



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED

2021.03.19

DATE


SIGNATURE

CASE NUMBER: 40858/19

DATE: 19 March 2021

ZIPHIWO MADODODWA MHLWANA
ZWELAKHE NTSHEPE

First Applicant
Second Applicant

V

DENEL SOC LTD

Respondent

JUDGMENT

MABUSE J

[1] In this application the two Applicants, Mr Ziphiwo Madododwa Mhlwana, the First Applicant, and Mr Zwelakhe Ntshepe, the Second Applicant, seek the following order:

- "1. That the resolution taken on 30 November 2017 regarding payments buying out the Applicants from their permanent employment constituted a binding agreement on the Respondent;

2. *That the Respondent is compelled to pay the First and Second Applicants an amount of R7m and R8.4m respectively in accordance with this resolution;*
3. *That the abovementioned amounts be paid within 7 days of this order;*
4. *That interest shall accrue on this amount at a legal rate from 30 November 2017 to date of payment."*

[2] The First Applicant was employed by the Respondent at its head office in Pretoria as a Group Chief Financial Officer (GCFO) while at the same time the Second Applicant was employed as a Group Chief Executive Officer (GCEO) of the Respondent. The Respondent, Denel Soc Ltd, is a state owned company. For purposes of brevity I shall refer to the Respondent herein as "Denel".

[3] The Purpose of this application is to seek an order in terms of which Denel is compelled to pay certain amounts specified in a notice of motion to wit R7m to the First Applicant and R8.4m to the Second Applicant in accordance with the resolution of the Board of Directors taken on 30 November 2017.

[4] On grounds set out in the answering affidavit and repeated in the counsels' heads of argument, Denel refuses to pay the said amounts to the Applicants. I will revert to the said grounds when I deal with Denel's answering affidavit.

THE BACKGROUND

[5] On 10 October 2006, the First Applicant was appointed as Chief Financial Officer (CFO) by BAE Land Systems ("BAE") which was, at that material time, owned by a British company called by that name.

[6] In 2015, BAE sold its South African subsidiary, BAE Land Systems South Africa, to Denel as a going concern. Following such sale, Denel became the Applicants' employer, according to

the Applicants, in terms of the provisions of s 197 of the Labour Relations Act 66 of 1995 ("the LRA").

- [7] BAE Land Systems South Africa then changed its name to Denel Vehicle Systems and became Denel's operating division.
- [8] Between April 2015 and September 2015 the First Applicant became a Divisional CFO for Denel. This meant that the First Applicant's permanent employment status was transferred to Denel.
- [9] During September 2015 Denel's GCFO was placed on suspension. In his absence or during his suspension, the First Applicant took up his position and became, albeit on an interim basis, Denel's Acting GCFO. The said suspended GCFO had, before his suspension, been approved on a permanent basis as GCFO. Prior to his suspension, Denel had entered into, and concluded, negotiations with him in terms of which his permanent employment was converted into a fixed 5 years' period appointment. The said suspended GCFO never resumed his duties because Denel and him decided mutually to terminate his employment.
- [10] At a meeting of Denel held on 7 June 2017, Denel's board adopted a resolution that permanent employment of certain employees be converted to fixed term employment in order to maintain a single contracting regime. The advantage of such a contracting regime was that the conversion would allow a negotiated and mutually agreed basis for the termination of permanent contracts. Their negotiations would, moreover, be conducted on a case-by-case basis. As on 7 June 2017, the First Applicant's earnings were R3,285,612.60.
- [11] Around March 2017 the process of filling up the post of GCFO permanently started. The First Applicant was one of those who was shortlisted to be interviewed. He was successful at the interview. He came out as a preferred candidate to be appointed Denel's full time GCFO. The First Applicant states that when Denel offered him the position of the GCFO, he

begged the board of Denel to enter into negotiations with him about how to deal with his permanent employment with Denel in the light of the fact that he did not want to give up his employment for the purpose of taking up a fixed term contract of employment with Denel failing such an agreement. He then informed Denel to offer the employment on a fixed term employment to another deserving candidate. Instead, Denel chose to offer him the position of the GCFO and to deal with the aspect that he was a permanent employee.

