IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

15996/17

CASE NO

In the matter between:

ORGANISATION UNDOING TAX ABUSE NPC	First Plaintiff
SOUTH AFRICAN AIRWAYS PILOTS' ASSOCIATION	Second Plaintiff

and

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA
PRIVATE BAG/PRIVAATSAK X67 PRETORIA 0001
2017 -03- 07
T. G. MALELE
REGISTRAR'S CLERK
GRIFFIER VAN DIE HOE HOF VAN SUID AFRIKA GAUTENG AFDELING, PRETORIA

DUDUZILE CYNTHIA MYENI	First Defendant
SOUTH AFRICAN AIRWAYS SOC LTD	Second Defendant
AIR CHEFS SOC LTD	Third Defendant
MINISTER OF FINANCE	Fourth Defendant

COMBINED SUMMONS

To the Sheriff or his Deputy:

Inform:

DUDUZILE CYNTHIA MYENI, a businesswoman and director residing at 102 Kolsterkring, Meerensee, Richards Bay, Kwa-Zulu Natal ("**the first defendant**");

and

SOUTH AFRICAN AIRWAYS SOC LTD, a state-owned company duly established in terms of company laws of the Republic of South Africa and the South African Airways Act, 2007 ("**SAA Act**"), having its registered

office at Airways Park, 32 Jones Road, Kempton Park, Johannesburg ("**the second defendant**");

and

AIR CHEFS SOC LTD, a state-owned company duly established in terms of the company laws of the Republic of South Africa, having its registered office at Airways Park, 32 Jones Road, Kempton Park, Johannesburg ("**the third defendant**");

and

The **MINISTER OF FINANCE**, a member of the National Cabinet who has his principal office at 40 Church Square, Pretoria, Gauteng. The Minister of Finance is, since 12 December 2014, the Cabinet member responsible for administering and regulating SAA under and in terms of the SAA Act ("**the fourth defendant**");

that

ORGANISATION UNDOING TAX ABUSE NPC, a non-profit company incorporated under the laws of the Republic of South Africa and having its registered office at 318 Oak Avenue, Randburg, Johannesburg ("**the first plaintiff**");

and

SOUTH AFRICAN AIRWAYS PILOTS' ASSOCIATION, a branch of the Air Line Pilots' Association of South Africa, which is a registered trade union in terms of section 96 of the Labour Relations Act 66 of 1995,

having its principal place of business at 10 Blockhouse Street, Kempton Park, Johannesburg (**"the second plaintiff"**),

hereby institute action against the first, second, third and fourth defendants, in which action the plaintiffs claim the relief on the grounds set out in the particulars annexed hereto.

Inform each defendant further that if such defendant disputes the claim and the defendant wishes to defend the action, the defendant shall:

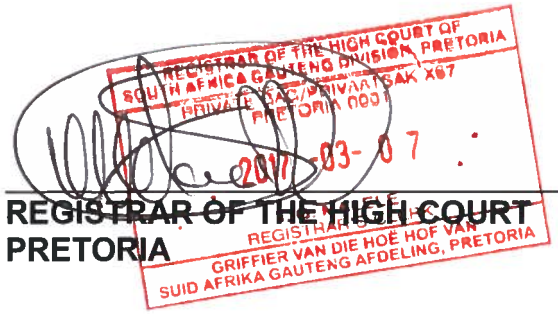
1. within one month of service on the defendants of this summons, file with the Registrar of this Court, notice of the defendants' intention to defend and serve a copy thereof on the plaintiffs' attorneys, which notice shall give the defendants' full residential or business address, and also an address (not being a post office box or *poste restante*) referred to in Rule 19(3) for the service on the defendants of all notices and documents in the action; and

2. thereafter, and within 20 days after filing and serving such notice of intention to defend, file with the Registrar and serve on the plaintiffs a plea, exception, notice to strike out, with or without a counterclaim.

Inform each defendant further that, if such defendant fails to file and serve such notice, judgment as claimed may be given against such defendant without further notice; or, if having filed and served such notice, the defendant fails to plead, except, make application to strike out or counterclaim, judgment may be given against the defendant.

Immediately thereafter serve on each defendant a copy of this summons and return the original to the Registrar with whatsoever you have done thereon.

Dated at Pretoria on the day of March 2017



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PARTICULARS OF CLAIM

PARTIES

1. The first plaintiff is the Organisation Undoing Tax Abuse NPC ("**OUTA**"), a non-profit company incorporated under the laws of the Republic of South Africa and having its registered office at 318 Oak Avenue, Randburg, Johannesburg.

2. The second plaintiff is the South African Airways Pilots' Association ("**SAAPA**"), a branch of the Air Line Pilots' Association of South Africa, which is a registered trade union in terms of section 96 of the Labour Relations Act 66 of 1995, having its principal place of business at 10 Blockhouse Street, Kempton Park, Johannesburg. SAAPA represents, 99% of the pilots in the employ of South African Airways SOC Ltd ("**SAA**").

3. The first defendant is Duduzile Cynthia Myeni ("**Ms Myeni**"), a businesswoman and director residing at 102 Kolsterkring, Meerensee, Richards Bay, Kwa-Zulu Natal.

4. The second defendant is South African Airways SOC Ltd, a state-owned company duly established in terms of the company laws of the Republic of South Africa and the South African Airways Act, 2007 ("**SAA Act**"), having its registered office at Airways Park, 32 Jones Road, Kempton Park, Johannesburg. SAA is an organ of state as defined in section 239 of the Constitution of the Republic of South Africa, 1996 ("**Constitution**") and a

public entity listed in Schedule 2 of the Public Finance Management Act, 1999 ("**PFMA**").

5. The third defendant is Air Chefs SOC Ltd ("**Air Chefs**"), a state-owned company duly established in terms of the company laws of the Republic of South Africa, having its registered office at Airways Park, 32 Jones Road, Kempton Park, Johannesburg. Air Chefs is a wholly owned subsidiary of SAA.

6. The fourth defendant is the **MINISTER OF FINANCE**, a member of the National Cabinet who has his principal office at 40 Church Square, Pretoria, Gauteng. The Minister of Finance is, and has been since 12 December 2014, the Cabinet member responsible for administering and regulating SAA under and in terms of the SAA Act.

7. No relief is sought against the second, third and fourth defendants, who are cited by virtue of such interests as they may have in the outcome of this matter.

DEFINITIONS

8. The plaintiffs use, *inter alia*, the following abbreviations in these particulars:

8.1 "**Airbus**" means Airbus Group SE;

8.2 "**BAC**" means the SAA Bid Adjudication Committee;

8.3 "**BnP**" means BnP Capital (Pty) Ltd;

8.4 **"the Board"** means the board of directors of SAA, which at all relevant times included Ms Myeni;

8.5 **"the Companies Act"** means the Companies Act 71 of 2008;

8.6 **"Emirates"** means the Emirates Group ;

8.7 **"Emirates MoU"** means a memorandum of understanding between SAA and Emirates;

8.8 **"EY"** means Ernst and Young Advisory Services (Pty) Ltd;

8.9 **"FAIS Act"** means the Financial Advisory and Intermediary Services Act 37 of 2002;

8.10 **"Mango"** means Mango SOC Ltd;

8.11 **"Mr Bezuidenhout"** means the erstwhile Acting Chief Executive Officer of SAA, Mr N Bezuidenthout;

8.12 **"Pembroke"** means Pembroke Aircraft Leasing 4 Ltd;

8.13 **"PFMA"** means the Public Finance Management Act 1 of 1999;

8.14 **"President Zuma"** means the President of the Republic of South Africa, Mr JG Zuma;

8.15 **"the RFI"** means the Request for Information on Transaction Advisory Services (GSM010/2016);

8.16 **"SCM Policy"** means SAA's Supply Chain Management Policy Version 2.0, dated September 2011, annexed marked **"POC1"**;

8.17 "**Section 54(2) application**" means an application in terms of section 54(2) of the PFMA.

8.18 "**the Transaction Advisor RFP**" or "**RFP**" means a Request for Proposals entitled: Appointment of a Transaction Advisor to Provide Financial Advice to **SAA (GSM021/16)**; and

8.19 "**Treasury Regulations**" means the Regulations in terms of the PFMA, Government Gazette No. 27388, March 2005.

DIRECTORSHIPS

9. Ms Myeni was appointed as a non-executive director of the Board on or about 28 September 2009. On or about 7 December 2012, Ms Myeni became the acting chairperson of the Board. In or about January 2015, Ms Myeni was appointed Chairperson. On 2 September 2016, Ms Myeni was reappointed as Chairperson of the Board. Ms Myeni continues to serve as a director and as the Chairperson of the Board.

10. Ms Myeni is also presently the head of SAA's Social and Ethics Committee and is a member of SAA's Finance, Investment and Procurement Committee, the Audit and Risk Committee as well as SAA's Remuneration and Human Resources Committee.

11. Ms Myeni is a member of the "*accounting authority*" of SAA, as contemplated in the PFMA by virtue of her membership of the Board.

12. Ms Myeni acted as a non-executive director of Air Chefs, a subsidiary of SAA, from or about 28 September 2009 to 8 March 2013 and then again from 28 May 2015 to 30 September 2016.

13. Ms Myeni is a director of SAA and Air Chefs for the purposes of section 162(2)(a) of the Companies Act.

JURISDICTION AND STANDING

14. This Honourable Court has jurisdiction in respect of this action by virtue of section 21(1) of the Superior Courts Act, 2013.

15. OUTA has standing to bring, and does bring, this application:

15.1 under section 157(1)(c) of the Companies Act; and

15.2 in the public interest, with the leave of this Court, in terms of section 157(1)(d) of the Companies Act.

16. OUTA's interest and the public's interest arise from OUTA's primary objectives. These include:

16.1 the protection and advancement of the Constitution as well as the promotion of effective, practical and enforceable taxation policies, which are free from corruption; and

16.2 the proper management of all major public entities.

17. SAAPA has standing to bring, and does bring, this application:

17.1 on behalf of and representing its members in terms of section 157(1)(a) of the Companies Act, by virtue of its status as an

employee representative in terms of section 162(2) of the Companies Act; and

17.2 in terms of section 157(1)(c) of the Companies Act.

18. SAA is:

18.1 a major public entity under Schedule 2 of the PFMA. The public has an interest in the proper management of all major public entities; and

18.2 the recipient of a shareholder guarantee loan of R19.1 billion issued by the state as at the date of this summons.

19. At all material times, SAA was technically insolvent.

20. Air Chefs is a state-owned entity and a wholly owned subsidiary of SAA.

21. OUTA seeks the leave of this Court in terms of section 157(1)(d) of the Companies Act to bring this application in the public interest.

22. Ms Myeni's conduct in the performance of her director's functions within and duties to SAA has breached:

22.1 the Constitution and in particular sections 195 and 217; and

22.2 the PFMA and the Companies Act, as detailed in these particulars of claim.

THE BNP CAPITAL DEAL

2.1 The appointment of a transaction adviser

23. On 15 January 2016, the Chief Financial Officer of SAA sent a request for the approval of the appointment of a transaction adviser regarding SAA's R15 billion debt restructuring to the Board. The Board, led by Ms Myeni as Chairperson, authorised the publication of the RFI on Transaction Advisory Services.

24. On 7 February 2016, SAA published the RFI.

25. The RFI was an invitation to interested organisations and/or individuals to provide transaction advisory services, including:

25.1 analysing SAA's loan agreements;

25.2 determining inefficiencies in SAA's R14 billion funding arrangements;

25.3 advising SAA on the restructuring of its balance sheet;

25.4 advising SAA on loans which appear to be inefficient but are actually strategic; and

25.5 analysing and recommending options for restructuring of SAA's current leases.

26. The scope of the RFI did not extend to the sourcing of funds for SAA.

27. The bidding process for the RFI closed on 16 February 2016.

28. This RFI was published despite the fact that:

28.1 the SAA Treasurer advised the Board that SAA did not require a transaction advisor; and

28.2 SAA did not, in fact, require a transaction adviser.

29. The RFI was not advertised for 14 days before the closing day for submissions.

30. By 16 February 2016, SAA had received bids from seven entities including BnP.

31. The other entities who submitted bids included Deloitte & Touché, Regiments Capital (Pty) Ltd, Basis Point Capital Investment Holding (Pty) Ltd, Cinga Holdings (Pty) Ltd, Nisela Capital (Pty) Ltd and Nedbank Ltd.

32. On 11 March 2016, SAA sent out the Transaction Adviser RFP.

33. The RFI did not indicate that the RFP would be restricted to those who had responded to the RFI.

34. The Transaction Adviser RFP was only sent to those entities that responded to the RFI.

35. The scope of the Transaction Adviser RFP did not extend to the sourcing of funds for SAA.

36. The submission period for the Transaction Adviser RFP closed on 18 March 2016.

37. The RFP was not advertised for 14 days before the closing day for submissions.

38. On or about 14 April 2016, the Board, led by Ms Myeni as Chairperson, resolved to award the Transaction Adviser contract to BnP.

39. On 20 April 2016, SAA sent a letter of award to BnP.

40. The letter of award recorded an all-inclusive cost to SAA that was higher than the cost proposed in BnP's bid.

41. On 21 April 2016, the Board, led by Ms Myeni as Chairperson, passed Written Resolution No 2016/B11 ("**B11**"):

41.1 which purported to extend the scope of the Transaction Adviser contract with BnP to include the sourcing of funding;

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

41.3 without any competitive process;

41.4 without a due diligence on BnP; and

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

42. In conducting in the manner described in paragraphs 23 to 41 above, the Board, led by Ms Myeni as Chairperson, failed, *inter alia*, to:

42.1 exercise the duty of utmost care to ensure reasonable protections of the assets and records of SAA as a public entity (as contemplated under section 50(1)(a) of the PFMA);

42.2 act with fidelity, honesty, integrity and in the best interests of SAA as a public entity in the managing of its financial affairs (as contemplated under section 50(1)(b) of the PFMA);

42.3 take responsibility for the safeguarding of the assets and management the revenue, expenditure and liabilities of SAA (as contemplated at section 51(1)(c) of the PFMA);

42.4 ensure that SAA maintains an effective, efficient and transparent system of financial and risk management and internal control (as contemplated at section 51(1)(a)(i) of the PFMA);

42.5 ensure that SAA maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective (as contemplated at section 51(1)(a)(iii) of the PFMA); and

42.6 ensure that SAA takes effective and appropriate steps to prevent irregular expenditure, fruitless and wasteful expenditure and expenditure not complying with the operational policies of SAA (as contemplated in section 51(1)(b)(ii) of the PFMA).

43. In conducting itself in the manner described in paragraphs 23 to 41 above, the Board, led by Ms Myeni as Chairperson, caused SAA to violate its SCM Policy in, *inter alia,* the following ways:

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

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

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

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

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

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

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

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

44. In conducting herself in the manner described in paragraphs 23 to 41 above, Ms Myeni:

44.1 knew, alternatively ought to have known, that she was acting unlawfully;

44.2 used the position of director, or information obtained while acting in the capacity of a director to gain advantage for herself, or for another person other than SAA or a wholly-owned subsidiary of SAA, or to knowingly cause harm to SAA or a subsidiary of SAA, as contemplated in section 76(2)(a) of the Companies Act;

44.3 grossly abused the position of director as contemplated in section 162(5)(c)(i) of the Companies Act;

44.4 intentionally, or by gross negligence, inflicted harm upon SAA, contrary to section 76(2)(a) of the Companies Act, as contemplated in section 162(5)(c)(iii) of the Companies Act. In particular, Ms Myeni:

44.4.1 used the position of director to knowingly cause harm to SAA or SAA's subsidiaries;

44.4.2 failed to exercise the powers and perform the functions of director in good faith and for a proper purpose; in the best interest of SAA; and/or with the degree of care or skill and diligence that may reasonably be expected of a person carrying out the same functions as Ms Myeni and having the general knowledge, skill and experience of that director; and

44.4.3 did not have any rational basis for believing that her decision was in the best interests of SAA;

44.5 acted in a manner that amounted to gross negligence, wilful misconduct or breach of trust in relation to the performance of her functions within, and duties to, SAA within the meaning of section 162(5)(c)(iv)(aa) of the Companies Act; and

44.6 acted in a manner described in section 77(3)(a) and (c) of the Companies Act, as contemplated in section 162(5)(c)(iv)(bb) of the Companies Act. In particular, Ms Myeni:

44.6.1 acted in the name of SAA, signed anything on behalf of SAA, or purported to bind the company or authorise the taking of any action by or on behalf of SAA, despite knowing that she lacked the authority to do so; and/or

44.6.2 acquiesced in the carrying on of the SAA's business despite knowing that it was being conducted in a manner that was reckless, *alternatively* with gross negligence, *further alternatively* for a fraudulent purpose.

45. Accordingly, this Honourable Court must make an order declaring Ms Myeni a delinquent director in terms of section 162(5) of the Companies Act.

The second resolution extending the Transaction Adviser contract to source funding

46. On or about 26 April 2016, the Financial Services Board suspended BnP's Financial Services Provider licence in terms of section 9 of the FAIS Act.

47. Between 20 and 25 May 2016, the Board, led by Ms Myeni as Chairperson, resolved to extend BnP's Transaction Adviser contract:

47.1 by pursuing a tender process with BnP as a sole bidder,

47.2 to include long-term funding for SAA amounting to R15 billion ("**the BnP extension resolution**").

48. The Board passed the BnP extension resolution despite the fact that:

48.1 confining the bidding process to BnP as sole bidder breached the SCM Policy;

48.2 the scope of the Transaction Adviser services had never included the sourcing of funds;

48.3 BnP did not have a Financial Services Provider licence;

48.4 SAA had not conducted a proper due diligence on BnP;

48.5 there was no evidence that BnP had the capability to source funds for SAA; and

48.6 the SAA Treasurer had received quotations for the sourcing of funds at a lower cost than the quotation from BnP from three of South Africa's biggest banks, which were existing service-providers of SAA.

49. Ms Myeni was the first director on the Board to cast a vote in favour of the BnP extension resolution on or about 20 May 2016.

50. On or about 25 May 2016, and as a result of the BnP extension resolution, SAA formally appointed BnP to source funds for SAA:

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

50.2 calculated at 1.5% of the funding sourced on behalf of SAA through BnP; and

50.3 despite the issues raised at para 48 above.

51. Ms Myeni knew, alternatively ought to have known, that by voting in favour of the BnP extension, she and the Board acted unlawfully in that they failed, *inter alia*, to:

51.1 take effective and appropriate steps to manage the available working capital efficiently and economically (as contemplated at section 51(1)(b)(iii) of the PFMA);

51.2 take responsibility for the safeguarding of the assets and management of the revenue, expenditure and liabilities of SAA (as contemplated at section 51(1)(c) of the PFMA);

51.3 exercise the duty of utmost care to ensure the reasonable protection of the assets and records of SAA as a public entity (as contemplated under section 50(1)(a) of the PFMA);

51.4 act with fidelity, honesty, integrity and in the best interests of SAA as a public entity in managing SAA's financial affairs (as contemplated under section 50(1)(b) of the PFMA); and

51.5 take effective and appropriate steps to prevent irregular expenditure, fruitless and wasteful expenditure and expenditure not complying with the operational policies of SAA (as contemplated at section 51(1)(b)(ii) of the PFMA).

52. The conduct of the Board, led by Ms Myeni as Chairperson, as described in paragraphs 46 to 51 above, amounted to a failure *inter alia* to:

52.1 exercise the duty of utmost care to ensure the reasonable protections of the assets and records of SAA as a public entity (as contemplated under section 50(1)(a) of the PFMA);

52.2 act with fidelity, honesty, integrity and in the best interests of SAA as a public entity in the managing of its financial affairs (as contemplated under section 50(1)(b) of the PFMA);

52.3 maintain an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective (as contemplated at section 51(1)(a)(iii) of the PFMA);

52.4 take effective and appropriate steps to prevent irregular expenditure, fruitless and wasteful expenditure, losses resulting from criminal conduct, and expenditure not complying with the operational policies of SAA (as contemplated at section 51(1)(b)(ii) of the PFMA);

52.5 take effective and appropriate steps to manage the available working capital efficiently and economically (as contemplated at section 51(1)(b)(iii) of the PFMA); and

52.6 take responsibility for the safeguarding of the assets and management of the revenue, expenditure and liabilities of SAA (as contemplated at section 51(1)(c) of the PFMA).

53. In respect of the BnP extension resolution and the conduct described in paragraphs 46 to 51 above, Ms Myeni:

53.1 knew, alternatively ought to have known, that she was acting unlawfully;

53.2 used the position of director, or information obtained while acting in the capacity of a director to gain an advantage for herself, or for another person other than SAA or a wholly-owned subsidiary of SAA, or to knowingly cause harm to SAA or a subsidiary of SAA, as contemplated in section 76(2)(a) of the Companies Act;

53.3 grossly abused the position of director, as contemplated in section 162(5)(c)(i) of the Companies Act;

53.4 intentionally, or by gross negligence, inflicted harm upon SAA, contrary to section 76(2)(a) of the Companies Act and as contemplated in section 162(5)(c)(iii) of the Companies Act. In particular, Ms Myeni:

53.4.1 used the position of director to knowingly cause harm to SAA or SAA's subsidiaries;

53.4.2 failed exercise the powers and perform the functions of director in good faith and for a proper purpose; in the best interest of SAA; and/or with the degree of care or skill and diligence that may reasonably be expected of a person carrying out the same functions as Ms Myeni and having the general knowledge, skill and experience of that director; and

53.4.3 did not have any rational basis for believing that her decision was in the best interests of SAA;

53.5 acted in a manner that amounted to gross negligence, wilful misconduct or breach of trust in relation to the performance of her functions within, and duties to, SAA, within the meaning of section 162(5)(c)(iv)(aa) of the Companies Act; and

53.6 acted in a manner described in section 77(3)(a) and (c) of the Companies Act, as contemplated in section 162(5)(c)(iv)(bb) of the Companies Act. In particular, Ms Myeni:

53.6.1 acted in the name of SAA, signed anything on behalf of SAA, or purported to bind the company or authorise the taking of any action by or on behalf of SAA, despite knowing that she lacked the authority to do so; and/or

53.6.2 acquiesced in the carrying on of the SAA's business despite knowing that it was being conducted in a manner that was

reckless, *alternatively* with gross negligence, *further alternatively* for a fraudulent purpose.

