54 application that was subsequently submitted to the Minister, nor were they consulted on this application. Mr Meyer had been involved in the preparation of the original section 54 application, which was submitted in May 2015, but was now excluded from the process.

382 On 16 November 2015, Ms Myeni submitted the new section 54 application to the Minister.[135] This appears at **Airbus Bundle Vol 4 p 243 - 261**. Ms Myeni sought approval to amend the approved Swap Transaction to insert an African Aircraft Leasing Company, to be financed by an unidentified "*local consortium of banks*".

383 Ms Myeni's signed covering letter to the application set out the core of the justification for this amendment. Mr Bosc, Ms Mpshe, Mr Meyer and Ms Halstead poured scorn on this justification, highlighting significant errors, falsehoods, and omissions. Their analysis is reflected in the Minister's letters of 24 November

[135] PoC p 47 para 132; Plea p 115 para 103.1.

2015 and 3 December 2015, which provided a more restrained but equally scathing analysis (**Airbus Bundle vol 4 pp 286(5) and 286(8)**).

384 At point 1 of her covering letter, **on p 244**, Ms Myeni referred to the alleged benefits of a "*ZAR denominated lease*". She claimed that this would save SAA approximately R2.6 billion in currency hedging costs as a ZAR lease would have "*zero hedging costs, resulting in saving of an estimated R2.6 bn on day 1*".

384.1 Mr Bosc, Ms Mpshe, Mr Meyer and Ms Halstead testified that this was manifestly false. There would always be currency hedging costs, regardless of the structure of the lease. A local leasing company or some other middleman would still have to pay Airbus for the aircraft in US dollars, regardless of the structure of the transaction. The currency risk would then be passed on to SAA in some way, either directly or by building the costs into the price of the lease.

384.2 Ms Halstead and Mr Meyer further testified that the R2.6 billion hedging cost was grossly inflated and was entirely unsubstantiated. Ms Halstead indicated that she had personally spoken to several financial institutions to obtain indicative hedging costs, which came back at a small fraction of this amount.[136]

385 At point 2 of the letter, **also on p 244**, Ms Myeni suggested that her proposal would somehow leave SAA with an asset and would "*trap this value within SA*".

[136] Halstead 12.2.2020 [REF].

385.1 This statement was nonsensical as Ms Myeni was still proposing that SAA would lease the aircraft, rather than acquiring them directly.

385.2 Moreover, Mr Bosc and Mr Meyer testified that wide-body aircraft like the A330 lose a substantial proportion of their value over time and cannot easily be resold, making a lease a far less risky option than an outright purchase. Ms Myeni's claims about the residual value of these aircraft therefore reflected a profound lack of understanding or expertise, again highlighting why it was impermissible for a non-executive chairperson to descend into the arena in this way.[137]

386 At point 3**, p 244**, Ms Myeni stated that "*the options in the SAA business case presented to yourself are not for SAA to either acquire outright the five A330s, or enter into a ZAR denominated lease. SAA's business proposal is to facilitate, from the local financial institutions, the outright acquisition / purchase of the five A330s and, leasing them to SAA by way of a ZAR denominated lease*".

386.1 Ms Halstead testified that the precise nature of this proposal still remained unclear, as it was uncertain whether Ms Myeni was proposing that SAA purchase the aircraft and then engage in a sale-and-leaseback, or whether the local aircraft leasing company would be acquiring these aircraft directly from Airbus. These different options involved very different legal and practical challenges.

386.2 Either of these scenarios would still have involved lengthy and complex procurement processes, which would have taken many months to

[137] Bosc 6.2.2020 [REF].

complete and would have required further section 54 approvals. Mr Meyer testified that from his experience in concluding the Pembroke deal in 2013, such a process could take between three and six months at minimum. In fact, the proposed deal would have required far more time. The Pembroke deal had involved an established and reputable international aircraft leasing company, in contrast with this proposal where Ms Myeni was now envisaging the creation of a new local aircraft leasing company from scratch.[138]

386.3 In this case, there was simply no time to follow such a lengthy and complex process, as Airbus had made clear that it required finality on the matter within 30 days. It can only be inferred that the supporters of this deal and the unnamed financiers were hoping to use this urgency as a pretext to force through a lucrative contract and to justify deviations from established procurement processes.

387 At point 4, **p 244**, Ms Myeni stated that "*With respect to the rates that the South African lessor will charge SAA for the five A330s, and any antecedent financial terms and conditions, these will be negotiated and finalised as soon as the procurement process of the South African financial institution(s) is complete*". This was further confirmation that the transaction was entirely speculative, as it still relied on a procurement process being followed at some later date.

388 Ms Myeni concluded her letter by claiming that there was no real urgency to complete the transaction, as she alleged that no PDPs were in fact due and

[138] Meyer 14.2.2020 [REF]; 17.2.2020 [REF].

payable. This was profoundly dishonest, as Ms Myeni knew full well from Airbus' correspondence that it was insisting on payment of the PDPs if the Swap Transaction was delayed any further or amended. We return to address this dishonesty in detail below.

389 Ms Myeni attached to her covering letter an email from Airbus, dated 16 November 2015 (**Airbus Bundle vol 3 p 246**). In this email, Mr Akoum referred to earlier correspondence from Ms Myeni dated 11 November 2015 and stated the following:

> *"Dear Chairperson,*
>
> *Airbus is willing exceptionally to give SAA another 30 days exemption from its obligations on the A320 due PDP payment until we have a clear understanding on how Nedbank would be financing the direct purchase by SAA of the 5 A330-300. MY team will contact SAA acting CEO to define a date for the joined meeting with Nedbank."*

390 Contrary to what Ms Myeni claimed, this email demonstrated that Airbus was still insisting on payment of the PDPs. Furthermore, Airbus' reference to a meeting with Nedbank indicates that Airbus had either been told or led to believe that Nedbank would be financing the deal. Ms Myeni accepted this under cross-examination.[139] This echoed Mr Akoum's letter of 14 October 2015 where he referred to "*your* [i.e. Ms Myeni's] *comment that such lessor has R6 bn ready and available for this transaction*" (**Airbus Bundle vol 3 p 197**).

391 This suggested that Ms Myeni was telling the Minister of Finance one thing and Airbus another, as the section 54 application made no mention of any existing

[139] Myeni 25.2.2020 [REF].

financing in place for this deal. Ms Halstead and Mr Meyer confirmed that, to their knowledge, there was no such financing "ready and available" at the time.

392 A further attachment to the section 54 application was an "unsolicited proposal" on a Nedbank letterhead, signed by a Mr Masotsha Mngadi. The letter is dated 30 October 2015 and was addressed directly to the Board members. It appears at **Airbus Bundle vol 4 p 252 - 254**. The plaintiffs' witnesses noted that this letter was highly suspicious:

392.1 Ms Halstead testified that she and her Treasury team were having weekly meetings with the major banks at the time, including Nedbank. At no time had Nedbank ever indicated that they had made or approved any such unsolicited proposal for the financing of these aircraft.[140]

392.2 Ms Halstead further testified that she became aware of Mr Mngadi in 2016, when it emerged that he was acting for BNP Capital, which had been improperly appointed as a transaction adviser for SAA's R15 billion recapitalisation plan. Mr Mngadi was later fired by Nedbank for his involvement in that deal.

392.3 Mr Meyer further testified that he was never shown this letter, even though he was still CFO at the time that it was ostensibly sent to the Board on 30 October 2015. He testified that any such unsolicited proposal ought to have been directed through his office and through EXCO. It was highly improper for this to be sent directly to the Board and for Ms Myeni to then

[140] Halstead 12.2.2020 [REF].

use this unsolicited proposal to justify the section 54 amendment application.[141]

392.4 In any event, Mr Mngadi's letter was not an offer of finance, but was merely a speculative proposal which was still subject to proper procurement processes being followed.

393 On 24 November 2015, the Minister pointed out serious flaws in the section 54 application and directed Ms Myeni to provide further information by 27 November 2015 (**Airbus Bundle vol 4 p 286(5)**). Ms Myeni responded on 30 November 2015, providing some further information, but not enough to satisfy the Minister and his team (**Airbus Bundle vol 4 p 286(1)**).

