IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 2024-016758

In the matter between:

THE MINISTER OF PUBLIC ENTERPRISES	First Applicant
THE DEPARTMENT OF PUBLIC ENTERPRISES	Second Applicant

and

MANGO AIRLINE SOC LIMITED *(In Business Rescue)*	First Respondent
SIPHO ERIC SONO N.O.	Second Respondent
NATIONAL UNION OF METALWORKERS OF SA	Third Respondent
THE MINISTER OF FINANCE	Fourth Respondent
NATIONAL TREASURY	Fifth Respondent
INTERNATIONAL AIR SERVICE COUNCIL	Sixth Respondent
AIR SERVICE LICENSING COUNCIL	Seventh Respondent

SOUTH AFRICAN AIRWAYS SOC LIMITED Eighth Respondent

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

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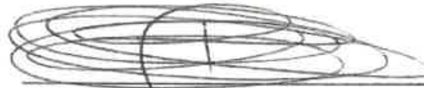
FILING SHEET

TAKE NOTICE that the Third Respondent hereby presents for service and filing:

1. NUMSA's answering affidavit

DATED AT JOHANNESBURG ON THIS THE 20th DAY OF FEBRUARY 2024.



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AND TO: **THE AFFECTED PERSONS OF MANGO AIRLINES SOC LTD *(IN BUSINESS RESCUE)***

Ninth Respondent

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION: PRETORIA

CASE NO: 2024 -016758

In the matter between:

THE MINISTER OF PUBLIC ENTERPRISES	First Applicant
THE DEPARTMENT OF PUBLIC ENTERPRISES	Second Applicant

and

MANGO AIRLINES SOC LIMITED *(In Business Rescue)*	First Respondent
SIPHO ERIC SONO N.O.	Second Respondent
NUMSA	Third Respondent
THE MINISTER OF FINANCE	Fourth Respondent
NATIONAL TREASURY	Fifth Respondent
THE INTERNATIONAL AIR SERVICE COUNCIL	Sixth Respondent
THE AIR SERVICE LICENSING COUNCIL	Seventh Respondent
SOUTH AFRICAN AIRWAYS	Eighth Respondent
THE AFFECTED PERSONS OF MANGO AIRLINES SOC LIMITED	Ninth Respondent

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(In Business Rescue)

THIRD RESPONDENT'S ANSWERING AFFIDAVIT

I, the undersigned

LESEGO NOXOLO BOEMO

do hereby make oath and state that:

1 I am an admitted attorney of the High Court of South Africa. I am employed as an Associate at Boqwana Burns, NUMSA's attorneys of record in this matter.

2 As the attorney charged with managing the litigation of this matter, the facts contained herein fall within my personal knowledge. They are true and correct unless otherwise stated or where the contrary appears from the context.

3 Given my role as the responsible attorney dealing with this matter, I am also authorised to depose to this affidavit.

4 I have read the First ("**the Minister of PE**") and Second ("**Department of PE**") Applicants' urgent application to interdict the First ("**MANGO**") and

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Second (“**the BRP**”) Respondents from enforcing and executing the order and judgment issued by the Honourable Justice Phooko AJ, issued on 6 September 2023, pending the determination of a petition brought by the Minister of PE and Department of PE and the Fourth (“**the Minister of Finance**”) and Fifth (“**National Treasury**”) Respondents, and respond thereto on NUMSA’s behalf on the terms set out in this affidavit.

5 Where I make submissions of a legal nature, I do so based on my own experience and in consultation with NUMSA’s legal team.

6 The purpose of this affidavit is to oppose the Minster of PE and the Department of PE’s urgent application to interdict MANGO and the BRP from enforcing and executing the order and judgment issued by the Honourable Justice Phooko AJ, issued on 6 September 2023, pending the determination of a petition brought by the Minister of PE and Department of PE and the Minister of Finance and National Treasury, on the following 7 grounds:

6.1 the situation the Applicants find themselves in is created by their own design;

6.2 a court ought not be concerned with the motives of those who execute orders;

6.3 it is in the public interest that the Court *a quo’s* order is executed;

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6.4 the Minister of PE failed to perform his constitutional duties in terms of section 237 of the Constitution;

6.5 the Minister of PE and the Department of PE have not established a *prima facie* right;

6.6 the Court *a quo's* order included a deeming provision in recognition of the inherent urgency associated with insolvency-related cases; and

6.7 the urgency of this application is self-created.

7 Before dealing with each of the above 7 grounds of NUMSA's opposition, I will provide the concise litigation background within which this application finds itself.

FACTUAL BACKGROUND

8 On 6 September 2023, the Honourable Justice Phooko AJ, *inter alia* ordered that the Minister of PE's failure to take a decision in respect of the section 54(2) application submitted by the BRP and MANGO and the Eighth Respondent ("**SAA**") was unlawful and constitutionally invalid, and directed that the Minister of PE, within 30 days after the service of the Court order, to take a decision in respect of the submitted section 54(2) application and communicate the outcome thereof to the MANGO, the BRP and SAA, including furnishing such reasons for the decision made, failing which *"the*

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Applicants [MANGO and the BRP] and [SAA] may assume that the section 54(2) application has been approved by operation of section 54(3) of the PFMA."

9 On 13 December 2023, the Honourable Phooko AJ refused the Minister of PE, the Department of PE, the Minister of Finance and the National Treasury leave to appeal against the whole judgment and order of the Court *a quo* delivered on 6 September 2023, and furnished the same order as the Court *a quo*.

10 The 30 day period within which the Minister of PE was to take a decision as, contemplated the Court *a quo's* order lapsed on 12 January 2024.

11 Similarly, the 30 day period within which the Minister of PE and the Department of PE were entitled to institute its application for special leave to appeal to the Supreme Court of Appeal, in terms of section 17(2)(b) of the Superior Courts Act 10 2013, lapsed on 12 January 2024.

12 On 12 January 2024, the Minister of PE had neither taken a decision in relation to the submitted section 54(2) application, nor had the Minister of PE and the Department of PE instituted their application for special leave to the Supreme Court of Appeal.

13 The BRP and MANGO were therefore, as at 13 January 2024, entitled and ordered to *"assume that the section 54(2) application ha[d] been approved by operation of section 54(3) of the PFMA."*

14 The BRP and MANGO also instituted a section 18(3) application, which was heard on the same day as the application for leave to appeal. The section 18(3) application was supported by NUMSA, and dismissed on 13 December 2023, together with the application for leave to appeal, the relevance of which will become apparent further down in this affidavit.

15 The Minister of PE, the Department of PE, the Minister of Finance and the National Treasury only served their applications for leave to appeal on the BRP, MANGO and NUMSA on 18 January 2024.

16 I am advised that the applications for special leave to appeal were only lodged with the SCA's Registrar on 6 February 2024.

THE SITUATION THE APPLICANTS' FINDS THEMSELVES IN IS CREATED BY THEIR OWN DESIGN

17 The Minister of PE and the Department of PE contend that the delay in the filing of their application for leave to appeal is not inordinate and/or unreasonable under the circumstances, having regard to the novelty of issues before the SCA and the public interest implications.

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18 The Minister of PE and the Department of PE also contend that they laboured under the impression that *dies non* applied to an application for special leave and acted on the ill-advise of their counsel.

19 In response to the second contention, the Minister of PE and Department of PE have been legally represented through these proceedings. It is a trite principle that the *dies non* periods only apply to affidavits and pleadings. No *dies non* period is provided for applications for leave to appeal under section 17 of the Superior Court Act, 2013.

20 I am advised that legal representatives both have a duty to advise their clients properly and to *"play open cards with the court"*,[1] and this urgent application therefore cannot be based on the Applicants' fundamentally flawed reading of the SCA rules.

21 Nowhere in the Minister of PE and the Department of PE's papers is it indicated what the legal basis was for the Applicants' erroneous view that the *dies non* was applicable to their applications for special leave to appeal, apart from the mere assertion that their counsel had ill-advised them.

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[1] *Lavelikhwezi Investments (Pty) Ltd & Others v Mzontsundu Trading (Pty) Ltd & Others* [2022] ZAECMGC 6 at para 44.

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22 What this means is that the Minister of PE and Department of PE have simply not given any explanation for the late filing of the application for leave to appeal.

23 In response to the first contention, while the delay may not be excessive, the explanation therefor is far from satisfactory, and simply not adequate for this Honourable Court to consider as a suitable justification for (a) the late filing of their application for leave to appeal in the SCA, and (b) interdicting the BRP and MANGO from enforcing and executing the order granted by the Court *a quo,* for the below stated reasons.

Irregular application for special leave to appeal

24 Firstly, on the face of the application for special leave to appeal, it is unclear to NUMSA whether the Minister of PE and the Department of PE are in fact applicants before the SCA, and whether the relief sought in the Notice of Motion, accompanying their Founding Affidavit, before the SCA, is competent.

25 This is because, the Founding Affidavit of the Minister of PE and the Department of PE prays for an order in terms of the accompanying Notice of Motion, which confusingly records that the National Treasury and the Minister of Finance apply to the SCA for *inter alia* an order that the Minister of PE and the Department of PE be granted special leave to appeal.

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26 I am advised that a court order must be framed unambiguously and be practical and enforceable. It must also leave no doubt as to what the order requires to be done. This is because the order is the operative part of the judgment and what the losing party appeals against.

27 In this regard, I am advised that the Constitutional Court jurisprudence is clear that if a court issues an ambiguous and unenforceable ineffective order, the court that issued it would not have exercised its discretion properly.[2]

28 The relief in Notice of Motion attached to the Minister of PE and the Department of PE's Founding Affidavit is sought by the Minister of Finance and the National Treasury, instead of the Minister of PE and the Department of PE.

29 Neither the Minister of Finance nor the National Treasury filed an affidavit in support of its prayer for an order by SCA to grant special leave to appeal to the Minister of PE and the Department of PE. Instead, the Minister of Finance and National Treasury filed a supporting affidavit seeking separate relief in the notice of motion attached to their supporting affidavit.

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[2] *Eke v Parsons* 2016 (3) SA 37 (CC0, concurring judgment of Jafta J, paras 73 -74; *Minister of Health and Others v Treatment Action Campaign and Others (No.1)* 2002 (5) SA 703 (CC) at paras 16 – 17.

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30 I am advised that it is impermissible for the Minister of Finance and the National Treasury, on behalf of the Minister of PE and the Department of PE, to seek an order that the SCA grant special leave to the Minister of PE and the Department of PE, without an accompanying affidavit in supporting of the relief sought. As I indicated, whilst there is a supporting affidavit from the Minister of Finance and National Treasury, that is presented as a separate application in its entirety seeking independent relief in terms of a self-standing notice of motion, rendering it an absolute mystery the exact nature of the relief sought by the Finance Applicants.

31 The relief sought in the Notice of Motion accompanying the Minister of PE and the Department of PE's Founding Affidavit, before the SCA, is therefore incompetent, and there are no prospects that the SCA will grant the ambiguous and uneforceable orders sought therein.

32 Secondly, paragraph 12 of the Minister of PE's and the Department of PE's Founding Affidavit provides that the "Supporting Affidavit" of the Minister of Finance and National Treasury accompanies the Minister of PE and the Department of PE's Affidavit.

33 However, paragraphs 5 and 8 of the Minister of Finance and National Treasury's "Supporting Affidavit", indicate that the Minister of Finance and National Treasury have made their own independent application for special

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leave to appeal, seeking the relief contained in their separately attached Notice of Motion.

34 Therefore, what purported to be a single application for special leave to appeal by the Minister of PE and the Department of PE, supported by the Minister of Finance and National Treasury, is self-evidently, two separate applications for special leave to appeal by the Applicants and the Minister of Finance and the National Treasury.

35 In this regard, NUMSA is materially prejudiced by the irregular nature of the Minister of PE and the Department of PE's application for special leave to appeal, which although presented as one application was in fact two.

36 In directing NUMSA to file its notice of intention to oppose, the Notice of Motion attached to the Founding Affidavit of the Minister of PE and the Department of PE provides that it lodges its affidavit after prior service to the Minister of Finance and the National Treasury, instead of the Minister of PE and the Department of PE, within one month after service of the application.

37 Therefore there are no reasonable prospects that the SCA will condone the late filing of such an irregular application lodged by both the Applicants and the Minister of Finance and National Treasury.

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No reasonable prospects that the SCA will grant the Applicants condonation

38 Thirdly, the Minister of PE and the Department of PE ought to have collaborated with the Minister of Finance and the National Treasury, in respect of their applications for special leave to appeal, before the time period for the filing of their applications had lapsed.

39 It is precisely as a result of the Minister of PE and the Department of PE's failure to collaborate with the Minister of Finance and the National Treasury, that the above-mentioned irregularities arose, and why the SCA's Registrar refused for the Minister of Finance and National Treasury to lodge their applications without citing the Minister of PE and the Department of PE as applicants.

40 It is also apparent from Annexure A of the Minister of PE and the Department of PE's Founding Affidavit, in support of its application for condonation application before the SCA, that it was only on 16 January 2024, four days after the date on which both applications for special leave to appeal were due, that the Minister of Finance and the National Treasury enquired whether the Minister of PE and the Department of PE intended on filing their own separate application for special leave to appeal.

41 Had the Applicants collaborated with the Minister of Finance and the National Treasury, the irregularities and delay could have been avoided.

42 I am advised that there is a higher duty imposed on public litigants, as the Constitution's principal agents, to respect the law and to fulfil procedural requirements, in line with what the Constitutional Court noted *Kirkland* that, government is *"not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution's primary agent. It must do right, and do it properly."*[3] The Minister of PE and the Department of PE fell short of this duty.

43 The Minister of PE and the Department of PE are the authors of their own delay, and there are no reasonable prospects that the SCA condone the late filing of their application for special leave to appeal, in these circumstances, as they have failed to show good cause for their failure to collaborate with the Minister of Finance and National Treasury and to file their application timeously.

Condonation application is reactionary to the Registrar's refusal to lodge the special leave to appeal applications

44 Fourthly, the Minister of PE and the Department of PE contend that the application for condonation before the SCA was made within a reasonable time given the fact that the application could not be made until such time that there was finality of the application.

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[3] *MEC for Health, Eastern Cape and Another v Kirkland Investments (Pty) Ltd* [2014] ZACC 6; 2014 (3) SA 481 (CC) at para 82. *(Kirkland).*

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45 What the Minister of PE and the Department of PE fail to appreciate is that the finality of their application for special leave to appeal occurred on 15 January 2024, when it attempted to lodge the same with the SCA's registrar without (a) a condonation application, despite the delay, and (b) having collaborated with the Minister of Finance and National Treasury.

46 The Minister of PE and the Department of PE only became aware of the Minister of Finance and the National Treasury's application for special leave to appeal on 16 January 2024, as a result of an email sent by the SCA Registrar's email.

47 I am advised that this was something that the Minister of PE and the Department of PE ought to have established as soon as they had agreed on applying for special leave to appeal, and it is unacceptable that the Applicants left such critical information for the SCA's Registrar to inform them about.

48 The Minister of PE and the Department of PE's application for condonation before the SCA is therefore a reaction to the Registrar's refusal to lodge the Minister of Finance and National Treasury's applications for special leave to appeal, in that, they only then actioned the changes that were proposed in the email from the SCA's Registrar, and liaised with the Minister of Finance's legal team regarding the citation of the parties and the filing of the "supporting affidavit", as contended at paragraph 42 of their Founding Affidavit before this Honourable Court.

49 Absolutely no explanation is tendered for why these efforts only took place when the *dies* for the filing of the application had effluxed, and thus there is simply no credible explanation once again from the Applicants why the application for special leave to appeal was late.

50 The Minister of PE and the Department of PE's condonation application was therefore an afterthought, and only brought in reaction to the Registrar's refusal to lodge their irregular and delayed applications.

51 There is no good cause shown for their delay in preparing their application timeously and for not complying with the SCA rules, and accordingly there are no reasonable prospects that the SCA will condone the late filing of the Minister of PE and the Department of PE's application for special leave to appeal.

A COURT OUGHT NOT BE CONCERNED WITH THE MOTIVES OF THOSE WHO EXECUTE COURT ORDERS

52 The Applicants erroneously contend at paragraph 49 that the letter sent by the attorneys of the BRP and MANGO is *mala fide,* because section 17(2)(b) of the Superior Courts Act provides that any delay in the filing of the petition can on good cause shown, be condoned and that this provision opens the doors to a late litigant, allowing the appeal to be heard notwithstanding the lateness.

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53 I am advised that courts should ordinarily not be concerned with the motives of those who execute court orders. This is because court orders stand on their own and must be given heed to regardless of the motives of those who execute them or cause them to be obtained and executed, which may not always be honourable.

54 I am advised that the question is always whether the Sheriff or whoever is charged with executing a court order, in this instance being the BRP and MANGO, is armed with a valid warrant of execution or court order.

55 The answer to this question in this particular case is in the affirmative. The Court *a quo's* order expressly directed that the Minister of PE, within 30 days after the service of the Court order, take a decision in respect of the submitted section 54(2) application . . . failing which, *"the Applicants [MANGO and the BRP] and [SAA] may assume that the section 54(2) application has been approved by operation of section 54(3) of the PFMA."*

56 Therefore *cadit quaestio*, i.e. the issue/ question falls away.

57 Thus the 'motive' for the execution of the order is irrelevant to the validity of the order. On this score there is simply no evidence before this court that the order cannot be executed.

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58 In any event, I am advised that the Applicants have neither furnished any such evidence that the BRP and MANGO have attempted to make use of the machinery of execution for ulterior or improper purposes.

59 I am further advised that, even if the Minister of PE, and any other judgment debtor were to suffer some or other form of loss or indignity, resulting from the execution of a lawful judgment or order, such loss, it has been held *"deserves no protection from the operation of the law especially if it is a natural consequence of the judgment itself"*.

60 Therefore, court orders must be lawfully executed and should be permitted to stand in the way of that process.

61 Additionally, it is a constitutional injunction that a judgment and court order may only be interfered with or even suspended under the most stringent and very exceptional circumstances. This principle appears from section 165(5) of the Constitution, which provides that *"an order or decision issued by a court binds all persons to whom and organs of state to which it applies."*

62 The Applicants have not furnished any such evidence in support of the exceptionality of this matter.

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63 As a result of the Minister of PE's failure to take a decision within 30 days of the Court *a quo's* order, the BRP and MANGO are entitled to proceed with the transaction in terms of the Court *a quo's* order.

IT IS IN THE PUBLIC INTEREST THAT THE ORDER OF THE COURT A QUO IS EXECUTED

64 The Applicants' contention that section 17(2)(b) of the Superior Courts Act allows for condonation on good cause shown, does not mean that the Applicants have in fact shown good cause, nor does it mean that the SCA will find that they have shown good cause. As already contended, the Applicants have in fact failed to show good cause for their late filing of their application for special leave to appeal.

65 Furthermore, NUMSA has opposed the Applicants' application for condonation on grounds similar to those recorded in this affidavit and some additional ones. A copy of NUMSA's opposing affidavit to the Applicants' application for condonation is attached hereto and marked as "**LNB 1**".

66 The additional reasons for NUMSA's opposition include that:

66.1 the application for special leave has no reasonable prospect of success on appeal;

66.2 no special circumstances exist to grant leave;

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66.3 the application for special leave to appeal does not raise any discrete point of law; and

66.4 it is not in the public interest that special leave to appeal be granted.

67 I am advised that it is in fact in the public interest that the BRP and MANGO execute the order and judgment of the Court *a quo*, given that the Court *a quo* correctly held that the application should not be left in limbo.

68 The suspension of the order of the Court *a quo inter alia* directly affects the rights of NUMSA's members, who were formerly employed by MANGO, a right of Preferential Re-Employment, which only vests in the event that MANGO is purchased by a third-party investor.

69 This means that the suspension of the Court *a quo's* order will leave NUMSA's members unemployed and with little hope of securing further employment, in circumstances where the Court *a quo* correctly found that the Minister of PE's failure to determine the section 54(2) application was unlawful.

70 The Minister of PE has once again failed to determine the section 54(2) application and fortuitously seeks to rely on his legal representative's misunderstanding of the SCA Rules in order to, once again, avoid determining the section 54(2) application and to prevent the BRP and MANGO from

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relying on the section 54(3) of the PFMA deeming provision, as directed by the Court *a quo*. This cannot be permitted.

71 It is therefore in the public interest that the order of the Court *a quo* is executed so that MANGO can resume operating and NUMSA's members can realise their right of Preferential Re-Employment.

72 Furthermore, it is in the public interest that MANGO is successfully launched, as a commercially sustainable airline, which will *inter alia* have the effect of introducing competitive prices to the market.

THE MINISTER OF PE FAILED TO PERFORM HIS CONSTITUTIONAL DUTIES IN TERMS OF SECTION 237 OF THE CONSTITUTION

73 The Applicants contend that a state owned entity cannot be disposed without the oversight of the Minister of PE and the Minister of Finance, as it will have serious implications on the future of MANGO as a state owned entity.