54. Accordingly, this Court must make an order declaring Ms Myeni a delinquent director in terms of section 162(5) of the Companies Act.

The cancellation of the sourcing of funds agreement

55. SAA cancelled the sourcing of funds agreement with BnP on 20 July 2016.

56. In July 2016, BnP sought a cancellation fee of R49.9 million for the cancellation of the souring-of-funds agreement.

57. The original agreement between SAA and BnP did not make provision for a cancellation fee.

58. In any event, the cancellation fee of R49.9 million was excessive and irregular in the circumstances.

59. On 7 July 2016, draft written resolution No 2016/B25 ("**B25**") was circulated to the Board by way of a round robin procedure in respect of the proposed cancellation fee of R49.9 million to BnP.

60. The following SAA officials advised the Board that the cancellation fee as proposed by B25 was irregular and unlawful:

60.1 the Chief Financial Officer; and

60.2 the chairperson of the audit and risk committee.

61. Each Board member voted against B25, except for Ms Myeni, who voted in favour of the resolution.

62. By voting in favour of B25, Ms Myeni failed, *inter alia*, to take effective and appropriate steps to:

62.1 exercise the duty of utmost care to ensure the reasonable protection of the assets and records of SAA as a public entity (as contemplated under section 50(1)(a) of the PFMA);

62.2 act with fidelity, honesty, integrity and in the best interests of SAA as a public entity in the managing of its financial affairs (as contemplated under section 50(1)(b) of the PFMA);

62.3 prevent irregular expenditure, fruitless and wasteful expenditure and expenditure not complying with the operational policies of SAA as the public entity (as contemplated at section 51(1)(b)(ii) of the PFMA);

62.4 manage the available working capital efficiently and economically (as contemplated at section 51(1)(b)(iii) of the PFMA); and

62.5 take responsibility for the safeguarding of the assets and management of the revenue, expenditure and liabilities of SAA (as contemplated at section 51(1)(c) of the PFMA).

63. By voting in favour of B25, Ms Myeni :

63.1 knew, alternatively ought to have known, that she was acting unlawfully;

63.2 used the position of director, or information obtained while acting in the capacity of a director to gain advantage for herself, or for another person other than SAA or a wholly-owned subsidiary of SAA, or to knowingly cause harm to SAA or a subsidiary of SAA, as contemplated in section 76(2)(a) of the Companies Act;

63.3 grossly abused the position of director, as contemplated in section 162(5)(c)(i) of the Companies Act;

63.4 intentionally, or by gross negligence, inflicted harm upon SAA, contrary to section 76(2)(a) of the Companies Act, as contemplated in section 162(5)(c)(iii) of the Companies Act. In particular, Ms Myeni:

63.4.1 used the position of director to knowingly cause harm to SAA or SAA's subsidiaries;

63.4.2 failed exercise the powers and perform the functions of director in good faith and for a proper purpose; in the best interest of SAA; and/or with the degree of care or skill and diligence that may reasonably be expected of a person carrying out the same functions as Ms Myeni and having the general knowledge, skill and experience of that director; and

63.4.3 did not have any rational basis for believing that her decision was in the best interests of SAA;

63.5 acted in a manner that amounted to gross negligence, wilful misconduct or breach of trust in relation to the performance of her functions within, and duties to, SAA within the meaning of section 162(5)(c)(iv)(aa) of the Companies Act; and

63.6 acted in a manner described in section 77(3)(a) and (c) of the Companies Act, as contemplated in section 162(5)(c)(iv)(bb) of the Companies Act. In particular, Ms Myeni:

63.6.1 acted in the name of SAA, signed anything on behalf of SAA, or purported to bind the company or authorise the taking of any action by or on behalf of SAA, despite knowing that she lacked the authority to do so; and/or

63.6.2 acquiesced in the carrying on of the SAA's business despite knowing that it was being conducted in a manner that was reckless, *alternatively* with gross negligence, *further alternatively* for a fraudulent purpose.

64. Accordingly, this Court must make an order declaring Ms Myeni a delinquent director in terms of section 162(5) of the Companies Act.

THE EMIRATES DEAL

65. At all material times, the commercial relationship between SAA and Emirates was the most profitable, *alternatively*, one of the most profitable, areas of SAA's business.

66. As of June 2015, SAA's relationship with Emirates generated a profit of approximately R170 million per annum for SAA.

67. At all material times, in terms of SAA's Shareholders Compact concluded in terms of Treasury Regulation 29.2, SAA and the Minister of Finance agreed that two of the key performance measures and indicators for SAA were commercial sustainability and governance compliance.

68. On or about February 2014, the Board of SAA, led by Ms Myeni as Chairperson, adopted a three-year Corporate Plan in terms of section 52 of the PFMA read with Treasury Regulation 29.1.

69. On or about February 2015, the Board of SAA, led by Ms Myeni as Chairperson, adopted a Network and Fleet Plan, which formed an essential element of the Corporate Plan.

70. On or about 9 January 2015, Emirates presented a proposal for an enhanced strategic partnership to SAA.

71. The Emirates proposal presented an opportunity for SAA to:

71.1 achieve the objectives of its Network and Fleet Plan; and

71.2 contribute significantly to achieving and maintaining SAA's financial sustainability.

72. More particularly, the Emirates proposal presented an opportunity for SAA to:

72.1 protect and maintain the existing relationship between SAA and Emirates;

72.2 ensure greater access and connectivity to global flight routes for SAA;

72.3 widen SAA's markets;

72.4 facilitate the expansion and growth of SAA; and

72.5 create direct financial gain for SAA of approximately USD100 million per annum.

73. On 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.

74. On or about 2 April 2015, the SAA Board, led by Ms Myeni as Chairperson, approved the Network and Fleet Plan, which included SAA meeting with the board of Emirates for the purpose of pursuing the

Emirates proposal, subject to, *inter alia*, the submission of a revised Emirates memorandum of understanding (MoU) to the SAA Board.

75. The revised Emirates MoU was circulated to the Board on or about 2 May 2015.

76. The Emirates MoU was designed to achieve the objectives set out in paragraphs 71 and 72 above.

77. On or about 30 May 2015, Ms Myeni instructed the then CEO, Mr Nico Bezuidenhout, to appoint the Operational Review Committee to advise the Board on the Emirates proposal.

78. On 7 June 2015, Mr Bezuidenhout:

78.1 informed the SAA Board that the Operational Review Committee recommended that SAA conclude the deal with Emirates on the basis of a revised MoU; and

78.2 reiterated that the scheduled date for concluding the MoU with Emirates was 16 June 2015.

79. The executive of SAA handled the Emirates MoU and kept the Board apprised of all developments.

80. The Board approved the Emirates MoU by way of electronic communication.

81. SAA executives confirmed a signature date of 16 June 2015 for the MoU with Emirates with Board approval.

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

83. Ms Myeni's reason for this instruction was that President Zuma had reservations about the Emirates MoU.

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

85. Ms Myeni acted on President Zuma's wishes for SAA not to conclude the Emirates MOU in circumstances where she knew, *alternatively* ought to have known, that:

85.1 President Zuma did not have the authority to interfere with the signing of the MoU; and

85.2 The Board had expressed approval for the signing of the MoU.

86. As a result of Ms Myeni preventing Mr Bezuidenhout from signing the Emirates MoU:

86.1 SAA's relationship with Emirates was severely compromised;

86.2 SAA forfeited significant financial and strategic benefits, including those benefits listed at paragraphs 71 and 72 above;

86.3 SAA suffered significant reputational harm internationally; and

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

87. Ms Myeni knew, *alternatively* ought to have known, that:

87.1 her adherence to the dictate of President Zuma was unlawful as he did not have the authority to interfere with an operational matter such as SAA concluding the MoU;

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

87.3 she was obliged to act in accordance with the Board's approval of the signing of the Emirates MoU;

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

87.5 preventing Mr Bezuidenhout from signing the Emirates MoU would lead to the harm outlined at paragraph 86 above.

88. As a result of:

88.1 failing to exercise her independent and unfettered discretion by following the unlawful dictate of President Zuma;

88.2 disregarding the Board's approval of r the Emirates MoU; and

88.3 preventing Mr Bezuidenhout from signing the Emirates MoU;

Ms Myeni:

88.4 failed to exercise the duty of utmost care and to ensure reasonable protections of the assets and records of SAA as a public entity (as contemplated under section 50(1)(a) of the PFMA);

88.5 failed to act with fidelity, honesty, integrity and in the best interests of SAA as a public entity in the management of its financial affairs (as contemplated under section 50(1)(b) of the PFMA);

88.6 failed to take effective and appropriate steps to manage the available working capital efficiently and economically (as contemplated at section 51(1)(b)(iii) of the PFMA);

88.7 failed to take responsibility for the safeguarding of the assets and management of the revenue, expenditure and liabilities of SAA (as contemplated at section 51(1)(c) of the PFMA);

88.8 acted in a way that is inconsistent with the responsibilities assigned to a member of an accounting authority (as contemplated in terms of section 50(2)(a) of the PFMA);

88.9 grossly abused the position of director, as contemplated in section 162(5)(c)(i) of the Companies Act;

88.10 used the position of director, or information obtained while acting in the capacity of a director to gain advantage for herself, or for another person other than SAA or a wholly-owned subsidiary of SAA, or to knowingly cause harm to SAA or a subsidiary of SAA, as contemplated in section 76(2)(a) of the Companies Act;

88.11 intentionally, or by gross negligence, inflicted harm upon SAA, contrary to section 76(2)(a) of the Companies Act and as contemplated in section 162(5)(c)(iii) of the Companies Act. In particular, Ms Myeni:

88.11.1 used the position of director to knowingly cause harm to SAA or SAA's subsidiaries;

88.11.2 failed exercise the powers and perform the functions of director in good faith and for a proper purpose; in the best interest of SAA; and/or with the degree of care or skill and diligence that may reasonably be expected of a person carrying out the same functions as Ms Myeni and having the general knowledge, skill and experience of that director; and

88.11.3 did not have any rational basis for believing that her decision was in the best interests of SAA;

88.12 acted in a manner that amounted to gross negligence, wilful misconduct or breach of trust in relation to the performance of her functions within, and duties to, SAA within the meaning of section 162(5)(c)(iv)(aa) of the Companies Act; and

88.13 acted in a manner described in section 77(3)(a) and (c) of the Companies Act, as contemplated in section 162(5)(c)(iv)(bb) of the Companies Act. In particular, Ms Myeni:

88.13.1 acted in the name of SAA, signed anything on behalf of SAA, or purported to bind the company or authorise the taking of any action by or on behalf of SAA, despite knowing that she lacked the authority to do so; and/or

88.13.2 acquiesced in the carrying on of the SAA's business despite knowing that it was being conducted in a manner that was

reckless, *alternatively* with gross negligence, *further alternatively* for a fraudulent purpose.

89. Accordingly, this Court must make an order declaring Ms Myeni a delinquent director in terms of section 162(5) of the Companies Act.

THE AIRBUS DEAL

The 2002 Agreement

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

The 2009 Revised Agreement

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

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

93. On or about 2 October 2009, SAA and Airbus concluded the 2009 Revised Agreement, subject to the approval of the SAA Board and the Minister of Public Enterprises.

94. The 2009 Revised Agreement included the following terms:

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

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

95. On or about April 2010:

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

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

The 2013 Pembroke Agreement

96. On or about 8 May 2013, the Chief Financial Officer of SAA requested approval by the Board, led by Ms Myeni as Chairperson, of a draft application to the Minister of Public Enterprises in terms section 54(2) of the PFMA:

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

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

97. On or about 27 May 2013, the SAA Board, led by Ms Myeni as Chairperson, approved the Board's Pembroke resolution, which included:

97.1 the draft section 54(2) application; and

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

98. Notwithstanding the Board's Pembroke resolution, Ms Myeni wrote to the company secretary of SAA on or about 2 June 2013 and requested her to record in the minutes of the Board meeting of 27 May 2013 that the Board had resolved that only two aircraft were to be financed by Pembroke.

99. The company secretary refused to amend the minutes according to Ms Myeni's request.

100. On or about 23 June 2013, Ms Myeni submitted a section 54(2) application to the Minister of Public Enterprises.

101. In the section 54(2) application, and notwithstanding the Board's Pembroke resolution, Ms Myeni recorded, *inter alia*, that the Board had resolved to finance only two aircraft with Pembroke.

102. In July 2013, Ms Myeni requested the other non-executive Board members of SAA to overturn the Board's Pembroke resolution.

103. All of the directors, except Ms Y Kwinana, refused.

104. Accordingly, the Board of SAA did not (in July 2013 or at any other time) approve the overturning of the Board's Pembroke resolution.

105. A special meeting of the Board was called in early 2014 in order to discuss Ms Myeni's attempts to undermine the Board's Pembroke resolution.

106. Ms Myeni did not attend the special meeting of the Board.

107. Ms Myeni knew, *alternatively*, ought reasonably to have known that:

107.1 her request to the company secretary to amend the minutes as alleged at para 98 above amounted to an attempt unlawfully and unilaterally to amend a board resolution; and

107.2 her representation to the Minister of Public Enterprises as alleged at paragraph 101 above was fraudulent, *alternatively* false.

108. In requesting the company secretary to amend the minutes of the Board meeting as alleged at para 98 above, Ms Myeni:

108.1 failed to exercise the duty of utmost care to ensure reasonable protection of the assets and records of the public entity (as contemplated in section 50(1)(a) of the PFMA);

108.2 failed to act with fidelity, honesty, integrity and in the best interests of SAA as the public entity in managing the financial affairs of SAA (as contemplated in section 50(1)(b) of the PFMA);

108.3 acted in a way that is inconsistent with the responsibilities assigned to a member of an accounting authority in terms of the PFMA (as contemplated in section 50(2)(a) of the PFMA);

108.4 used her position as a member of an accounting authority to improperly benefit another person (as contemplated in section 50(2)(b) of the PFMA); and

108.5 failed to take responsibility for the safeguarding of the assets and the management the revenue, expenditure and liabilities of SAA (as contemplated at section 51(1)(c) of the PFMA).

109. In making material misrepresentations in the section 54(2) application to the Minister of Public Enterprises as alleged at para 101 above, Ms Myeni failed to:

109.1 exercise the duty of utmost care to ensure reasonable protection of the assets and records of SAA as a public entity (as contemplated under section 50(1)(a) of the PFMA);

109.2 act with fidelity, honesty, integrity and in the best interests of SAA as a public entity in the managing of its financial affairs of SAA (as contemplated under section 50(1)(b) of the PFMA); and

109.3 take responsibility for the safeguarding of the assets and management the revenue, expenditure and liabilities of SAA (as contemplated at section 51(1)(c) of the PFMA).

