IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No.: 010700/2023

In the matter between:

MANGO AIRLINES SOC LIMITED (***IN BUSINESS RESCUE***)	First Applicant
SIPHO ERIC SONO N.O.	Second Applicant
and	
THE MINISTER OF PUBLIC ENTERPRISES AND TWO OTHERS	First to Third Respondents
THE MINISTER OF FINANCE	Fourth Respondent
NATIONAL TREASURY	Fifth Respondent
THE INTERNATIONAL AIR SERVICES COUNCIL AND OTHERS	Sixth to Further Respondents

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MINISTER OF FINANCE AND NATIONAL TREASURY'S APPLICATION FOR LEAVE TO APPEAL

TAKE NOTICE that the Minister of Finance and the National Treasury ("**Finance Respondents**") intend to apply to the above Honourable Court, on a date and time to be arranged with the Registrar of the above Honourable Court, for leave to appeal to the Supreme Court of Appeal alternatively the Full Bench of this Honourable Court,

against the whole judgment, including costs of His Lordship Mr Acting Justice Phooko delivered on 6 September 2023 under case number 010700/2023.

TAKE FURTHER NOTICE that this application is based on the following errors of law and fact:

A. REASONABLE PROSPECTS OF SUCCESS

1. Section 17(1)(a)(i) of the Superior Courts Act provides that leave to appeal may be granted where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success.

2. For the reasons that follow, it is respectfully submitted that an appeal against the entire judgment and order would have a reasonable prospect of success.

Ground 1: No valid application

3. The applicants sought primary relief to the effect that (a) a valid and complete application had been submitted[1] and (b) the applicants could assume that the application had been approved.[2] In the alternative the applicants sought relief that: (i) the refusal was unlawful and constitutionally invalid;[3] (ii) the PE Minister could not seek any further information;[4] (iii) direct the PE Minister to make a decision.[5]

4. The High Court held that the applicants could not ask the court to issue a declarator that they may assume approval has been granted.[6] It also held that

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1 NOM, at 01-3, prayer 2.
2 NOM, at 01-3, prayer 3.
3 NOM, at 01-3, prayer 4.1.
4 NOM, at 01-3, prayer 4.2.
5 NOM, at 01-3, prayer 4.3.
6 High Court Judgment, para 182.

the court could not decide whether the application had been validly submitted and thus refused this request by the applicants.[7]

5. However, in directing the PE Minister to make a decision regarding the application,[8] the High Court not only contradicted its earlier reasoning, but failed to have regard to the evidence that there was an agreement between the shareholder, SAA, and the Ministers to resubmit the application. (The court's finding that this agreement was unlawful is dealt with below). This meant that the evidence before the Court was that there was no valid application before the Ministers.

6. There are reasonable prospects that an appellate court will find that there was no valid application before the Ministers for consideration. Further that the Ministers could not be compelled to decide the application.

Ground 2: Conflation of SAA and Mango

7. The High Court found that the 30-day period may be extended by agreement between Mango and the PE Minister.[9] However, it held that the agreement to extend was "invalid" because it did not include the BRP practitioner. The Court also held that the BRP was authorised to state that there would be no further information coming from his side and that he had full control and management of the affairs of Mango.[10]

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7 High Court Judgment, para 168.
8 High Court Judgment, para 22 second para (a).
9 High Court Judgment, para 183
10 High Court Judgment, para 205.

8. The Court erred by conflating the rights and duties of SAA with that of the BRP who acts on behalf of Mango. There are reasonable prospects that an appeal court will find that :

8.1. The shares in Mango that are sought to be sold are owned by SAA. Thus, neither Mango nor its BRP are party to the section 54 approval process.

8.2. Section 54(2) of the PFMA obliges the accounting authority for the public entity that intends to conclude a transaction for the *"disposal of a significant shareholding in a company"* to make the application. This is not Mango — it is SAA. Therefore it is SAA that must submit the application and not Mango. It is also SAA that enjoys the benefits of the deeming provision in section 54(3) of the PFMA and not Mango.

8.3. Only SAA (and its accounting authority, its board) may submit the application in terms of section 54(2) of the PFMA.

8.4. SAA, which is the relevant public entity in terms of section 54(2) and (3) had agreed on an extension of the time period with the PE Minister.

