



## Peter Moyo Case: Summary of the Arguments contained in the Contempt Affidavit

Johannesburg, 9 October 2019

### Key Takeout's:

- When deciding to issue the second notice of termination on 21 August 2019, the Directors had reached the conclusion that irrespective of the outcome of the pending litigation a continued employment relationship with Mr. Moyo had become untenable and that, consequently, it was in the best interests of the Companies and their stakeholders to give further notice to terminate his employment.
- The Board was especially cognizant of not issuing a second notice that might show any disrespect to the Court. Its legal advisors reflected on this carefully and advised the Board that a second notice would, in the prevailing circumstances, not breach or disrespect judicial process. We believe that the Court's initial judgment on 30 July 2019 confirmed our contractual right to terminate Mr. Moyo's employment. Furthermore, when granting leave to appeal against the initial judgment, the Court acknowledged that the relationship between the Board and Mr. Moyo was "unwholesome".
- The view that issuing a second notice would not amount to contempt of court was based on three main considerations: (1) The law, confirmed in an authoritative Appellate Division case, allows a party to give a second notice in circumstances such as these. (2) The Court's own judgment dated 30 July 2019 contemplated the possibility and permissibility of such a step. (3) Mr. Moyo's lawyers on two occasions stated in court that giving further notice under the contract was permissible in principle.

### Overview

On 30 July 2019, the Court granted Mr. Moyo various forms of relief, including an order temporarily reinstating him as the CEO of OML. This relief was granted on a preliminary basis, pending a final decision on the matter.

During the course of the initial urgent application and again in subsequent proceedings on 16 August 2019, Mr. Moyo's senior counsel conceded that there was no legal impediment to a further notice of termination of employment being served on Mr. Moyo.



The Directors had reached the conclusion, in the course of the litigation that followed the delivery of the first notice of termination, that irrespective of the outcome of that litigation a continued employment relationship with Mr. Moyo had become untenable and that, consequently, it was in the best interests of the Companies and their stakeholders to give further notice to terminate his employment.

On 21 August 2019, OML gave further notice of termination of Mr. Moyo's employment. The decision to give the second notice was a step that was separate from the decision to give the first notice of termination. It was a step taken for reasons that were different from those that had led to the first notice of termination.

- Old Mutual had a contractual right to issue a second notice of termination without having withdrawn the first notice of termination. The second notice did acknowledge the existence of the first notice, and referred to it, making it clear that the first notice was not being withdrawn. Should the Court ultimately decide that the first notice was valid after all, the second notice would simply fall away. If not, the second notice would remain effective.
- Old Mutual decided to issue the second notice of termination whatever the ultimate outcome of the applications for leave to appeal and for suspension of the interim order. The Board was specifically advised that this would not disregard or disrespect the interim order concerning the first notice, or improperly influence or pre-empt the pending proceedings. Once it had made this decision, there was no good reason to await the pending judgment/s before issuing the second notice of termination.
- The Board carefully explored with its legal advisers the question whether its reasons for giving the second notice were somehow contingent on the first notice. The Board was specifically advised that the reasons (determined by the Board) for giving the second notice stood independently of, and were not contingent on, the first notice. The Board was specifically concerned that it should not give a second notice if this would show disrespect to the Court. Its legal advisors reflected on this carefully and advised the Board that a second notice would, in the prevailing circumstances, not breach or disrespect judicial process.



- Old Mutual was entitled to give the second notice once the reason for giving it had become clear, irrespective of the status of ongoing litigation over the validity of the first notice.

Old Mutual has, at all relevant times, relied on professional legal advice to understand the legal rights and obligations relevant to the decisions the Board has taken in respect of this matter. They have taken decisions that they believed, on rational grounds and on the strength of legal advice, were permissible in law, and they have at all times believed, in good faith, that those decisions served the best interests of Old Mutual.

In taking those decisions, Board members have discharged their fiduciary duties as directors under Section 76 of the Companies Act 71 of 2008 and have acted in good faith on the strength of legal advice.

Old Mutual has, at all times, acted reasonably and respectfully on the basis of legal advice received from respected legal advisers. They have also been advised that by paying Mr. Moyo's salary, they have in any event discharged their primary obligations under the terms of a temporarily reinstated contract of employment. There has been no disdain on the part of the Board for judicial authority. The Board's conduct has not in any way sullied the authority of the Courts.

## **Ends**

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