394 On 3 December 2015, the Minister of Finance declined Ms Myeni's request to amend the existing section 54 approval.[142] A copy of his rejection letter is at **Airbus Bundle vol 4 pp 286(8) – 286(11)**. Minister Nene set out the deficiencies in the application in detail and concluded that:

> "SAA has not demonstrated that there is certainty *that the proposed amendment to the transaction structure would leave the airline in a better financial position than it would otherwise have been had the airline implemented the original swap transaction structure. In fact, the information available to National Treasury indicates that the proposed transaction structure would actually leave SM in a materially worse off financial position where it is unable to meet its commitments as they fall due."* (**p 286(10)**)

395 Minister Nene further directed that Ms Myeni and the remaining SAA Board members must conclude the approved Swap Transaction without delay and by

[141] Meyer 14.2.2020 [REF]; 17.2.2020 [REF].
[142] PoC p 48 para 135; Admitted Plea p 115 para 105.

no later than 21 December 2015, which was the deadline set by Airbus. Failure to meet that deadline would mean that Airbus would issue a default notice in respect of the outstanding PDPs.

The events in December 2015

396 On 9 December 2015, Minister Nene was fired by President Zuma. He was replaced by Minister Des Van Rooyen, sending the markets into freefall and resulting in the rapid depreciation of the Rand. At the time, there was widespread speculation that Minister Nene's refusal of Ms Myeni proposal was a primary factor in his removal.

397 As a result of the ensuing financial crisis, Minister Van Rooyen was rapidly replaced by Minister Gordhan, who took office on 13 December 2015.

398 On 15 December 2015, shortly after taking office, Minister Gordhan wrote to Ms Myeni, recording their conversation earlier that day. This letter is at **Airbus Bundle vol 4 p 286(12)**. Minister Gordhan's letter opened by acknowledging the turmoil of the previous week, the speculation surrounding SAA's involvement in Minister Nene's removal, and the need for swift action to restore market confidence:

> *"The developments that took place last week and the response of the financial markets are well known. The South African Rand depreciated significantly against major currencies, the stock market fell and bond yields shot up by over 150 basis points. It is imperative to restore the confidence and rebuild a resilient economy in the context of challenging global and emerging markets and the domestic economic environment to ensure a better life for all South Africans.*
>
> *A considerable amount of the speculation which fueled the crisis we witnessed last week centred on SAA. State owned companies (SOCs)*

> *are certainly one of the key risks to our fiscal framework and SM is foremost among these, given its unstable financial position. Therefore, one of the key steps in reversing the negativity must be to demonstrate that the airline is being capably managed in line with the law and good corporate governance, that it is on a sound financial footing and, as our President has emphasised, that it cannot be construed that SAA is dictating to government how it should be assisted and that no decision runs contrary to the fiscal prudence that our country is renowned for. We will need to work together closely in order to achieve this objective."*

399 Minister Gordhan indicated that he was willing to afford Ms Myeni one final opportunity to make out a case for the proposed amendments to the approved Swap Transaction. He further arranged for a meeting between SAA and the Deputy Minister for the following day, 16 December 2015. Ms Halstead testified that Ms Myeni and other non-executive Board members failed to attend that meeting, as is reflected in the minutes of this meeting at **Airbus Bundle vol 4 p 286.14 – 286.16.**

400 On 17 December 2015, Ms Myeni submitted the section 54 amendment application again. Apart from a new covering letter, this was identical to the application of 16 November 2015. This application is at **Airbus Bundle vol 8 pp 682 – 697**.

401 On 20 December 2015, Minister Gordhan rejected the amended section 54 application on the same grounds as his predecessor. His letter is at **Airbus Bundle vol 4 pp 286A – 286F**. He directed that SAA was to conclude the Swap Transaction by 21 December 2015 and he outlined a detailed series of deadlines for the actions necessary to conclude this deal in time. He specified that this would require that:

401.1 The Board approve execution of the transaction to swap the purchase of the ten A320s for a lease of five A330-300s from Airbus, either through a meeting in person, teleconference or through round robin;

401.2 The Board's resolution to execute the lease transaction with Airbus was to be provided to his office by 13h00 on 21 December 2015;

401.3 The Board's decision be communicated to Airbus and confirmation be obtained in writing from Airbus that it was in agreement;

401.4 The confirmation from Airbus was to be provided to his office by as soon it is received, but before close of business on 21 December 2015; and

401.5 A press statement would be released at 15h00 by National Treasury on 21 December 2015, which should preferably be done as a joint statement with SAA.

402 Minister Gordhan concluded his letter by calling on Ms Myeni and the SAA Board to show leadership at a time of national crisis:

> *"I want to reiterate that the implications of our response to this matter go well beyond SAA. At this time we are called upon to show leadership and to act In the best interests of the country. Failure by the SAA Board to do so would be a collective neglect of your fiduciary responsibilities to SAA and to the country."*

403 In her testimony, Ms Halstead detailed the extraordinary events on 21 December 2015. On that day, she worked closely with other Treasury officials, including Mr Momoniat, the Acting DG, in attempting to conclude the Swap Transaction. They were in contact with the Minister regularly throughout the day.

404 Ms Halstead testified that, to her knowledge, Ms Myeni, Ms Kwinana and Dr Tambi were travelling, creating challenges in securing a round robin approval of the transaction.

405 This was despite the fact that it should have been well known to all of the Board members that 21 December 2015 was the deadline for concluding on the transaction, failing which SAA would have to pay the PDPs. However, Ms Myeni had made no proactive efforts to coordinate the Board members and to convene a special Board meeting ahead of time. Ms Myeni admitted as much under cross-examination.[143]

406 Ms Halstead further testified that Ms Myeni reported to the Minister that she had received a letter from Ms Kwinana, resigning from the Board. The Minister directed Ms Myeni to share a copy of the letter with him. To this date, no copy of such a letter has ever been provided and, despite having supposedly served her resignation, Ms Kwinana continued serving on the board until August 2016.

407 Late on the afternoon of 21 December 2015, Mr Momoniat contacted Mr Akoum of Airbus by finding his telephone number on an Airbus letterhead. Ms Halstead testified that she was in Mr Momoniat's office at the time and listened in on the call. Mr Akoum stated that no one from SAA had made any contact with Airbus that day to explain the situation or to inform them of the way forward before close of business on 21 December 2015. Nevertheless, Mr Akoum agreed to provide an additional 24 hours to resolve the matter.

[143] Myeni 26.2.2020 [REF].

408 It later emerged that Ms Myeni had received a letter from Airbus on the morning of 21 December 2015, but the contents were only shared with the National Treasury after they called Airbus directly. This letter appears in the **Airbus Bundle vol 4 p 286.17 – 286.18**. Airbus' letter clearly outlined that in order for SAA to conclude the Swap Transaction, as the Minister had directed, Airbus required that by close of business on 21 December 2015 the SAA Board confirm in writing its unconditional approval of the swap transaction as agreed. If no such approval was delivered, Airbus would immediately issue a default notice in respect of the outstanding PDPs.

409 Late in the evening, the Company Secretary reported to National Treasury that she had finally secured the necessary approvals. The Board resolution was only communicated to the Treasury and Airbus on 22 December 2015.

410 The only evidence of such a resolution is found at **Airbus Bundle, Item 45, Volume 4 Page 286G**. This document merely confirms that on 31 March 2015 the Board approved the Swap Transaction. No other resolutions have been discovered or delivered, despite subpoenas issued on SAA and National Treasury. Ms Halstead confirmed that to the best of her recollection, this was the document that was sent to National Treasury on 22 December 2015.

411 The end result was that after months of obstruction, delays and brinkmanship, Ms Myeni and the Board merely confirmed the same decision that had already been made unanimously on 31 March 2015, nine months before.