8.5. The SMF need not have included the BRP as it related to the assets of the asset holder — SAA — not the asset itself — Mango.

Ground 3: Finding on legal standing

9. The High Court found that the applicants (one of whom is the BRP) did not lack *locus standi*.[11] It did so on two basis. One, on the basis that correspondence[12] and the Amended Business Rescue Plan permitted the BRP to submit the section 54(2) application[13] and two, on the basis that the *Ragavan*[14] decision held that a BRP *"has the necessary standing to institute these proceedings"*.[15]

10. There are reasonable prospects that a court of appeal will find that:

    10.1. Section 54(2) of the PFMA provides that the accounting officer of the public entity that intends to conclude the transaction must submit relevant particulars to the executive authority. The PFMA is binding unless and until it is declared inconsistent with the Constitution.

    10.2. The BRP is not the accounting authority of the public entity and therefore is not entitled to submit relevant particulars to the PE Minister.

    10.3. Neither correspondence nor an Amended Business Rescue Plan afford a statutory entitlement to the BRP that has explicitly been reserved for the accounting officer of the public entity i.e. in this case: the board of SAA.

    10.4. By holding that the BRP has statutory powers not afforded to him by the statute by virtue of correspondence and the Amended Business Rescue Plan, the High Court elevated the latter documents to a status above the

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11 High Court Judgment, para 166.
12 High Court Judgment, para 165.
13 High Court Judgment, para 166.
14 *Ragavan and Others v Optimum Coal Terminal (Pty) Ltd and Others* 2023 (4) SA 78 (SCA).
15 High Court Judgment, para 164.

empowering statute — section 54(2) of the PFMA. It also disregarded the status of the PFMA.

11. There are also reasonable prospects that a court of appeal will find that:

11.1. The facts of *Ragavan* are so distinguishable as to be rendered irrelevant to the dispute before the High Court and thus ought not to have served as a basis for the High Court to find that the applicants (particularly the BRP) had *locus standi.*

11.2. The distinguishing facts are that:

11.2.1. The company to which *Ragavan* related was not a state-owned company on which the PFMA was binding. In this case, both of the companies (Mango and SAA) are state-owned companies bound by the provisions of the PFMA.

11.2.2. *Ragavan* concerned provisions related to the consideration of a business plan and the voting thereon.[16] That issue does not arise in this case. What does arise in this case is whether a BRP can do that which falls within the exclusive statutory terrain of another entity.

11.2.3. In *Ragavan* there was no statutory provisions which contradicted those of the Companies Act. In this case, section 54(3) explicitly provides that it is the board of SAA that must submit the application. Neither one of the applicants are the

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16 Ragavan, para 4.

board of SAA and thus neither one of them may usurp the statutory entitlement of the SAA board.

11.3. Based on the fact that *Ragavan* is distinguishable, there are reasonable prospects of success that an appeal court may find that the High Court placed incorrect reliance on *Ragavan* and thus hold that the applicants did not have *locus standi*.

Ground 4: Incorrect interpretation of section 54(3)

12. The High Court found that on 19 January 2023 the BRP advised the PE Minister that it would not give him any additional information in the future. From that, it concluded that the 30-day period in section 54(3) had been triggered and thus that the PE Minister was bound to make a decision within 30 days.[17]

13. In reaching this conclusion the High Court erred by failing to properly interpret the section in context.

14. The Finance Respondents offered four principle headlines of interpretation to the section: (i) it applies only for the benefit of the public entity (not the applicants); (ii) the presumption occurs only where no "response" has been given; and (iii) the 30-day period can only be computed from the date on which "relevant particulars" are provided; (iv) the parties (i.e. the PE Minister and SAA) may tacitly agree to extend the period.

15. Save to note the Finance Respondent's submissions in respect of section 54(3),[18] and accepting that the "response" in section 54(3) was not a decision of

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17 High Court Judgment, para 179.
18 High Court Judgment, para 148.

approval or rejection,[19] the High Court did not engage substantively with these interpretations.

Ground 5: Erroneous finding that the agreement between SAA Board and the PE Minister was invalid

16. The High Court erred in finding that the agreement between the SAA board and the PE Minister to extend the 30-day period was *"invalid and of no force and effect"* as it *"envisages the extension of the 30-day period without the consent of the BRP who is in full management control of Mango Airlines"*.[20]

17. This is so because: (i) the applicants had not sought to declare that agreement unlawful or invalid. This issue was thus not before the Court for decision; and (ii) in order to be invalid, the agreement would have to be in contravention of the law and it was not; (iii) the agreement was entirely consistent with the text of section 54(3) of the PFMA which does not require the BRP's consent or involvement.

Ground 6: Flawed review relief

18. The relief granted by the High Court is an amended amalgamation of that which had been sort by the applicants and NUMSA.

19. The High Court granted a declaration that the PE Minister's failure to take a decision in respect of the applicants and South African Airways SOC Ltd ("**SAA**") section 54(2) application was unlawful and constitutionally invalid.[21]

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19 High Court Judgment, paras 185 to 186.
20 High Court Judgment, para 190.
21 High Court Judgment, para 222(c).

20. There are reasonable prospects that an appeal court will find that the applicants had failed to make out a case that the failure to decide, in the circumstances of this case, was unlawful.

Ground 7: Failure to consider the guarantee conditions

21. The Finance Respondents relied on the strict condition of a guarantee issued in favour of SAA. The submission was that the approval of both the Minister of PE and the Minister of Finance was required where SAA intends to undertake transactions in terms of section 54 of the PFMA. In other words, SAA's sale of its shareholding in Mango requires the approval of both the Minister of PE and the Minister of Finance.[22]

22. The High Court noted the Finance Minister's submissions regarding the guarantee conditions.[23] It however did not engage any further in these submissions as it ought to have done.

23. Guarantee conditions are a constitutional matter: section 218(1) of the Constitution provides that *"[t]he national government, a provincial government or a municipality may guarantee a loan only if the guarantee complies with any conditions set out in national legislation."*

24. The PFMA, at section 70(1), provides as follows:

> *"A Cabinet member, with the written concurrence of the Minister (given either specifically in each case or generally with regard to a category of cases and*

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22 Finance Respondent's First AA, at 016-26, para 51.
23 High Court Judgment, paras 150 and 151.

subject to any conditions approved by the Minister), may issue a guarantee, indemnity or security which binds —

. . .

(b) a national public entity referred to in section 66(3) (c) in respect of a financial commitment incurred or to be incurred by that public entity."

B. COMPELLING REASONS

25. Section 17(1)(a)(ii) of the Superior Courts Act 10 of 2013 provides that leave to appeal may be granted where there is some compelling reason why the appeal should be heard.

26. In addition to the prospects of the appeal dealt with above, there are compelling reasons why leave to appeal should be granted in respect of the entire judgment and order of the High Court. These are:

Public interest

27. The issues raised in this matter implicate the public interest in that they deal with key public finance issues including:

27.1. Government's imperative to grant loans and guarantees subject to conditions;

27.2. The constraints imposed by such conditions;

27.3. The control measures in place which regulate the ability of an organ of state to enter into a significant transaction; and

27.4. The interplay between the rights of a BRP and a shareholder insofar as they relate to business rescue proceedings involving public entities.

Novelty

28. Both the Companies Act[24] and the Public Finance Management Act ("**PFMA**")[25] are relevant to this dispute[26]

29. Section 140 of the Companies Act, provides that the business rescue practitioner has full management control of the company in substitution for its board and pre-existing management. In this case, the Amended Business Rescue Plan provides that it is the business rescue practitioner ("**BRP**") who must submit a section 54(2) application to the Minister of Public Enterprises ("**PE Minister**") for approval.

30. However, section 54(2)(c) provides that it is the accounting authority of the public entity that will conclude a transaction for the disposal of a significant shareholding that must submit the application of the PE Minister; this is the board of SAA.

31. There are no court decisions applying the PFMA and the Companies Act in instances where the company is under business rescue and its sole shareholder has obligations under the PFMA. This is an important public interest issue that involves the proper interpretation of these two critically important pieces of legislation but also implicates the protection of the public purse.

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24 Act 71 of 2008
25 Act 1 of 1999.
26 High Court Judgment, para 194.

TAKE FURTHER NOTICE that the Finance Respondents request that the costs of this application be costs in the appeal.

Dated at Pretoria on this the 27th day of September 2023.

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