110. In respect of the conduct alleged at paragraph 98 and paragraph 101 above, Ms Myeni:

110.1 knew, *alternatively* ought to have known, that she was acting unlawfully;

110.2 used the position of director, or information obtained while acting in the capacity of a director to gain advantage for herself, or for another person other than SAA or a wholly-owned subsidiary of SAA, or to knowingly cause harm to SAA or a subsidiary of SAA, as contemplated in section 76(2)(a) of the Companies Act;

110.3 grossly abused the position of director as contemplated in section 162(5)(c)(i) of the Companies Act;

110.4 intentionally, or by gross negligence, inflicted harm upon SAA, contrary to section 76(2)(a) of the Companies Act and as contemplated in section 162(5)(c)(iii) of the Companies Act In particular, Ms Myeni:

110.4.1 used the position of director to knowingly cause harm to SAA or SAA's subsidiaries;

110.4.2 failed exercise the powers and perform the functions of director in good faith and for a proper purpose; in the best interest of SAA; and/or with the degree of care or skill and diligence that may reasonably be expected of a person carrying out the same functions as Ms Myeni and having the general knowledge, skill and experience of that director; and

110.4.3 did not have any rational basis for believing that her decision was in the best interests of SAA;

110.5 acted in a manner that amounted to gross negligence wilful misconduct or breach of trust in relation to the performance of her functions within, and duties to, SAA within the meaning of section 162(5)(c)(iv)(aa) of the Companies Act; and

110.6 acted in a manner described in section 77(3)(a) and (c) of the Companies Act as contemplated in section 162(5)(c)(iv)(bb) of the Companies Act. In particular, Ms Myeni:

110.6.1 acted in the name of SAA, signed anything on behalf of SAA, or purported to bind the company or authorise the taking of any action by or on behalf of SAA, despite knowing that she lacked the authority to do so; and/or

110.6.2 acquiesced in the carrying on of the SAA's business despite knowing that it was being conducted in a manner that was reckless, *alternatively* with gross negligence, *further alternatively* for a fraudulent purpose.

111. Accordingly, this Court must make an order declaring Ms Myeni a delinquent director in terms of section 162(5) of the Companies Act.

The Swap Transaction

112. On or about 31 March 2015, the SAA Board, led by Ms Myeni as Chairperson, unanimously, *alternatively* duly, resolved to approve the Swap Transaction between SAA and Airbus in terms of Written Resolution 2015/B27: Approval of the Airbus A320 Swap Transaction".

113. The main terms of the Swap Transaction amended the 2009 Revised Agreement as follows:

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

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

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

114. The Swap Transaction would, *inter alia*,:

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

114.2 allow SAA to procure A330-300 aircraft instead of A320 aircraft.

115. A condition of the conclusion of the Swap Transaction was that SAA would obtain the necessary governance approvals.

116. On or about 30 July 2015, the Acting Chief Executive Officer and the Chief Financial Officer of SAA signed the execution documents in terms of SAA's Delegation of Authority Framework, 2012.

117. On or about 30 July 2015, the Minister of Finance conditionally approved the Swap Transaction in terms of section 54(2) of the PFMA.

118. On or about 11 September 2015, the Minister of Finance unconditionally approved the Swap Transaction in terms of section 54(2) of the PFMA.

119. The Swap Transaction could not, however, be executed until Ms Myeni signed the execution documents mentioned in paragraph 116 above.

120. Ms Myeni failed and/or refused to sign the execution documents promptly.

121. On or about 29 September 2015, and in a letter dated 17 September 2015, Ms Myeni sent a letter to Airbus in which she stated

that SAA had decided to amend the terms of the Swap Transaction in order, *inter alia*, to involve an African aircraft leasing company.

122. The SAA Board had not, in fact, decided to amend the terms of the Swap Transaction on the terms set out in Ms Myeni's letter or at all.

123. The Minister of Finance had not approved the amendment of the Swap Transaction on the terms set out in Ms Myeni's letter or at all.

124. In representing to Airbus that the proposed amendments to the Swap Transaction had been approved by the SAA Board, Ms Myeni:

124.1 failed to exercise the duty of utmost care to ensure the reasonable protection of the assets and records of SAA as a public entity (as contemplated under section 50(1)(a) of the PFMA);

124.2 failed to act with fidelity, honesty, integrity and in the best interests of SAA (as contemplated in section 50(1)(b) of the PFMA);

124.3 acted in a way that is inconsistent with the responsibilities assigned to a member of an accounting authority in terms of the PFMA (as contemplated in section 50(2)(a) of the PFMA); and

124.4 used her position as a member of an accounting authority to improperly benefit another person (as contemplated in section 50(2)(b) of the PFMA).

125. In respect of her misrepresentations in her letter to Airbus dated 17 September 2015, Ms Myeni:

125.1 knew, *alternatively* ought to have known, that she was acting unlawfully in the manner outlined in para 124 above;

125.2 used the position of director, or information obtained while acting in the capacity of a director to gain advantage for herself, or for another person other than SAA or a wholly-owned subsidiary of SAA, or to knowingly cause harm to SAA or a subsidiary of SAA as contemplated in section 76(2)(a) of the Companies Act;

125.3 grossly abused the position of director as contemplated in section 162(5)(c)(i) of the Companies Act;

125.4 intentionally, or by gross negligence, inflicted harm upon SAA, contrary to section 76(2)(a) of the Companies Act, as contemplated section 162(5)(c)(iii) of the Companies Act. Act In particular, Ms Myeni:

125.4.1 used the position of director to knowingly cause harm to SAA or SAA's subsidiaries;

125.4.2 failed exercise the powers and perform the functions of director in good faith and for a proper purpose; in the best interest of SAA; and/or with the degree of care or skill and diligence that may reasonably be expected of a person carrying out the same functions as Ms Myeni and having the general knowledge, skill and experience of that director; and

125.4.3 did not have any rational basis for believing that her decision was in the best interests of SAA;

125.5 acted in a manner that amounted to gross negligence, wilful misconduct or breach of trust in relation to the performance of her functions within, and duties to, SAA within the meaning of section 162(5)(c)(iv)(aa) of the Companies Act; and

125.6 acted in a manner described in section 77(3)(a) and (c) of the Companies Act, as contemplated in section 162(5)(c)(iv)(bb) of the Companies Act. In particular, Ms Myeni:

125.6.1 acted in the name of SAA, signed anything on behalf of SAA, or purported to bind the company or authorise the taking of any action by or on behalf of SAA, despite knowing that she lacked the authority to do so; and/or

125.6.2 acquiesced in the carrying on of the SAA's business despite knowing that it was being conducted in a manner that was reckless, *alternatively* with gross negligence, *further alternatively* for a fraudulent purpose.

126. Accordingly, this Court must make an order declaring Ms Myeni a delinquent director in terms of section 162(5) of the Companies Act.

Ms Myeni's amended section 54(2) application

127. In or about October 2015, Airbus sent letters to Ms Myeni warning that the delays occasioned by her proposed amendments to the Swap Transaction might lead SAA to incur contractual penalties.

128. On 10 October 2015, a meeting was held between Airbus and certain SAA Board members, including Ms Myeni, in which Ms Myeni:

128.1 proposed amending the Swap Transaction with Airbus to include an African aircraft leasing company; and

128.2 falsely represented that this proposed amendment had been approved by the Board.

129. Ms Myeni's proposed amendments to the Swap Transaction caused the delay of the conclusion of the Swap Transaction.

130. On or about 15 October 2015, the Chief Financial Officer of SAA informed the Director-General of the National Treasury that the delay occasioned by the SAA Board's failure to sign-off on the Swap Transaction was impairing SAA's ability to meet its cash flow obligations.

131. On or about 6 November 2015, Ms Myeni received legal advice to the effect that:

131.1 SAA was obliged to perform in terms of the Swap Transaction; and that

131.2 SAA would be prejudiced by further delays of the Swap Transaction.

132. On 16 November 2015, Ms Myeni submitted an application to amend the section 54(2) approval of the Minister of Finance of 11 September 2015.

133. In her section 54(2) application of 16 November 2015, Ms Myeni:

133.1 stated, *alternatively* implied, that the Board had duly approved the proposed amendments she requested of the Minster;

133.2 failed to say that the Board had already unanimously approved the original Swap Transaction, as alleged at paragraph 112 above.

133.3 stated, *alternatively* implied that, in approving the proposed amendments, SAA had followed due processes under the Significance and Materiality Framework in terms of National Treasury Regulation 28.3;

133.4 requested approval to amend the Swap Transaction by *inter alia* involving an African aircraft leasing company;

133.5 relied on an unsolicited proposal Ms Myeni had received from Mr M Mngadi of Nedbank in respect of the financing and leaseback of five aircraft from Airbus;

133.6 failed to include the contents of the legal opinion of 6 November 2015 to the effect that SAA was required to execute the Swap Transaction without the proposed amendments;

133.7 failed to inform the Minister of Finance of the advice of senior SAA management that the delay of the Swap Transaction caused by the

proposed amendments threatened SAA's solvency and liquidity as well as its Network and Fleet Plan; and

133.8 failed to inform the Minister of Finance that Airbus did not agree to the proposed amendments.

134. Notwithstanding the contents of Ms Myeni's application to amend the section 54(2) approval of the Minister of Finance:

134.1 the Board had never duly approved the proposed amendments; and

134.2 SAA had not followed due process in terms of the Significance and Materiality Framework in terms of National Treasury Regulation 28.3 with regard to the proposed amendments.

135. The Minister of Finance declined the request for approval on 3 December 2015.

136. On 21 December 2015, the Minister of Finance directed the Board to conclude the Swap Transaction with Airbus in line with the section 54(2) approval which had been granted in July 2015.

137. By not following proper process in applying to amend the section 54(2) approval of the Minister of Finance of 11 September 2015, Ms Myeni caused SAA to breach the Significance and Materiality Framework in terms of National Treasury Regulation 28.3.

138. In respect of Ms Myeni's application to amend the section 54(2) approval of the Minister of Finance of 11 September 2015, as alleged at para 132 above, Ms Myeni failed to:

138.1 exercise the duty of utmost care to ensure the reasonable protection of the assets and records of SAA as a public entity (as contemplated in section 50(1)(a) of the PFMA);

138.2 act with fidelity, honesty, integrity and in the best interests of SAA as a public entity in managing its financial affairs (as contemplated in section 50(1)(b) of the PFMA);

138.3 disclose all the material facts, including those reasonably discoverable, which in any way may have influenced the Minister of Finance's decision (as contemplated under section 50(1)(c) of the PFMA);

138.4 take effective and appropriate steps to prevent irregular expenditure, fruitless and wasteful expenditure and expenditure not complying with the operational policies of SAA as the public entity (as contemplated at section 51(1)(b)(ii) of the PFMA);

138.5 take effective and appropriate steps to manage the available working capital efficiently and economically (as contemplated at section 51(1)(b)(iii) of the PFMA); and

138.6 take responsibility for the safeguarding of the assets and management of the revenue, expenditure and liabilities of SAA (as contemplated at section 51(1)(c) of the PFMA).

139. In respect of Ms Myeni's application to amend the section 54(2) approval of the Minister of Finance of 11 September 2015, as alleged at para 133 above, Ms Myeni:

139.1 grossly abused the position of director as contemplated in section 162(5)(c)(i) of the Companies Act;

139.2 used the position of director, or information obtained while acting in the capacity of a director to gain advantage for herself, or for another person other than SAA or a wholly-owned subsidiary of SAA, or to knowingly cause harm to SAA or a subsidiary of SAA, as contemplated in section 76(2)(a) of the Companies Act;

139.3 intentionally, or by gross negligence, inflicted harm upon SAA, contrary to section 76(2)(a) of the Companies Act, as contemplated in section 162(5)(c)(iii) of the Companies Act. Act In particular, Ms Myeni:

139.3.1 used the position of director to knowingly cause harm to SAA or SAA's subsidiaries;

139.3.2 failed exercise the powers and perform the functions of director in good faith and for a proper purpose; in the best interest of SAA; and/or with the degree of care or skill and diligence that may reasonably be expected of a person carrying out the same functions as Ms Myeni and having the general knowledge, skill and experience of that director; and

139.3.3 did not have any rational basis for believing that her decision was in the best interests of SAA;

139.4 acted in a manner 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, SAA within the meaning of section 162(5)(c)(iv)(aa) of the Companies Act; and

139.5 acted in a manner described in section 77(3)(a) and (c) of the Companies Act, as contemplated in section 162(5)(c)(iv)(bb) of the Companies Act. In particular, Ms Myeni:

139.5.1 acted in the name of SAA, signed anything on behalf of SAA, or purported to bind the company or authorise the taking of any action by or on behalf of SAA, despite knowing that she lacked the authority to do so; and/or

139.5.2 acquiesced in the carrying on of the SAA's business despite knowing that it was being conducted in a manner that was reckless, *alternatively* with gross negligence, *further alternatively* for a fraudulent purpose.

140. Accordingly, this Court must make an order declaring Ms Myeni a delinquent director in terms of section 162(5) of the Companies Act.

141. Ms Myeni's conduct in attempting to renegotiate the Swap Transaction delayed its implementation.

142. By delaying the implementation of the Swap Transaction, Ms Myeni exposed SAA to the following risks:

142.1 defaulting on its guarantee repayments as well as the breach of the Swap Transaction itself;

142.2 triggering of cross-defaults on other leasing arrangements; and

142.3 the breach of warranties and exposure in respect of acceleration clauses.

143. Due in part to the failure to conclude the Swap Transaction timeously, SAA:

143.1 was prevented from finalising SAA's 2014/15 financial statements as it was not a going concern;

143.2 could not hold the Annual General Meeting; and

143.3 could not table SAA's audited financial statements in Parliament timeously.

144. In respect of her conduct described at paragraph 141 above, Ms Myeni failed to:

144.1 exercise the duty of utmost care to ensure reasonable protection of the assets and records of SAA as a public entity (as contemplated in section 50(1)(a) of the PFMA);

144.2 act with fidelity, honesty, integrity and in the best interests of SAA as a public entity in managing its financial affairs (as contemplated in section 50(1)(b) of the PFMA);

144.3 disclose all the material facts, including those reasonably discoverable, which in any way may have influenced the Minister of Finance's decision (as contemplated under section 50(1)(c) of the PFMA);

144.4 take effective and appropriate steps to prevent irregular expenditure, fruitless and wasteful expenditure and expenditure not complying with the operational policies of SAA as the public entity (as contemplated at section 51(1)(b)(ii) of the PFMA);

144.5 take effective and appropriate steps to manage the available working capital efficiently and economically (as contemplated at section 51(1)(b)(iii) of the PFMA); and

144.6 take responsibility for the safeguarding of the assets and management of the revenue, expenditure and liabilities of SAA (as contemplated at section 51(1)(c) of the PFMA).