- [12] On 1 June 2017 Denel offered the First Applicant the employment at Denel Corporate Office on a fixed basis commencing on 1 June 2017 and ending on 31 May 2022 with a basic salary remuneration of R5,000,000.00 excluding the permanent bonus.
- [13] Following the said offer of the role of the GCFO, Denel and the First Applicant reached an agreement in terms of which his permanent employment as a Divisional CFO was converted in order to enable him to take up the role of the GCFO for a fixed period of 5 years. The First Applicant contends that by agreeing to converting his Divisional CFO position to enable him to become GCFO for a fixed period of 5 years, Denel was buying him out of his permanent employment as a Divisional CFO of its subsidiary.
- [14] Subject to the approval of the Board, the First Applicant and a certain Lungisane Daniel Mantsha ("Mr Mantsha") concluded an agreement in terms of which Denel would buy him out of his permanent employment contract and pay him 12 months' remuneration at a rate of his earnings of R3,285,612.00. The conversion from permanent to fixed term contract was to take place on 1 June 2017 when the First Applicant took up the position of the GCFO.
- [15] On 7 June 2017 a 5 year fixed employment contract was entered into by and between Denel, represented by Mr Mantsha, and the First Applicant. Clause 3.1 fixed remuneration of the Applicant for a total remuneration of R5,000,000.00 and 50% representing performance based pay as set out in clause 3.2.

- [16] On 7 June 2017 the board took a resolution adopting the conversion of the First Applicant's employment contract from permanent to fixed term and to pay him a 12 months' separation payment, among others, as permanent contract termination.

THE TERMS

A copy of the minutes is annexed to the founding affidavit as Annexure '004'.

- [17] The agreement to agree to a 12 months' payment for the conversion was because of the salary offer made in accordance with the employment contract entered into between Denel and the First Applicant, on 7 June 2017 which set the First Applicant's salary as at R5,000,000.00.
- [18] On 8 June 2017 Vuyo Kazi Xaxa, the Company Secretary, of the board and Group Legal Executive of Denel, wrote an email to Natasha Davis, the Humans Relations Director at Denel and informed her of the resolution of the board of Denel taken on 7 June 2017. This is the resolution that confirmed the conversion of the permanent contract to a fixed term contract and signed offer for fixed term copy of the email is attached as Annexure '005'.
- [19] At the end of June 2017 Denel paid the First Applicant an amount equivalent to the 12 months' remuneration in accordance with the resolution of 7 June 2017.

[20] **MEMORANDUM OF INCORPORATION**

- 20.1 Clause 13.3 of the Memorandum of Incorporation deals with the process of the appointment of the CEO and CFO of Denel.
- 20.2 Clause 13.3.1 states that the board shall identify, nominate, and evaluate potential candidates for appointment at the CEO in accordance with the guidelines.
- 20.3 Clause 13.3.2 provides that the shareholder shall appoint the CEO from a shortlist of candidates provided by the board in accordance with the Guidelines.

20.4 Clause 13.3.3 states that the board shall identify, nominate, evaluate, and appoint a candidate for appointment of CFO providing that the shareholder shall approve such appointment in writing.

[21] After the appointment of the Applicants, it was mandatory for the chairperson to inform the Minister in writing of the appointment and seek her to endorse their appointment in terms of clause 13.3.3 of the MOI.

[22] Although the Applicants had no proof that the chairman had done so, they are adamant that he did so following the response from the Minister attached to the founding affidavit in which the Minister approved the appointment of both applicants, the First Applicant as GCFO and the Second Applicant as GCEO, both for a fixed term of 5 years.

[23] The Minister approved the Applicants' appointments but not their salaries. Instead, she suggested the salaries of R3,500,000.00 for the First Applicant and R4,500,000.00 for the Second Applicant. The First Applicant was aware of the contents of the said letter.

[24] The First Applicant was unhappy about the remuneration approved or suggested by the Minister for him and the Second Applicant. He then approached Mr Mantsha again to open negotiations about his pay out in relation to the conversion of his permanent appointment. He raised his complaints with Mr Mantsha who undertook to escalate them to the board.

[25] The board convened a meeting on 30 November 2017. The purpose of the meeting was twofold:

25.1 the first purpose was to consider and approve the conversion of the permanent appointment of the Second Applicant as he was taking up his appointment as the GCEO;

25.2 the second purpose was to formally consider and approve the remuneration of the new GCEO and GCFO and as well as their conversion proposition of permanent contracts

to fixed term contracts for the two executive directors in line with the resolution of 7 June 2017.