74 The Minister of PE and the Department of PE have however failed to give an explanation for, at the very least, why the Minister of PE did not take a decision, within 30 days of the order granted by the Court *a quo*, to reject the section 54(2) application, and then apply for special leave to appeal to the SCA. I am advised that this course of action would have averted the Minister of PE from bringing this urgent application.

75 It is clear from this application that the Minister of PE's provisional view, that the submitted section 54(2) application by SAA does not contain sufficient and relevant particulars, has not changed, which means that nothing prevented him from rejecting the already submitted section 54(2) application within the specified period in the Court *a quo's* order.

76 I am advised that it could not have been the intention of the Legislature to permit the Executive Functionary, in terms of section 54(2) of the PFMA, to perpetually remain outside the scope of PAJA by way of a stratagem of providing "responses" to the effect that the supply of further information was "inadequate", "incomplete" or "did not constitute relevant particulars", which would never trigger the application of the Executive Functionary's provisional view, and in turn, would keep him beyond the purview of PAJA.

77 The Minister of PE has once again, this time in contravention of the Court *a quo's* order, failed to perform his constitutional duties with diligence and without delay, in terms of section 237 of the Constitution.

78 It cannot be the case that the Minister of PE is permitted to avoid his constitutional duties at all costs, especially when that duty does not entail a predetermined outcome. The Minister of PE was at liberty to reject the section 54(2) application within 30 days of the order of the Court *a quo*, which would have released the third party investor and the BRP from the limbo that the Minister of PE has created.

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79 This much was confirmed by the Court *a quo* at paragraph 69 of the section 18(3) judgment, which records that the Court *a quo's* order did not tie the hands of the Minister of PE to decide the section 54(2) application in a particular manner and that the Minister of PE still retained the discretion to make a decision on whether to approve the section 54(2) application. Once the Minister of PE decided, that would be the end of the process of the decision and MANGO would have to either go into business or wind up. One of these possibilities is unavoidable.

80 Therefore the Minister of PE and the Department of PE have failed to give reasons for why the Minister of PE, in contravention of his constitutional obligations, failed to take a decision in terms of the Court *a quo's* order.

THE MINISTER OF PE HAS NOT ESTABLISHED A *PRIMA FACIE* RIGHT

81 This failure by the Minister of PE to take a decision in terms of section 54(2) of the PFMA has adverse implications on his alleged *prima facie* right to have the appeal before the SCA considered.

82 By fulfilling his constitutional duty to take a decision in terms of section 54(2) of the PFMA, within the timeframe prescribed in the Court *a quo's* order, even if the decision was negative, would not have lead NUMSA to oppose the Minister of PE's application for condonation in the SCA on such strong terms.

83 This is because, the state of limbo within which NUMSA argued that the BRP, NUMSA's members, and the third party investor had been forced into by the Minister of PE, would have fallen away. This submission was strongly argued by NUMSA before the Court *a quo*, and the Court *a quo* aligned itself with this submission.

84 The Court *a quo* at paragraph 43 of the section 18(3) judgment recorded that the BRP and MANGO had submitted that there was evidence before it that the Minister of PE's reasons for pursuing an appeal was to obtain legal certainty about how the section 54(2) provision of the PFMA ought to operate. The legal certainty could still be obtained in circumstances where the Minister of PE would have rejected the section 54(2) application.

85 The Minister of PE, in full knowledge that the Court *a quo* had aligned itself with NUMSA's submission, still failed and/or refused to do away with the offending scenario, and instead seeks to peg his failure to take a decision, in contravention of section 237 of the Constitution, and his *prima facie* right, on the mere misinterpretation of the SCA rules.

86 I am advised that this is unsatisfactory in the absence of a sound explanation.

THE COURT A QUO ORDER INCLUDED A DEEMING PROVISION IN RECOGNITION OF THE INHERENT URGENCY ASSOCIATED WITH INSOLVENCY RELATED CASES

87 The Minister of PE and the Department of PE contend that the Court *a quo's* refusal of the section 18(3) application by MANGO and the BRP appreciated the seriousness of the implications and the irreversibility of the implications of allowing the BRP to sell MANGO whilst an appeal was pending.

88 This is incorrect, the Court expressly held at paragraphs 69 and 70 that the order of the Court *a quo* did not tie the hands of the Minister of PE and that he still retained the discretion to make a decision on whether or not to approve the application. The Court also specifically held that it did not think that the issue of prejudice arises on the part of the State Respondents, because the Minister of PE was directed to consider what was before him and make a decision that he deems just in the circumstances.

89 The Court *a quo's* order contains a deeming provision, premised on section 54(3) of the PFMA, affording the BRP and MANGO the right to assume that the section 54(2) application, lodged before him, had been approved upon no decision having been taken by the Minister of PE within the prescribed 30 days in the order.

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90 The Minister of PE is well aware of the deeming provision contained in the Court *a quo's* order.

91 I am advised that the deeming provision contained in the Court *a quo's* order recognises the speedy manner in which the decision-making process has to be made in terms of section 54(2) of the PFMA and the inherent urgency associated with insolvency-related cases.

92 The Court at paragraph 74 of the section 18(3) judgment held that because two possibilities await MANGO, either to be saved or liquidated, there was a demand that finality be reached and that it was incumbent on all the parties involved to allow the inherent urgency to inform their conduct and cooperate to the greatest extent possible to bring finality to the Business Rescue Proceedings that are connected to the section 54(2) application.

93 Notwithstanding the deeming provision being contained in the order of the Court *a quo*, the Minister of PE still chose not to take a decision, in terms of section 54(2) of the PFMA.

94 I am advised that an adverse decision in terms of section 54(2) of the PFMA would have prevented the application of the deeming provision contained in the Court a *quo's* order.

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95 The Minister of PE, having failed to take such a decision, cannot now be permitted to come before this Honourable Court to seek urgent relief suspending the application of the deeming provision, when he did nothing to mitigate its application and enforcement, and in spite of the Court holding that finality be reached in respect of MANGO's two possibilities.

96 This Honourable Court should not come to the aid of the Applicants in circumstances where they have intentionally disregarded the petition of this Honourable Court to treat this matter with the requisite urgency, and to cooperate to the greatest extent possible to bring finality to the Business Rescue Proceedings that are connected to the section 54(2) application.

URGENCY IS SELF-CREATED

97 The Minister of PE and the Department of PE seek to argue that the urgency of this application originates from the letter sent by the BRP and MANGO on 31 January 2024.

98 I am advised that this is incorrect. The real urgency has always rested on the deeming provision contained in the Court *a quo's* order, which became operative on 12 January 2024, and which has always been forceable.

99 Between 15 January 2024, when the Applicants' allege that they came to the realisation that they had procedural problems in lodging of their applications for special leave to appeal, and 18 January 2024, when they eventually

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served their applications on the Respondents, the Minister of PE had still not taken a decision in terms of the Court *a quo's* order, despite the fact that it had now become apparent to them that the (a) time period within which they had to institute their applications had lapsed, and (b) deeming provision contained in the Court *a quo's* order had become operative.

100 As already stated, the Minister of PE and the Department of PE have been legally represented throughout these proceedings, and it cannot be that they are permitted to feign the ability to read and interpret the effects of the Court *a quo's* order by seeking to create artificial geneses of urgency.

101 This application would have been avoided had the Minister of PE and the Department of PE had the intention to comply and engage with the *Court a quo's* order genuinely and meaningfully.

102 It is apparent from all of the preceding grounds of NUMSA's opposition that the Minister of PE and the Department of PE never truly sought to engage with the effects of the Court *a quo's* order, nevermind comply with it.

103 This if further evident from the Applicants' artificial bases for the urgency of this application, which are all directed at the conduct and intention of the BRP and MANGO, who at all times acted in compliance with the Court *a quo's* order.

104 I am advised that the Minister of PE and the Department of PE's failure to engage with, and correctly interpret the effect of the Court *a quo's* order, cannot be overlooked in determining the issue of urgency.

105 The Minister of PE and the Department of PE have failed to provide any reason as to why the Minister of PE did not, between 15 January 2024 and 18 January 2024, take a decision, in terms of section 54(2) of the PFMA and the Court *a quo's* order, in full knowledge that the deeming provision was then applicable.

106 It is not sufficient for the Applicants to contend and suggest that the BRP and MANGO's letter dated 31 January 2024 made them alive to the operation of the Court *a quo's* deeming provision contained in its order.

107 Accordingly, the alleged urgency of this application is self-created by the Applicants' refusal to comply and engage with the Court *a quo's* order at any cost.

108 Therefore this application ought to be struck off the roll for lack of urgency.

AD SERIATIM RESPONSES AND CONCLUSION

109 I have not answered ad seriatim the averments in the Minister of PE and the Department of PE's application. I can state categorically however that the tendered explanation regarding the *dies non* and the Applicants' failure to

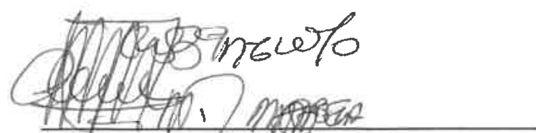
coordinate their efforts in filing this application before the expiry of the prescribed time periods, combined with the fact that the Minister of PE and the Department of PE have failed to provide any reasons for the Minister of PE's failure to abide by the Court *a quo's* order, pending their application for special leave to appeal, means it must be dismissed.

110 I deny any assertion to the contrary.

111 Accordingly, this application ought to be dismissed with costs, including the costs of two counsel.

DEPONENT

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at Sandton on this the 20 day of **FEBRUARY 2024**, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended by R1648 of 19 August 1977, and as further amended by R1428 of 11 July 1989, having been complied with.



COMMISSIONER OF OATHS

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IN THE SUPREME COURT OF APPEAL SOUTH AFRICA

SCA CASE NO: 083/2024

COURT A QUO CASE NO: 010700/2023

In the matter between:

THE MINISTER OF FINANCE	First Applicant
NATIONAL TREASURY	Second Applicant
THE MINISTER OF PUBLIC ENTERPRISES	Third Applicant
THE DEPARTMENT OF PUBLIC ENTERPRISES	Fourth Applicant

and

MANGO AIRLINE SOC LIMITED *(In Business Rescue)*	First Respondent
SIPHO ERIC SONO N.O.	Second Respondent
NATIONAL UNION OF MINEWORKERS OF SA	Third Respondent
INTERNATIONAL AIR SERVICE COUNCIL	Fourth Respondent
THE AIR SERVICE LICENSING COUNCIL	Fifth Respondent
SOUTH AFRICAN AIRWAYS	Sixth Respondent

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THE AFFECTED PERSONS OF MANGO AIRLINES SOC LIMITED Seventh Respondent

(In Business Rescue)

FILING SHEET

KINDLY TAKE NOTE THAT the Third Respondent hereby presents for filing:

1. NUMSA' answering affidavit opposing condonation.

DATED AT Bloemfontein **ON THIS THE** 19th **DAY OF FEBRUARY 2024.**

J Le Riche

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AND TO: **STATE ATTORNEY PRETORIA**

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ButheleziL@dotgiv.za

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AND TO: **SOUTH AFRICAN AIRWAYS SOC**
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OR Tambo International Airport
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MJLamola@flyssa.com
FikileMhlonto@flyssa.com

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AND TO: THE AFFECTED PERSONS OF MANGO AIRLINES SOC LTD

(IN BUSINESS RESCUE)

Seventh Respondent

ORIGINAL

IN THE SUPREME COURT OF APPEAL SOUTH AFRICA

SCA CASE NO:

COURT A QUO CASE NO: 010700/2023

In the matter between:

THE MINISTER OF FINANCE	First Applicant
NATIONAL TREASURY	Second Applicant
THE MINISTER OF PUBLIC ENTERPRISES	Third Applicant
THE DEPARTMENT OF PUBLIC ENTERPRISES	Fourth Applicant

and

MANGO AIRLINE SOC LIMITED *(In Business Rescue)*	First Respondent
SIPHO ERIC SONO N.O.	Second Respondent
NATIONAL UNION OF MINEWORKERS OF SA	Third Respondent
INTERNATIONAL AIR SERVICE COUNCIL	Fourth Respondent
THE AIR SERVICE LICENSING COUNCIL	Fifth Respondent
SOUTH AFRICAN AIRWAYS	Sixth Respondent

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THE AFFECTED PERSONS OF MANGO AIRLINES SOC LIMITED Seventh Respondent
(In Business Rescue)

ANSWERING AFFIDAVIT OPPOSING CONDONATION

I, the undersigned

LESEGO NOXOLO BOEMO

do hereby make oath and state that:

1 I am an admitted attorney of the High Court of South Africa. I am employed as an Associate at Boqwana Burns, NUMSA's attorneys of record in this matter.

2 As the attorney charged with managing the litigation of this matter, the facts contained herein fall within my personal knowledge. They are true and correct unless otherwise stated or where the contrary appears from the context.

3 Given my role as the responsible attorney dealing with this matter, I am also authorised to depose to this affidavit.

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4 I have read the applicants' condonation applications for the late filing of the application for leave to appeal and respond thereto on NUMSA's behalf on the terms set out in this affidavit.

5 Where I make submissions of a legal nature, I do so based on my own experience and in consultation with NUMSA's legal team.

6 The purpose of this affidavit is to oppose the applicants' application to condone the late filing of the application for leave to appeal. The Minister of Finance and National Treasury ("the Finance Applicants") seek condonation for the late filing of the application appeal in their 'supporting affidavit', whilst the Minister of PE and the Department of PE have brought a separate application seeking to condone the late filing of the application. NUMSA opposes both.

7 I point out that while the delay may not be excessive, the explanation therefor is far from satisfactory, and simply not adequate for this court to condone the late filing of the application for leave to appeal. The reason proffered by the Minister of PE and Department PE is first, the assertion that they laboured under the impression that dies non applies to an application for special leave, and second, the ill-advised insistence that this is indeed the case.

8 The Minster of PE and Department PE have been legally represented through these proceedings. It is a trite principle that the dies non periods only apply

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to affidavits and pleadings. No dies non period is provided for applications for leave to appeal under section 17 of the Superior Court Act, 2013. What this means is that the Minister of PE and Department of PE have simply not given any explanation for the late filing of the application for leave to appeal. On this basis alone, the application for leave to appeal must be dismissed.

9 For its part the Minister of Finance and National Treasury contend that their application was filed late because the Registrar would not accept the application within the prescribed time periods since they cited the Minister of PE and Department of PE, as respondents and not co-applicants. They contend further that they had no power to cite the Minister of PE and Department of PE as co-applicants since they could not determine for the latter whether they intended to bring an application for leave to appeal.

10 But what transpired after the time period for the filing of the application for leave to appeal lapsed, is telling. The state applicants coordinated their efforts with the Minister of PE and Department of PE initiating the application for leave to appeal and the Finance Applicants filing a 'supporting affidavit'.

11 Absolutely no explanation is tendered for why these efforts only took place when the *dies* for the filing of the application effluxed, and thus there is simply no credible explanation once again from any of the applicants why the application for leave to appeal is late.

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12 While it is also a trite principle that good prospects on the merits may compensate for a poor explanation for the delay, there is little significance to the application of this principle because the application for special leave has no reasonable prospect of success on appeal. Further, no special circumstances exist to grant leave. The application for leave does not raise any discrete point of law. If leave is refused it means simply that the MPE and MoF must decide the section 54(2) application and consequently there is no manifest injustice that will transpire. Lastly, it is simply not in the public interest for leave to appeal to be granted, and the application itself lacks prospects of success.

13 The learned judge a quo correctly found that the Minister of PE failed to decide the section 54(2) application. He correctly set aside this failure, and directed that a decision is made on the application, failing which the deemed approval, as set out in section 54(3) of the PFMA would take effect. There is no merit to the argument that the application was submitted by the BRP and thus invalid. The facts show that the application was submitted by SAA, albeit that the Amended Business Rescue Plan empowered the BRP to submit the section 54(2) application. Since the application was on the facts submitted by the Board of SAA, there was compliance with section 54(2), and simply no appealable point on this issue.

14 Further, there is no reasonable prospect that an appellate court will find NUMSA had no standing to intervene in the urgent application. NUMSA

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intervened in the interests of its members to enforce their rights under clause 10 of the Retrenchment Agreement, which vests its members with a right of first refusal to employment in the event that the Amended Business Rescue plan is successfully implemented and a Strategic Equity Partner found for Mango. NUMSA thus pleaded its direct and material interest in the outcome of the litigation and also its broad and general standing under section 38 of the Constitution.

15 It is an established principle that once a legal interest is demonstrated, which is what NUMSA showed, then the court a quo would have had no discretion on granting NUMSA leave to intervene as a party to the application. There is no reasonable prospect that this finding will be overturned on appeal.

16 For these reasons, as well as the opposition as pleaded in the main answering affidavit, the application for leave to appeal has no reasonable prospects of success. This together with the absence of any credible explanation for the delay means that condonation for the late filing of the application should be refused.

17 I have not answered ad seriatim the averments in the separate condonation application for the Minister of PE and Department of PE and the Finance Applicants condonation application. I cannot attest to what transpired on the facts leading to the lateness of the application. I can state categorically however that the tendered explanation regarding the dies non and the

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applicants' failure to coordinate their efforts in filing this application before the expiry of the prescribed time periods, combined with the fact that the application lacks prospects of success, means it must be dismissed. I deny any assertion to the contrary.

18 I must point out that NUMSA is also materially prejudiced by the irregular nature of the application for leave to appeal, which although presented as one application is in fact two. In directing NUMSA to file its notice of intention to oppose, the Notice of Motion attached to the Founding Affidavit of the Minister of PE and the Department of PE provides that it lodges its affidavit after prior service to the Minister of Finance and the National Treasury, instead of the Minister of PE and the Department of PE, within one month after service of the application.

19 On the face of the application, it is unclear to NUMSA whether the Minister of PE and the Department of PE are in fact applicants before this Honourable Court, and whether the relief sought in the Notice of Motion accompanied to their Founding Affidavit is competent.

20 In sum, the Minister of PE and the Department of PE and the Finance Applicants ought to have collaborated in respect of their applications before the time period for the filing of the application for leave to appeal effluxed.

21 It is precisely as a result of the Applicants failure to collaborate with each other, that all of the above-mentioned irregularities have arisen, and why this

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Honourable Court's Registrar refused for the Applicants to lodge their applications for the reasons stated in the email exchanges attached to the Minister of PE and the Department of PE's application for condonation.

22 At paragraph 88 of the Finance Applicants' supporting affidavit, they aver that on 16 January 2024, this Honourable Court's Registrar refused to lodge their application for leave to appeal on the basis that they had cited the Minister of PE and the Department of PE as respondents, and that they had no authority to cite them as co-applicants.

23 This again is evidence that the Applicants' failure to collaborate with each other has resulted in this delay and confusion.

24 It is also apparent from Annexure A of the Minister of PE and the Department of PE's Founding Affidavit, that it was only on 16 January 2024, a day after the date on which both applications for leave to appeal were due, that the Finance Applicants enquired whether the Minister of PE and the Department of PE intended on filing their own separate application for leave to appeal.

25 Had the Applicants collaborated with each other, the irregularities and delay could have been avoided.

26 I am advised that there is a higher duty imposed on public litigants, as the Constitution's principal agents, to respect the law and to fulfil procedural

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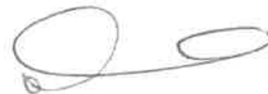
requirements, in line with what the Constitutional Court noted *Kirkland* that, government is *"not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution's primary agent. It must do right, and do it properly."*[1] The Applicants have fallen short of this duty.

27 The Applicants are therefore the authors of their own delay, and both applications ought to be dismissed on this basis.

28 In any event, the Applicants have failed to meet the threshold set out in section 17(1)(a)(i) of the Superior Courts Act, and that no compelling reasons exist to grant leave.

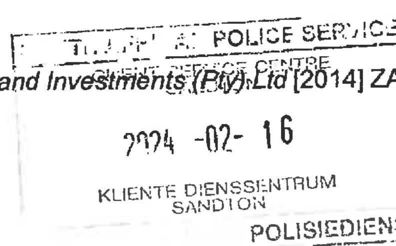
29 On this basis too, both applications for condonation ought to be dismissed.



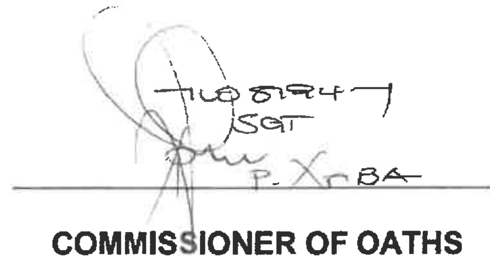
DEPONENT

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at Gallo Manor

[1] *MEC for Health, Eastern Cape and Another v Kirkland Investments (Pty) Ltd* [2014] ZACC 6; 2014 (3) SA 481 (CC) at para 82. *(Kirkland).*



on this the 16th day of **FEBRUARY 2024**, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended by R1648 of 19 August 1977, and as further amended by R1428 of 11 July 1989, having been complied with.



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