



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

**Case No: 010700/2023**

- (1) REPORTABLE: YES  
(2) OF INTEREST TO OTHER JUDGES: YES  
(3) REVISED

**06/09/2023**  
DATE

  
SIGNATURE

**MANGO AIRLINES SOC LIMITED**  
**(IN BUSINESS RESCUE)**

First Applicant

**SIPHO ERIC SONO N.O.**

Second Applicant

**NATIONAL UNION OF METALWORKS OF SOUTH AFRICA**  
**(INTERVENING)**

Third Applicant

and

**THE MINISTER OF PUBLIC ENTERPRISES**

First Respondent

**THE DEPARTMENT OF PUBLIC ENTERPRISES**

Second Respondent

**SOUTH AFRICAN AIRWAYS SOC LTD**

Third Respondent

**THE MINISTER OF FINANCE**

Fourth Respondent

**NATIONAL TREASURY**

Fifth Respondent

**THE INTERNATIONAL AIR SERVICES COUNCIL**

Sixth Respondent

**THE AIR SERVICES LICENSING COUNCIL**

Seventh Respondent

**THE AFFECTED PERSONS OF MANGO AIRLINES SOC LIMITED (IN BUSINESS RESCUE)**

Eighth Respondent

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 06 September 2023.

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## **JUDGMENT**

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**PHOOKO AJ**

### **INTRODUCTION**

- [1] This case involves Mango Airlines SOC Limited (Mango Airlines) whose airfoils have been grounded due to dire financial constraints experienced by the airline. The airline has been grounded for almost two years.
- [2] Despite ongoing business rescue efforts, business rescue proceedings were put on hold due to various factors, one of them being the alleged absence of outstanding additional relevant information from the appropriate accounting authority with the capacity to file an application for business rescue in terms of section 54(2) of the Public Finance Management Act 1 of 1999 (“the PFMA”) on behalf of Mango Airlines.
- [3] The crux of this matter concerns the alleged failure by the First Respondent to make a decision regarding the section 54(2) application that was submitted to him/her in December 2022. This brings to the fore the interplay between the provisions of the PFMA and the Companies Act 71 of 2008 (“the Companies Act”)

in so far as they relate to business rescue proceedings involving public entities, the accounting authority, and an application for approval of disposal of public assets amongst others.

- [4] Aggrieved by the First Respondent's delay in processing and deciding on their application lodged in terms of section 54(2)<sup>1</sup> of the PFMA, the First and Second Applicants launched this application *inter alia* seeking an order from this Court that compels the First Respondent to make a decision with regards to their application and/or to declare that the application has been approved by operation of law as per section 54(3) of the PFMA.
- [5] The Third Applicant filed an application to intervene on behalf of its members and asked this Court to review the First Respondent's omission, being a failure to take a decision.
- [6] The First Respondent, the Second Respondent, the Fourth Respondent, and the Fifth Respondent are the parties who opposed the relief sought by the Applicants save for the application to intervene lodged by the Third Applicant.

## THE PARTIES

- [7] The First Applicant is Mango Airlines, a state-owned company currently undergoing business rescue proceedings, with registration number 2006/018129/30 incorporated with limited liability in accordance with the laws of South Africa with a registered address at Mezzanine Level, Domestic Departures Terminal, OR Tambo International Airport, Kempton Park, 1627. As a state-owned entity, Mango Airlines is governed in accordance with the prescripts of,

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<sup>1</sup> The full provision provides:

'Before a public entity concludes any of the following transactions, the accounting authority for the public entity must promptly and in writing inform the relevant treasury of the transaction and submit relevant particulars of the transaction to its executive authority for approval of the transaction:

- (a) establishment or participation in the establishment of a company;
- (b) participation in a significant partnership, trust, unincorporated joint venture or similar arrangement;
- (c) acquisition or disposal of a significant shareholding in a company;
- (d) acquisition or disposal of a significant asset;
- (e) commencement or cessation of a significant business activity; and
- (f) a significant change in the nature or extent of its interest in a significant partnership, trust, unincorporated joint venture or similar arrangement'.

amongst others, the PFMA.

- [8] The Second Applicant is Siphon Eric Sono who is cited in these proceedings in his capacity as the duly appointed business rescue practitioner (“the BRP”) of Mango Airlines, practicing through his employer, Opis Advisory (Pty) Ltd with registration number 2007/012055/07 whose principal place of business is situated at West Wing, Birchwood Court, 43 Montrose Street, Midrand.
- [9] The Third Applicant is the National Union of Metalworkers of South Africa (“NUMSA”), a trade union registered in terms of section 95 of the Labour Relations Act 66 of 1995 whose place of business is at 153 Bree Street, corner Gerald Sekoto Street, Newtown, Johannesburg.
- [10] The First Respondent is the Minister of Public Enterprises (“the PE Minister”) cited in his official capacity whose principal place of business is at 80 Hamilton Street, Arcadia, Pretoria, 007 C/O the State Attorney, Old Mutual Centre, 8<sup>th</sup> Floor, 167 Andries Street, Pretoria, 0001.
- [11] The Second Respondent is South African Airways SOC Ltd (“SAA”), a state-owned company with limited liability duly incorporated in accordance with the laws of South Africa with registration number 1997/022444/30 whose registered address is at Airways Park, 32 Jones Road, Kempton Park, Johannesburg, 1627.
- [11.1] SAA is the sole shareholder of Mango Airlines and owns 100% of its shares.
- [12] The Fourth Respondent is the Minister of Finance who is cited herein in his official capacity and whose address of service is 40 Church Street, Old Reserve Bank Building, 2<sup>ND</sup> Floor, Pretoria, c/o the State Attorney, Old Mutual Centre, 8<sup>th</sup> Floor, 167 Andries Street, Pretoria, 0001.
- [13] The Fifth Respondent is National Treasury whose principal place of business is at 40 Church Street, Old Reserve Bank Building, 2<sup>ND</sup> Floor, Pretoria, c/o the State Attorney, Old Mutual Centre, 8<sup>th</sup> Floor, 167 Andries Street, Pretoria, 0001.

- [14] The Sixth Respondent is the International Air Services Council, a juristic person established in terms of section 3 of the International Air Services Act 60 of 1993 of Forum Building Cnr Struben and Bosman Streets, Pretoria, 0001.
- [15] The Seventh Respondent is the Air Service Licensing Council, a juristic person established in terms of section 3 of the International Air Services Act 60 of 1993 of Forum Building Cnr Struben and Bosman Streets, Pretoria, 0001
- [16] The Eighth and Further Respondents are All Affected Persons of Mango Airlines as defined in section 128(1)(a) of the Companies Act.
- [17] There is no relief sought against the Second, Eighth, and Further respondents.

## **THE ISSUES**

- [18] The issues for determination are:
- [18.1] where there is a conflict between the provisions of the Companies Act and the PFMA, which provisions should prevail.
- [18.2] whether the application submitted by the applicants and SAA in terms of section 54(2) of the PFMA was a valid and complete application .
- [18.3] whether the section 54(2) application has been approved by operation of section 54(3) of the PFMA.
- [18.4] whether the First Respondent's refusal to take a decision in respect of the section 54(2) application is unlawful and constitutionally invalid and/or stands to be reviewed and set aside.
- [18.5] whether the First Respondent is entitled to request that the applicants furnish any further information in support of the section 54(2) application.
- [18.6] whether the applicants have the requisite standing/legal interest to seek the relief sought.

[18.7] whether the application before this Court is premature.

[18.8] whether the test for the granting of declaratory relief is met.

[18.9] whether the consideration of the section 54(2) application constitutes an executive function to which the Court should exercise deference due to the principle of separation of powers principle.

[18.10] whether NUMSA has a direct and substantial interest in the proceedings before this Court and if NUMSA's application for leave to intervene as co-applicant should be granted.

## **FACTUAL BACKGROUND**

[19] Mango Airlines is a low-cost domestic airline that used to operate in various destinations across South Africa. SAA is the sole shareholder of Mango Airlines. The airline was launched on 30 October 2006 and commenced its business operations on 15 November 2006. Mango Airlines had 718 staff members and a fleet of 8 aircrafts leased from Macquarie. Mango Airlines has been grounded from July 2021 to date.

[20] Due to the government's Covid-19 restrictions<sup>2</sup> such as the nationwide lockdown implemented with the aim of curbing the spread of the Covid-19 virus, Mango Airlines closed its business operations from 26 March 2020 and resumed its operations from 20 June 2020. Further lockdown restrictions were implemented after this period. The lockdowns negatively affected Mango Airlines' business operations.

[21] Consequently, Mango Airlines' un-flown ticket liability increased. An un-flown ticket liability is a liability incurred due to payments received from customers but

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<sup>2</sup> See *Minister of Cooperative Governance and Traditional Affairs v De Beer and Another* (538/2020) [2021] ZASCA 95; [2021] 3 All SA 723 (SCA). See also N Sobikwa and MR Phooko "An assessment of the constitutionality of the COVID-19 regulations against the requirement to facilitate public participation in the law-making and/or administrative processes in South Africa" 2021 (25) *Law, Democracy, and Development* 325-326.

clients have not flown as the airline has not been operational due to various intervals of lockdown stated earlier.

- [22] Mango Airlines' financial troubles were worsened by SAA's inability, its sole shareholder, to save it. The basis for this was that SAA was also undergoing business rescue proceedings from the period 05 November 2019 until 30 April 2021.
- [23] Even though Mango Airlines had financial difficulties, its board of directors was of the view that the company had a reasonable prospect of being rescued if it voluntarily commenced business rescue proceedings, received post-commencement finance, and was placed under the supervision of a senior BRP.
- [24] To implement their views, on 16 April 2021, the board of directors resolved to place Mango Airlines in business rescue in terms of section 129 of the Companies Act. On 28 July 2021, the business rescue proceedings of Mango Airlines commenced.<sup>3</sup>
- [25] On 28 July 2021, the BRP was appointed in terms of section 129(3)(b) of the Companies Act to manage Mango Airlines' business rescue proceedings as per Chapter 6 of the Companies Act. The BRP's duties include but are not limited to, the preparation and lodging of the required application in terms of section 54(2)(c) of the PFMA to the PE Minister for the consideration, approval, or rejection of the application.
- [26] On 22 July 2021, the PE Minister, as the executive authority exercising supervision and control over Mango Airlines, approved the voluntary business rescue proceedings for disposal of a significant shareholding in a company in terms of section 54(2)(c) of the PFMA read with the significance and materiality framework (SMF). Consequently, on 28 July 2021, Mango Airlines was formally placed under voluntary business rescue.

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<sup>3</sup> *Mango Pilots Association and Others v Mango Airlines SOC Limited and Another* (21/35958) [2021] ZAGPJHC 876 at para 62.

[27] Accordingly, on 21 October 2021, the BRP prepared the first business rescue plan where he *inter alia* proposed that Mango Airlines should be rescued from its financial distress and that in the interim resume its business operations possibly by December 2021.<sup>4</sup> On 31 October 2021, the business rescue plan was published for consideration by all relevant and affected parties as per section 150(2) of the Companies Act.

[28] However, SAA did not support the business rescue plan as prepared by the BRP. SAA expressed its concerns over the proposal that Mango Airlines should resume its business operations in December 2021. It suggested that Mango Airlines should not return to service until a strategic equity partner was acquired to provide funding for its future operations. As a result, SAA submitted a request to the BRP to consider revising the business rescue plan and address its concerns.

[29] On 25 November 2021, the BRP published an amended business rescue plan.<sup>5</sup> On 2 December 2021, the revised business rescue plan was adopted by the creditors of Mango Airlines with the supporting vote of more than 75% including SAA in terms of sections 152(2)<sup>6</sup> and (4)<sup>7</sup> of the Companies Act. The amended business rescue plan *inter alia* envisaged that Mango Airlines will not resume its operations, will not form part of the SAA group, that a strategic equity partner will be procured to invest in SAA to fund its future operations, creditors of Un-Flown Tickets will receive vouchers, and, that the application will be made to the PE

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<sup>4</sup> The first business rescue plan of Mango Airlines can be found at <https://www.flymango.com/upload/Responsive/Content/PDFs/Mango%20Airlines%20SOC%20Limited%20Business%20Rescue%20Plan%2029.10.2021.pdf> (accessed 7 June 2023).

<sup>5</sup> The amended business rescue plan of Mango Airlines can be found at <https://www.flymango.com/upload/Responsive/Content/PDFs/Amended%20Mango%20Airlines%20Amended%20Business%20Rescue%20Plan%20-%2025%20Nov%202021.pdf> (accessed 7 June 2023).

<sup>6</sup> The full provision provides as follows:

'In a vote called in terms of subsection (1)(e), the proposed business rescue plan will be approved on a preliminary basis if—

(a) it was supported by the holders of more than 75% of the creditors' voting interests that were voted; and

(b) the votes in support of the proposed plan included at least 50% of the independent creditors' voting interests, if any, that were voted'.

<sup>7</sup> The full provisions states that 'A business rescue plan that has been adopted is binding on the company, and on each of the creditors of the company and every holder of the company's securities, whether or not such a person...;



Minister in terms of section 54(2) of the PFMA to approve the disposal of SAA's shareholding in Mango Airlines.