- [26] At the said meeting of 30 November 2017, the board approved the proposals that the First Applicant be paid an additional 24 months' separation pay out which totaled R7m and the Second Applicant's R8.4m for the full 36 months. The board further resolved that that resolution be implemented immediately. The minutes of the 30 November 2017 meeting showed the following entry:

"Important to note is that Mr Mhlwana's guaranteed package at DVS as a Divisional CFO was R3.5m. The board deliberated on this matter and highlighted that, it is unfair and an injustice to expect Mr Mhlwana to accept the R3.5m now approved by the shareholders without any other compensation to the incumbent. As GCFO he is taking more responsibility than he was as a divisional CFO, and the board is thus inclined to approve R7m referred to in the foregoing paragraph."

The foregoing paragraph of the minutes reads as follows:

"The GCS did further confirm that the GCEO and the GCFO did receive acting allowances during their acting tenures in line with Denel policy."

- [27] The First Applicant states that at the time the board took its resolution of 30 November 2017, he was going through difficult financial times. Notwithstanding that, he and the Second Applicant, based on the ordeals with financial position, resolved not to request immediate payment of their monies. They wanted Denel to recover first financially before they could ask for or demand the payments from Denel in accordance with the resolution of 30 November 2017.

- [28] Any payment to them of any money in keeping with the resolution of 30 November 2017 was overtaken by events. They approached the board in February with what they had planned and the board rubberstamped it in February 2018. Unfortunately, in March 2018 a new board was purported and it refused to proceed with the recovery plan.

- [29] The Second Applicant resigned from Denel on 15 May 2018 before he could be paid. On 9 November 2018 Denel terminated the First Applicant's employment contract following a disciplinary process. Upon termination of the First Applicant's contract of employment, Denel did not pay him the R7m that the board had resolved to pay on 30 November 2017.
- [30] It is the Applicants' case that Denel has an obligation to pay them for their conversion of their permanent employment. According to them, the resolution adopted on 30 November 2017 by the board of Denel amounted to an undertaking and an agreement between Denel and them to pay out these remarks.
- [31] A fundamental complaint raised by Denel against the application is that the Applicants have approached this Court without any cause of action. It is unclear to Denel whether the Applicants alleged a breach of contract between them and Denel. It would appear, from the arguments of Adv Z Feni, that the basis of the Applicants' claims is contractual because he told the Court when this issue came up for discussion that the Applicants have set out the terms of the contract in the application. So, it behoved this Court to scan the applications to establish the terms of the contract.
- [32] It is also not clear whether the Applicants' case is that Denel has breached a statutory duty. A question that Denel asks is on what grounds in law do the Applicants allege that they are entitled to the relief that they seek in the notice of motion? In my view, the resolutions in question do not constitute an agreement with the Applicants. The application, in my view, constitutes an attempt by the Applicants to enforce compliance by Denel. If it was an agreement it was for that reason, as I set out below, unlawful and with no effect. For the same reasons there was no valid reasons in law to conclude such an agreement. The foundation on which such an agreement was based were flawed.

DETERMINATION OF THE REMUNERATION OF DIRECTORS

- [33] S 66(8) of the Companies Act 71 of 2008 (“the Companies Act”) deals with the determination of the directors’ remuneration. It provides that:

“Except to the extent that the memorandum of incorporation of a company provides otherwise, the company may pay remuneration to its directors for their service as directors, subject to subsection (9).”

According to s 66(8), any amount that the board of directors determines as any directors’ remuneration is subject to the provisions of s 66(9). Subsection (9) states as follows:

“Remuneration contemplated in subsection (8) may be paid only in accordance with a special resolution approved by the shareholders within the previous two years.”

- [34] In the application under consideration, the shareholder was the Minister of Public Enterprises. The determination by the board of Denel of Directors’ remuneration required the blessing or permission or consent or sanction of the shareholder. Any amount determined by the board and not sanctioned by the shareholder was ultra vires, invalid and unlawful.

- [35] The First Applicant states that on 7 June 2017 a five-year fixed employment was entered into between the Respondent, represented by Mr Mantsha, and him. The said employment contract provided for the total base remuneration of R5,000,000.00 and 5% representing performance-based pay. On 7 June 2017, the board took a resolution adopting the conversion of his employment contract to a fixed term and to pay him a 12 months’ separation agreement:

35.1 the remuneration of R5,000,000.00 agreed by and between the First Applicant on one side and Denel on the other side, as set out in clause 3.1 of the agreement signed by Mr Mantsha on behalf of Denel and the First Applicant was not sanctioned by any shareholder as required by the provisions of s 66(9) of the Companies Act. Therefore, the said agreement is invalid and unlawful.

35.2 the resolution of the board taken on 7 June 2017 to:

confirm the conversion of permanent contracts to fixed term contracts and to pay the First Applicant a 12 months' separation payment is invalid and unlawful. The board had not obtained the sanction of the shareholder. The board acted ultra vires its powers. The resolution of 7 June 2017 contravenes the provisions of s 66(9) of the Companies Act. In the absence of ministerial sanction, Denel cannot and could not then pay out any separation payment. It has no power to approve such payments.

[36] For the same reasons set out in the preceding paragraph in respect of the resolution taken by the board on 7 June 2017, the resolution of 30 November 2017 is unlawful. It is invalid for want of compliance with s 66(9) of the Companies Act. It cannot be lawfully acted upon as it is null and void. It is for this reason that in his heads of argument, counsel for Denel states that it is quite an extraordinary occurrence for a party to come to Court and ask for unlawful decisions to be sanitized through a court order. This resolution of 30 November 2017 must suffer the same fate as the resolution of 7 June 2017. It must be set aside.

[37]

37.1 Attached to Denel's answering affidavit, was State Owned Enterprise's Remuneration Guidelines, which explicitly set out the position of the directors' remuneration. Before dealing with it I need to point out, at this stage, that during his argument, Mr Feni concluded that the Guidelines do not apply to the current matter. He also argued that the Minister's sanction is not required for the purposes of the determination of a director's remuneration. In my view he was wrong.

37.2 These guidelines are binding on all state-owned enterprises such as Denel. They provide that any remuneration of Executive Director of a state owned enterprise must comply with the framework set out therein.

37.3 The purpose of the guidelines is set out to be:

"... to assist boards and remuneration committees in the determination and negotiations of the Chief Executive Officers (CEO) of SOE to establish a related coherent remuneration policy and system for executive directors."

The GCFO will fall into this category of Chief Executive Officers.

37.4 *"Boards and remuneration committees are expected to apply these guidelines in determining remuneration and incentives of CEO's and ED's and in formulating remuneration policies."*

The guideline is comprehensive. It sets out the remuneration policies that the board must observe in the determination of the remuneration and incentives of the CEO's and ED's. Failure to observe the guideline renders any conduct inconsistent with it fatal.

[38] These Guidelines define three categories of payments that could be made to an Executive Director. These three categories are remuneration, long term incentives and short term incentives. Whether or not the board considers any form of payment to the Executive Director, whether it be remuneration, long term or short term incentives or ex gratia payment, the provisions of s 66(9) of the Companies Act and of the Guidelines must always be observed. Any resolution of the board which is inconsistent with the said section and Guidelines will not have any legal effect and is liable to be impugned.

[39] Counsel for the Applicants argued that the two Applicants were not directors at the time the resolutions were taken. According to him, at that relevant time, the First Applicant was a permanent employee as Divisional CFO of BAE Lands Systems in subsidiary of Denel and the Second Applicant was a business development manager. The two Applicants were therefore not directors. He was arguing against the statement by counsel for Denel that the resolution taken by the erstwhile board was not a resolution that the board could have competently and lawfully taken. The argument went further and stated that that remuneration for any director, including any separation payment, would only be taken by the Minister by way of a special resolution taken at a shareholders' meeting and no such resolution was adopted by the Minister.

[40] The argument by Adv Feni that at the time the resolutions were taken the First Applicant was not a director carries no weight. The following circumstances show that the two Applicants were in fact directors.

[41] On 1 June 2017, in his own words, the First Applicant took up the position of the GCFO. So, he became the GCFO on 1 June 2017. On 7 June 2017 the First Applicant entered into a five year fixed employment contract with Denel. The said agreement was signed by him, the First Applicant, and Mr Mantsha on behalf of Denel. In terms of Clause 1 of the said contract his job title was described as Group Chief Financial Officer. On 7 June 2017 the board took a resolution in which it adopted the conversion of the First Applicant's employment contract from permanent to fixed term and to pay the First Applicant five months' separation payment, as permanent contract termination terms. We have now established that when the board took its resolution on 7 June 2017, the First Applicant was already a GCFO and in terms of the agreement that was signed by him and Mr Mantsha.