412 Ms Halstead and Mr Meyer both gave evidence on the likely consequences for SAA and the country had Treasury not intervened. Their evidence stood uncontested. SAA had no money to pay the outstanding PDPs. Had Airbus issued a default notice, this would have triggered the cross-default clauses and the acceleration of billions of Rand in debt. SAA would have been forced into business rescue or liquidation, with all the negative consequences that are now being so amply demonstrated. The government would also have faced a call on its guarantees, jeopardising the fiscus at a time of economic and political turmoil. In Ms Halstead's words this would have had a catastrophic "domino effect" on other SOEs and the economy.

413 Faced with all of these risks, Ms Myeni adopted an attitude of supine indifference. No effort was made to convene a special board meeting in advance of the 21 December 2015 deadline, let alone arrange for Board members to be contactable on the day. Most damning was the fact that Ms Myeni and the board members also made no attempt to contact Airbus that day, despite the fact that Ms Myeni had little difficulty in corresponding with Airbus directly on previous occasions.

414 When confronted with this evidence, Ms Myeni merely claimed that she had personally signed a resolution on 21 December 2015, but was at a loss to explain what further steps she had taken to contact Airbus or to ensure that the other necessary signatures were gathered in time.

Ms Myeni's evidence

415 Ms Myeni's version on the Swap Transaction was again shifting, inconsistent, and generally incomprehensible. In the cross-examination of Mr Bosc, Ms Myeni's counsel failed to put any meaningful version on the Airbus deal. This Court warned counsel of the consequences.[144] Similarly, Ms Myeni's counsel failed to present anything resembling a full or complete version to Ms Mpshe[145] or Ms Halstead.[146] The majority of their evidence was left untouched, despite this Court's further warnings.[147]

416 It was only in Mr Meyer's testimony that Ms Myeni's counsel presented something approximating a version. This version attempted to distance Ms Myeni from the events by claiming that she had not attended any meetings with Airbus, that she was merely a "*mouthpiece*" for the Board, and was "*caught in the middle*" between different factions.[148] Mr Meyer responded that this was incorrect, as Ms Myeni had played the leading role in attempting to renegotiate the Swap Transaction and that she had direct dealings with Airbus throughout.

417 In her testimony, Ms Myeni again attempted to deny any individual responsibility. While she now admitted to meeting with Airbus on 10 October 2015 and to corresponding directly with Airbus representatives,[149] she continued to claim that she was merely acting on behalf of a "*collective*".[150] She repeatedly attempted

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[144] Bosc 7.2.2020 [REF].
[145] Mpshe 11.2.2020.
[146] Halstead 13.2.2020 [REF].
[147] Halstead 13.2.2020 [REF].
[148] Meyer 17.2.2020 [REF]; 18.2.2020 [REF].
[149] Myeni 20.2.2020 [REF].
[150] Myeni 20.2.2020 [REF]; 21.2.2020 [REF]; 24.2.2020 [REF]' 25.2.2020 [REF].

to pass the buck to Ms Kwinana, Dr Tambi, and other unnamed members of the executive, who she claimed were in favour of renegotiating the Swap Transaction. She refused to give any clear answer as to whether she in fact supported or opposed the original Swap Transaction, but continuously insisted that the Board wanted to weigh up all options. Yet it was clear that Ms Myeni was in favour of only a single option: the insertion of an unidentified African Aircraft Leasing Company as a precondition for concluding the deal.

418 Ms Myeni was at a complete loss to explain why she had supported the Swap Transaction in March 2015 and had signed the section 54 application in May 2015, but now sought to second-guess that decision.[151]

419 Most tellingly, Ms Myeni could not explain why the Board did not simply ratify the Swap Transaction and then later explore the option of a local aircraft leasing vehicle. The question was put to her repeatedly, both by counsel and by the Court, but she provided no intelligible response over four days of sustained cross-examination.[152] She in fact admitted that she could provide no answer.

420 As Mr Meyer and Mr Bosc were at pains to explain, the Swap Transaction that had been negotiated with Airbus included a provision allowing the lease to be sold down to other leasing vehicles at a later stage, following a proper procurement process. Therefore, the desire to find a local leasing company should not in any way have been an obstacle to the swift conclusion of the Swap Transaction.

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[151] Myeni 21.2.2020 [REF].
[152] Myeni 21.2.2020; 24.2.2020; 25.2.2020 [REF].

First issue: Ms Myeni's misrepresentations to Airbus

421 Ms Myeni's 29 September 2015 letter to Airbus was a wilful, or at the very least, grossly negligent, misrepresentation to Airbus which was sent without Board authority.[153]

422 The evidence has established that Ms Myeni's letter contained no less than four false statements.

423 First, there was no basis for Ms Myeni to claim that she was writing to Airbus "*On behalf of the Board of South African Airways".* Mr Meyer confirmed that Ms Myeni had made no attempt to circulate this letter to the Board or to discuss its contents before it was sent.[154] His evidence stood uncontradicted.

424 Second, it was false to claim that "*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."* The full Board had already unanimously approved the Swap Transaction in their resolution of 31 March 2015 (**Airbus Bundle vol 4 p 286G**), Ms Myeni had signed off on the section 54 application to the Minister in May 2015 **(Airbus Bundle vol 2 p 117.1**), and the Minister had unconditionally approved the transaction (**Airbus Bundle vol 2 p 163**).

[153] PoC p 43 paras 123 – 124; Plea p 114 para 96.
[154] Meyer 14.2.2020 [REF].

425 Third, the statement that "*SAA has decided to do this transaction slightly differently, by engaging an African Aircraft Leasing Company to engage directly with you"* was equally false. As Ms Myeni admitted in her plea, at this time the SAA Board had not decided to amend the terms of the Swap Transaction[155] and the Minister had not approved an amendment of the Swap Transaction.[156]

426 Ms Myeni further admitted under cross-examination that such a substantial amendment to an existing transaction would have required Board approval and a section 54 approval from the Minister.[157] However, no such approvals had been obtained.

427 Fourth, there was no "African Aircraft Leasing Company" in existence at the time, nor had any procurement process been commenced by SAA to create or identify such a leasing vehicle. Mr Bosc, Ms Mpshe, Mr Meyer and Ms Halstead all confirmed this fact. Ms Halstead testified that she was aware of local aviation financing companies, but there was no specialist local aircraft leasing company at the time.

428 The only plausible inference that can be drawn is that Ms Myeni made these misrepresentations knowingly and wilfully. Ms Myeni could have been in no doubt about the content of the letter and the gravity of the changes to the transaction that she was proposing. Ms Myeni testified that she applied her mind to all correspondence to which she attached her signature.[158] As Chairperson of

[155] PoC p 43 para 122; Plea p 114 para 94.1.
[156] PoC p 43 para 123; Plea p 114 para 95.
[157] Myeni 24.2.2020 [REF – 14:15 pm].
[158] Myeni 20.2.2020 [REF] ; Myeni 24.2.2020 [REF].

the Board, Ms Myeni would also have known full well that there was no Board resolution to authorise her actions. Therefore, this was deliberate dishonesty and a gross abuse, as contemplated in section 162(5)(c)(i) of the Companies Act.

429 This letter was further in breach of section 77(3)(a) of the Companies Act, read with section 162(5)(c)(iv)(bb), as Ms Myeni plainly *"acted in the name of the company, signed anything on behalf of the company, … despite knowing that the director lacked the authority to do so*". On Ms Myeni's own admission, there was no Board resolution at the time authorising her to unilaterally attempt to change a deal that had already been approved by the Board and the Minister.

430 At best for Ms Myeni, her letter was grossly negligent. Under cross-examination, Ms Myeni confirmed that before sending this letter she made no steps to check whether there was a Board resolution to support such a change, she made no attempt to discuss the contents of the letter with other Board members, nor did she even circulate this letter to other Board members in advance.[159] On her own admission, there was no care taken on a significant letter that jeopardised the entire Swap Transaction and exposed SAA to financial ruin. That is the definition of gross negligence.

431 As Mr Bosc testified, the mere fact that Ms Myeni believed that she could unilaterally renegotiate the Swap Transaction with Airbus, following more than nine months of work by specialists and experts on the existing deal, is itself indicative of recklessness.

[159] Myeni 24.2.2020 [REF, 14:30 pm].

432 In response, Ms Myeni's version has frequently and inexplicably changed. Ms Myeni has advanced no less than four separate, contradictory defences over the course of the trial.

433 First, in her plea, Ms Myeni's only defence was to deny that she had ever represented to Airbus that the Board had decided to change the transaction. She pleaded that "*the letter 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.*"[160] She pleaded further that "*she did not indicate in her letter that the Board had decided to amend the terms of the Swap transaction* ."[161]

434 The content of Ms Myeni's letter gives the lie to this claim. In stating that "*SAA has decided to do this transaction slightly differently, by engaging an African Aircraft Leasing Company to engage directly with you"* (**Airbus Bundle p 177)**, Ms Myeni was plainly representing that the Board had taken a decision to effect a significant change to the deal.

435 This was indeed a substantial change to the negotiated deal, not a "slight change". This was confirmed by Airbus and the Minister in their responses. Both refused to allow such a substantial alteration to the deal without proper processes being followed.

[160] Plea p 113
[161] Plea p 114 para 94.2.

435.1 Mr Bregier's letter to Ms Myeni on 5 October 2015 (**Airbus Bundle pp 196A – 196B**) noted that

> *"[S]ell-down to a specific lessor was never part of the agreement between Airbus and SAA. Therefore it cannot be entertained at such a late stage as a condition to this transaction which would severely compromise Airbus' ethics and compliance guidelines."*

435.2 The Minister of Finance also regarded this as a material change to the terms of the Swap Transaction **(Airbus Bundle p 238A – 238B at 238B)**. In correspondence with Ms Myeni on 12 November 2015, the Minister stated that:

> *"Should SAA wish to pursue either an outright purchase or a lease from a local leasing company, this would constitute a significant amendment to the transaction that I have already approved, requiring that SAA apply for approval in terms of Section 54(2) of the Public Finance Management Act (PFMA)."*

436 Second, in her evidence and under-cross examination, Ms Myeni has now sought to advance a different defence that contradicts her plea. She now appears to claim, contrary to the evidence, that there was a Board resolution for introduction of the "African Aircraft Leasing Company", despite her plea admitting that there was no such resolution.

437 This new version is entirely impermissible. Ms Myeni's application to withdraw that admission was refused and no further application for amendment has been made or allowed.[162]

[162] *Myeni v Organisation Undoing Tax Abuse NPC and Others* [2019] ZAGPPHC 565 (2 December 2019).

438 In any event, there is no substance to Ms Myeni's belated claim that there was a Board resolution or other approval on 29 September 2015 to approve the insertion of an African Aircraft Leasing Company.

438.1 First, no such resolution was discovered by Ms Myeni or SAA. Even after this Court took the generous and extraordinary step of affording Ms Myeni further time to retrieve the relevant documents during the course of her cross-examination, Ms Myeni came up empty-handed.[163]

438.2 Second, Ms Myeni's reliance on the "special" meeting of 28 and 29 September 2015 does not take her case any further. The meeting of 28 and 29 September 2015 was not a Board meeting, but a meeting between three Board members and management. Mr Meyer, Mr Bosc, and Ms Mpshe all confirmed this fact in their evidence. Their objections to the characterisation of this meeting were recorded in Mr Bosc's correspondence dated 3 November 2015, appearing at **Airbus Bundle vol 4 pp 216 – 221**.

438.3 Third, the draft minutes of the 28 / 29 September meeting to which Ms Myeni refers were just that: draft, unsigned minutes. There is no evidence that these minutes were ever approved. Most significantly, there is no Board resolution recorded in these minutes to change the Airbus Swap Transaction. The minutes appear at **Airbus Bundle pp 178 – 188**.

438.4 Finally, the email chain between the Company Secretary, Ms Kibuuka, and Ms Fikilepi, dated 5 October 2015, conclusively shows that there was no

[163] Myeni 21.2.2020 [REF].

resolution to change the Swap Transaction at the time. Ms Kibuuka and Ms Fikilepi were only at the stage of discussing the need to prepare a draft resolution and accompanying submission for the Board to consider (**Airbus vol 3 pp 196C – 196E**).

439 Fourth, when confronted with this evidence , Ms Myeni then sought to claim that this decision did not require a formal resolution. She claimed that there was informal Board approval for the change to the Swap Transaction, even though it was not reduced to writing in a resolution.[164]

439.1 This is an astonishing claim. In writing to Airbus, Ms Myeni was undoing an agreement that had taken more than nine months of negotiation and work, contradicting the Board's resolution of 31 March 2015 and Minister Nene's section 54 approval. Such a decision could not be taken lightly, nor could it be taken informally without any proper records.

439.2 In any event, there is again no evidence of Board approval for such a substantial change in direction, informal or otherwise. Ms Myeni's reliance on the 28 / 29 September 2015 meeting is again mistaken for all the reasons addressed above.

439.3 In any event, even on Ms Myeni's version of that meeting, Ms Myeni and Ms Kwinana were the only non-executive Board members present at that meeting and the only members present to support this change. Any "approval" given at that meeting was the view of only two Board members, not the full the Board.

[164] Myeni 24.2.2020 [REF – 14:20]

440 In a last ditch effort, Ms Myeni claimed that her letter of 29 September 2015 was prepared by the Company Secretary, Ms Kibuuka, in an apparent attempt to shift the blame for any misrepresentations.[165] However, when pressed, Ms Myeni stated that she approved of the contents of the letter. Ms Myeni further testified that she checked all draft correspondence carefully before signing and that by signing this letter she indicated her approval of its contents. Therefore, there is no basis for Ms Myeni to now attempt to disavow this letter.

Second issue: The section 54 application

441 The second ground of delinquency is that Ms Myeni's 16 November 2015 application to the Minister to approve the section 54(2) approval was dishonest, failed to disclose material facts, and was unlawful.[166]

442 As highlighted above, directors' duties of good faith and honesty are heightened under the PFMA. Section 50(1)(b) requires directors of public entities to "*act with fidelity, honesty, integrity and in the best interests of the public entity*". Section 50(c) goes further by imposing a duty of disclosure. Directors of public entities must "*on request, disclose to the executive authority responsible for that public entity … all material facts, including those reasonably discoverable, which in any way may influence the decisions or actions of the executive authority…*".

443 Honesty and full disclosure have particular significance under section 54(2) of the PFMA. A responsible Minister can only exercise effective oversight over

[165] Myeni 20.2.2020 [REF]; Myeni 21.2.2020 [REF]; Myeni 24.2.2020 [REF].
[166] PoC pp 46 – 51 paras 127 - 140.

major transactions that require his or her approval if information is presented honestly, fully and accurately.

444 Ms Halstead, Mr Bosc, Ms Mpshe and Mr Meyer have pointed out a long list of falsehoods, misrepresentations and omissions of material facts in Ms Myeni's covering letter to the section 54(2) application and the accompanying documents. Their evidence stands uncontradicted. We need only highlight several glaring examples.

Dishonesty in respect of the PDPs

445 The primary falsehood was Ms Myeni's claim that no PDPs would be payable on the revised Swap Transaction that she was proposing. Ms Myeni concluded her covering letter to the Minister by claiming that:

> *"[A]s long as the SWAP transaction is consummated by SAA, neither the issue of defaulting on the original A320 purchase agreement nor the consequential payment of the PDP flowing from this 2002 agreement should arise. The urgency purportedly created for the payment of the PDPs by the end of November 2015 or subsequently should not arise. In any event, Airbus has given SAA a 30-day extension in this regard (see attached email from Airbus dated 16 November 2015)."* (**Airbus Bundle vol 4 p 245)**

446 Ms Myeni repeated the same lie in the business case which was submitted to the Minister 9 November 2015 under Ms Myeni's signature. There Ms Myeni claimed that:

> *"It must be noted that we are NOT cancelling the SWAP therefore there are no urgent payments required as those only take effect if the SWAP is cancelled"* (**Airbus Bundle vol 4 p 236O**)

447 These claims were manifestly false. Airbus had repeatedly and consistently made it clear that the PDPs would be due and payable if Ms Myeni delayed the

conclusion of the Swap Transaction any further and if she sought to alter the Swap transaction: This appears from:

447.1 Mr Akoum's email of 25 September 2015 (**Airbus Bundle vol 3 p 176D**);

447.2 Mr Charieras' email of 1 October 2015 (**Airbus Bundle vol 3 p 196F**);

447.3 Mr Bregier's letter of 5 October 2015 **(Airbus Bundle vol 3 p 196A)**;

447.4 Mr Akoum's letter of 14 October 2015 (**Airbus Bundle vol 3 p 197**);

447.5 Mr Akoum's email of 16 November 2015 (**Airbus vol 4 p 246**).

448 Mr Akoum's letter of 14 October 2015 stated Airbus' position in the starkest terms. He emphasised that Airbus was not willing to entertain the unilateral insertion of an African Aircraft Leasing Company as a precondition for the conclusion of the Swap Transaction. Instead, Airbus was only willing to entertain a direct sale of the five A330s if SAA made immediate payment of USD17 million in outstanding PDPs and a further USD100 million within 30 days. (**Airbus Bundle vol 3 p 197**) If the Swap Transaction was not concluded in time, SAA would remain bound to pay PDPs under the existing agreement.

449 Faced with this evidence, Ms Myeni admitted under cross-examination that it was false to claim that no PDPs were due.[167] She further admitted that the section 54 application failed to make any reference to these PDPs or Airbus' demands.[168]

[167] Myeni 25.2.2020 [REF – morning].
[168] Myeni 25.2.2020 [REF – morning].

450 Despite making these concessions, Ms Myeni continued to insist that the section 54 application and the earlier business case reflected her "*understanding at the time*".[169] This claim does not withstand scrutiny. Ms Myeni could have been in no doubt as to the true facts at the time she signed off on the section 54 application. Airbus had made its position clear in its correspondence and at the meeting of 10 October 2015. The issue of the PDPs was also set out in explicit detail in Mr Meyer's repeated warnings to the Board, the 6 November 2015 opinion submitted to the Board by Ms Mpshe, and the Minister's letter of 12 November 2015.

451 It was only when the Minister confronted Ms Myeni with Airbus' letter of 14 October 2015 that Ms Myeni finally admitted that the PDPs would still be due and payable.

452 In his letter of 24 November 2015, the Minister revealed to Ms Myeni that he was well aware of the 14 October 2015 letter, as Mr Meyer had attached it to his letter of 15 October 2015 (**Airbus vol 4 p 286(5)**). The Minister stated:

> "*[I]t is my understanding from Airbus' letter that at full execution of the amendment for SAA to purchase the A330s an additional PDP of USD100 million would be payable. This is contrary to SAA's assertion in the section 54 application that no further PDPs would be payable.*" **(Airbus Bundle vol 4 p 286(6))**

453 In Ms Myeni's response on 30 November 2015, she acknowledged for the first time that the PDPs were indeed payable:

> *"1. On the 14'" of October 2015, I received a communication from Airbus stipulating that*

[169] Myeni 25.2.2020 [REF morning].

> *"At full execution of this amendment an additional PDP in the amount of 100m$ will be required, any received A320 PDP's will be trensferred to the A330 contract and additional PDP's will be required at later dates until the A330 last delivery"*
>
> *We acknowledge the fact that SAA is not in a financial position to afford this PDP of USD 100million and other future PDP's but the strategy that we have is to recoup this money from the selected local leasing company."* (**Airbus Bundle vol 4 p 286(2)**)

Notably, Ms Myeni still neglected to mention that Mr Akoum had insisted that USD17 million would be immediately payable and that the USD100 million was due in 30 days. Even when trapped in a lie, Ms Myeni refused to give the Minister a full and complete answer.

454 This chain of correspondence indicates that Ms Myeni could have been in no doubt as to the true state of affairs at the time she signed the section 54 application on 16 November 2015. Her misrepresentation of the PDPs was therefore wilful, or at best for her, grossly negligent.

Material facts omitted

455 Not only was Ms Myeni untruthful in the section 54 application, but the application also failed to disclose material facts that were directly relevant to the Minister's decision, in direct breach of her duties under section 50(1)(d) of the PFMA.

456 The plaintiffs pleaded that Ms Myeni:

456.1 failed to disclose Airbus' true position and its correspondence;

456.2 failed to include the contents of the legal opinion of 6 November 2015 or any reference to the advice contained in that memorandum;

456.3 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.[170]

457 Ms Myeni was under a direct duty to disclose this information. In his letter of 12 November 2015, Minister Nene had directed that a section 54 amendment application should be filed which had to contain, inter alia, concrete details on "*[a]ll costs that the airline will incur in respect of the transaction*" and "*[c]ash flow and profitability projections over the full life time of the transaction and the approach to ensure that SAA will have the cash resources available to meet all payments when they become due"* (**Airbus Bundle vol 4 p 238B**).

458 Ms Halstead confirmed in her testimony that this information was not properly disclosed to the Minister in the 16 November 2015 application. Her evidence stood uncontradicted.

459 Again, these were not minor omissions. Minister Nene's repeated insistence that Ms Myeni and the SAA Board provide further information could have left her in no doubt as to the need for full and frank disclosure. Again, her total failure to take any care to ensure that the section 54 application contained all relevant information was, at minimum, grossly negligent.

[170] PoC p 47 para 133; Denied Plea p 115 para 103.

Absence of a board resolution

460 The section 54 application was also in breach of the PFMA and the Significance and Materiality Framework, as there was no evidence of any formal Board resolution to support this application.

461 The Significance and Materiality Framework Agreement provides the procedural requirements for such a section 54 application. Under Annexure A: "Process", this Framework specifically requires that all section 54 applications must be accompanied by "*a certified resolution by the Board or appropriate Board committee as well as information on which the Board or committee based its resolution*" (**Corporate Policy Bundle vol 5 p 412)**.

462 In the section 54 application, Ms Myeni explicitly recorded that a Board resolution was attached: **"***The SAA Board resolution for the approval of the transaction is herewith attached and marked as Annexure C*" **(Airbus Bundle vol 4 p 248, para 3.1)**.

463 The accompanying attachment was merely a "Board Submission" signed by Ms Myeni and Ms Kwinana. By all appearances, this submission was prepared and approved by Ms Myeni and Ms Kwinana alone. Ordinarily, a submission is signed by the author and the recommender, as is evident from previous submissions to the Board for approval (see Mr Meyer's submission on 27 March 2015 at **Airbus Bundle vol 1 p 78 – 81**). Ms Myeni herself conceded that this document was irregular.

464 In any event, a mere submission was not a certified Board resolution, as required. There is no evidence of such a resolution in the papers. Again, Ms Myeni and SAA did not discover these documents, nor did Treasury provide them under subpoena. Accordingly, the only conclusion that can be drawn is that such a resolution did not exist at the time.

Ms Myeni's further evasions

465 Under cross-examination, Ms Myeni was asked to explain why this Court should not find her grossly negligent in allowing such a defective section 54 application to be submitted under her name. She declined to offer any answer, even when pressed by the Court. She was content to state that "*my non-response does not mean that I was grossly negligent*".[171]

466 When pressed further, Ms Myeni faintly suggested that it was not her job to prepare such applications and that this was the task of the CEO and EXCO. She stated "*The CEO [Musa Zwane] signed it … I assumed that it must have gone through all the relevant EXCO approvals*".[172]

467 On the papers, there is no evidence whatsoever that the section 54 application went through any proper EXCO process. The documents bear all the hallmarks of having been prepared by Ms Myeni and the remaining Board members themselves, without any meaningful input from the executive. This is apparent from several significant features of these documents:

[171] Myeni 25.2.2020 [REF].
[172] Myeni 25.2.2020 [REF].

467.1 The section 54 application form contains only two signatures: Ms Myeni's and Mr Zwane's, the new Acting CEO (**Airbus Bundle vol 4 p 250**). There were no signatures from any other members of EXCO or the Company Secretary, as would be expected in such an application. For purposes of comparison, see the previous section 54 application submitted in May 2015 (**Airbus Bundle vol 2 117.1 – 117.7**),

467.2 As already noted, the application was accompanied by a Board submission, ostensibly serving as proof of a Board resolution. The Board submission only contains the signatures of Ms Myeni and Ms Kwinana, suggesting that they both prepared and approved the submission, without any executive input **(Airbus Bundle vol 4 p 256 at 261**). The defects are again highlighted by comparing this with the previous Board submissions on the Swap Transaction on 27 March 2015, which clearly reflected the CEO and CFO's input and signatures (**Airbus Bundle vol 1 p 81**).

468 Even if Mr Zwane, the Acting CEO, had some hand in preparing this application, it would have been entirely unreasonable for Ms Myeni to simply rubber-stamp his work. Ms Myeni knew full well that Mr Zwane had been in the job for no more than three days, after Ms Mpshe was removed from her position on 13 November 2015. The CFO, Mr Meyer, had resigned on 12 November 2015, and confirmed in his testimony that he was not consulted on this section 54 application before his departure. In these circumstances, a responsible chairperson would have closely scrutinised the section 54 application, knowing that the Acting CEO had no prior involvement in the matter. The absence of any proof that Ms Myeni took such steps is again ample grounds for a finding of gross negligence.

469 In a last ditch effort, Ms Myeni attempted to cast doubt on the authenticity of this section 54 application, suggesting that there was "*something sinister about this document*".[173] No such version had been put to any of the plaintiffs' witnesses. In any event, Ms Myeni submitted the self-same section 54 application to the Minister of Finance on 17 December 2015, complete with all the same deficiencies and errors (**Airbus Bundle vol 8 pp 682 – 697**). As a result, her belated attempt to cast doubt on the 16 November 2015 application is further proof of her dishonesty.

Third issue: Wilful and reckless exposure of SAA to risks and harm

470 The evidence has established that Ms Myeni knowingly took SAA and the country to the brink of disaster by delaying the conclusion of the Swap Transaction. Were it not for the intervention of the Minister of Finance and the efforts of Treasury officials in in December 2015, SAA would have faced almost certain ruin.

471 It is established that after the Minister's unconditional approval on 11 September 2015, the only outstanding requirement was for the Board to ratify the signatories to the Swap Transaction.[174]

472 Rather than doing so, the evidence demonstrates that Ms Myeni joined Dr Tambi and Ms Kwinana in failing or refusing to ratify. Ms Myeni then actively participated in efforts to renegotiate the Swap Transaction through the insertion of the African Aircraft Leasing Company.[175] The fact that she was aided and

[173] Myeni 25.2.2020 [REF – morning].
[174] Plea p 113 para 90.
[175] PoC p 46 para 129; Denied Plea p 115 para 100; PoC p 51 para 141; Plea p 116 para 109.

abetted in these efforts by Dr Tambi and Ms Kwinana does not in any way absolve her of individual responsibility. She signed off on the fraudulent letter to Airbus on 29 September 2015, she signed the proposals and section 54 amendment application sent to Minister Nene on 16 November 2015, she inserted herself into negotiations with Airbus, and she supported the improper appointment of a transaction adviser at the eleventh hour.

473 Ms Myeni has now admitted that the PDPs were in fact due and payable and that SAA did not have the money to pay for these PDPs at the time.[176] The uncontested evidence detailed above showed the dire consequences for SAA and the country if SAA had defaulted on these payments by delaying conclusion of the Swap Transaction. Minister Gordhan reiterated these dangers to the country in his letter of 20 December 2015:

> "*A default by SAA would trigger defaults and cross-defaults, including a cross-default on the government guaranteed debt totalling R11.3 billion. This would have severe negative ramifications for the country*." (**Airbus Bundle vol 4 p 286C para 10**)

474 Ms Myeni's recklessness in the face of these consequences is apparent from the full timeline of events set out above. We highlight just six stand-out markers of her recklessness.

475 First, Ms Myeni displayed complete disregard for public funds. Her attitude is best demonstrated by the following exchange with the Court under cross-examination:

[176] Myeni 25.2.2020 [REF].

> "***Court: …*** *Is it your evidence that SAA had the money to pay the PDPs that were due and payable?*
>
> ***Ms Myeni:*** *"SAA belongs to government 100% … they wouldn't allow South African Airways to fail."*[177]

476 This answer reveals Ms Myeni's true attitude. She honestly believed that there was no problem if SAA defaulted on its debts, as the government and the public ought to have been saddled with SAA's debts, regardless of the consequences. This was despite the repeated and consistent warnings from Minister Nene that the government did not have the money to bail out SAA at the time and would not do so. In his letter of 20 October 2015, Minister Nene specifically stated that:

> *"Government's fiscal position over the medium term Is extremely tight. In line with the assumptions made by SAA in the Long Term Turnaround Strategy, no funding allocation will be made to SAA. All state-owned companies, including SAA, must strive to operate on the strength of their balance sheet."* (**Airbus Bundle vol 3 p 204**)

477 Such recklessness with public funds is itself sufficient reason to find Ms Myeni delinquent and to bar her from ever holding the office of a director again.

478 Second, Ms Myeni defied Minister Nene's direct instruction to conclude the Swap Transaction by 18 September 2015 as a prerequisite for the Minister to consider SAA's application for the R5 billion going concern guarantee. Ms Myeni did so knowing full well that SAA required this going concern guarantee urgently to conclude its financial statements on a going concern basis and to keep SAA afloat, yet she persisted in attempting to renegotiate the transaction with Airbus.

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[177] Myeni 24.2.2020 [REF].

479 Third, Ms Myeni persisted with the attempts to change the Swap Transaction and delayed its conclusion, despite all the warnings from Mr Meyer, the Minister, Airbus, and the 6 November 2015 opinion.

480 Fourth, after Ms Myeni received Airbus' unequivocal rejection of her attempts to renegotiate the deal on 5 October 2015, she persisted in attempting to have a transaction adviser appointed and personally identified Quartile Capital for the role. She effectively used her own delays as a pretext to deviate from procurement procedures.

481 Fifth, the events of 21 December 2015 are themselves sufficient for a finding of delinquency. As detailed above, Ms Myeni took no proactive steps to conclude the deal or to contact Airbus to secure more time. It was left to Treasury officials to ask Airbus for more time and to press the Company Secretary to secure the necessary approvals.

482 Finally, Ms Myeni could offer no answer to a simple question: why did she feel it necessary to delay the conclusion of the Swap Transaction, with all that was stake, when SAA could simply have executed the deal and then later investigated the option of a local leasing company? Ms Myeni's inability to give any answer is either a shocking dereliction of duty or is indicative of some ulterior motive. In either case, Ms Myeni's evasions are sufficient for a finding of delinquency.

Ms Myeni's responses

483 Ms Myeni has sought to counter these allegations of recklessness by claiming that the Board was entitled to consider a wide range of options in the best interests of SAA, that the Minister of Finance was amenable to different options, and Airbus was willing to afford SAA more time.

484 The evidence has shown these claims to be entirely false.

485 First, Ms Myeni and her supporters on the Board were not in fact "exploring options". The evidence shows that they were insistent on inserting a middleman before the Swap Transaction could be concluded. Ms Myeni's letter to Mr Bregier on 29 September 2015 was by no means exploratory in nature. It was a unilateral attempt to change the deal on terms of her choosing.

486 Second, Ms Myeni's insistence on "exploring options" continues to disregard the pressing urgency that was presented by the PDPs and SAA's liquidity crisis. SAA was not free to explore all options, but remained rigidly bound by its contractual obligations under the legacy Airbus deal, unless and until the agreed Swap Transaction was concluded.