- [30] Based on the revised and adopted business rescue plan, the BRP procured an investor for Mango Airline who *inter alia* is willing to acquire its shareholding from SAA, settle payments to all creditors, and settle the remaining debts of Mango Airlines as per the terms of the approved amended business rescue plan. Consequently, the BRP "directly and through SAA" submitted the application for the PE Minister's approval in terms of section 54(2) of the PFMA on 29 September 2022. On 26 October 2022, the PE Minister responded to the BRP and *inter alia* stated that the application was incomplete and requested additional information.
- [31] On 28 October 2022, SAA provided a response to the PE Minister and undertook to take responsibility for the section 54(2) application and consented to the PE Minister's suspension of operation of the 30-day presumption of approval as per section 54(3) of the PFMA until the requested additional information was submitted to the PE Minister.
- [32] On 28 November 2022, SAA re-submitted a revised section 54(2) application "*which reflected the consensus reached between Mango and the Board of SAA*". However, the PE Minister again responded on 21 December 2022 to SAA and requested key additional information that would enable him to consider the application further.
- [33] At the time of writing this judgment, the PE Minister had not yet made a decision in terms of section 54(2) of the PFMA. According to the BRP, the substantial implementation of the amended business rescue plan as per the provisions set out in section 152(8) of the Companies Act, has been delayed due to the PE Minister's failure to act or failure to make a decision.
- [34] Dissatisfied by the PE Minister's alleged failure to act and/or make a decision, Mango Airlines and the BRP instituted these proceedings seeking relief from this Court to *inter alia* order the PE Minister to take a decision and/or to trigger the

application of the statutory presumption that the PE Minister has granted approval as there has been no response within the 30 days or more as provided for in section 54(3) of the PFMA.

[35] The trade union, NUMSA, applied to intervene on behalf of its affected members, and the retrenched workers. NUMSA supports the application of Mango Airlines and the relief sought therein. In addition, NUMSA seeks relief that will declare that the conduct displayed by the PE Minister's failure to take a decision timeously violates section 237 of the Constitution, is unlawful, and ought to be reviewed and set aside under the principle of legality. Alternatively, the PE Minister's failure to take a decision timeously should be reviewed and set aside in terms of section 6(2)(g) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA").

[36] None of the parties have opposed NUMSA's application for leave to intervene save to indicate that the First, Second, Fourth, and Fifth Respondents oppose the relief sought by NUMSA on various grounds including the alleged lack of *locus standi* by NUMSA or support the relief sought by Mango Airlines and the BRP.

#### **APPLICATION TO INTERVENE**

[37] NUMSA filed an application to intervene in these proceedings on the grounds that it is *inter alia* an affected party, as a registered union representing employees of Mango Airlines in terms of section 128(1)(a) of the Companies Act. Further, NUMSA contended that it has a direct and substantial interest in the outcome of the business rescue processes or proceedings by virtue of the retrenchment agreements that were concluded between NUMSA and the BRP which governs the preferential re-employment of Mango Airlines' employees that were retrenched amongst others.

[38] In my view, NUMSA meets the test for ascertaining whether a party has a direct and substantial interest in the subject matter of the case because it has shown that, by virtue of the retrenchment agreements, the rights of its members are

likely to be affected by the orders sought. In *South African Riding for the Disabled Association v Regional Land Claims Commissioner and Others*<sup>8</sup> the Constitutional Court held that “*if the applicant shows that it has some right which is affected by the order issued, permission to intervene must be granted*”. There is no doubt that the relief sought will in one way or another have a bearing on the rights of the retrenched employees.

[39] Furthermore, in *Steel and Engineering Industries Federation and Others v National Union of Metalworkers of South Africa*,<sup>9</sup> it was held that it was well recognised that trade unions and employers' organisations were entitled to litigate for the benefit of their members. It is important that the interests of the former employees of Mango Airlines are taken into account for the failure not to will result in their rights in terms of the concluded retrenchment agreements being more likely to be negatively affected if no one would advance their case. NUMSA therefore wants to ensure that their interests are adequately represented and protected throughout the business rescue process and in this litigation.

[40] In light of the above, I am satisfied that NUMSA has a direct and substantial interest in the subject matter and therefore their application for leave to intervene is granted. In any event, none of the parties have opposed NUMSA's application in so far as it relates to the aspect of intervening.

## CONDONATION

[41] The legal principles applicable to the granting of condonation are well-known and settled in our law. The Constitutional Court in *Mphephu-Ramabulana and Another v Mphephu and Others*<sup>10</sup>, eloquently put the position as follows:

‘ . . . compliance with this Court's Rules and timelines is not optional, and . . . condonation for any non-compliance is not at hand merely for the asking. The question in each case is "whether the interests of

<sup>8</sup> 2017 (5) SA 1 (CC) at para 10.

<sup>9</sup> (1) 1993 (4) SA 190 (T) pg 676. See also *Bamford v Minister of Community Development and State Auxiliary Services* 1981 (3) SA 1054 (C).

<sup>10</sup> 2022 (1) BCLR 20 (CC) at para 33.

justice permit" that condonation be granted. Factors such as the extent and cause of the delay, the reasonableness of the explanation for the delay, the effect of the delay on the administration of justice and other litigants, and the prospects of success on the merits if condonation is granted, are relevant to determining what the interests of justice dictate in any given case'.

[42] The aforesaid factors are therefore useful in determining whether to grant condonation for the late filing of heads of argument. I now turn to consider the applicable time frames, the extent of the lateness, and the explanation proffered by NUMSA.

[43] On 4 May 2023, a case management meeting was held between the parties. It was agreed that NUMSA would, as an intervening party file their heads of argument and other outstanding papers by no later than 15 May 2023. However, NUMSA only filed its heads of argument on 17 May 2023. Consequently, NUMSA asks for condonation for its late filing of the heads of argument.

[44] NUMSA's explanation is that it sought to "sufficiently" deal with the issues raised in the answering affidavit of the PE Minister and Finance Minister and therefore filed their heads two days after the due date. According to NUMSA, this was an unforeseen delay. In addition, NUMSA contended that no parties would be prejudiced by the granting of the condonation for the late filing of their heads of argument.

[45] This Court is satisfied by the explanation proffered by NUMSA regarding the filing of their head of argument two days later.<sup>11</sup> This is an insignificant delay that has no negative impact on these proceedings or the parties thereto. Accordingly, it is in the interest of justice that the late filing of the heads of arguments be condoned.<sup>12</sup>

## **APPLICABLE LAW**

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<sup>11</sup> *Academic and Professional Staff Association v Pretorius NO and Others* (2008) 29 ILJ 318 (LC) at para 17 - 18.

<sup>12</sup> *Brummer v Gorfil Brothers Investments (Pty) Ltd* 2000 (2) SA 837 (CC) at para 3.

## Standing

[46] Standing in law relates to a litigant's interest in the matter and their ability to institute a legal claim and seek the necessary redress. In *Groenewald Lubbe Incorporated v Fick*<sup>13</sup>, Molefe J correctly held that:

‘Locus standi concerns the sufficiency and directness of a litigant's interest in proceedings which warrants his or her title to prosecute the claim asserted’.

[47] This entails that a person wishing to institute legal proceedings must have a “*direct and substantial interest in the right which is the subject matter of the litigation and the outcome of such litigation*”.<sup>14</sup> In other words, a party instituting legal proceedings must make out a case that he/she has the necessary *locus standi* to institute legal action. The duty to allege and prove *locus standi* rests on the party instituting legal proceedings.<sup>15</sup> Failure to do so is dispositive of the entire case because that person is not capable of claiming redress from the court.<sup>16</sup>

## The Companies Act and the PFMA

[48] The PFMA and the Companies Act are the primary Acts that have triggered the current application. On the one hand, section 54(1) and (3) of the PFMA provides as follows:

“Information to be submitted by accounting authorities.—

(1) The accounting authority for a public entity must submit to the relevant treasury or the Auditor-General such information, returns, documents, explanations and motivations as may be prescribed or

<sup>13</sup> (A 278/13) [2013] ZAGPPHC 479 at para 7.

<sup>14</sup> *Ibid* at para 8.

<sup>15</sup> *Mars Incorporated v Candy World (Pty) Ltd* 1991 (1) SA 567 (AD) at para 14.

<sup>16</sup> *Four Wheel Drive Accessory Distributors CC v Rattan NO* 2019 (3) SA 451 (SCA) at para 19.

as the relevant treasury or the Auditor-General may require' (own emphasis added).

....

- (3) A public entity may assume that approval has been given if it receives no response from the executive authority on a submission in terms of subsection (2) within 30 days or within a longer period as may be agreed to between itself and the executive authority.

[49] A plain reading of the above provisions entails that the accounting authority of the public entity concerned has the responsibility to submit the relevant application to the National Treasury for approval. If no response has been received within 30 days of submission or any other agreed date, the public entity may assume that such approval has been granted. Both the provisions are silent on whether an accounting authority of the public entity could be substituted by someone else. In other words, there appear to be no exceptions to the application of the said provisions, and ought to apply as they appear.

[50] On the other hand, sections 152(2) and (3) of the Companies Act provides that:

'...

- (2) A business rescue plan that has been adopted is binding on the company, and on each of the creditors of the company and every holder of the company's securities, whether or not such a person—

- (a) was present at the meeting;  
 (b) voted in favour of adoption of the plan; or  
 (c) in the case of creditors, had proven their claims against the company.

- (3) The company, under the direction of the practitioner, must take all necessary steps to—

....

- (b) implement the plan as adopted (own emphasis added).

[51] This provision refers to the stage where a business rescue plan has been adopted by all the affected parties. The roles and terms about how to proceed with the business rescue plan are stipulated in the said plan. The provision is clear in that the steps must be taken “under the direction of the practitioner”.

[52] There appears to be a conflict that exists between the provisions of section 54(2) of the PFMA and sections 152(2) and (3) of the Companies Act. The former empowers the accounting authority (being SAA) to lodge the application in terms of section 54(2) of the PMFA whereas the latter empowers the BRP to do so.

[53] Assuming that a conflict has been identified, section 3(3) of the PFMA provides that “[i]n the event of any inconsistency between this Act and any other legislation, this Act prevails”. This is not the end of the matter because the Companies Act also provides a mechanism for resolving any conflict between itself and the PFMA amongst others. Section 5(4) provides as follows:

‘If there is an inconsistency between any provision of this Act and a provision of any other national legislation—

- (a) the provisions of both Acts apply concurrently, to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second; and
- (b) to the extent that it is impossible to apply or comply with one or the inconsistent provisions without contravening the second...

(i) ...

(ee) Public Finance Management Act, 1999 (Act No. 1 of 1999)

...

prevail in the case of an inconsistency involving any of them, except to the extent provided otherwise in section 49(4) ...’.

[54] This Court will, therefore, need to fully engage with all the aforesaid provisions to ascertain whether the provisions of the PFMA and the Companies Act can be reconciled in a case where a conflict has been established and/or that the provisions of the PFMA should prevail.

## Law of contract

[55] The law of contract is clear in that contractual terms must be discharged in good faith unless such a contract is against public policy.<sup>17</sup> In *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd*<sup>18</sup> it was held that:

‘The privity and sanctity of contract entails that contractual obligations must be honoured when the parties have entered into the contractual agreement freely and voluntarily’ (own emphasis added).

[56] The court went on to state that “*parties enter into contractual agreements in order for a certain result to materialise*”<sup>19</sup> such as the implementation of their obligations as provided for in the agreement. This entails that this Court should be slow to interfere with binding contractual terms except where there are good reasons to do so.

## Judicial Review under the Constitution and PAJA

[57] The Promotion of Administrative Justice Act 3 of 2000 (“PAJA”) was enacted to give effect to section 33 of the Constitution which *inter alia* provides for the review of administrative action by a court. As a result, the grounds for judicial review have been codified in PAJA except for the principle of legality. Section 1 of PAJA defines administrative action as “*any decision taken, or any failure to take a decision*” when exercising a public function in terms of any legislation.<sup>20</sup> Section 6(2)(g) of PAJA provides that a party may apply for the review of a decision if “*the action consists of a failure to take a decision*”. This ground of review will be present in instances where there is a duty on an administrator to take a decision, but such an administrator has failed to take a decision within reasonable time frames.

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<sup>17</sup> *Barkhuizen v Napie* 2007 (7) BCLR 691 (CC) at para 73.

<sup>18</sup> 2018 (2) SA 314 (SCA) at para 23.

<sup>19</sup> *Ibid* at para 23.

<sup>20</sup> See section 1(a)(i) of PAJA.



[58] In *Kate v Member of the Executive Council for the Department of Welfare, Eastern Cape*<sup>21</sup>, the court found that the period of more than three months to take a decision on the applicant's applications for a disability grant to be unreasonable and constituted a ground of review in terms of section 6(2)(g) of the PAJA. The period in which a decision must be made will depend on the circumstances of each case, and whether it is prescribed by a statute.

#### Judicial Review under the principle of legality

[59] The exercise of public power is subject to constitutional scrutiny on the basis of the principle of legality, underpinning the Constitution.<sup>22</sup> The principle of legality imposes restrictions on the exercise of executive power in that the executive must *inter alia* exercise its powers to serve the legitimate purpose<sup>23</sup> of those powers, the executive may not exercise the powers that have been conferred upon it in a manner that is irrational<sup>24</sup>, and the executive must exercise its powers diligently and without undue delay.<sup>25</sup>

[60] The principle of legality requires that every exercise of power, at a minimum, must be rational.<sup>26</sup> In *Khosa v Minister of Social Development*<sup>27</sup> the Court stated that:

‘The test for rationality is a relatively low one. As long as the government purpose is legitimate and the connection between the law and the government purpose is rational and not arbitrary, the test will have been met’.

[61] These are the benchmarks, under the principle of legality, in which the executive

<sup>21</sup> [2005] 1 All SA 745 (SE) at para 39.

<sup>22</sup> See *inter alia* *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC); *Pharmaceutical Manufacturers Association of South Africa: Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC).

<sup>23</sup> *Gauteng Gambling Board & another v MEC for Economic Development, Gauteng Provincial Government* 2012 (5) SA 24 (SCA).

<sup>24</sup> *Pharmaceutical Manufactures: In re Ex parte Application of the President of the Republic of South Africa* 2000 (2) SA 674 (CC).

<sup>25</sup> *Minister for Justice and Constitutional Development v Chonco* 2010 (4) SA 82 (CC).

<sup>26</sup> *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) at para 49.

<sup>27</sup> 2004 (6) SA 505 (CC) at para 67.

powers ought to be exercised. The discussion above signals that there are no definite answers or solutions to the present case. Therefore, this Court needs to adopt a holistic approach in line with the applicable legal principles to dispose of the legal issues raised before it.

[62] I now turn to consider the circumstances of this case taking into consideration the oral and written submissions of the parties before this Court to ascertain whether this Court may grant the relief sought by the Applicants.

## APPLICANTS' SUBMISSIONS

### Locus standi

[63] The Applicants argued that the BRP has *locus standi* as an officer of the court under section 140(3)(a) of the Companies Act because he is required to report to the court during business rescue proceedings.<sup>28</sup> Further, they argued that the BRP under section 140(3)(b)<sup>29</sup> of the Companies Act is mandated to act in the best interest of the company with skill and diligence to “*fulfil his responsibilities as such as a director of a company*” as envisaged in section 76(3)(b)(c)<sup>30</sup> of the Companies Act.

[64] Furthermore, the Applicants contended that once a business plan is adopted, it is binding on the company, its creditors, and shareholders regardless of whether they voted in favour of the adopted plan at the meeting as per the provisions of the Companies Act. Based on this, the Applicants argued that SAA, as a shareholder of Mango Airlines, is bound by the amended business rescue plan.

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<sup>28</sup> Section 140(3)(a) provides that ‘During a company’s business rescue proceedings, the practitioner— is an officer of the court, and must report to the court in accordance with any applicable rules of, or orders made by, the court’.

<sup>29</sup> The provision provides that the practitioner “has the responsibilities, duties and liabilities of a director of the company, as set out in sections 75 to 77...’.

<sup>30</sup> The provision states that:

‘...a director of a company, when acting in that capacity, must exercise the powers and perform the functions of director—

(a) ...

(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...’

[65] In addition, the Applicants submitted that the BRP has *locus standi* because he has full management and control of Mango Airlines as opposed to the Board of Directors as per the provisions of section 140(1)(a)<sup>31</sup> of the Companies Act. Further, the Applicants argued that the BRP is responsible for the implementation of the revised business rescue plan that was adopted by the affected parties as per section 140(1)(d) of the Companies Act.<sup>32</sup>

[66] Relying on *Commissioner for the South African Revenue Services v Louis Pasteur Investments (Pty) Ltd and Others*<sup>33</sup>, the Applicants *inter alia* argued that the BRP must as soon as possible take steps to ensure that Mango Airlines is rescued.

In light of the above submissions, the Applicants argued that the BRP and SAA submitted the section 54(2) application to the PE Minister for approval to sell SAA shares in Mango Airlines, but a decision is not forthcoming. Based on this, the Applicants contend that the BRP has the requisite standing to approach this Court to seek appropriate relief when the implementation of an amended business rescue plan is frustrated due to unlawful conduct.

#### Section 54(2) Application under the PFMA

[67] The Applicants contended that it was common cause that the BRP played a significant role in the preparation of the business rescue plan and ensuring that the business rescue plan complies with section 54(2) of the PFMA including ensuring that consensus was reached between the BRP and the Board of SAA

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<sup>31</sup> The full provisions provide:

‘During a company’s business rescue proceedings, the practitioner, in addition to any other powers and duties set out in this Chapter—

(a) has full management control of the company in substitution for its board and pre-existing management...’

<sup>32</sup> The full provision provides: ‘During a company’s business rescue proceedings, the practitioner, in addition to any other powers and duties set out in this Chapter—

...

(d) is responsible to—

(i) develop a business rescue plan to be considered by affected persons, in accordance with Part D of this Chapter; and

(ii) implement any business rescue plan that has been adopted in accordance with Part D of this Chapter’.

<sup>33</sup> 2022 (5) SA 179 (GP).

in ironing out the issues raised by the PE Minister. Based on this, the Applicants argued that they (BRP and Mango Airlines) “*are entitled and in fact have a duty to ensure that that rescue plan is substantially implemented according to its terms*”.

[68] As a result, the Applicants argued that the failure by SAA to compel the PE Minister to decide the fate of the section 54(2) application does not deprive them of the requisite legal standing to compel the PE Minister to make that decision. To this end, the Applicants asked this Court to recognise their legal standing as per the terms of the adopted business rescue plan and their interest in the implementation and finalisation of same.

[69] The Applicants contended that there was no basis for objecting to the BRP’s standing because there was no such objection when the BRP submitted the section 54(2) application in respect of the business rescue proceedings of LMT Products (Pty) Ltd (LMT Products) a wholly-owned subsidiary of Denel. There, the Applicants argued that the PE Minister approved the application without suggesting that it was not the BRP but Denel or LMT Products that had to submit the application to him. Based on this, the Applicants asked this Court to recognize their standing to bring this application.

#### Interpretation of sections 54(2) and (3) of the PFMA

[70] The Applicants aver that the PE Minister’s contention that the statutory presumption contained in section 54(3) of the PFMA operates if the PE Minister has not taken a decision within 30 days or beyond, will not be triggered until he is “*satisfied*” with the information provided to him is misplaced. Further, they disputed the PE Minister’s view that the operation of the said section is triggered by a failure to respond. According to the Applicant, the express provisions of section 54(2) of the PFMA do not require that the executive authority must be “*satisfied*” before he or she grants the approval.

[71] The Applicants submitted that the PE Minister is introducing “*the subjective notion of ministerial satisfaction before the requisite approval is provided in*

*section 54(2) of the PFMA*". To support their averments, the Applicants submitted that the Constitutional Court in *Independent Community Pharmacy Association v Clicks Group Ltd and Others*<sup>34</sup> warned "against reading words into a statute by implication unless it is necessary to do so". The Applicants submitted that the introduction of "satisfied" in the aforesaid section is contrary to constitutional values of openness, responsiveness, and accountability by Government as provided for in section 1(d)<sup>35</sup> and section 195(1)<sup>36</sup> of the Constitution.

[72] The Applicants further contended that even if the PE Minister and Minister of Finance were to insist that the subjective requirement of "satisfied" which they seek to introduce constitutes the exercise of executive powers that this Court should respect the notion of the separation of powers, this Court is entitled to interfere and correct the unlawful or unconstitutional exercise of those executive powers under the principle of legality or rationality.

[73] The Applicants argued that the powers conferred on the PE Minister under section 54(2) of the PFMA include a duty to exercise that power and where the executive authority fails to exercise such power within 30 days or a period as agreed to by parties concerned, section 54(3) of the PFMA provided for the presumption of automatic approval.

[74] Additionally, the Applicants submitted that section 54 of the PFMA requires the speedy finalisation of the application as the accounting authority of the affected

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<sup>34</sup> [2023] ZACC 10 at para 126.

<sup>35</sup> The provision in part reads: 'The Republic of South Africa is one, sovereign, democratic state founded on the following values:

...

(d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness'.

<sup>36</sup> The section in part provides: 'Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

(a) A high standard of professional ethics must be promoted and maintained.

(b) Efficient, economic and effective use of resources must be promoted.

(c) Public administration must be development-oriented.

(d) Services must be provided impartially, fairly, equitably and without bias.

(e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.

(f) Public administration must be accountable.

(g) Transparency must be fostered by providing the public with timely, accessible and accurate information...'

public entity is required to “*promptly and in writing inform the relevant treasury of the transaction and submit relevant particulars of the transaction to its executive authority for approval of the transaction*”. According to the Applicants, the duty to take a decision promptly is re-enforced by section 237 of the Constitution which requires that “[a]ll constitutional obligations must be performed diligently and without delay”.

[75] The Applicants argued that the PE Minister was now seeking other options for Mango Airlines outside the adopted revised business rescue plan as the PE Minister was quoted stating that “...I have implored SAA Board to consider other options ...in case the transaction does not materialise”. According to the Applicants, this is not permissible under section 54(2) of the PFMA. The PE Minister is to consider the amended business rescue plan as submitted before him and take a decision. The basis for this is that SAA has made it clear that Mango Airlines will not form part of the SAA Group and that a new investor should be found to fund Mango Airlines’ operations as per the amended business rescue plan.

[76] Furthermore, the Applicants argued that they submitted all the information as per the significance and materiality framework (“SMF”) including the additional information that was required by the PE Minister for the application in terms of section 54(2) of the PFMA. Despite this, the Applicants contended that the PE Minister still states that the information supplied to him is inadequate. The missing information pertains to the fact that the Board of SAA should have considered other options for the disposal of Mango Airlines, a comprehensive due diligence report on the bidder, and the potential loss to SAA if the disposal went through. The Applicants assert that this is not required by the SMF.

[77] The Applicants provided a response to the PE Minister indicating that their objections and/or request for further information was misconceived as the BRP had stated that there was no indication as to what the purpose of the due diligence report is or any indication of the expected scope of the investigation envisaged amongst others. Furthermore, the Applicants submitted that they also responded to the PE Minister’s dissatisfaction with the CDH due diligence report

to the effect the PE Minister's concerns were unfounded as SAA had expressed its satisfaction with the report undertaken by CDH.

- [78] Regarding the PE Minister's concern about the potential loss to SAA if the disposal were to proceed, the Applicants submitted that it was clear from the amended business rescue plan as submitted, that SAA as Mango Airline's sole shareholder would receive a nil distribution as a result of the winding-up process and that Mango Airlines' equity value had a nil value due to, among other things, its significant liabilities. Consequently, the Applicants contended that "*SAA could not suffer any loss from disposing of Mango*".
- [79] The Applicants further contended that the BRP had in a letter of 4 November 2022 to the PE Minister *inter alia* advised that "*the priority of payment in bankruptcy and insolvency favours the creditors, ahead of any payments to a shareholder...*"
- [80] Furthermore, the Applicants contended that the PE Minister was alerted to the fact that the preferred bidder's business plan contains sensitive information that the consortium had opposed to being shared as SAA and Mango Airlines will be competitors. However, the executive summary of the said business plan was shared with the PE Minister.
- [81] The Applicants argued that the issue of foreign ownership does not arise in this case because the owners of the investment company are South Africans and have furnished proof of this fact, including their South African identity documents.
- [82] The Applicants contend that the PE Minister's reliance on "*the return of R800 000 000.00 investment from the state*" to Mango Airlines is misplaced as that money was set aside for Mango Airlines' business rescue plan and not for the ordinary operations of the airline.
- [83] Therefore, the Applicants submitted that there is no basis for the PE Minister to demand further information.

## NUMSA'S SUBMISSIONS

### Locus standi

[84] The Third Applicant argued that the source for their *locus standi* is derived from section 38(e) of the Constitution which entitles an association to act on behalf of its members to enforce their constitutional rights when they have been breached in terms of sections 33 and 237 of the Constitution.

[85] NUMSA further contended that section 33 of the Constitution guarantees everyone the right to a just and fair administrative action which includes protection against a failure of the administrator to take a decision when exercising public power as provided for in sections 6(2)(g) and 6((3)(b) of PAJA.

[86] NUMSA submitted that the PE Minister's decision in terms of section 54(2) of the PFMA constitutes the implementation of national legislation in terms of section 85(2)(a) of the Constitution and has an external binding effect. Based on this, NUMSA argued that the PE Minister's power must be exercised reasonably and lawfully in a manner that does not adversely affect the rights of NUMSA's members who were employed by Mango Airlines.

[87] NUMSA contended that the PE Minister has a constitutional duty to ensure that the application made in terms of section 54(2) of the PFMA is finalised without delay as per section 237 of the Constitution.

[88] Based on the above, NUMSA argued that it has the relevant legal standing to bring this review application. In the alternative, NUMSA contended that it is both in the interest of justice and public interest that its application is determined.

### Direct and substantial interest

[89] NUMSA argued that it has a direct and substantial interest because of *inter alia* their members are affected persons in terms of section 120 of the Companies Act and there exists a duty to seek the implementation of various agreements affecting its members as entered into by NUMSA and SAA and Air Chefs SOC



Ltd. Consequently, NUMSA argues that its intervention is necessary as they place the interests of its members before this Court.

[90] NUMSA submitted that all efforts should be explored to save Mango Airlines as its members will be re-employed if Mango Airlines resumes its operations.

[91] Additionally, NUMSA submitted that the PE Minister's delay in making a decision may result in the winding-up of Mango Airlines if the business rescue plan were to fail.

[92] NUMSA submitted that it was incorrect for the PE Minister to seek information from SAA instead of the BRP as all the powers of the Board of Directors of SAA were subject to the authority of the BRP as per the business rescue plan. According to NUMSA, section 137(4) of the Companies Act governs business rescue proceedings and requires that the SAA board seek the approval of the BRP for any decision concerning Mango Airlines. Consequently, any decision taken by the board without the approval of the BRP is void. According to NUMSA, the PE Minister cannot rely on the undertaking made by SAA on 12 January 2023.

[93] NUMSA further argued that section 140 of the Companies Act regulates the powers of the BRP and provides that the BRP has "*full management and control of the company in substitution of its board and pre-existing management*".

[94] NUMSA also argued that section 154(4) of the Companies Act makes a business rescue plan binding on the organisations creditors and shareholders once it has been adopted. Furthermore, NUMSA argued that section 154(5)(a) and (b) empowers the BRP with all the necessary steps to ensure that the adopted business rescue plan is implemented.

[95] Relying on the cases of *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd*,<sup>37</sup> and *Booyesen v Jonkheer Boerewynmavery (Pty) Ltd (In Business Rescue)* and

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<sup>37</sup> 2020 (5) SA 35 (SCA) at para 16.

*Another*,<sup>38</sup> NUMSA submitted that the directors of the company under business rescue remain under the authority of the BRP and that the BRP steps into the shoes of the board of directors and its management during the business rescue period. Therefore, NUMSA argued that section 66 read with sections 137 and 152 of the Companies Act is clear in that, during the business rescue process, the BRP is in control of Mango Airlines and that the SAA Chairperson was not authorised to give an undertaking on behalf of SAA and/or Mango Airline.

[96] To emphasize their point, NUMSA argued that paragraphs 6.3.12 and 6.3.12.1 of the amended business rescue plan *inter alia* tasked the BRP with the preparation and submission of the section 54(2) application under the PFMA on behalf of SAA. As a result, NUMSA argued that it is the BRP who must submit the section 54(2) application and give an undertaking on behalf of SAA in respect of Mango Airlines.

[97] NUMSA referred to the decision of the Constitutional Court in *Diener N.O. v Minister of Justice and Correctional Services*<sup>39</sup> and argued that business rescue proceedings are inherently urgent in nature to reduce the extent of prejudice that may be suffered by creditors and employees.

[98] Furthermore, NUMSA argued that all the relevant information was submitted to the PE Minister by the BRP via SAA and that the BRP had further stated that no further information was to be made available by them. Consequently, NUMSA argued that the PE Minister was in a position to approve or reject the section 54(2) application as per the decision in *Outa v Myeni*.<sup>40</sup>

[99] According to NUMSA, a decision by the PE Minister would have released Mango Airlines, the BRP, and the preferred bidder from the indefinite *limbo* that they find themselves in, and that the BRP would have explored other options to protect the interest of all stakeholders as per the amended business plan.

[100] NUMSA submitted that a failure by the PE Minister to take a decision within 30

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<sup>38</sup> 2017 (4) SA 51 (WCC) at para 57.

<sup>39</sup> 2019 (4) SA 372 (CC) at para 38

<sup>40</sup> [2021] ZAGPPHC 56 at paras 208 to 209 and paras 211 – 213 (*Myeni* decision).

days regarding the section 54(2) application breached section 6(2)(g) of PAJA and is thus reviewable.

[101] Relying on the case of *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd*,<sup>41</sup> NUMSA argued that the failure to take a decision by the PE Minister violates the principle of legality and is therefore invalid and reviewable.

[102] NUMSA contended that they seek a “declarator . . . which flows *ex lege* in this case and is both mandatory and just and equitable”. Based on this, NUMSA submitted that their member’s rights as per the retrenchment agreement have been affected by the PE Ministers’ failure to take a decision and that they will be affected by the sought declarator. Relying on *South African Riding for the Disabled Association v Regional Land Claims Commissioner and Others*,<sup>42</sup> NUMSA submitted that an applicant in an application to intervene the party needs to *inter alia* show that it has a right adversely affected or likely to be affected by the order sought and that it was sufficient to make allegations which proved, would entitle them to relief.

[103] Therefore, NUMSA contended that section 172(1) of the Constitution requires a court to declare law or conduct that is contrary to the Constitution when resolving a dispute between parties invalid to the extent of its inconsistency.

[104] NUMSA argued that this Court has the power to grant the relief sought by NUMSA under section 8(2) of PAJA which includes directing the taking of the decision or declaring the rights of the parties in relation to the taking of the decision.

## **FIRST AND SECOND RESPONDENT’S SUBMISSIONS**

[105] The First and Second Respondents argued that the applicants lack the *locus standi* to institute these proceedings because section 54(2) of the PFMA when properly construed and interpreted, excludes the applicants.

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<sup>41</sup> 2018 (2) SA 23 (CC) at para 40.

<sup>42</sup> 2017 (5) SA 1 (CC) at para 9.

[106] Further, the First and Second Respondents contended that the reliance on the provisions of the Companies Act is misplaced because section 5 of the very same Companies Act gives precedence to the PFMA when there is a conflict between the two acts.

[107] The First and Second Respondents submitted that for one to have *locus standi* when bringing an application for review proceedings, they are required to demonstrate that they have the necessary interest and there exists an infringement or threatened infringement of such a right. To this end, they argued that the Applicants incorrectly seek to rely on and enforce rights and duties flowing from the Companies Act in a section 54(2) process that is regulated by the PFMA.

[108] Relying on *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO*<sup>43</sup> and *Others*, the First and Second Respondents argued that “the best litigant in this matter is SAA as the accounting authority recognised by the PFMA”.

[109] The First and Second Respondents further at length relied on *Muldersdrift Sustainable Development Forum v Mogale City*<sup>44</sup> and said that the relief claimed there “was to declare the appointment of a Municipal Manager irregular and thus to set aside such appointment”. According to the First and Second Respondents, “it is a similar relief that is being sought by the applicants in this matter”. Based on this, they contended that the test is firstly “whether the interest of justice would require the Honourable Court to come to their assistance and secondly, whether this Honourable Court should exercise its discretion in their favour”. Their response to the said question was negative.

[110] The First and Second Respondents contended that the provisions of the Companies Act cannot be relied upon as an aid for the interpretation of the PFMA because this is impermissible in law. As a result, the First and Second Respondents are of the view that the Applicants’ attempts to disregard the provisions of the PFMA, and its regulation of the section 54(2) process is

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<sup>43</sup> (1) SA 984 (CC) at para 231.

<sup>44</sup> (2424/14) [2015] ZASCA 118 (11 September 2015).

misguided.

[111] Relying on section 49(1) of the PFMA, the First and Second Respondents argued that every public entity must have an accounting authority or controlling body for purposes of the Act and that sections 49(2) and (b) recognises the board or other controlling body of a public entity as the accounting authority of that entity. Where there is no board or controlling body, they submitted that the chief executive officer or other person in charge of the public entity becomes the accounting authority. Based on this, they contended that SAA is a public entity with a board of directors. Consequently, the board of SAA under the chairman, Mr. M John Lamola, wrote letters to the Applicants and the PE Minister.

[112] The First and Second Respondents argued that the PFMA recognises the board of SAA or its chairperson as the accounting authority and the PE Minister as per section 49 of the PFMA had requested that SAA through its board take responsibility for the section 54(2) application.

[113] The First and Second Respondents contended that Mango or the BRP were not entitled to lodge the section 54(2) application because Treasury had not approved under section 49(3) of the PFMA, that they take over the responsibilities of the board of SAA or the chairperson. As a result, the said delegation of powers in terms of the amended business rescue plan is unlawful and invalid as "*correctly conceded by SAA*". According to the First and Second Respondents, the legislature clearly intended to exclude non-accounting authorities from submitting any information required by the Act.

[114] The First and Second Respondents further contended that section 51(f) of the PFMA gives the accounting authority of a public entity the power to submit the required information to the relevant executive authority or treasury amongst other things. To this end, they argued that the said submissions include the section 54(2) application to be submitted by the accounting authority which is SAA, or its chairperson.

[115] The First and Second Respondents argued that the PE Minister has not rejected

the section 54(2) application and the arguments to the effect that he may be acting contrary to the powers of the BRP are premature. To this end, they argued that no final decision has been made that would trigger the need for this Court's intervention and therefore the applicant's case does not meet the requirements of ripeness.<sup>45</sup> Consequently, they argued that the Applicants would not suffer any prejudice if they were to await the outcome of the PE Minister's decision once he has received information from SAA.

[116] Furthermore, the First and Second Respondents submitted that in terms of sections 54(1), and 50(1)(c) of the PFMA the PE Minister as the executive authority may require any information which may influence the decision. To this end, the First and Second Respondents contended that the PE Minister may require or request additional information or documents that are necessary for the PE Minister to take an informed decision. In addition, they argued that by doing so, the PE Minister properly exercises his oversight responsibilities under the PFMA.

[117] The First and Second Respondents submitted that without the mechanism in place enabling the PE Minister to request further information, it meant that applications such as the section 54(2) applications would be out-rightly dismissed for lack of completeness and result in undesirable consequences for applicants such as SAA. According to the First and Second Respondents the request for further information "*serves the interest of both the accounting authorities and the executive authorities*".

[118] The First and Second Respondents contended that an SMF was concluded between the PE Minister and SAA to *inter alia* enable the PE Minister as a shareholder representative to exercise effective oversight over the affairs of SAA, and ensure that SAA's transactions comply with the regulatory framework.

[119] Furthermore, the First and Second Respondents contended that Annexure A of the SMF deals with a section 54(2) application and states that where information

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<sup>45</sup> *Korabie v Judicial Commission of Inquiry into Allegations of State Capture, Corruption & Fraud in the Public Sector, including Organs of State & Others* 2022 4 All SA 811 (WCC).

is incomplete or insufficient, the 30-day business period will not apply until such information has been submitted to the Department of Public Enterprise.

[120] The First and Second Respondents argued that for the presumption of approval to apply as per section 54(3) of the PFMA, there must be no response received within the 30-day period. To this end, they submitted that the said presumption is not applicable in this case because the section 54(2) application was submitted on 29 September 2022, and on 26 October 2022, and that the PE Minister responded to the section 54(2) application *inter alia* requesting additional information and instructing SAA to take responsibility of the said application. Consequently, they argued that the PE Minister provided a response within the 30-day period.

[121] The First and Second Respondents further contended that on 28 November 2022, SAA re-submitted a revised section 54(2) application. Post this, a meeting was held between SAA, the Department of Public Enterprise officials, and National Treasury on 14 December 2022 to discuss the information contained in the re-submitted section 54(2) application.

[122] The First and Second Respondents further stated that on 21 December 2022, the PE Minister sent another letter regarding the re-submitted section 54(2) application wherein he requested further information relating to *inter alia*, foreign ownership, the submission of a due diligence report to ensure that both SAA and the PE Minister were satisfied with the bidders, the business plan of the preferred bidder to assess the viability of the disposal transaction, and the exploration of alternative options. According to the First and Second Respondents, the request for further information was reasonable and rational and showed that the PE Minister responded and complied with section 54(3) of the PFMA. Therefore, they argued, that there should be no interference by this Court as per the decision in *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism*.<sup>46</sup>

[123] The First and Second Respondents contended that the applicants are excluded

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<sup>46</sup> 2004 (4) SA 490 (CC).

by the PFMA from seeking any declaratory relief from a court because the section 54(2) application only involves SAA and the PE Minister, there is no dispute in relation to the additional information requested by the PE Minister, and that SAA agreed to the suspension of the 30-day period and undertook to resubmit a revised 54(2) application. To bolster their argument, the First and Second Respondents argued that there is no dispute between the “*rightful parties to the section 54 application*” and that the issues raised do not attract this Court’s jurisdiction.

[124] The First and Second Respondents submitted that the declaratory order compelling the PE Minister to take a decision about an incomplete and unsatisfactory application is without merit as the applicants have not made out a case for a declaratory order.

[125] In addition, the First and Second Respondents submitted that there are no rights that have been encroached upon or taken away as the SAA has been given an opportunity to resubmit the section 54(2) application.

[126] Finally, the First and Second Respondents contended that the relief sought by the applicants to the effect that the PE Minister be directed to take a decision within a certain period constitutes a *mandamus van spolie*, this occurs where a court orders a public official to do or refrain from doing something. According to the First and Second Respondents, the effect of a mandamus is similar to a final interdict, and therefore the requirements of the same must be met. In other words, the applicants must show that there exists a clear right, an injury has been committed or reasonably apprehended and no other form of relief is available.

[127] The First and Second Respondents argued that SAA is the one that seeks to dispose of its assets, and according to the provisions set out in the PFMA is to draft and submit the section 54(2) application and not the applicants. Accordingly, the applicants have no enforceable right against the PE Minister as section 54(2) “*completely excludes the entitlement of the applicants to the relief they seek*”. Further, that SAA has undertaken to submit the information requested by the PE Minister.



[128] The First and Second Respondents further submitted that the harm envisaged by the applicants and that “*Mango might lose an investor does not arise as against the Minister*”. The basis of this is that the subject matter of the section 54(2) application only involves SAA and the PE Minister. Consequently, they argued that any harm, whether direct or indirect to third parties, will not be sufficient to satisfy this requirement against the PE Minister because only SAA can enforce these rights and not the applicants.

[129] Ultimately, the First and Second Respondents contended that this Court should be slow to interfere with statutory powers that are exclusively in the domain of the executive and legislative branches of Government unless such intrusion is sanctioned by the Constitution as per the decision in *National Treasury and Others v Opposition to Urban Tolling Alliance and Others*.<sup>47</sup>

#### **FOURTH AND FIFTH RESPONDENTS’ SUBMISSIONS**

[130] The Fourth and Fifth Respondents’ submissions to a certain extent echoed those of the First and Second Respondents in so far as they related to who has the required authority to submit the section 54(2) application, the meaning of “response”, standing and how a conflict ought to be resolved in a case where there is a conflict between the provisions of the Companies Act and the PFMA.

##### Response to NUMSA’s application

[131] The Fourth and Fifth Respondents argued that NUMSA’s averment to the effect that once a BRP is appointed, he takes over the responsibilities of the board of directors, and that he is the one to initiate and submit the section 54(2) application under the PFMA was only dealt within the replying affidavit. Accordingly, they contended that it ought to be dismissed.

[132] The Fourth and Fifth Respondents further contended that NUMSA’s review and declaratory relief that NUMSA seek are unsustainable because NUMSA failed to demonstrate factually that the PE Minister has failed to take a decision. The basis

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<sup>47</sup> 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) para [45] – [47].

for this is that the principle found in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*<sup>48</sup> requires that this matter “be decided on the facts in the applicant’s affidavits which are admitted by the respondents together with the facts set out in the respondents affidavits”. To this end, they argued that this matter must be decided on a factual basis that the PE Minister, the Minister of Finance, and the Board of SAA agreed that the 30-day period envisaged in section 54(2) of the PFMA did not start running since SAA has not yet submitted the additional required information. According to the Fourth and Fifth Respondents, this is fatal to NUMSA’s case.

[133] The Fourth and Fifth Respondent further argued that section 3(3) of the PFMA and section 5(4)(b)(i)(ee) of the Companies Act provide for the supremacy of the PFMA if there is an inconsistency between the PFMA and any other legislation. Consequently, they contended that section 54(2) applies irrespective of the business rescue provisions of the Companies Act and that therefore the amended business rescue plan is inconsistent with the PFMA as it incorrectly grants authority to the BRP to submit a section 54(2) application for approval.

[134] The Fourth and Fifth Respondents contended that the application for review was premature as there has been no failure to take a decision because the application is incomplete and has not been considered.

[135] Furthermore, the Fourth and Fifth Respondents submitted that NUMSA had failed to meet the requirements of section 21(1)(c) of the Superior Court’s Act because NUMSA’s declaratory relief only seeks that the court pronounce that “It is declared that in terms of section 54(3) of the PFMA the First and Second Applicant are entitled to assume that approval has been granted in respect of their application lodged under section 54(2) of the PFMA” whereas an application for declaratory relief must relate to the effect that either the law or the conduct is inconsistent with the Constitution and is invalid. This will enable such law or conduct to fall within the ambit of section 172(1)(a) of the Constitution. Section 172 of the Constitution provides that a court “*must declare that any law or*

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<sup>48</sup> 1984 (3) SA 623 (A) 634H-I.

*conduct that is inconsistent with the Constitution is invalid to the extent of its consistency*” According to the Third and Fourth respondents, the said provision applies even where the conduct which has been impugned is a failure to act.

[136] Based on the above submissions, the Fourth and Fifth Respondents argued that NUMSA does not seek a declarator to the effect that “*the Minister of PE’s failure to take a decision is inconsistent with the Constitution and thus invalid*” and that section 172 of the Constitution does not apply. Relying on inter alia, the case of *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another*, the Third and Fourth Respondents contended that the Constitutional Court there made the following observation:

‘The failure by the President to comply with the remedial action taken against him, by the Public Protector in her report of 19 March 2014, is inconsistent with section 83(b) of the Constitution read with sections 181(3) and 182(1)(c) of the Constitution and is invalid’.<sup>49</sup>

[137] Additionally, the Fourth and Fifth Respondents argued that the declaratory order sought by NUMSA does not “flow from its review relief”. Consequently, they argued that section 8(2) of PAJA does not apply as it *inter alia* deals with granting any order, in review proceedings, that is just and equitable and declaring the rights of the parties in relation to the taking of the decision. To strengthen their argument, they argued that a declarator to the effect that “the applicants are “entitled to assume under section 54(3)” does not flow from any review relief” but is “a stand-alone declarator which seeks to establish that the presumption of approval under section 54(3) was triggered on the facts of the present matter”.

[138] In light of the above, the Fourth and Fifth Respondents argued that NUMSA has not met the test for a declaratory order.

#### submissions in respect of the BRP and Mango Airlines

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<sup>49</sup> 2018 (2) SA 571 (CC) at para 222.2.

[139] The Fourth and Fifth Respondents, through reliance on various constitutional provisions, argued that they were required to take measures to *inter alia* ensure adherence to procurement measures in a manner that is fair, and cost-effective. These measures include compliance with transparency and expenditure controls in all spheres of government.<sup>50</sup>

[140] The Fourth and Fifth Respondents further argued that the Applicants are incorrect to say that section 217 of the Constitution is not applicable in the present matter because the Supreme Court of Appeal in *Airports Company South Africa SOC Ltd v Imperial Group Ltd and Others*<sup>51</sup> observed that:

“...IT [procurement] does not limit procumbent to state expenditure. Section 217(1) spells out what ‘procurement means, which is ‘to contract for goods or services’. Section 217 does not restrict the means by which goods and services are acquired”.<sup>52</sup>

[141] Accordingly, they firmly submit that section 217 of the Constitution is applicable as they were dealing with the procurement of a state asset in the form of disposal of its shares and therefore, they were ensuring compliance when inquiring about other available options to SAA. The Fourth and Fifth Respondents contended that it was for the aforesaid reasons, that the section 54(2) application was being carefully and thoroughly considered.

[142] The Fourth and Fifth Respondents argued that section 3(3) of the PFMA provides a guideline should the PFMA be in conflict with another Act. As a result, they argue that the PFMA provided where there is such conflict, the PFMA will prevail over that legislation including over any provision of the Companies Act.

[143] The Fourth and Fifth Respondents contended that just like the Constitution, the PFMA *inter alia* places an obligation on the National Treasury to ensure

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<sup>50</sup> See sections 2, 85(2)(e), 216(1) read with 2, 217(1) of the Constitution.

<sup>51</sup> 2020 (4) SA 17.

<sup>52</sup> 2020 (4) SA 17 SCA.

transparency in expenditure, assets, and liabilities of State-Owned Enterprises.<sup>53</sup>

[144] Relying on section 54(1) of the PFMA, the Fourth and Fifth Respondents asserted that SAA's board was obligated to provide all "*manner of documentation to National Treasury*" including explanations and motivations. Based on this, they argued that the National Treasury is entitled to request additional information from SAA about the section 54(2) application at the centre of this litigation. Furthermore, they submitted that it was the only accounting officer of the public entity who has the obligation to furnish the necessary information and not the BRP.

[145] The Fourth and Fifth Respondents further argued that section 54(2) of the PFMA does not provide clarity to what "relevant particulars" entails but could be accepted as meaning information that will enable the relevant executive authority to exercise their power to approve or reject a section 54(2) application. Consequently, they contended that as the PE Minister is the only one who is tasked with taking a decision, he has the sole discretion to determine whether all relevant particulars have been submitted and not the applicants.

[146] In addition, the Fourth and Fifth Respondents submitted that it is the PE Minister who can approve the section 54(2) application and not this Court.

[147] They further contended that the extension of the 30-day period to consider the section 54(2) application was an outcome of consensus between the relevant parties, namely the PE Minister, National Treasury, and SAA to run once all the additional requested information was submitted.

[148] Furthermore, the Fourth and Fifth Respondents argued that the section 54(3) presumption only occurs when there is no form of response. Consequently, the said provision can only start running on a date when relevant particulars have been provided. To this end, the Fourth and Fifth Respondents submitted that on 19 January 2023, SAA via its chairperson Mr. Lamola, confirmed that he had not provided National Treasury with a "complete set of the relevant particulars" such

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<sup>53</sup> See sections 2 and long title of the PFMA.

as the annual financial statements for “2018/19 to 2021/22”, and the “*valuation of SAA shares*”. Therefore, not all relevant information was provided for by SAA on 19 January 2023.

[149] According to the Fourth and Fifth Respondents, the words “decision” and “response” in section 54(3) of the PFMA are different. The former entails bringing a matter to an end whereas the latter means a verbal or written response. Based on the above, on one hand, they argued that a decision entails the approval or rejection of the section 54(2) application. Regarding the latter, they contend that a response entails a response to the said application such as a letter requesting further information as per the letters dated 25 and 26 October 2022 including the one for 15 February 2023.

[150] The Fourth and Fifth Respondents argued that it could not have been the intention of the legislature that a section 54(2) application could be decided within 30 days as it involves several factors to be considered such as the financial impact on the decision.

[151] The Fourth and Fifth Respondents contended that the Constitution<sup>54</sup> and the PFMA<sup>55</sup> provide that the national government or minister may *inter alia* guarantee a loan only if it complies with the conditions set out in the legislation. In light of the above, they argued that this case falls within the framework of government guarantees. To this end, they submitted that the Minister of Finance stated that the government would provide a R.5006 billion guarantee for the period 01 September 2012 to 30 September 2014 to ensure that the SAA board are able to sign off the AFS as a going concern...and that SAA continues to operate as a going concern.

[152] The Fourth and Fifth Respondents argued that there were conditions attached to the said guarantee, one of the conditions provide that the section 54(2) application would be subject to the approval of the Minister of Finance and the PE Minister.

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<sup>54</sup> Section 218(1).

<sup>55</sup> Section 70(1).

[153] According to the Fourth and Fifth Respondents, on 28 April 2013, a Guarantee Framework Agreement (GFA) was entered into between the Government of the Republic of South Africa and SAA. Clause 1.2.6 of the GFA deals with transactions falling within the ambit of section 54(2) of the PFMA and it *inter alia* provides that the section 54(2) application would be subject to the approval of the Minister of Finance and the PE Minister.

[154] Furthermore, the Fourth and Fifth Respondents submitted that Clause 7.13 of the GFA compels the accounting authority of SAA to obtain the necessary government consent in transactions that may *inter alia* affect funding or the acceleration of the guaranteed liability. This they argue, is evident that the Minister of Finance's approval is required. This is something that is disputed by the applicants.

[155] The Fourth and Fifth Respondents submitted that the GFA is binding and ought to be complied with it. In addition, they argued that there was no evidence placed before this Court that confirms that the reporting as per Clause 7 of the GFA has been complied with.

[156] The Fourth and Fifth Respondents argued that the SMF *inter alia* provides that an update on the information submitted during the Pre-Notification Phase shall "include" details of a certified resolution by the Board amongst others. Therefore, they argue that the word "include" is not exhaustive. To bolster their argument, they further contended that the SMF provides that:

'... Should the information be incomplete or insufficient for a comprehensive assessment of the proposed transaction, then the 30 business day period will not be applicable until such information is submitted to the DPE.'

[157] In light of the above, the Fourth and Fifth Respondents argued that the information submitted in the section 54(2) application may not be insufficient and that the PE Minister is entitled to seek additional information that will enable him to take a decision.

[158] The Fourth and Fifth Respondents argue that the applicants have not made out a case for declaratory relief as set forth in section 21(1)(c) of the Superior Courts Act 10 of 2013 because they have not satisfied the two requirements for a declaratory order as set out in *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd*<sup>56</sup> in that they have not established an existing, future or contingent right or obligation and that they have not demonstrated that this is a case where this Court should exercise its discretion.

[159] Furthermore, the Fourth and Fifth Respondents contended that the Applicants have failed to show that they possess a right flowing from section 54(2) of the PFMA which gives rise to the relief sought.<sup>57</sup> To emphasize their point, they argued as follows:

[159.1] that the applicants in prayer 2 seek relief to the effect that they submitted a valid and complete section 54(2) application to the PE Minister when in fact they are not entitled to submit an application in terms of the said provision. Consequently, they are not entitled to a declaratory relief.