145. In respect of her conduct alleged at para 141 above, Ms Myeni:

145.1 grossly abused the position of director as contemplated in section 162(5)(c)(i) of the Companies Act;

145.2 used the position of director, or information obtained while acting in the capacity of a director to gain advantage for herself, or for another person other than SAA or a wholly-owned subsidiary of SAA, or to knowingly cause harm to SAA or a subsidiary of SAA as contemplated in section 76(2)(a) of the Companies Act;

145.3 intentionally, or by gross negligence, inflicted harm upon SAA, contrary to section 76(2)(a) of the Companies Act, as contemplated in section 162(5)(c)(iii) of the Companies Act In particular, Ms Myeni:

145.3.1 used the position of director to knowingly cause harm to SAA or SAA's subsidiaries;

145.3.2 failed exercise the powers and perform the functions of director in good faith and for a proper purpose; in the best interest of SAA; and/or with the degree of care or skill and diligence that may reasonably be expected of a person carrying out the same functions as Ms Myeni and having the general knowledge, skill and experience of that director; and

145.3.3 did not have any rational basis for believing that her decision was in the best interests of SAA;

145.4 acted in a manner 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, SAA within the meaning of section 162(5)(c)(iv)(aa) of the Companies Act; and

145.5 acted in a manner described in section 77(3)(a) and (c) of the Companies Act, as contemplated in section 162(5)(c)(iv)(bb) of the Companies Act. In particular, Ms Myeni:

145.5.1 acted in the name of SAA, signed anything on behalf of SAA, or purported to bind the company or authorise the taking of any action by or on behalf of SAA, despite knowing that she lacked the authority to do so; and/or

145.5.2 acquiesced in the carrying on of the SAA's business despite knowing that it was being conducted in a manner that was

reckless, *alternatively* with gross negligence, *further alternatively* for a fraudulent purpose.

146. Accordingly, this Court must make an order declaring Ms Myeni a delinquent director in terms of section 162(5) of the Companies Act.

THE ERNST & YOUNG REPORT

147. In or about 28 July 2015, SAA instructed EY to conduct an investigation into the procurement and contract management practices at SAA and its subsidiaries.

148. In or about 10 December 2015, EY sent a draft report to SAA, including to the Board.

149. The EY Report identified, *inter alia*, the following concerns:

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

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

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

149.4 failure to follow correct tender processes and overpayment in respect of Air Chefs' contract with Vizzini Motors (Pty) Ltd;

149.5 failure to follow correct tender processes and overpayment in respect of Air Chefs' contract with First Garment Rental (Pty) Ltd ("**First Garment**") concluded in September 2012;

149.6 overpayment under, and questionable existence of, Air Chefs' informal "consultancy agreement" with First Garment;

149.7 a conflict of interest and overpayment in respect of South African Airways Technical SOC Ltd's ("**SAAT's**") contract with Mtha Aviation (Pty) Ltd;

149.8 overpayment in respect of SAAT's contract with Savuka Property Care Services CC;

149.9 failure to manage expenditure in respect of SAAT's contract with KWE as well the questionable nature of some of the services paid for by SAAT; and

149.10 informal and suspicious nature of SAAT's contract with AAR Corporation, which contract appears to have been prompted by SAA and resulted in the resignation of Mr Parsons from the Board.

150. The draft EY report recommended that SAA should take immediate steps to remedy each of the above issues.

151. From December 2015, Ms Myeni had knowledge of the draft EY Report.

152. 154. The final report was not materially different to the draft report.

153. 155. As Chairperson of the Board, Ms Myeni knew, *alternatively* ought to have known, that each of the concerns the EY Report identified had a negative impact on the operational and/or financial success of SAA and its subsidiaries.

154. Ms Myeni knew, *alternatively* ought to have known, that the Board ought to have taken steps to protect the interests of SAA within a reasonable period of time with regard to each of the concerns the EY Report identified.

155. To date, Ms Myeni and the Board have taken no material steps to address or remedy any of the issues and concerns raised in the EY Report.

156. By failing to take material steps to address or remedy any of the issues and concerns raised in the EY Report, Ms Myeni failed to:

156.1 exercise the duty of utmost care to ensure reasonable protection of the assets and records of the public entity (as contemplated in section 50(1)(a) of the PFMA);

156.2 take effective and appropriate steps to prevent irregular expenditure, fruitless and wasteful expenditure and expenditure not complying with the operational policies of the public entity (as contemplated at section 51(1)(b)(ii) of the PFMA);

156.3 take effective and appropriate steps to manage the available working capital efficiently and economically (as contemplated at section 51(1)(b)(iii) of the PFMA); and

156.4 take responsibility for the safeguarding of the assets and management of the revenue, expenditure and liabilities of SAA (as contemplated at section 51(1)(c) of the PFMA).

157. In respect of her failure to take material steps to address or remedy any of the issues and concerns raised in the EY Report, Ms Myeni:

157.1 grossly abused the position of director as contemplated in section 162(5)(c)(i) of the Companies Act;

157.2 used the position of director, or information obtained while acting in the capacity of a director to gain advantage for herself, or for another person other than SAA or a wholly-owned subsidiary of SAA, or to knowingly cause harm to SAA or a subsidiary of SAA, as contemplated in section 76(2)(a) of the Companies Act;

157.3 intentionally, or by gross negligence, inflicted harm upon SAA, contrary to section 76(2)(a) of the Companies Act, as contemplated in section 162(5)(c)(iii) of the Companies Act In particular, Ms Myeni:

157.3.1 used the position of director to knowingly cause harm to SAA or SAA's subsidiaries;

157.3.2 failed exercise the powers and perform the functions of director in good faith and for a proper purpose; in the best interest of SAA; and/or with the degree of care or skill and diligence that may reasonably be expected of a person carrying out the same functions as Ms Myeni and having the general knowledge, skill and experience of that director; and

157.3.3 did not have any rational basis for believing that her decision was in the best interests of SAA;

157.4 acted in a manner that amounted to gross negligence, wilful misconduct or breach of trust in relation to the performance of her

functions within, and duties to, SAA, within the meaning of section 162(5)(c)(iv)(aa) of the Companies Act; and

157.5 acted in a manner described in section 77(3)(a) and (c) of the Companies Act, as contemplated in section 162(5)(c)(iv)(bb) of the Companies Act. In particular, Ms Myeni:

157.5.1 acted in the name of SAA, signed anything on behalf of SAA, or purported to bind the company or authorise the taking of any action by or on behalf of SAA, despite knowing that she lacked the authority to do so; and/or

157.5.2 acquiesced in the carrying on of the SAA's business despite knowing that it was being conducted in a manner that was reckless, *alternatively* with gross negligence, *further alternatively* for a fraudulent purpose.

158. Accordingly, this Court must make an order declaring Ms Myeni a delinquent director in terms of section 162(5) of the Companies Act.

WHEREFORE:

(a) the first plaintiff asks this Honourable Court to:

i. grant leave in terms of section 157(1)(d) of the Companies Act to bring this application; and

(b) the plaintiffs ask this Honourable Court to grant an order in the following terms:

i. Ms Myeni is declared a delinquent director in terms of section 162(5) of the Companies Act;

ii. all defendants who oppose the relief herein, jointly and severally, the one paying the others to be absolved, are to pay the costs of suit on an attorney and own client scale, including the costs of two counsel;

iii. 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, will be repaid to that defendant or entity by Ms Myeni in her personal capacity;

iv. Further and/or alternative relief.

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TO: **THE REGISTRAR**
High Court
PRETORIA