487 Third, the Minister of Finance repeatedly expressed his concerns with the delays and outlined the dire consequences. The fact that Minister Nene allowed more time to submit information and Minister Gordhan afforded Ms Myeni a further chance to present her proposal was not indicative of any acceptance of these proposals or support for Ms Myeni's actions. As Ms Myeni herself stated, the

ordinary role of the executive authority is not to be interventionist or "instructive" in SAA's affairs, but to leave decision-making to the Board.[178] The fact that Minister Gordhan and Treasury were ultimately forced to intervene as they did is indicative of how reckless Ms Myeni and her enablers had become.

488 Finally, the fact that Airbus extended the deadline for the payment of PDPs to accommodate negotiations was also no justification for Ms Myeni's conduct. While Airbus provisionally granted an extension of 30 days on 14 October 2015 and again on 16 November 2015, the fact remained that the PDPs would become due and payable and SAA had no means of paying. Airbus' refusal to afford any further leeway was clearly reflected in its letter to Ms Myeni on 21 December 2015 (**Airbus Bundle p 286.18**).

Fourth issue: Breach of financial reporting obligations

489 Finally, in delaying the conclusion of the Swap Transaction, Ms Myeni wilfully or recklessly contributed to SAA breaching its financial reporting obligations under the PFMA.[179]

490 Section 55 (1) of the PFMA requires the accounting authority of a public entity to prepare annual financial statements and submit such financial statements to the auditors as well as to the relevant treasury within two months after the financial year end. Section 55 further requires the accounting authority to submit the audited financial statements along with the auditor's report on the financial

[178] Myeni 20.2.2020 [REF].
[179] PoC p 52 para 143; Plea p 116 para 109.

statements and an annual report to treasury, the responsible executive authority and the Auditor-General (if it did not perform the audit) within five months of the end of the financial year. The report and audited financial statements must then be submitted for tabling in Parliament or the provincial legislature.[180]

491 Section 65 (1) requires the executive authority responsible for the public entity, being the Minister of Finance, to table the annual report, audited financial statements and audit report in Parliament within one month after the accounting authority has received the audit report. If the executive authority fails to table these documents in Parliament within six months' after the end of the financial year, subsection (2) obliges the executive authority to provide a written explanation to parliament in which case the Auditor-General may issue a special report on the delay.

492 It follows that the SAA Board had a duty to prepare and submit SAA's financial statements to the auditors and Treasury on 31 May 2015 being the period within two months after the end of SAA's financial year which is 31 March. SAA then had until the 31 August 2015 to submit to national treasury its annual report and audited financial statements together with the auditors' report. Treasury then had an obligation in terms of section 61 to table the relevant documents in Parliament within one month of receiving them from SAA, which would be 31 September 2015 at the latest.

180 Section 55(1)(d).

493 Notwithstanding these obligations, the SAA board, with Ms Myeni as chairperson, did not finalise its 2014/2015 financial statements within the requisite time period. Mr Meyer and Ms Halstead testified at length on the consequences of this breach, as it impacted SAA's ability to obtain financing from prospective lenders, it shook the confidence of SAA's existing creditors, and it profoundly compromised the ability of the Minister and Parliament to exercise effective oversight over SAA.[181]

494 The failure by Ms Myeni and her enablers to ratify the Swap Transaction directly contributed to this breach.

495 As reflected in Minister Nene's letter of 14 September 2015 (**Airbus Bundle vol 3 pp 164.1 – 164.2**), the conclusion of the Swap Transaction was a pre-requisite for SAA to be granted the R5 billion government guarantees that would ensure that the company's 2014/2015 annual financial statements could be prepared on a going concern basis as opposed to an insolvent basis. This is why Minister Nene initially set the deadline of 18 September 2015 for the conclusion of the deal.

496 Despite Ms Myeni being made aware of this fact on numerous occasions, she nonetheless took no steps to ensure that the resolution authorising the executives to sign the Airbus deal was passed. In fact, she did the opposite by attempting to renegotiate the existing Swap Transaction with Airbus.

[181] Halstead 12.2.2020 [REF]; Meyer 14.2.2020 [REF].

497 The extent of Myeni's awareness of the risks and her recklessness in the face of these risks is shown by the following summary of the correspondence:

Date of Letter / Event	Description	Reference
14 September 2015	Minister Nene wrote to the Chairperson requiring SAA to finalise a number of outstanding matters before 18 September 2015 one of which was "*the conclusion of the A320/A330 swap transaction. "* The Minister further stated: "*I am aware that by not approving the going concern guarantee SAA's 2014/15 Annual Financial Statements cannot yet be signed off as a going concern by the Board or the airline's external auditors. Therefore, to avoid unnecessary delays, I require that SAA finalise the matters listed above by 18 September 2015."*	**Airbus Bundle vol 2 pp 164.1 – 164.2.**
18 – 28 September 2015	No response is received from SAA despite the 18 September deadline.	**Halstead 12.2.2020**
30 September 2015	Minister Nene wrote to Ms Myeni stating that: "*I am disappointed by the delays from SAA which has prevented the financial statements (AFS) being concluded and consequently the convening of the Annual General Meeting (AGM). This is contributing to an erosion of trust from stakeholders, including lenders as well as Parliament, where the submission of the AFS will now have to be delayed."*	**Airbus Bundle vol 8 p 669**
20 October 2015	Minister Nene writes to Ms Myeni stating: *"Following my letter of 30 September 2015, SAA has not provided me with any further feedback in terms of progress in concluding the remaining outstanding matters before the going guarantee will be considered."*	**Airbus Bundle vol 3 p 204**
10 November 2015	Minister Nene's further warning to Chairperson, highlighting the "serious corporate governance and fiduciary failure"	**Airbus Bundle vol 4 p 237**
12 November 2015	Minister Nene demands a section 54(2) application for the proposed amendments and again warns of the consequences of delaying the finalisation of financial statements.	**Airbus Bundle vol 4 p 238A**

24 November 2015	Minister Nene demands further information to support section 54(2) application and again highlights the ongoing breach of reporting obligations.	**Airbus Bundle vol 4 p 286(5)**
3 December 2015	Minister Nene rejects section 54(2) amendment application and emphasises the need to conclude the Swap Transaction without further delay.	**Airbus Bundle vol 4 p 286(8)**
20 December 2015	Minister Gordhan rejects the resubmission of the section 54(2) amendment application and directs that the Swap Transaction be conclude by 21 December 2015.	**Airbus Bundle vol 4 p 286A.**

498 Despite all these warnings, Ms Myeni did everything but take steps to conclude the Swap Transaction. In these circumstances, her misconduct was wilful, or at the very least, grossly negligent, in breach of her duties under the PFMA.

499 In ***Msimang NO and Another v Katuliiba and Others***,[182] the High Court held that the reckless failure by two directors of a private company, *inter alia*, to ensure the timely preparation of annual financial statements for the company and to hold AGMs was sufficient for an order declaring them to be delinquent directors.

500 This case is even more deserving of a delinquency order, as the impact of these breaches was not confined to a narrow class of private shareholders. As a state-owned entity, SAA's failure to prepare and finalise financial statement timeously robbed the public at large of effective oversight over SAA finances and jeopardised SAA's ability to raise funding.

[182] [2013] 1 All SA 580 (GSJ).

DELINQUENCY AND THE APPROPRIATE SANCTION

501 The evidence has conclusively demonstrated that Ms Myeni's conduct was delinquent under section 162(5)(c) of the Companies Act.

502 Accordingly, this Court "must" order that Ms Myeni is a delinquent director. It has no discretion in this regard.[183]

503 This Court only has a discretion in respect of the conditions that may be attached to the order and its duration.[184] Section 162(6) of the Companies Act provides that a declaration of delinquency under section 162(5)(c) subsists for a minimum period of seven years or such longer period as determined by the court.

504 In this case, we submit that Ms Myeni's misconduct warrants a lifelong declaration of delinquency:

504.1 Her misconduct is severe, going to the heart of a director's duties under the Companies Act, the common law and the PFMA;

504.2 In her actions and in these proceedings, Ms Myeni has repeatedly demonstrated gross dishonesty;

504.3 Ms Myeni has shown no contrition or remorse for her conduct. Quite the opposite, her evasions and attempts to pass the buck to others through constant appeals to the "collective" are indicative of a person wholly unsuited to ever be entrusted with responsibility as a director;

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[183] *Gihwala* at para 140.
[184] Section 162(10) of the Act.

504.4 Ms Myeni represents an ongoing threat to the public and shareholders, as reflected by her existing directorships of no less than four different companies, including at least one parastatal, Centlec.[185]

505 A lifelong delinquency order still offers the hope of some redemption. It will always remain open to Ms Myeni to apply to this Court after three years from the date of this order for the declaration of delinquency to be suspended in terms of sub-sections 162(11) and (12). This would require her to demonstrate to this Court that she has sufficiently remedied and rehabilitated her misconduct. In the absence of convincing proof to the contrary, she cannot be trusted to hold the office of a director or to be allowed near any public entity.

COSTS

Punitive costs

506 We submit that the applicants are entitled to their costs in these proceedings, on a punitive scale. The Constitutional Court recently summarised the relevant principles on punitive costs in *Public Protector v South African Reserve Bank*:[186]

> *"[221] … The punitive costs mechanism exists to counteract reprehensible behaviour on the part of a litigant. As explained by this Court in* Eskom*, the usual costs order on a scale as between party and party is theoretically meant to ensure that the successful party is not left "out of pocket" in respect of expenses incurred by them in the litigation. Almost invariably, however, a costs order on a party and party scale will be insufficient to cover all the expenses incurred by the successful party in the litigation. An award of punitive costs on an attorney and client scale may be warranted in circumstances where it*

[185] Postponement AA p 95 – 96 paras 36 – 40.
[186] *Public Protector v South African Reserve Bank* [2019] ZACC 29; 2019 (9) BCLR 1113 (CC) at paras 221 – 223.

would be unfair to expect a party to bear any of the costs occasioned by litigation."

[222] The question whether a party should bear the full brunt of a costs order on an attorney and own client scale must be answered with reference to what would be just and equitable in the circumstances of a particular case. A court is bound to secure a just and fair outcome.

[223] More than 100 years ago, Innes CJ stated the principle that costs on an attorney and client scale are awarded when a court wishes to mark its disapproval of the conduct of a litigant. Since then this principle has been endorsed and applied in a long line of cases and remains applicable. Over the years, courts have awarded costs on an attorney and client scale to mark their disapproval of fraudulent, dishonest or mala fides (bad faith) conduct; vexatious conduct; and conduct that amounts to an abuse of the process of court."

507 Ms Myeni's dishonesty and evasiveness have already been addressed in detail above. This reprehensible conduct is sufficient reason for a punitive costs order as a mark of this Court's disapproval.

508 Ms Myeni has not only proved to be dishonest in her dealings at SAA, but she has also been dishonest with this Court. This dishonesty is best demonstrated by Ms Myeni's attempts to explain her failure to appear in court at the very beginning of the trial on 7 October 2015.

509 In her postponement application, Ms Myeni initially claimed to have no money to travel to Court.[187] She stated on affidavit that "*I was … unable to be present in court on the day the matter was set down for hearing as I had no means to come from Richards Bay to Pretoria*." She further claimed that she was "*unemployed*" and that "*it is not easy for me to travel from KwaZulu- Natal to Gauteng without any funding.*"

[187] Postponement FA p 47 para 34.

510 In that affidavit, Ms Myeni deliberately failed to disclose to this Court that she earned over R4,3 million in directors' remuneration during her time at SAA[188] and an additional R3,45 million from her time as a director on the Mhlathuze Water Board,[189] not to mention her undisclosed earnings from her numerous other directorships over the years.[190] She also failed to disclose that she remains an active director of at least four companies, including her ongoing role as deputy chairperson at Centlec, a Free State parastatal, which paid her at least R274,364.00 in directors' fees in 2018.[191] Nor did she mention that she owns a property in Richard's Bay worth at least R4,2 million.[192] When confronted with this evidence in cross-examination, Ms Myeni made no attempt to deny it.

511 Instead, Ms Myeni sought to offer a new explanation for the failure to attend Court. She now claimed that it was unfair to expect her to spend her own money on the litigation, in circumstances where she believed that SAA's insurers ought to have paid for her costs.[193] This entirely contradicts her previous pleas of poverty, demonstrating that she perjured herself on affidavit. She now admits that she exercised a deliberate choice not to come to Court. Such dishonesty and disrespect of this Court's processes is worthy of the heaviest punitive costs order.

512 In addition, Ms Myeni's conduct of this litigation also requires condemnation. Between October and November 2015, she launched no less than four separate

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[188] Plaintiffs' Answering Affidavit (AA) p 93 para 32.

[189] AA p 94 para 33.

[190] Myeni 20.2.2020 [REF].

[191] Postponement AA p 95 – 96 paras 36 – 40.

[192] AA pp 95 – 96 paras 36 – 40.

[193] Myeni 20.2.2020 [REF].

interlocutory applications, with the clear purpose of causing delay. When those applications were dismissed, Ms Myeni then waited until the scheduled commencement of this trial on 27 January 2019 to file two separate applications for leave to appeal, long out of time. This conduct was clearly calculated to cause maximum delay and disruption. In fact, it succeeded in prolonging this trial substantially and contributed to the plaintiffs' costs.

513 After her delaying tactics failed, Ms Myeni then elected not to attend trial for the duration of the plaintiffs' evidence, despite this Court's repeated warnings that this would compromise her defence. During her testimony, Ms Myeni's evasiveness and refusal to answer direct questions substantially prolonged proceedings.

514 In these circumstances, justice and equity requires that the plaintiffs be fully indemnified, to the greatest extent possible, from the costs of this litigation.

Reimbursement of public entities for Ms Myeni's costs

515 Section 78(6)(a) of the Companies Act, read with section 78(7), provides that a company may not indemnify or insure a director against any liability (including costs) arising from wilful misconduct or wilful breaches of trust on the part of the director. Dishonesty falls squarely within the scope of that exclusion.

516 Section 78(8) further provides that "*a company is entitled to claim restitution from a director of the company or of a related company for any money paid directly or*

indirectly by the company to or on behalf of that director in any manner inconsistent with this section."

517 In this case, Ms Myeni has herself claimed that all of her legal costs in this matter, at least up until the withdrawal of her former attorneys in June 2019, were covered by SAA's director's liability insurance.[194]

518 Therefore, we submit that this Court must order the return of any money paid, directly or indirectly, to Ms Myeni by SAA and other public entities to cover her costs in this litigation. The public should never have been burdened with those legal costs and it is appropriate that this public money be returned without further delay.

[194] Myeni 20.2.2020 [REF].

CONCLUSION AND REMEDY

519 For these reasons, we submit that the plaintiffs have made out a case for the relief sought in this action, with punitive costs, including the costs of three counsel.

520 We submit that the following order is appropriate:

520.1 Ms Myeni is declared a delinquent director in terms of section 162(5) of the Companies Act.

520.2 This declaration of delinquency is to subsist for the remainder of Ms Myeni's lifetime, subject to the provisions of sections 162(11) and (12) of the Companies Act.

520.3 Ms Myeni is directed to pay the costs of this action on an attorney and own client scale, including the costs of three counsel;

520.4 Any and all costs incurred by Ms Myeni in the course of these proceedings, but which were in fact paid by another defendant or any public entity on behalf of Ms Myeni, either directly or indirectly, must be repaid to that defendant or entity by Ms Myeni in her personal capacity.

521 The mystery remains as to why Ms Myeni repeatedly took SAA and the country to brink. Her motives will only be revealed by following the money trail. Some of this work has begun in the Commission of Inquiry into State Capture, which has revealed further, shocking allegations of corruption and money laundering involving Ms Myeni and her cronies. However, that work means little if the police

and the NPA do not take action. It is for this reason that the plaintiffs request this Court to refer this matter to the NPA for investigation.

522 As we emphasised at the outset, this case is but the first step in holding all who are responsible for SAA's collapse to account. It should not be the last.

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