[42] When the resolution of 30 November 2017 was taken, the First Applicant was already a GCFO and the Second Applicant a GCEO. The principle item that was discussed at that meeting was remuneration. It was an already foregone conclusion on 30 November 2017 that the First Applicant was the GCFO and the Second Applicant was the GCEO.

[43] The First and Second Applicants were directors. The First and Second Applicants sat in the board meetings as ex officio directors that approved these payments. The minutes of the board meeting of 30 November 2017 showed that, among others, Mr Z Ntshepe – Group CEO (GCEO) and Mr Z Mhlwana – Group CFO (GCFO) were present. They even made submission to the board about why they felt entitled to those payments. The letter of the Minister dated 7 November 2017 made it plain that the First Applicant and the Second Applicant were appointed Group Chief Financial Officer and Group Chief Executive Officer respectively of Denel and ex officio directors of the Denel body of directors. The Minister's letter confirms their appointment as GCFO and GCEO. Therefore, the argument by Mr Feni

that at the time of the resolutions of 7 June 2017 and 30 November 2017 the First Applicant and Second Applicant were not directors is flawed. Moreover, it must be recalled that at the stage they were offered those positions they were already acting in those roles and had discharged the powers of the executive directors during their acting tenures.

[44] The conversion payment offers were not made to the Applicants independently of their promotions to GCFO and GCEO, respectively. These offers were made to the Applicants as incentives to give them to accept the director positions of GCFO and GCEO. It is common cause that the remuneration of the Applicants as GCFO and GCEO were, in terms of s 66(9) of the Companies Act, subject to the shareholder approval and that their determination was subject to the Guidelines. According to counsel for Denel it is an absurd proposition that the remuneration of the Applicants as employees/executive directors is subject to the shareholder's approval, yet any gratuities or "conversion" payments are not.

[45] The Companies Act and the guidelines make it expressly clear that any payments to the Applicants is subject to the sanction of the shareholder. No such sanction was obtained in respect of the remuneration and ex-gratia payments determined for the Applicants. Any resolution of the board that was passed without the approval of the shareholder is void. Consequently, the Applicants cannot rely on such resolutions for their claim. Their claim can therefore not be sustained.

[46] Denel has lodged a counterapplication against the First Applicant in which it seeks the following relief:

1. It is declared that resolutions 5.2.a and b of the Respondent (Denel Soc Ltd) on 7 June 2017 and 30 November 2017 are unlawful.
2. Alternatively, resolutions 5.2.a and b of the Respondent (Denel Soc Ltd) on 7 June 2017 and 30 November 2017 are reviewed and set aside.
3. The First Applicant, Ziphiwo Madododwa Mhlwana is ordered to repay the Respondent (Denel Soc Ltd) R1,652,718.60 within 30 days of this order.

This is a review application by Denel against its own decision to approve the “conversion” payments to the Applicants. An organ of state is permitted to bring a self-review application where its own decision is tainted with an illegality. In this regard, counsel for Denel found support in **State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd 2018 (2) SA 23 CC at paras 18 to 42** which itself referred to **Khumalo v MEC for Education 2014 (5) SA 579 (CC) at 590**. At para [35] the Court had the following to say:

“Section 195 provides for a number of important values to guide decision makers in the context of public sector employment. When, as in this case, a responsible functionary is enlightened of a potential irregularity, s 195 lays a compelling basis for the founding of a duty on the functionary to investigate and, if need be, to correct any unlawfulness through the appropriate avenues. This duty is founded, inter alia, in the emphasis on accountability and transparency in s 195(1)(f) and (g) and the requirement of a high standard of professional ethics in s 195(1)(a). Read in the light of the founding value of the rule of law in s 1(c) of the Constitution, these provisions found not only standing in a public functionary who seeks to review through a court process a decision of its own department, but indeed they found an obligation to act to correct the unlawfulness, within the boundaries of the law at the interests of justice.”

[47] The purpose of the counter application by Denel is to seek an order that reviews and sets aside the resolutions of the board in terms of which the “conversion” payments that were clear contraventions of the Companies Act and the Guidelines. The resolutions of the board about the “conversions” payments fail to comply with s 66(9) of the Companies Act and the Guidelines. The board was not empowered to pass these resolutions. In passing those resolutions, the board exceeded its powers in terms of both the Companies Act and the Guidelines. This was unlawful and a violation of the law.

[48] In **Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council 1999 (1) SA 374 CC at paragraph [58]** the Constitutional Court stated that:

"It seem central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred by the law."

Counsel for Denel referred the Court furthermore to the judgment of **Affordable Medicines Trust v Minister of Health 2006 (3) SA 247 CC at para [49]**. There the Court had the following to say:

"The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of the law. The doctrine of legality, which is an incident of the rule of law, is one of the controls through which the exercise of the public power is regulated by the Constitution."

[49] Clearly the exercise of public power that is not congruent with the principle of legality is inconsistent with the Constitution itself. Section 172(1) of the Constitution requires the Court to declare any conduct which violates the Constitution invalid or unlawful and to review and set it aside.

[50] In their replying affidavit and answering affidavit to the counter application, the Applicants raised a point *in limine* that Denel has not complied with Rule 6 of the Uniform Rules of Court. They contend that Denel failed to file an answering affidavit in which it sought to oppose the Applicants' application on an attached notice of motion in which it seeks to review the resolution of Denel.

[51] This point *in limine*, besides having been framed without any purity, lacks merit. There is a notice of motion clearly marked "counter application" which complies in all material respects with what is expected of a notice of motion. This counter application precedes the answering affidavit. Attached to the counter application is the affidavit of David du Toit. In my view, there is compliance by Denel with the Rules of Court.

[52] The Applicants raised a point that Denel has launched this application and failed to cite the individual board members who took the resolutions. This statement lacks merit. In the first place this application was not “launched” by Denel. It was “launched” by the Applicants. Secondly, for inexplicable reasons, the Applicants did not cite the members of the board who took the impugned resolutions. They certainly did not regard them as necessary parties. They did not think that they had any interest in the application. They certainly did not seek any relief against them. Citing them would not have added any value to their case. Denel could not cite the board members if the Applicants did not do so.

[53] The First Applicant admitted that at the end of June 2017 Denel paid him the equivalent of the twelve months’ remuneration in accordance with the resolution that was taken on 7 June 2017. The First Applicant did not state the amount that was paid to him. It took a diligent search by Mr du Toit to obtain the payment confirmation that reflects that the First Applicant received a sum of R1,652,718.60 on 28 June 2017. A copy of proof of payment of the amount of R1,652,718.60 is attached to the answering affidavit as Annexure ‘AA4’.

[54] This payment should have been sanctioned by the shareholder in terms of s 66(9) of the Companies Act. As it was not approved by the shareholder, it was unlawful. Denel, as a state owned enterprise, is under an obligation in terms of the Public Finance Management Act 1 of 1999 and Public Service Act 103 of 1994 to recover the said payment from the First Applicant.

APPLICATION FOR CONDONATION

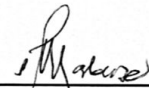
[55] There is before me an application by Denel for condonation for the late filing of its answering affidavit. The reasons proffered by Denel for the delay are that much of the facts set out in the answering affidavit were not within the personal knowledge of the deponent to the answering affidavit. The board that sat during the impugned resolutions had been removed and in its place a new board was installed. In order to get the correct fact, a thorough search for the information had to be undertaken. It took extensive time to search through

the archives and records of Denel to find the information. The board had to be consulted. The Applicants have not attached the necessary documents to their application. This necessitated a delivery by Denel of the Rule 5(12) notice. When it realized that it would not be able to deliver its answering affidavit timeously, Denel sought an indulgence of two weeks from the Applicants, who granted it gladly.

[56] In the light of the reason for the delay, the fact that the Applicants were aware of the difficult situation in which Denel found itself, considering the fact that the delay involve no prejudice to the Applicants, I see no reason why the application should not be granted. Moreover, counsel for the Applicant did not put up any fight on this aspect of the delay.

[57] The following order is hereby made:

1. **The application is hereby dismissed, with costs.**
2. **The resolutions adopted by the Respondent's board of directors on 7 June 2017 and 30 November 2017 are hereby reviewed and set aside.**
3. **The counter-application is hereby granted.**
4. **The First Applicant, Ziphiwo Madododwa Mhlwana, is hereby ordered to repay, within 30 days of this order, the Respondent (Denel Soc Ltd), the sum of R1,652,718.60.**
5. **The application for condonation by the Respondent for the late filing of its answering affidavit is hereby granted.**



PM MABUSE

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicant:

Adv Z Feni

Instructed by:

Qhali Attorneys

Counsel for the Respondent:

Adv T Ramogale

Instructed by:

Edward Nathan Sonnenbergs

Date on the opposed roll before Mabuse J:

8 March 2021

Date of Judgment:

19 March 2021