

THE SUPREME COURT OF APPEAL OF

SOUTH AFRICA

SCA CASE NO:083/2024

COURT A QUO CASE NO: 010700/2023

In the matter between:

**THE MINISTER OF PUBLIC
ENTERPRICES**

First Applicant

**THE DEPARTMENT OF PUBLIC
ENTERPRISES**

Second Applicant

MINISTER OF PUBLIC ENTERPRISES

Third Applicant

DEPARTMENT OF PUBLIC ENTERPRISES

Fourth Applicant

and

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

First Respondent

SIPHO ERICSONO N.O

Second Respondent

**NATIONAL UNION OF METALWORKERS
OF SOUTH AFRICA**

Third Respondent

SOUTH AFRICAN AIRWAYS SOC LTD

Fourth Respondent

**THE INTERNATIONAL AIR
SERVICE COUNCIL**

Fifth Respondent

C/O STATE ATTORNEY: BLOEMFONTEIN

Fedsure Building, 11th Floor

149 Chlotte Maxeke Street

BLOEMFONTEIN, 9301

Email: CoCronje@justice.gov.za

Enq: Nelise Cronje

**TO: THE REGISTRAR OF THE HIGH COURT
PRETORIA**

**AND TO: BOQWANA BURNS INC,
Attorneys for the 3rd Respondent**

1st Floor, 357 Rivonia Boulevard Rivonia

Ref: Mr B Murison/az/BOO492

Tel: 011 234 9519

Email: brett@boqwanaburns.com / rumentha@boqwanaburns.com

c/o: PH ATTORNEYS

35 Markgraaff Street

Westdene

Bloemfontein

9301

Email: bianca@phinc.co.za

**AND TO: BOWMANS GILFILLIAN INC.
Attorneys For the 1ST & 2ND Respondents**

11 Alice Lane

SANDTON

Tel: (011) 669 9000

THIN 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
ENTERPRISE**

Fourth Applicant

And

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

First Respondent

SIPHO ERICSONO N.O

Second Respondent

**NATIONAL UNION OF MINEWORKES
OF SA**

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
(IN BUSINESS RESCUE)**

Nineth Respondent

NR



**THIRD AND FOURTH APPLICANT'S REPLYING AFFIDAVIT TO THE THIRD
RESPONDENTS ANSWERING AFFIDAVIT**

I, the undersigned:

MAXWELL MATUBATUBA

Do hereby state as follows:

1. I am an adult male practicing Attorney, practising as such at the offices of the State Attorney, Pretoria, situated at SALU Building, 255 Schoeman Street, Pretoria.
2. Save where specifically stated or where the context indicates otherwise, I have personal knowledge of the facts stated herein; or, I have ascertained and determined them from documents in the possession of and/or under the control of the Applicant. I confirm that the facts referred to herein are true and correct.
3. Where I make submissions of a legal nature, I do so on the advice of the Applicant's legal representatives.
4. I have read the answering affidavit filed on behalf of the Third Respondents and I respond thereto below. I do not intend to address every allegation. Allegations in the answering affidavit that are inconsistent with the content of the founding affidavit and what is set out herein, must be taken to be denied.

AD PARAGRAPH 6 TO 29 THEREOF

5. There is a concerted effort, on the part of the Third Respondent, to ensure that the substance of the case is obfuscated by considerations of form. The effort manifests by way of an objection, *in limine*, raising complaints with the irregularities with the application for leave to appeal.
6. The Third and Fourth Respondents have filed a founding affidavit and the First and Second applicants have filed a supporting affidavit.
7. On 16 January 2024, I was informed by our correspondent attorney, Ms Cronje that the Registrar was in possession of the Minister of Finance and National Treasury's application for leave to appeal:
 - 7.1. *"Leave to appeal was refused against the Minister of DPE and the Department of Public Enterprise, why are they cited as Respondents? This will have a cost implication on them should the appeal succeed."*
8. At this point, it became apparent that the Minister of Finance and the Department of Treasury had similarly instituted appeal proceedings. As a matter of urgency, we had to incorporate the changes proposed in the email and liaise with the First and Second Applicants with regard to citation of the parties and the filing of their supporting affidavit to our main application.
9. The face of the application for leave to appeal reads as follows:

NR



"The Minister of Finance and National treasury, the Minister of Public Enterprise Notice for Special Leave to Appeal. It logically follows that the applicants seeking special leave to appeal both, seek the relief as set out in the application".

10. I deposed to the founding affidavit in the special application for leave to appeal on behalf of the Minister of PE and the Department of PE and the Minister of Finance and National Treasury have filed a supporting affidavit. The founding affidavit does not exceed the required number of pages.
11. The relief set out in the special application for leave to appeal is the same as the relief set out in Minister of Finance and Treasury's supporting affidavit, and such the relief sought is unambiguous and capable of implementation.
12. Although the procedural concerns raised by Numsa are not being undermined, the Applicants submit that the real question is about prejudice and the interests of justice. The interest of justice leans in favour of having the merits of the leave to appeal being considered and determined by the Court.

AD PARAGRAPH 28 TO 33 THEREFORE

13. The request for condonation by Numsa is not opposed.

AD PARAGRAPH 37 TO 57 THEREOF

14. The relief sought by Numsa was grounded on the basis that the alleged dilatory conduct by the Minister of PE contravenes section 237 of the Constitution, the

principle of legality and PAJA and that the delay will most likely be the proximate cause of any decision to wind down Mango should the business rescue fail. The review relief sought by Numsa was premature, primarily because the Minister of PE had made a request for additional information and the accounting authority, SAA had undertaken to provide him with the required information. No reviewable decision had been made as yet.