[159.2] that the applicants in prayer 3 seek declaratory relief to the effect that they may assume in terms of section 54(3) of the PFMA that the PE Minister has approved their section 54(2) application when in fact it is SAA who is entitled to make such an assumption under section 54(3) of the PFMA. Therefore, Mango Airlines is not entitled to the relief sought.

[159.3] that the applicants in prayer 4.1 did not plead a constitutional breach in their founding affidavit<sup>58</sup> because they do not point out that the PE Minister's conduct is inconsistent with his constitutional and statutory duties. As a result, they have not made out a case.

[159.4] that the applicants in prayer 4.3 will eventually receive a decision from the PE Minister but cannot be hurried where the information required to take a

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<sup>56</sup> 2005 (6) SA 205 (SCA) at 213E–G.

<sup>57</sup> *Trinity Asset Management (Pty) Ltd and others v Investec Bank and others* 2009 (4) SA 89 (SCA) at para 51.

<sup>58</sup> *Damons v City of Cape Town* (2022) 43 ILJ 1549 (CC) at para 117.



decision is not readily available before them.

[160] The Fourth and Fifth Respondents contended that a court cannot grant an order that sanctions an unlawful act or requires a party to act unlawfully such as granting the applicants relief that they are not entitled to.

[161] The Fourth and Fifth Respondents argued that the “relief sought by the applicants is not only a breach of the PFMA but perhaps more importantly a breach of the Constitution”.

[162] Relying on precedent,<sup>59</sup> the Fourth and Fifth Respondents argued that the relief sought by the Applicants is contrary to the separation of powers as it seeks to invade into the executive domain by seeking to substitute the exercise of the duty of “*the PE Minister and Minister of Finance from asking for more information with an approval from the PE Minister*”.

[163] Ultimately, the Fourth and Fifth Respondents argued that the Applicants lack *locus standi* because they do not rely on any constitutional breach in their heads of argument but rely on Chapter 6 of the Companies Act which deals with business rescue proceedings amongst other things.

## EVALUATION OF SUBMISSIONS

[164] Concerning the Applicants’ *locus standi*, the First and Second Respondents argued that the Applicants lack *locus standi* to institute these proceedings because section 54(2) of the PFMA when properly construed and interpreted, excludes the Applicants. Further, they contended that SAA is the accounting authority for the purposes of the PFMA. I do not think that this interpretation is entirely correct. The basis for this is that the BRP as someone who is tasked with the full management of the company to oversee its day-to-day affairs during the business rescue process, has the necessary standing to institute these proceedings. As was correctly found in *Ragavan and Others v Optimum Coal*

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<sup>59</sup> *Electronic Media Network Limited and Others v e.tv (Pty) Limited and Others* [2017] ZACC 17 at paras 1 - 4, quoting *Economic Freedom Fighters v Speaker of the National Assembly* 2016 (3) SA 580 (CC), at paras 92 - 93.

*Terminal (Pty) Ltd and Others*<sup>60</sup> that:

...the BRP has full management control of the company in substitution for its board and pre-existing management and has the power to implement the business plan. Once BRPs have to implement a plan then that must include collecting the debts in accordance with the business plan. Full management and control of the company in substitution for its board could not be clearer...' (own emphasis added).

[165] In light of the above, the BRP has a direct and substantial interest in the subject matter of the litigation and the outcome thereof. The primary role of the BRP is to assess whether and how a company could be rescued. The BRP has been throughout the process working together with SAA to ensure that the section 54(2) application is finalised and submitted. For example, at one stage, the BRP addressed a letter to the PE Minister alerting him that the SAA Board had failed and/or omitted to enclose the actual section 54(2)(c) application in its letter to the PE Minister. In addition, the BRP highlighted the following concerns:

'Unfortunately, SAA did not follow the process which SAA itself proposed in its letter to the Department of Public Enterprises ...dated 7 December 2021 whereby SAA confirmed that "the Board notes that according to the information under paragraph 6.3.12 [of the Business Rescue Plan], the Business Rescue Practitioner will, in collaboration with SAA, prepare and manage the submission of the PFMA Section 54(2) application to the Ministry of Public Enterprises and to National Treasury' (own emphasis added).<sup>61</sup>

[166] Furthermore, the Amended Business Rescue Plan *inter alia* provides that the BRP will "prepare and submit a request for approval in terms of section 54(2)(c)

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<sup>60</sup> At para 32.

<sup>61</sup> CaseLines: 001: item. Clause 6.3.12 of the Amended Business Rescue Plan *inter alia* provides that the BRP will "prepare and submit a request for approval in terms of section 54(2)(c) of the PFMA" and "on behalf of SAA" ....

of the PFMA” and “on behalf of SAA”.<sup>62</sup> Additionally, the Amended Business Rescue *Plan inter alia* provides that the BRP will prepare and submit a request for approval in terms of section 54(2) of the PFMA.<sup>63</sup> In my view, the above paragraphs settles the BRP’s *locus standi*. I fail to understand a proposition that suggests that section 54(2) excludes the Applicants. It was only in the later stages that SAA opted to exclude the BRP including entering into agreements that purported to extend the 30-day period without the BRP.<sup>64</sup> All in all, the BRP has standing to institute these proceedings.

[167] Regarding the validity and state of completeness of section 54(2) application submitted by the Applicants and SAA to the PE Minister, the Applicants asked this Court to declare that they submitted a valid and complete application. If this Court was to declare that a valid and complete application in terms of section 54(2) of PFMA was submitted, it would entail that the PE Minister is not entitled to request additional information but to decide on the application regardless of whether there is a piece of outstanding information. The Constitutional Court in *Hugh Glenister v President of the Republic of South Africa and others*<sup>65</sup> expressed with approval the sentiment that it is “*not for the court to disturb political judgments, much less to substitute the opinions of experts*”.

[168] In light of the above, it is the PE Minister who is better placed to determine whether an application brought to him in terms of section 54(2) of the PFMA is valid and/or complete. The Court is not in a position to do so. Therefore, this Court is unable to enter the terrain of the PE Minister and decide whether the application submitted by the Applicants and SAA in terms of section 54(2) of the PFMA was a valid and complete application. This is a determination that falls within the ambit of the work of the PE Minister and not this Court.

[169] Concerning the PE Minister’s argument that he/she must be “satisfied” before he or she grants approval in terms of the section 54(2) application, I agree with the Applicants’ contention only in so far as the reading of section 54(2) of the PFMA

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<sup>62</sup> See clause 6.3.12.1 of the Amended Business Rescue.

<sup>63</sup> See clause 6.3.12.1 of the Amended Business Rescue.

<sup>64</sup> Applicant’s founding affidavit at para 98.

<sup>65</sup> 2011 (3) SA 347 (CC) at para 67.

not containing any provision to the effect that the executive authority must be “satisfied” with the information provided to him prior to making a decision. As was correctly found in *Independent Community Pharmacy Association v Clicks Group Ltd and Others*<sup>66</sup> that:

‘one cannot read words into a statute by implication unless the implication is necessary in the sense that without it effect cannot be given to the statute as it stands, and that without the implication the ostensible legislative intent cannot be realised’ (own emphasis added).

[170] However, this is where my association with the aforesaid Applicants’ submission ends. This Court differs from the Applicants’ submission that the PE Minister is not entitled to request additional information as per the section 54(2) application. The purpose of the PFMA is to *inter alia* regulate the financial management of the national and provincial spheres of government, and to ensure that expenditure is managed efficiently and effectively. I doubt that the said purpose could be achieved where the PE Minister is merely requested to consider and decide whatever application is brought before him even when he/she sees that there is no adequate information tabled before him/her to enable him/herto make an informed decision. This could not have been the intention of the legislature.

[171] The First, Second, Third, and Fourth Respondents in my view correctly relied on the provisions of sections 54(1) and 50(1)(c) of the PFMA as the provisions that empower the PE Minister to request additional information. Section 50(1)(c) of the PFMA *inter alia* places a duty on the accounting authority “on request”, by the executive authority to disclose all material facts which in any way may influence the decisions or actions of the executive authority. Section 54(1) of the PFMA also requires the accounting authority to submit “*documents, explanations, and motivations as may be prescribed or as the relevant treasury or the Auditor-General may require*”. Any interpretation that suggests that the PE Minister may not request further information would defeat the plain meaning of

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<sup>66</sup> At para 123.

the provisions referred to above.

[172] Consequently, the provisions of the PFMA in so far as the request for information by the PE Minister is concerned point me to one conclusion, the PE Minister is entitled to request additional information as and when he deems it necessary, otherwise failure to do so may result in approving or rejecting the section 54(2) application based on insufficient information. In my view, the PE Minister acted within his powers as provided for in the PFMA to request additional information to satisfy himself whether to approve or not to approve the section 54(2) application.

[173] Furthermore, the First and Second Respondents correctly submitted that transparency, accountability and sound management of revenue and expenditure as per section 2 of the PFMA could be achieved when the PE Minister has all the information at his disposal prior to making a decision.

[174] I am aware of the reliance by the Fourth and Fifth Respondents on various provisions of the SMF. I agree that the SMF *inter alia* requires the PE Minister to exercise oversight of transactions undertaken in respect of SAA including compliance with legislative and policy requirements.<sup>67</sup> Additionally, the SFM does allow the PE Minister to request further information in case a section 54(2) application is incomplete.<sup>68</sup> This would be not achieved wherein the PE Minister would be barred from requesting additional information about a section 54(2) application.

[175] However, my difficulty is that the SMF was concluded on 22 October 2021 between the PE Minister and the Board of Directors of SAA. The BRP is not a party to the SMF.<sup>69</sup> In addition, the SMF provisions do not say anything about the amended business rescue plan. It would appear that the SMF provisions were drafted when Mango Airlines was in ordinary business circumstances and not when the airline was under a business rescue process. This is not the case. In

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<sup>67</sup> See section 3 of the SMF.

<sup>68</sup> See sections 2.4.2 and 2.3.18 of the SMF.

<sup>69</sup> See section 1.1.16 of the SMF.

my view, the SMF serves a good purpose and could have been better drafted given the fact that Mango Airlines was at the time already under business rescue. The absence of the BRP as a party to the SMF is a major defect. I will deal with this observation comprehensively later in the judgment where the agreement to extend the 30-day period as per section 54(3) of the PFMA is discussed.

[176] Regarding the averment that the section 54(2) application was approved by operation of section 54(3) of the PFMA, this issue is interconnected with the subject of whether there was a “response” to the section 54(2) application or whether the section 54(2) application has been brought before this Court prematurely. I will therefore address all these issues under this heading.

[177] Section 54(3) of the PFMA provides:

‘A public entity may assume that approval has been given if it receives no response from the executive authority on a submission in terms of subsection (2) within 30 days or within a longer period as may be agreed to between itself and the executive authority’ (own emphasis added).

[178] The plain reading of the aforesaid provision reveals two factors. First, it gives an unequivocal right to Mango Airlines or any public entity that is authorised to submit a section 54(2) application to “assume that approval” of section 54(2) application has been given if there is no response received from the PE Minister within 30 days. It must be noted that SAA re-submitted the section 54(2) application on 28 November 2022 following a consensus between Mango Airlines and the Board of SAA. Post the resubmission, on 21 December 2022 the PE Minister addressed a letter to SAA requesting additional information ranging from due diligence report to foreign ownership that will enable him to assess the section 54(2) application. In addition, the PE Minister stated that the 30-day period will start running once all the conditions were met. This letter was sent to the Applicants within 30 days of receipt of their section 54(2) application. Consequently, this affected the triggering of operation of the 30-day period as

there was a response within that time-frame. I have already stated that the PE Minister has the statutory power to request additional information.

[179] Accordingly, the PE Minister's letter of 21 December 2022 disrupted the running of the 30-day period until additional information was furnished to him. However, something occurred. In a letter dated 19 January 2023, Mango Airlines through its BRP and in unequivocal terms informed the PE Minister that it was not going to give him any additional information whatsoever in the future.<sup>70</sup> In my view, Mango Airlines' failure to provide any additional information to the PE Minister triggered a further and final operation of section 54(3) and the PE Minister had to take a decision within 30 days whether to approve or decline the section 54(2) application as he has an application before him. Accordingly, the PE Minister has failed to take a decision. It cannot be said that this application is premature when the PE Minister is by statute bound to take a decision within a specified period but has failed to do so. Accordingly, this application is ripe and rightly brought before this Court.

[180] In my view, NUMSA correctly relied on the *Myeni decision*. There, after Ms Myeni was afforded a further opportunity to make out a case for proposed amendments to an already approved section 54(2) application about a Swap Transaction, she merely submitted an application that was similar to the initial one which was declined save for a new covering letter. The PE Minister rejected the amended section 54(2) application.<sup>71</sup> Similarly in this case, the PE Minister received an amended section 54(2) application and was informed by the BRP that there is no further information that will be provided to him. In other words, the PE Minister was asked by the BRP to consider what is already before him. Therefore, he must take a decision as his courtesy request for additional information has been turned down. When counsel for the First and Seconded Respondent were asked by this Court as to what should happen to the submitted section 54(2) application as the Applicants have made it clear that they will not provide the requested additional information, his response was that no decision will be taken and that the Applicants are at liberty to explore other options. I disagree. In *Dykema v*

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<sup>70</sup> See letter on CaseLines 001: item 22.

<sup>71</sup> *Myeni* decision at paras 212-213.

*Malebane and Another*, the Constitutional Court held that “*the right to a decision arises from a validly submitted application*”.<sup>72</sup> The evidence before this Court suggests otherwise because the re-submitted section 54(2) submitted on 28 November 2022 by SAA “reflected the consensus reached between Mango [Airlines] and the Board of SAA” as per the PE Minister’s concerns in the letter of 26 October 2022 about ensuring alignment between the Board and the BRP.

[181] In addition, the Applicants, comprehensively refuted that there were any defects in their section 54(2) application. Furthermore, the Applicants addressed the issue of deficiency ranging from a due diligence report to the foreign ownership requirement. This was not disputed by the Fourth and Fifth Respondents. Consequently, the PE Minister must take a decision. The status of the Applicant’s section 54(2) application cannot eternally remain in *limbo*.

[182] I also need to highlight that the evidence before this Court does not show any instance/s where Mango Airlines states that it has exercised its right to assume that approval of its section 54(2) application has been given by the PE Minister because of his failure to respond. Consequently, Mango Airlines cannot ask this Court to take a decision on its behalf as this Court is not well suited to all factors that are pivotal in a section 54(2) application and/or conducting the affairs that are related to a business rescue operation. In any event, section 54(3) of the PFMA is clear in that “a public entity” is the one who may assume that approval has been given and not anyone else.

[183] Section 54(3) of the PFMA also allows for the extension of the 30-day period as may be agreed to between Mango Airlines and the PE Minister. This brings me to the second aspect regarding the agreement that was entered into between the PE Minister and SAA to extend the 30-day period as per section 54(3) of the PFMA. I do not deem it necessary to deal with this aspect because it related to the initial section 54(2) application that was submitted on 29 September 2022. Post this, there was a re-submission on 28 November 2022. This re-submission in my view consisted of an application made afresh and the 30-day period

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<sup>72</sup> At para 59.



therefore started running on 19 January 2023 when the BRP advised that there would be no additional information to be supplied to the PE Minister. This re-submission altered any arrangements that were made before it in so far as the presumption of approval is concerned.

[184] Regarding the meaning of response contained in section 54(3) of the PFMA, given the narration provided earlier, it follows that the responses made by the PE Minister regarding the section 54(2) application did at some stage affect and extend the operation of the 30-day period. This was only up until the Applicants informed the PE Minister that they would not furnish any further information. Consequently, in the context of this case, “response” serves to mean two things namely;

[184.1] first, to put a matter to an end, approval or rejection of a section 54(2) application.

[184.2] second, to provide an interim response pending the approval or rejection of a section 54(2) application such as requesting further information.

[185] I say so because the provisions of section 54 of the PFMA are to be read and considered as a whole and not to be read in isolation from other provisions of the Act. The legislature foresaw a stage where they may be a request for further information by the executive authority as per section 54(1). Consequently, a response in the form of requesting further information accommodates such situations. This entails that the word “response” is flexible in that it could be a response requesting further information or a response providing a decision if there is no additional information required.

[186] In my view, the legislature carefully chose the wording in subsection 3 and opted to use “response” instead of a “decision”. If the latter wording was used, it meant that the executive authority would have been compelled to decide on an application even if such an application was incomplete. In other words, there

would have been no room to request additional information because the provision would have required a decision to be made. Therefore, this has addressed the arguments relating to the meaning of the words “response” and “decision”.

[187] The Fourth and Fifth Respondents argued that NUMSA’s ground for review to the effect that the BRP is *inter alia* the only person authorised to submit a section 54(2) application and that the undertaking provided by the SAA on 12 January 2023 is void as it was only raised, for the first time, in the replying affidavit and ought to be dismissed. This was not pleaded in the founding affidavit but somehow found its way into NUMSA’s replying affidavit. This was an attempt by NUMSA to introduce a completely new case. In *Man Financial Services (Pty) (RF) Ltd v Elsologix (Pty) Ltd and Others*<sup>73</sup> Van Nieuwenhuizen AJ said:

‘...It is of course trite that not must an applicant in motion proceedings make out a proper case in the founding papers and that an applicant is bound to the case made out therein and may not make out a new case in the replying affidavit (emphasis added)’.

[188] I agree with the above legal position. NUMSA must stand or fall by averments made in its founding affidavit. Accordingly, NUMSA’s sudden reliance on the aforesaid grounds must fail. I will deal with the other grounds of review under the principle of legality and PAJA separately.

[189] Regarding the agreement between the PE Minister and the Board of SAA to extend the 30-day period stipulated in section 54(3) of the PFMA, the First and Second Respondents correctly stated that clause 6.2.2 of the amended business rescue plan provides that compliance with *inter alia* the SMF is mandatory.<sup>74</sup> To this end, the Fourth and Fifth Respondents argued that the relevant parties namely the Board of Directors of SAA, the PE Minister and the Minister of Finance agreed that the 30-day period had not yet commenced (alternatively was

<sup>73</sup> [2021] ZAGPJHC 112 (24 August 2021) (unreported) at para 6.

<sup>74</sup> CaseLines 016: item 10.

extended) given that the relevant particulars had not been provided. In addition, they argued that the *Plascon Evans* principle was applicable in that the matter had to be decided on the facts in the Applicant's affidavit which are admitted by the Respondents together with the facts set out in the Respondents' affidavits. In my view, they are missing the point.

[190] The BRP has full management control of the company in substitution for its board and pre-existing management and has the power to implement the amended business rescue plan. If the PE Minister and the Board of Directors of SAA were to be allowed to extend the 30-day period under section 54(3) of the PFMA using the provisions of the SMF, and without consulting the BRP, this would relegate the powers of the BRP and undermine the binding nature of the adopted amended business rescue plan. The agreement between the PE Minister and the Board of Directors of SAA is invalid and of no force and effect only to the extent that it envisages the extension of the 30-day period without the consent of the BRP who is in full management control of Mango Airlines. This applies with the purported agreement of 14 December 2023 seeking to extend the 30 day period without the involvement of the BRP. I find the case of *Henque 3935 CC t/a PQ Clothing Outlet v Commissioner For The Sa Revenue Service*<sup>75</sup> relevant and applicable here. There, it was held that:

'Sections 151 and 152 of the Companies Act provide for the plan to be tabled at a meeting of the creditors for adoption. In cases where the plan adopted by the creditors affects the rights of shareholders or members, as in this case, then the plan would have to be tabled at a meeting of these shareholders or members for their approval of the adoption. Should the plan be adopted, and approved (in the case where approval is necessary), in terms of s 152(4) it is binding on all creditors regardless of whether a creditor was at the meeting or not (own emphasis added).<sup>76</sup>

[191] The amended business rescue plan was adopted and SAA as a shareholder was

<sup>75</sup> (2020/35790) [2023] ZAGPJHC 234.

<sup>76</sup> *Ibid* at para 5.

part and parcel of the approval process. Therefore, to validate the SMF agreement would undermine the aforesaid provisions of the Companies Act. Furthermore, in *Ragavan and Others v Optimum Coal Terminal (Pty) Ltd and Others*<sup>77</sup>, it was held that:

‘The genesis of the BRP’s power are clearly set out in s 137 and s140 of the Companies Act. S 140 prescribes the general powers and duties of practitioners. “s140 (1) During a company’s business rescue proceedings, the practitioner, in addition to any other powers and duties set out in this Chapter- (a) has full management control of the company in substitution for its board and pre-existing management; (b) may delegate any power or function of the practitioner to a person who was part of the board or pre-existing management of the company; (c) may- (i) remove from office any person who forms part of the pre-existing management of the company; or (ii) appoint a person as part of the management of a company, whether to fill a vacancy or not, subject to subsection (2); and (d) is responsible to- (i) develop a business rescue plan to be considered by affected persons, in accordance with Part D of this Chapter; and (ii) implement any business rescue plan that has been adopted in accordance with Part D of this Chapter (own emphasis added)’.

...

‘This section is unequivocal and provides that the BRP has full management control of the company in substitution for its board and pre-existing management and has the power to implement the business plan....Full management and control of the company in substitution for its board could not be clearer (own emphasis)’.

[192] The Applicants were correct in their submission when they stated that the amended business rescue plan was similar to a binding contract. Our jurisprudence requires that a party seeking to avoid a contractual term show good reason for failing to comply with the term. Counsel for the PE Minister did not take this Court into confidence as to why this Court should interfere with an

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<sup>77</sup> (52832/2021) [2022] ZAGPJHC 22 at paras 31-32.

unambiguous contractual term flowing from a business rescue plan and the provisions of the Companies Act. In *Napier v Barkhuizen*<sup>78</sup> Cameron AJ [as he then was] with the support of all members of the court warned that:

‘...intruding on apparently voluntarily concluded arrangements is a step that judges should countenance with care...’.

[193] In light of the above, if this Court was to easily interfere with voluntarily concluded terms in a business rescue plan without good cause, then there would be no need for affected parties to hold a meeting and adopt a business rescue plan that would be subsequently ignored. Therefore, to accept the submissions of Counsel for the PE Minister would be contrary to the doctrine of *pacta sunt servanda* and undermine the role of the BRP in business rescue proceedings.

[194] Concerning the conflict between the provisions of the Companies Act and the PFMA, research has shown that is no precedence. The Fourth and Fifth Respondents argued that the provisions of the PFMA will prevail where there is a conflict with the provisions of the Companies Act. However, there were no submissions whatsoever that were advanced to specify the nature of the conflict that exists between the two legislations. In disputing the alleged conflict, counsel for the First and Second Applicants argued that this Court should adopt an interpretative approach that will reconcile and harmonise the provisions of the Companies Act and the PFMA to the effect that section 54(3) of the PFMA and Chapter 6 of the Companies Act both give effect to “*commercial urgency and expedition*”.

[195] In particular, counsel for the First and Second Respondents highlighted that the Fourth and Fifth Respondents overlooked the provisions of section 5(4)(a) and (b)(1)(ee) of the Companies Act which provide that:

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<sup>78</sup> *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at para 12.

‘If there is an inconsistency between any provision of this Act and a provision of any other national legislation—

(a) the provisions of both Acts apply concurrently, to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second; and

(b) to the extent that it is impossible to apply or comply with one or the inconsistent provisions without contravening the second...

(i) ...

(ee) Public Finance Management Act, 1999 (Act No. 1 of 1999)

[196] The enquiry envisaged by section 5(4)(a) of the Companies Act is to *inter alia* first establish whether there is a conflict and then whether it is possible to apply one of the inconsistent provisions without contravening the second.<sup>79</sup> In this present matter, this Court was not directed and/or shown any conflict. Accordingly, any argument suggesting the existence of a conflict without identifying it is difficult to comprehend. In my view, counsel for the First and Second Applicants correctly contended that the Fourth and Fifth Respondents had to show that it is not possible to apply and comply with both the provisions of the Companies Act and the PFMA and, to the extent that it is impossible, does the PFMA apply to the extent of any inconsistency with the Companies Act. I agree with the submissions made by counsel for the Applicants in that none of the reconciliatory interpretative approaches has been taken to mitigate the conflict, if any, between the two legislations. To this end, I am persuaded by the submissions by counsel for the First and Second Applicants that section 54(2) and (3) of the PFMA is capable of being interpreted as per section 5(4)(a) and (b)(i)(ee) of the Companies Act in such a way that it provides for speedy finalisation of the business rescue process.

[197] This Court stated earlier that the Amended Business Rescue Plan *inter alia*

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<sup>79</sup> RA de la Harpe *et al Commentary on the Companies Act of 2008* Vol.1 (Juta, 2022) pg 1-98-99.

provides that the BRP will “prepare and submit a request for approval in terms of section 54(2)(c) of the PFMA” and “on behalf of SAA”.<sup>80</sup> Additionally, the Amended Business Rescue Plan *inter alia* provides that the BRP will prepare and submit a request for approval in terms of section 54(2) of the PFMA. Considering the facts of this matter the BRP, in collaboration with SAA, prepared and managed the submission of the section 54(2) application in terms of the PFMA to the PE Minister. This to my mind is an indication that, in these circumstances, the PFMA and the Companies Act are capable of being interpreted in such a way that a conflict, if any, between the two statutes is avoided.

[198] In other words, they are capable of being reconciled as per the provisions of section 5(4) of the Companies Act. By approving this approach in the Amended Business Rescue Plan, the Board of SAA, while aware that section 54(2) of the PFMA only allows the “accounting authority” to make the submission under the PFMA noted the role of the BRP appointed under the Companies Act in the process of preparing and submitting the application in terms of section 54(2) of the PFMA. This alone defeats the argument that now purports to exclude the BRP in jointly preparing and submitting the section 54(2) application and/or the argument that allowing the provisions of the PFMA to prevail must mean the exclusion of the BRP in the preparation and submission of the application. The argument suggesting that the Applicants incorrectly seek to rely on and enforce rights and duties flowing from the Companies Act in a section 54(2) process that is regulated by the PFMA also falls to be rejected. The provisions of both statutes apply concurrently, and this was approved by the parties concerned in the Amended Business Rescue Plan.

[199] This would solve any potential conflict between the two statutes unless they are incapable of being reconciled. In this case, there has been no form of conflict shown. Therefore, the argument to the effect that there is a conflict between the provisions of the PFMA and the Companies Act stands to fail.

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<sup>80</sup> See clause 6.3.12.1 of the Amended Business Rescue.

[200] Concerning a review of the PE Ministers' failure to take a decision, the courts have over the years provided guidance on the extent to which a court can go when embarking on a process that seeks to review an administrative or executive decision. Before answering the issue related to a failure to take a decision, I deem it necessary to first determine whether this Court is dealing with an administrative or executive decision as this will assist this Court in determining the extent to which it interfere with such a decision.

[201] Whether a decision is administrative, or executive is not clear-cut. In *Minister of Defence and Military Veterans v Motau and Others*,<sup>81</sup> the court explained that:

'It is also true that the distinction between executive and administrative action is often not easily made. The determination needs to be made on a case-by-case basis; there is no ready-made panacea or solve-all formula.<sup>82</sup>

...

Executive powers are, in essence, high-policy or broad direction-giving powers. The formulation of policy is a paradigm case of a function that is executive in nature. The initiation of legislation is another. By contrast, "[a]dministrative action is . . . the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the state, which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals." Administrative powers are in this sense generally lower-level powers, occurring after the formulation of policy. The implementation of legislation is a central example. The verb "implement", which also appears in section 85(2)(a) of the Constitution and distinguishes it from section 85(2)(e), may serve as a useful guide: administrative powers usually entail the application of formulated policy to particular

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<sup>81</sup> 2018 (4) BCLR 387 (CC).

<sup>82</sup> *Ibid* para 43.



factual circumstances. Put differently, the exercise of administrative powers is policy brought into effect, rather than its creation’.<sup>83</sup>

[202] The decision that this Court is called upon to interrogate does not deal with initiation or policy formulation. The source of power is not the Constitution but the PFMA. Furthermore, the source of power is described by the PFMA. The role of the PE Minister here is concerned with implementing or giving “*effect to a policy, a piece of legislation or an adjudicative decision*”.<sup>84</sup> Accordingly, this Court is faced with a matter involving the exercise of administrative power and not executive power.

[203] Similarly in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*<sup>85</sup> in the context of an administrative decision, the Constitutional Court held that:

‘In treating the decisions of administrative agencies with the appropriate respect, a Court is recognising the proper role of the Executive within the Constitution. In doing so a Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A Court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a Court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the Courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a Court should pay due respect to the route selected by the decision-maker. This

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<sup>83</sup> *Ibid* para 37.

<sup>84</sup> Hoexter, C, Penfold, G, “Administrative Law in South Africa” 3<sup>rd</sup> edition [2022] Juta p 73.

<sup>85</sup> 2004 (4) SA 490 (CC) at para 48.

does not mean, however, that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a Court may not review that decision. A Court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker (own emphasis added).

[204] This Court is, therefore, called upon to exercise a great deal of caution when reviewing a decision that falls within the ambit of another arm of government. It has no open-handed authority to interfere in the administrative processes and its powers are limited. However, if the circumstance of a given case requires it to enter into the terrain of the administrative process, it will not shy away from doing so. As was correctly found in *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another*<sup>86</sup> that:

‘The Constitution demands of all those on whom it imposes obligations, to fulfil them diligently and without delay. It is the duty of this Court to ensure that this injunction is followed. An order issued to achieve this purpose therefore cannot be described as trenching upon the separation of powers’.

[205] In light of the above, I now turn to consider whether there has been a failure to take a decision from the PE Minister. I have already found that this application was not brought prematurely before this Court. I have also found that the moment the BRP responded to the PE Minister to the effect that there would be no further forthcoming information from his side as the authority tasked with the full control and management of the affairs of Mango Airlines on 19 January 2023, the statutory prescribed 30-day period started running and ended on 01 March 2023. I have found that this date was not extended by the SMF.

[206] In *Intertrade Two (Pty) Ltd v MEC for Roads and Public Works Eastern Cape and*

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<sup>86</sup> 2018 (2) SA 571 (CC) at para 217.

*Another*<sup>87</sup> it was held that:

‘...the administrative process is incomplete and hangs in limbo. It is a reviewable irregularity for an administrative decision-maker to fail to take a decision when he or she has been empowered to do so’.

[207] The aforesaid case mirrors the current state of affairs in the present application.

In my view, there has been a failure, for approximately four months, by the PE Minister to take a decision regarding the section 54(2) application submitted to him. This leads me to consider whether the failure and/or delay to take a decision by the PE Minister has been unreasonable thus leading to the violation of the Applicants’ right to administrative action that is lawful and reasonable as provided for in section 6(2)(g) of PAJA, together with section 6(3)(a)(i) and (iii) of the PAJA. These provisions provide that the failure to take a decision within a reasonable time is a ground of review and hence an infringement of the fundamental right to just administrative action. The answer is in the affirmative. As was correctly found in *MEC Vumazonke and Others v MEC for Social Development and Welfare for Eastern Cape Province*,<sup>88</sup> the failure to take a decision within three months amounts to an unreasonable delay and constituted a violation of the right to lawful administrative action.

[208] This is where in my view the provisions of section 237 of the Constitution which enjoins functionaries within organs of state to “*perform diligently and without delay all constitutional obligations*” also squarely fits in as argued by the Applicants. I have already classified this matter as one falling within the ambit of administrative action. It is therefore not necessary to venture into the exercise of executive power. Even if that is so, the Applicants have in my view correctly contented that any exercise of public power is subject to constitutional scrutiny.<sup>89</sup>

[209] The PE Minister is bound by the Constitution and must act within its boundaries

<sup>87</sup> [2007] ZAECHC 149; [2008] 1 All SA 142 (Ck) at para 14.

<sup>88</sup> (ECJ 050/2004) [2004] ZAECHC 40 at para 39. See also *MEC for the Department of Welfare v Kate* (580/04) 2006 (4) SA 478 (SCA) at para 10 and 22.

<sup>89</sup> See for example, *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 (12) BCLR 1458 (CC), and *Pharmaceutical Manufacturers Association of South Africa: Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC).

to meet the requirement of legality and rationality. *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others*<sup>90</sup>

‘...What the Constitution requires is that public power vested in the executive and other functionaries be exercised in an objectively rational manner.

Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the executive and other functionaries....’.

[210] I do not see how a delay in taking a decision could be considered as rational. The delay in taking a decision in respect of the section 54(2) application has in my view violated section 237 of the Constitution. It is the duty of this Court to ensure that the constitutional prescripts imposed on the PE Minister to discharge his duties are adhered to.

[211] Concerning the Fourth and Fifth Respondents’ argument that NUMSA does not seek a declarator to the effect that the PE Minister’s failure to take a decision is inconsistent with the Constitution and invalid as per section 172 of the Constitution, I disagree. NUMSA clearly states in its affidavit that “*the MPE’s dilatory conduct, contravenes section 237 of the Constitution, the principle of legality...*”. In *Rabinowitz v Van Graan and Others*<sup>91</sup>, it was held that:

‘It is not necessary to refer in terms to a specific section in a statute provided that the pleader formulates his case clearly or, put differently, it is sufficient if the facts are pleaded from which the conclusion can be drawn that the provisions of the statute apply’.

[212] Consequently, I am satisfied that NUMSA relies on the provisions of section 237 of the Constitution dealing with delay in executing constitutional obligations.

<sup>90</sup> 2000 (3) BCLR 241 at paras 89-90.

<sup>91</sup> 2013 (5) SA 315 (GSJ) at para 15.

Therefore, the case is formulated sufficiently in its founding affidavit.

[213] The PE Minister's stance has been *inter alia* largely on the reliance on the SMF agreement entered into between him and the Board of Directors of SAA which purported to extend the 30-day period that is provided for under section 54(3) of the PFMA. This argument is unsustainable because that SMF agreement did not involve the BRP who is in full control and management of the affairs of Mango Airlines. Nothing can be done outside the watch of the BRP. As was correctly found in *Ragavan and Others v Optimum Coal Terminal (Pty) Ltd and Others*<sup>92</sup> that:

‘Nothing of significance can be done by the Directors [or the shareholders] during business rescue proceedings without the authorisation by the BRP together with the other powers they have...’

[214] Furthermore, the reliance on the outstanding information for the delay by the PE Minister is misplaced because the BRP who is in full control of the management of the affairs of Mango Airlines has responded to the effect that he will not supply any additional information. Consequently, the PE Minister, as the relevant treasury, must act with the information at his disposal and either approve or reject the section 54(2) application. I have extensively dealt with the aforesaid aspects elsewhere and therefore need not elaborate further here.

[215] Concerning the argument that the Applicants seek to rely on and enforce rights and duties flowing from the Companies Act in a section 54(2) process that is regulated by the PFMA, the PE Minister is incorrect. The provision of the PFMA and the Companies Act are both applicable in this case as on the one hand, the PFMA requires the accounting authority of Mango Airlines to submit the section 54(2) application. On the other, the Companies Act, by virtue of business rescue proceedings has entrusted the BRP with full management control of the affairs of Mango Airlines in the exclusion of its board of directors. The two provisions therefore both apply concurrently. This is evident as both the BRP and the board of SAA had worked together in the preparation and submission of the section

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<sup>92</sup> 2023 (4) SA 78 (SCA) at para 47.

54(2) application.

[216] This Court has taken cognisance that the section 54(2) application has been before the PE Minister since December 2022 although the 30-day period envisaged in section 54(3) of the PFMA started running on 19 January 2023. A protracted period has, without a doubt, gone by.

[217] Regarding the granting of declaratory relief, in *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd*<sup>93</sup> Jafta AJ, as he was then, held that a court is empowered to make a declaratory order under section 21(1)(c) of the Superior Courts Act 10 of 2013 if two requirements are met namely; the first is that the applicant has an interest in “*an existing, future or contingent right or obligation*”<sup>94</sup> and the second is that once the court is satisfied that such conditions have been met then it has to decide whether to grant a declaratory order or not. I have already found that NUMSA has an interest in this matter.<sup>95</sup> In addition, NUMSA has an obligation as a registered union to represent former employees of Mango Airlines “who are particularly prejudiced in that they are deprived of the right of first refusal for re-employment conferred on them by clause 10 of the Retrenchment Agreement”. In my view, both the requirements have been met. by the Applicants for declaratory relief sought.

[218] Having carefully considered both written and oral submissions of the parties, I am of the view that the Applicants have been largely successful in these proceedings.

## **COSTS**

[219] All the parties sought to persuade this Court that in the event that they were successful, they were entitled to costs.

[220] However, an obvious observation is that the Applicants namely, the BRP, Mango Airlines, and the NUMSA have been largely the successful parties in this matter.

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<sup>93</sup> 2005 (6) SA 205 (SCA) at para 18.

<sup>94</sup> *Ibid* at para 16.

<sup>95</sup> *Ibid* at para 17.

[221] Therefore, the general rule, that costs should follow the result, must apply.<sup>96</sup>

## ORDER

[222] Having regard to the above, the following order is made:

- (a) NUMSA is granted leave to intervene as co-applicant.
  - (b) NUMSA's late filing of its heads of argument is condoned.
  - (c) It is declared that the First Respondent's failure to take a decision in respect of the application submitted by the Applicants and the Third Respondent in terms of section 54(2) of the PFMA is unlawful and constitutionally invalid.
  - (d) The First Respondent's failure to determine the section 54(2) PFMA application is reviewed and set aside.
- (a) The First Respondent is directed within 30 days after the service of the Court order, to take a decision in respect of the section 54(2) application and communicate the outcome thereof to the Applicants and the Third Respondent, including furnishing such reasons for the decision made, failing which the Applicants and the Third Respondent may assume that the section 54(2) application has been approved by operation of section 54(3) of the PFMA.
  - (b) The First, Second, Fourth and Fifth Respondents are ordered to pay the costs of this application, including the costs of two counsels, jointly and severally.

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<sup>96</sup> *President of the Republic of South Africa & Others v Gauteng Lions Rugby Union & Another* 2002 (2) SA 64 (CC) at para 15.



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**PHOOKO AJ**

**ACTING JUDGE OF THE HIGH COURT,  
GAUTENG DIVISION, PRETORIA**



**APPEARANCES:**

Counsel for the 1 <sup>st</sup> and 2 <sup>nd</sup> Applicant:	Adv IV Maleka SC & Adv T Scott
Instructed by:	Instructed by Cliffe Dekker Hofmeyer Inc
Counsel for the Third Applicant:	Adv R Tulk, Adv NL Buthelezi
Counsel for the First and Second Respondents:	Adv Mphanga SC, Adv D Mtsweni, and and Adv M Sekwakweng
Instructed by:	State Attorney, Pretoria
Counsel for the Fourth to Fifth Respondents:	Adv K Pillay, Adv N Nyembe and Adv C Juries
Instructed by:	State Attorney, Pretoria
Counsel for the Sixth to Eighth Respondents:	n/a
Instructed by:	n/a
Date of Hearing:	29 & 30 May 2023
Date of Judgment:	06 September 2023