15. Section 54 (2) requires that a public entity seeking to significantly alter or dispose of its significant shares first obtain ministerial consent or permission prior to such a disposal. Section 54(2) application is governed by the PFMA which makes provisions for the accounting authority to institute the section 54 (2) application. Further section 49(3) requires exceptional circumstances and consent or the instruction of the treasury to authorise the BRP to act as the accounting authority, all which is absent in the present case.
16. It lies on SAA if it is dissatisfied with the decision or lack thereof of the Minister of PE to seek any relief available in law to challenge the decision or indecision of the Minister of PE. Even so, before SAA can challenge the decision or indecision, it is enjoined in terms of section 41(3) of the Constitution and the incidental applicable legislation to exhaust all other remedies before it approaches a court to resolve a dispute *inter partes*.
17. The court *a quo* essentially extended the interpretation of section 54 (2) to include *any other interested party with direct and substantial interest in the section 54(2) process* (own emphasis) despite the unambiguous intention of the legislature to limit the application of section 54 (2) to accounting authorities.

NR



18. Numsa therefore lacked the requisite *locus standi* to institute the proceedings against the Minister of PE and it was not entitled to the review relief granted.

AD PARAGRAPH 58 TO 97 THEREOF

19. Numsa is correct that in the letter dated 28 October 2022¹ the board of SAA took responsibility of the process for the submission for the section 54 (2) application; however, the same letter records that SAA undertook to furnish the outstanding information required by the Minister of PE. This undertaking was in line with the statutory context of the PFMA.

20. The Board of SAA then acceded to provide the Minister of PE with additional information for him to make a determination on the section 54(2) application. Whilst waiting for the resubmission and correction of the concerns raised in the section 54 (2) application, the BRP and Mango instituted urgent proceedings before the High Court, compelling the Minister of PE to make a determination on the section 54(2) application.

21. It follows that there is no *lis* between the Minister of PE and the BRP. SAA is enjoined to take all steps necessary to ensure compliance with the provisions of section 54(2).

22. There is no conflict between the case presented by National Treasury and that of the Minister of PE and the Department of PE, both parties maintain that the PFMA prevails over the Companies Act in case of a conflict.

¹ Case lines Record: Volume 015-108, paragraph 198.

NR



23. In terms of section 54 (2) of the PFMA the accounting authority of SAA is required to make application to the Minister of PE. The submission of the said application is the exclusive competency of the board of SAA. This must be read with section 49 (3) of the PFMA which requires the consent of National Treasury to authorise another entity i.e., the BRP to assume the role and functions of another accounting authority envisaged in the PFMA. This has not happened in *casu*.
24. The National Treasury has not authorised the BRP to submit nor challenge the Minister of PE's decision in respect of the section 54 (2) application.
25. Notwithstanding this, the learned judge erroneously found that the BRP was entitled to submit the section 54 (2) application. This approach, we submit, is not in harmony with the objects and spirit of the PFMA. This finding is further inconsistent with the rule of law and the principle of legality in that, it is the SAA and not the BRP that is entrusted with the power to bring an application in terms of section 54(2) and the relevant provision of the PFMA does not permit any delegation of that power to the BRP.
26. The BRP enjoys certain powers during the business rescue proceeding, these powers however, do not extend or apply beyond the scope of the Companies Act.

AD PARAGRAPH 98- 131 THEREOF

27. At paragraph 168 of the judgment *a quo* the court found that it is unable to enter the terrain of the Minister and decide whether the application brought by the Applicants was valid and complete. The court then concluded that such a determination was the exclusive province of the Minister, and not the court.

NR



28. The Learned Judge correctly found that the Minister is entitled to request additional information as empowered by section 54(1) and section 50(1)(c).
29. On the concession of the accounting authority to provide the Minister with the requested information, the process had not yet reached finality. The Minister would have been entitled upon response by the board of SAA to make any decision with regards to the section 54 application.
30. Clearly the Minister could not have rationally and validly applied his mind to the application. It is imperative that the Minister has full and complete information to exercise effective oversight, and in appreciation of this obligation, SAA undertook to comply with the Minister's request.
31. A request for further information does not constitute a decision that is reviewable by PAJA, only a decision whether to accept or reject an application may be reviewed in terms of PAJA. Further the information requested is to enable the PE minister to efficiently exercise his oversight, and only once a decision is taken can a review procedure apply.
32. Numsa was therefore not entitled to the review relief.

WHEREFORE the third and the fourth applicants persist with the relief set out in the Notice of Motion.

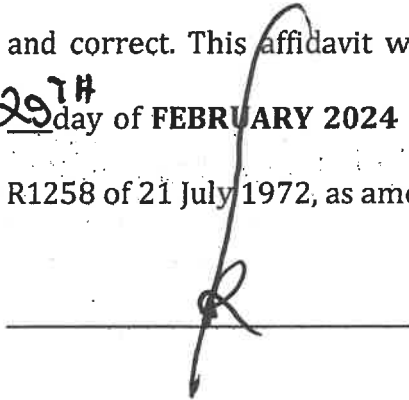
NR





DEPONENT

I hereby certify that the deponent declares 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 PRETORIA on this 29TH day of **FEBRUARY 2024** and that the Regulations contained in Government Notice R1258 of 21 July 1972, as amended, have been complied with.



COMMISSIONER OF OATHS

FULL NAMES:

NYIKO RONALD BALOYI
COMMISSIONER OF OATHS EX OFFICIO
PRACTISING ATTORNEY
PRETORIA, RSA
CELL: 073 220 2896
FAX: 086 666 1436
Email: ronaldn@mailbox.co.za

CAPACITY:

AREA: