

COPY



**COMBINED**

**SUMMONS**

**IN THE HIGH COURT OF SOUTH AFRICA**

**WESTERN CAPE DIVISION, CAPE TOWN**

**CASE NO:** 9141/19

In the matter between:

**PUBLIC INVESTMENT CORPORATION SOC LIMITED**

First Plaintiff

**GOVERNMENT EMPLOYEES PENSION FUND ("THE GEPF")**

Second Plaintiff

and

**AYO TECHNOLOGY SOLUTIONS LIMITED**

Defendent

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**TO: THE SHERIFF OR HIS DEPUTY:**

**INFORM:**

**AYO TECHNOLOGY SOLUTIONS LIMITED**, a company with limited liability duly registered and incorporated in accordance with the Companies Act, which carries on

business as an Integrated Technology company with its registered office and principal place of business at Quay 7, East Pier, V & A Waterfront, Cape Town, Western Cape, South Africa.

(hereinafter referred to as the Defendant) that:

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**THE PUBLIC INVESTMENT CORPORATION SOC LIMITED**, a Corporation with separate juristic personality established in terms of Section 2 of the Public Investment Corporation Act, 23 of 2004 ("PIC Act") and duly registered in accordance with the Companies Act, 71 of 2008 ("the Companies Act") as a state-owned company with its registered place of business at Menlyn Maine Central Square, Corner Aramist Avenue & Corobay Avenue, Waterkloof Glen Extension 2, Pretoria;

and;

**THE GOVERNMENT EMPLOYEES PENSION FUND ("THE GEPF")**, a Pension Fund with separate juristic personality originally established by Section 3 of the Government Service Pension Act, 57 of 1973 and continues to exist as such in terms of the Government Employees Pension Law, 21 of 1996 ("the GEPF law") with its registered office at GEPF Administration Office Building 2A, Trevenna Campus, Corner Meintjies and Francis Bard Street, Suunyside, Pretoria.

(hereinafter called the Plaintiffs),

hereby institute action against the Defendant, in which action the Plaintiffs claim the relief and on the grounds set out in the particulars of claim annexed hereto.

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**INFORM** the Defendant further that if Defendant disputes the claim and wishes to defend the action, the Defendant shall –

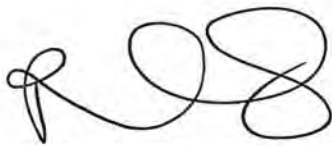
- (i) Within 10 (TEN) days of the service upon the Defendant of this summons, file with the Clerk of this court at number 35 Keerom Street, Cape Town 8001, Notice of the Defendant's intention to defend and serve a copy thereof on the Attorneys of the Plaintiffs, which Notice shall give an address (not being a post office or *poste restante*) referred to in the Rule 19 (3) for the service upon the Defendant of all notices and documents in the action.
- (ii) Thereafter and within 20 (TWENTY) days after filing and serving notice of intention to defend as aforesaid, file with the registrar and serve upon the Plaintiffs a Plea, Exception, Notice to strike out, with or without a Counter-claim.

**INFORM** the Defendant further that if the Defendant fails to file and serve notice as aforesaid, Judgement as claimed may be given against the Defendant without a further notice to the Defendant, or if, having filed and served such notice, it fails to

plead, except, make application to strike out or strike out or counter-claim, judgment may be given against it.

**AND** immediately thereafter serve on the Defendant a copy of this Summons and return the same to the Clerk with whatsoever you have done thereupon.

DATED at **JOHANNESBURG** on this the **28<sup>th</sup>** day of **MAY** 2019.



**GWINA ATTORNEYS INCORPORATED**

Plaintiffs' Attorneys

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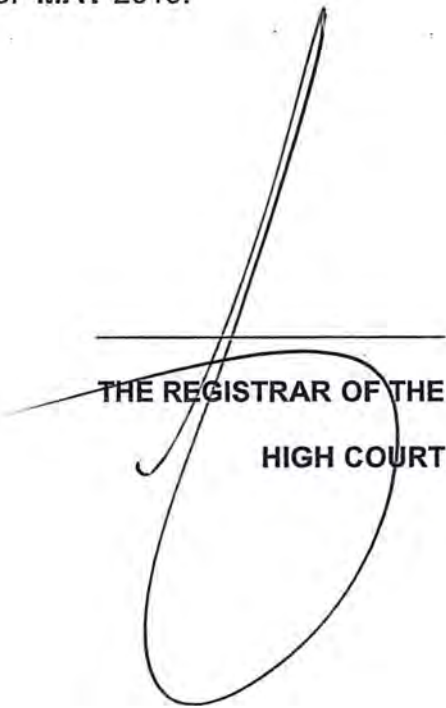
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THE REGISTRAR OF THE  
HIGH COURT

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## PARTICULARS OF CLAIM

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### THE PARTIES

1 The First Plaintiff is the Public Investment Corporation SOC Limited ("PIC").

The PIC :

1.1 is a corporation with separate juristic personality established in terms of section 2 of the Public Investment Corporation Act, 23 of 2004 ("PIC Act"), duly registered in accordance with the Companies Act, 71 of 2008 ("the Companies Act") as a state-owned company;

1.2 is an organ of state as defined in section 239 of the Constitution of the Republic of South Africa, 1996 ("Constitution");

1.3 is subject to and obliged to comply with the Public Finance Management Act, 1 of 1999 ("PFMA") and is listed as a public entity under schedule 3 of the PFMA; and

1.4 carries on business as a financial services provider and in particular as an asset manager in terms of the Financial Advisory and Intermediary Services Act, 37 of 2002 ("FAIS") and has its registered office at Menlyn Maine Central Square, Corner Aramist Avenue & Corobay Avenue, Waterkloof Glen Extension 2, Pretoria.

2 The Second Plaintiff is the Government Employees Pension Fund ("the GEPF"), a pension fund with separate juristic personality that has its registered

office at GEPF Administration Office Building 2A, Trevenna Campus, Corner Meintjies and Francis Bard Streets, Sunnyside, Pretoria. The GEPF was originally established by section 3 of the Government Service Pension Act, 57 of 1973. It continues to exist as such in terms of the Government Employees Pension Law, 21 of 1996 ("the GEP law").

- 3 The Defendant is Ayo Technology Solutions Limited ("AYO"), a company duly registered and incorporated with limited liability in accordance with the Companies Act, which carries on business as an integrated technology company and which has its registered office and principal place of business at Quay 7, East Pier, V & A Waterfront, Cape Town, Western Cape, South Africa.
- 4 At all material times AYO knew that the PIC acted as agent for the GEPF and that the GEPF would become the beneficial owner of any shares subscribed for by the PIC, notwithstanding that such shares would be registered in the name of the PIC.

#### **THE PRIVATE PLACEMENT**

- 5 During December 2017, AYO undertook a private placement in conjunction with the listing of all its issued shares on the Johannesburg Stock Exchange.
- 6 The object of the private placement was to raise R4,3 billion for AYO.
- 7 On or about 14 December 2017, the PIC, purportedly represented by its chief executive officer at the time, Dr Daniel Matjila ("Dr Matjila") and Mr Lebogang

Molebatsi ("Mr Molebatsi"), signed two irrevocable subscription applications ("the subscription applications").

- 8 In terms of the subscription applications, the PIC irrevocably applied, and requested AYO to accept its applications, to subscribe for 11 627 906 shares and 88 154 749 shares in AYO, respectively, comprising an aggregate subscription for 99 782 655 shares in AYO, at a price of R43 per AYO share, resulting in an aggregate consideration of R4 290 654 165.00 (i.e. R499 999 958.00 plus R3 790 654 207.00).
- 9 All the shares the PIC applied for were allotted to the PIC on or about 18 December 2017 at a price of R43 per AYO share, resulting in an aggregate consideration for the allotment of R4 290 654 165.00. The allotment of shares purportedly concluded an agreement for the subscription of the shares in AYO ("the subscription agreement").

## **THE NEGOTIATIONS AND THE MISREPRESENTATIONS**

- 10 Prior to the conclusion of the subscription agreement, and pursuant to an approach from AYO, the PIC, represented by Dr Matjila and/or Mr Victor Seanie (Assistant Portfolio Manager: Listed Equities) ("Mr Seanie") and/or Mr Molebatsi and/or Mr Fidelis Madavo ("Mr Madavo") had entered into negotiations with AYO represented by Dr Iqbal Survé ("Mr Survé") and/or Mr Khalid Abdulla ("Mr Abdulla") and/or Mr Abdul Malick Salie ("Mr Salie") and/or Ms Nomvuyo Dube ("Ms Dube").



11 During the course of such negotiations, AYO provided the PIC with the following documents:

11.1 a draft pre-listing statement of AYO, a copy of which is attached as POC1. The draft pre-listing statement was provided to the PIC on or about 24 November 2017 (“draft pre-listing statement”);

11.2 the pre-listing statement of AYO issued on 13 December 2017, a copy of which is attached as POC2;

11.3 a presentation entitled “2017 AYO BT Market Sounding” (“the market sounding presentation”), a copy of which is attached as POC3;

11.4 correspondence authored by Ms Dube, providing information in response to queries from the PIC's Mr Seanie on 7 December 2017 and 12 December 2017 copies of which are attached as POC4.1 and 4.2; and

11.5 correspondence authored by Mr Salie and sent to Mr Seanie on 14 December 2017, a copy of which is attached as POC5.

12 During the course of the negotiations, AYO, represented by Dr Survé and/or Mr Abdulla and/or Mr Salie and/or Ms Dube orally and/or in the draft-prelisting statement and/or in the pre-listing statement and/or in market sounding presentation and/or in the further correspondence described at paragraphs 11.4 and 11.5 above made the following misrepresentations expressly, alternatively, tacitly to the PIC, represented by Dr Matjila and/or Mr Madavo

and/or Mr Molebatsi and/or Mr Seanie, *alternatively* to the GEPF represented by the PIC:

12.1 it was a foregone conclusion that the 30% effective shareholding in BT Communication Services (South Africa) (Pty) Ltd ("BT") held by AEEI would be transferred to AYO;

12.2 it was a foregone conclusion that certain of BT's existing primary customers would move to AYO and would transfer their existing contracts and conclude further contracts with AYO;

12.3 BT had consented to the inclusion of the BT financial information in the market sounding presentation and the draft pre-listing statement and the pre-listing statement;

12.4 the following forecasts represented the genuinely held views of AYO of Revenue and Profit Forecasts for AYO, which had a realistic prospect of being achieved:

12.4.1 revenue for AYO in the 2018 financial year was forecast to be R4,430,912,000.00;

12.4.2 profit before taxation for the 2018 financial year for AYO was projected to be R1,013,848.00;

12.4.3 revenue for AYO in the 2019 financial year was forecast to be R7,740,563,000.00;

12.4.4 profit for AYO before taxation for the 2019 financial year was forecast to be R1,454,140.00;

12.4.5 a major part of the forecast revenue and profit before taxation for AYO in the 2018 and 2019 financial years would come from BT;

12.4.6 in relation to the 2018 financial year, revenue of R944,096,880.00 was forecast from existing customers of BT;

12.4.7 in relation to the 2019 financial year, revenue of R1,389,407,053.00 was forecast for AYO from existing customers of BT;

12.4.8 the expected revenue increase through the empowerment that would be brought by AYO's 30% effective shareholding in BT was forecast to be R859,794,118.00 in respect of financial year-end 2018 and R1,324,822,151.00 in respect of financial year-end 2019;

12.4.9 existing customer A was expected to transfer 70% of its existing business from BT to AYO in 2018 and 100% of its business from BT to AYO in 2019, with a concomitant contribution to revenue forecast of R244,518,000.00 for 2018 and R377,257,000.00 for 2019; and

12.4.10 existing customer B was expected to transfer 80% of its existing business from BT to AYO in 2018 and 100% of its existing business from BT to AYO in 2019, resulting in a contribution to the revenue of AYO of R424,684,000.00 in 2018 and R583,941,000.00 in 2019;

- 12.5 in relation to the revenue of R2,077,869,211.00 forecast for AYO for 2018, and the revenue of R4,354,927,619.00 forecast for AYO for 2019 from additional market share, a host of complementary target companies had been engaged and were at various stages of due diligence with agreements expected to be concluded post the listing; and
- 12.6 there was great urgency in concluding the subscription agreement as the listing of AYO could not be delayed due to the requirements of SASOL in relation to the proposed conclusion of a contract between AYO and SASOL.
- 13 In so far as the Plaintiffs assert that the aforesaid misrepresentations were expressly alternatively tacitly made by AYO in the documents referred to in paragraph 12 and its sub-paragraphs above, the Plaintiffs refer specifically to the following Annexures and pages:
- 13.1 POC1, being the draft pre-listing statement (pp 12 to 13, pp 15 to 17, p 26, pp 31 to 33, p 40, p 65, and pp 164 to 165);
- 13.2 POC2, being the pre-listing statement of AYO (pp 6 to 9, pp 20 to 22, 27, pp 43 to 46, and pp 119 to 120);
- 13.3 POC3, being the market sounding presentation (pp 3 to 4, pp 15 to 21, and annexure 1); and
- 13.4 POC4.1, (pp 1 to 3) and POC4.2 (pp 1 to 3) being correspondence from Ms Dube to Mr Seanie;

13.5 POC5, being an email from Mr Salie to Mr Seanie

14 To the knowledge of AYO the aforesaid misrepresentations were false alternatively AYO ought reasonably to have known that the aforesaid representations were false.

15 In the course of such negotiations, AYO omitted to disclose to the PIC that (“the undisclosed facts”):

15.1 the acquisition of the 30% shareholding in BT by AYO remained uncertain and was subject to BT’s approval which had not been given;

15.2 BT had not agreed that it would transfer its existing customers, a decision to transfer those customers was in the discretion of BT and that there was no prospect of this occurring within the projected time-frames;

15.3 BT had not consented to the inclusion of the BT financial information in the market sounding presentation, the draft pre-listing statement, and the pre-listing statement;

15.4 the forecasts referred to in paragraph 12.4 above did not represent the genuinely held views of AYO of Revenue and Profit Forecasts for AYO and did not have a realistic prospect of being achieved;

15.5 AYO had not engaged with a host of complementary target companies and/or AYO had not conducted any due diligences in relation to such companies and/or AYO did not have any realistic expectation that

agreements would be concluded with any such companies post the listing;

15.6 it was not expected by AYO that any other investors would genuinely subscribe for shares in AYO in terms of the private placement;

15.7 certain investors had been approached by AYO and requested to put in subscriptions for shares in terms of the private placement on the assurance that such offers for subscription would not be accepted by AYO, but that the entire private placement would be placed with the PIC and that the other subscriptions were only required to create the false impression that there was genuine demand for the private placement AYO shares at the issue price of R43 per share;

15.8 immediately prior to the private placement, the AYO shares which had been issued to the BEE Consortium at R1.50 per share had been directly or indirectly vendor-financed; and

15.9 AYO did not intend to use the entire proceeds of the private placement for the purposes reflected in the pre-listing statement but intended to divert certain of the funds to related party companies to facilitate the repayment of existing debts and/or for alternative purposes.

16 To the knowledge of AYO, at all material times the PIC acted on the understanding that the facts set out in paragraphs 12.1 to 12.6 above were correct. By its failure to disclose the undisclosed facts AYO further misrepresented to the PIC that the PIC's understanding was correct.

## DUTY OF CARE AND ITS BREACH

17 At all material times, AYO was aware:

17.1 that the facts known to it and misrepresented positively and by omission to disclose as aforesaid would be material and relevant factors to the PIC in assessing whether to conclude and implement the subscription agreement and if so, on what terms and at what price;

17.2 the PIC was not aware of the true facts positively misrepresented nor of the undisclosed facts as aforesaid at any time prior to the conclusion of the subscription agreement and payment of the subscription price;

17.3 the PIC acted on the understanding that the facts positively misrepresented were correct; and

17.4 had the PIC known that the positively misrepresented facts were not correct and/or of the undisclosed facts, it would not have agreed to enter into the subscription agreement or pay the subscription price.

18 In the circumstances, AYO had a duty not to misrepresent the aforesaid positively misrepresented facts and/or to disclose the aforesaid undisclosed facts to the PIC prior to the conclusion of the subscription agreement and the payment of the subscription price by the PIC.

19 In breach of the aforesaid duty, AYO fraudulently, *alternatively*, negligently, positively misrepresented the aforesaid facts to the PIC, *alternatively* did not disclose the aforesaid undisclosed facts to the PIC.

- 20 In relation to the alternative allegation of negligence, AYO was negligent in that, given the facts pleaded above, AYO ought to have foreseen that its positive misrepresentation, *alternatively* its failure to disclose the undisclosed facts to the PIC prior to the subscription agreement being concluded, would induce the PIC into entering into the subscription agreement and would cause the PIC and/or the GEPF to suffer loss and ought not to have made such positive misrepresentations, *alternatively* not to have omitted to disclose the aforesaid facts.
- 21 As a result of AYO's positive misrepresentation, *alternatively* failure to disclose the aforesaid undisclosed facts to the PIC, the PIC was induced to conclude the subscription agreement and to make payment of the subscription price.
- 22 PIC completed the subscription applications on 14 December 2017 and pursuant thereto AYO allotted the 99 782 655 shares subscribed for to the PIC on or about 18 December 2017.
- 23 Payment of the subscription price by the PIC to AYO was made and the shares in AYO were issued to the PIC as follows:
- 23.1 R499,999,958.00, in respect of 11,627,906 shares, was paid on 21 December 2017 and these shares were issued to the PIC on that date; and
- 23.2 R3,790,654,207.00, in respect of 88,154,490 shares, was paid on 22 December 2017 and these shares were issued to the PIC on 27 December 2017.



**CLAIM A: THE DUTIES, OBLIGATIONS AND REQUIREMENTS OF THE PIC AND THE GEPP**

24 As an organ of state, the PIC is obliged to act in accordance with the standards of conduct and the obligations imposed by the Constitution by:

24.1 acting rationally, through considering relevant considerations and complying with material and mandatory procedures of law; and

24.2 complying with the basic values and principles governing the public administration, through promoting and maintaining a high standard of professional ethics and promoting an efficient, economic and effective use of resources, in terms of section 195 of the Constitution.

25 The PIC, through its board, has fiduciary duties under the PFMA including the duties to:

25.1 exercise the utmost care to ensure reasonable protection of the assets and records of the public entity; and

25.2 act with fidelity, honesty, integrity and in the best interests of the PIC in managing the financial affairs of the PIC.

26 The object of the PIC under section 4 of the PIC Act is to act as a financial services provider under the Financial Advisory and Intermediary Services Act, 37 of 2002 ("the FAIS Act"). Under section 5 of the PIC Act, the PIC has such powers as are necessary to enable it to achieve its object.

- 27 The PIC is obliged under section 10(1) of the PIC Act to invest deposits with it in accordance with the PIC's investment policy.
- 28 The management of the PIC is vested in its board under section 8 of the PIC Act, and the board of the PIC is empowered to establish committees under section 7 of that Act, as it considers necessary.
- 29 The PIC board has established the Executive Committee of the board and empowered it to perform the duties imposed upon the board by the PIC Act or any other law, including to establish sub-committees.
- 30 The Executive Committee has established the Portfolio Management Committee (Listed Investments ("PMC-Li")) as a sub-committee of the Executive Committee.
- 31 The Executive Committee has delegated to the PMC-Li its functions and responsibilities in respect of the Investment Policy and Strategy for Listed Investment, which has been adopted by the PIC Board.
- 32 The PMC-Li:
  - 32.1 has the decision making powers provided by the PIC Board through the Delegation of Authority Framework for Listed Investments ("DoA");
  - 32.2 has the authority to consider and approve investment decisions in relation to listed transactions in accordance with the DoA; and

32.3 is obliged to exercise its powers and duties subject to the PIC Act, including to:

32.3.1 ensure and monitor compliance with applicable laws, regulations and adopted non-binding rules, codes and standards in a way that supports the organisation being ethical and a good corporate citizen;

32.3.2 ensure that responsible investment practice is adhered to in order to promote good governance and the creation of value by investee companies;

32.3.3 oversee the implementation of investment decisions; and

32.3.4 give due consideration to the relevant provisions of the Companies Act read with the regulations to the Companies Act, the PIC Act, the DoA, King IV and any other applicable legislation, regulations and policies.

33 The DoA stipulates that the final approval of "Strategic Investments (Listed) for amounts greater than R3 billion but less than 10 billion" must be agreed to by the PIC's chief executive officer, chief financial officer and Executive Head of Listed Investments, before being approved by the PMC-Li.

34 The object of the GEPF is to provide pensions and certain other related benefits as determined in the GEP law to members, pensioners and their beneficiaries.

- 35 The GEPF operates under rules styled "*Rules of the government employees' pension fund*" ("the GEPF Rules") promulgated in terms of section 29 of the GEP law under Proclamation Proc 21 of 19 April 1996.
- 36 On behalf of the GEPF; and in terms of a written Investment Management Agreement concluded between the PIC and the GEPF in or about 2007 ("the Investment Management Agreement"), the PIC manages the GEPF's portfolio of investments, which are owned by the GEPF and have been assigned by the GEPF to be managed by the PIC as deposits, as defined in section 1 of the PIC Act. The Investment Management Agreement was concluded or about 12 June 2007.
- 37 In terms of the Investment Management Agreement and the GEPF Rules:
- 37.1 the GEPF has appointed the PIC as its agent and granted it authority to represent the GEPF in managing its portfolio of investments, including the authority to conclude transactions on behalf of the GEPF and to authorize any action on behalf of the GEPF; and
- 37.2 it is recorded that the PIC is obliged to comply with the FAIS Act and its regulations, the Securities Services Act, 36 of 2004 (repealed and replaced by the Financial Markets Act, 19 of 2012), the Financial Institutions (Protection of Funds) Act, 28 of 2001, the PFMA, the PIC Act, the GEP Law.

## THE DECISION WAS UNLAWFUL

38 The decision to enter the subscription agreement was unlawful and falls to be reviewed and set aside because that decision was:

38.1 contrary to the principle of legality in that it was:

38.1.1 irrational in not taking relevant considerations into account;

38.1.2 not in compliance with material and mandatory procedures of law;

38.2 contrary to the PIC's constitutional obligations in that it was contrary to:

38.2.1 professional ethics and so contrary to the basic values and principles governing the public administration; and

38.2.2 was a reckless use of resources and contrary to efficient economic and effective use of resources.

38.3 contrary to the board of the PIC's duties and obligations under the PFMA to:

38.3.1 exercise the duty of utmost care to ensure reasonable protection of the assets and records of the public entity; and

38.3.2 act with fidelity, honesty, integrity and in the best interests of the PIC in managing the financial affairs of the PIC.

- 39 The PIC was formally approached by AYO on 16 November 2017 to participate in the listing of AYO.
- 40 The listing was due to take place on 15 December 2017.
- 41 To AYO's knowledge it was not possible for the PIC to comply with mandated processes to consider and approve the transaction.
- 42 Dr Matjila had represented to Dr Survé and other representatives of AYO that, regardless of the PIC's legal obligations and internal requirements, the PIC would participate in the AYO listing.
- 43 Dr Matjila procured that the PIC entered the subscription agreement, acting in concert with and with the knowledge of representatives of AYO.
- 44 Dr Matjila and Mr Molebatsi signed the subscription applications on 14 December 2017.
- 45 Upon the signature of those applications, the PIC was purportedly bound to subscribe for the subscription shares.
- 46 The PIC was allotted 99,782,655 shares in AYO at a price of R43 per AYO share, resulting in an aggregate consideration of R4,290,654,165.00 on 18 December 2019.

- 47 Neither Dr Matjila nor Mr Molebatsi had authority under the DoA to sign the applications and to bind the PIC to the subscription prior to approval from the PMC-Li.
- 48 The PMC-Li had not approved the PIC subscribing for shares prior to the signature of the subscription applications.
- 49 Under the DoA, the PMC-Li was required to approve the transaction following the agreement of the chief executive officer, chief financial officer and Executive Head: Listed Investments.
- 50 Neither the chief financial officer nor the Executive Head: Listed Investments had agreed to the transaction prior to the signature of the subscription applications on 14 December 2017.
- 51 The DoA constituted the delegation of the PIC board's powers and duties to control the business of the corporation, direct the operations of the PIC and exercise all such powers of the PIC under sections 7 and 8 of the PIC Act.
- 52 No due diligence on the AYO transaction had been completed when the subscription applications were signed, and therefore neither Dr Matjila nor Mr Molebatsi had considered the result of a due diligence into AYO prior to signing the subscription applications.

- 53 The PIC's "Listed Equities Investments Standard Operating Procedures" required that a transaction such as the subscription of shares in AYO follow a process where:
- 53.1 it was originated;
  - 53.2 an initial analysis was carried out;
  - 53.3 a first submission was made to the PMC requesting permission to conduct a due diligence and input on the nature of the due diligence to be conducted;
  - 53.4 a detailed due diligence takes place; and
  - 53.5 the PMC considered the transaction with the benefit of the detailed due diligence reports before approving a transaction, prior to its conclusion.
- 54 None of the steps described at paragraphs 53.2 to 53.5 were properly carried out by the PIC in regard the subscription in AYO.
- 55 Such information as had been presented to the PIC, as set out in paragraphs 12 and 13 above was incomplete and incorrect.
- 56 The information was incomplete and incorrect in the respects identified at paragraphs 14 to 16 above.
- 57 On or about 21 December 2017, a PMC-Li meeting was called to approve the subscription for shares in AYO.



58 It was not disclosed to the PMC-Li that:

58.1 the PIC was already purportedly bound to subscribe for shares under the subscription agreement; and

58.2 the PIC had been allotted 99,782,655 shares in AYO at a price of R43 per AYO share, resulting in an aggregate consideration of R4,290,654,165 on 18 December 2019.

59 The PMC-Li was not presented with a completed due diligence report from either the PIC's Legal Team or the PIC's Environmental, Social and Governance Team.

60 Unaware that the PIC was already bound to the subscription agreement, the PMC-Li imposed conditions that ostensibly had to be fulfilled before the purchase of shares in AYO could occur, namely:

*"a) The PIC and Ayo entering into a put option to protect PIC's client against a share price decline;*

*b) A commitment that Ayo will spend the equity funds raised only on acquisitions for growth within 24 months;*

*c) the Legal and ESG Teams performing a complete due diligence and providing feedback to PMC-LI;*

*d) Ayo implementing a conflict of interest policy;*

*e) the appointment of independent non-executive directors to the board of Ayo; and*

*f) shareholder approval for all acquisitions (other than BT) that are great [sic] than 10% of Ayo's market cap."*

61 The PMC-Li therefore did not approve the subscription by the PIC of shares in AYO.

62 None of the conditions described in paragraph 60 were fulfilled prior to the subscription agreement being entered.

63 The PIC did not ratify or waive the requirement that these conditions be entered.

64 Therefore, the decision to enter the subscription agreement is unlawful as it is contrary to the principle of legality and/or the PIC's constitutional obligations.

65 The PIC seeks that decision to enter the subscription agreement is declared unlawful, reviewed and set aside, and that the subscription agreement is reviewed and set aside and AYO be ordered to return the R4 290 654 165.00 to the PIC against return of the subscription shares, which PIC and/or the GEPF hereby tenders to return.

66 Such relief is just and equitable relief which this Court is empowered to order in terms of section 172 of the Constitution.

67 The relief is just and equitable because:

67.1 the majority of the R4,290,654,165.00 remains in the possession of and under control of AYO;

67.2 the R4,290,654,165.00 represents money invested on behalf of the GEPP, which had no knowledge or forewarning of the investment, and which acts on behalf of and in the interest of its members; and

67.3 AYO knowingly procured the investment by the PIC contrary to the PIC's legal obligations and processes.

68 These proceedings have been instituted without unreasonable delay, alternatively if the Court finds that there was an unreasonable delay in seeking the review of the PIC's decision was unreasonably delayed, such delay ought to be condoned.

69 The timing of these proceedings occurred as follows:

69.1 AYO had actively attempted to conceal the true nature of its business and future business prospects from PIC as described above in paragraphs 12 to 17 above;

69.2 Dr Matjila had used his influence within the PIC and knowledge of its procedures to ensure the subscription agreement was purportedly approved and implemented;

69.3 from December 2017 until October 2018, representatives of the PIC including Messrs Seanie and Molebatsi attempted to engage AYO on implementing the conditions imposed by the PMC-Li at its 20 December 2017 meeting. AYO was not responsive to these attempts.

- 69.4 in May 2018, an internal audit investigation found irregularities with the purported approval of the transaction at the PMC-Li meeting of 20 December 2017;
- 69.5 the PIC's Investment Committee made enquiries with management concerning the AYO transaction between May 2018 and October 2018;
- 69.6 in August 2018, AYO publicly announced its agreement to purchase AEEI's interest in BTSA had lapsed;
- 69.7 Dr Matjila left the PIC In November 2018;
- 69.8 in December 2018, the board of the PIC instituted an investigation of the AYO transaction via the PIC's internal audit department;
- 69.9 in January 2019, the internal audit investigation was concluded, and its outcome presented to the PIC's board;
- 69.10 the PIC board acted expeditiously to brief attorneys and counsel to evaluate and institute the appropriate legal proceedings against AYO in February 2019;
- 69.11 in February, March, April and May 2019, the PIC and its legal advisors were assessing the contemplated legal proceedings against AYO, which included testimony at the Judicial Inquiry into allegations of impropriety at the PIC, chaired by retired Judge President of the Supreme Court of Appeal, the Honourable Justice Lex Mpati ("the Mpati Commission");

69.12 during the same period describe above, and more particularly in February and March 2019, the PIC and its legal advisors had to contend with urgent proceedings to set-aside a compliance notice – that was declared unlawful and set-aside - issued by the Companies and Intellectual Property Commission against the board of PIC in relation to PIC's investment in AYO; and

69.13 further evidence was assessed, including that presented to the Mpati Commission during April and May 2019, and this claim instituted in May 2019.

70 The PIC therefore acted as expeditiously as possible in the circumstances to bring these proceedings.

71 There is no prejudice to AYO occasioned by the delay, in the event that the Court finds that there was unreasonable delay (which is denied).

#### **CLAIM B, ALTERNATIVELY TO CLAIM A**

72 The conclusion of the subscription agreement in respect of 99,782,655 shares in AYO and/or the payment of the subscription price in respect thereof by the PIC to AYO in the aggregate sum of R4,290,654,165.00 was, to the knowledge of AYO, not authorized by the PIC.

73 The PIC made payment of the aggregate subscription price of R4,290,654,165 to AYO in the *bona fide*, but mistaken, belief that the conclusion of the

subscription agreement and /or the payment was authorized and it was obliged to do so.

74 The PIC and/or the GEPF tenders return of the 99,782,655 AYO shares to AYO.

75 In the premises, and tendering as aforesaid, the PIC, *alternatively* the GEPF, claims payment from AYO of the sum of R4,290,654,165.00.

### **CLAIM C**

76 As a result of the positive misrepresentations set out above, *alternatively* the failure to disclose the aforesaid undisclosed facts, the PIC is entitled to cancel the subscription agreement as it hereby does, and tenders return to AYO of the 99,782,655 shares in AYO.

77 In the premises and tendering as aforesaid, the PIC, *alternatively* the GEPF, claims payment from AYO of the sum of R4,290,654,165.00.

**WHEREFORE**, tendering as aforesaid, the PIC, *alternatively* the GEPF, claims:

1. that the decision to enter the subscription agreement be declared unlawful and set aside;
2. that AYO be ordered to pay to the PIC *alternatively* to the GEPF R4,290,654,165.00;

3. interest on the aforesaid amount at the rate of 10.25% *per annum* from 22 December 2017 to date of final payment;
4. costs of suit;
5. further and/or alternative relief.

*Alternatively:*

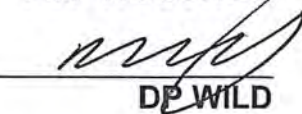
6. payment to the PIC alternatively to the GEPF of the sum of R4,290,654,165.00;
7. interest on the aforesaid amount at the rate of 10.25% *per annum* from 22 December 2017 to date of final payment;
8. costs of suit;
9. further and/or alternative relief.

DATED AT **SANDTON** on this 27<sup>th</sup> day of **MAY 2019**

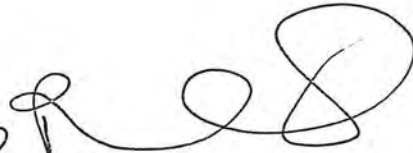
  
GJ MARCUS SC

  
LN HARRIS SC

  
PMP NGCONGO

  
DP WILD

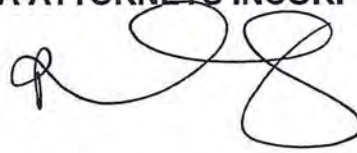
Plaintiffs' Counsel

PP 

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AND TO: **THE REGISTRAR OF THE  
ABOVE HONOURABLE COURT  
CAPE TOWN HIGH COURT**

AND TO: **AYO TECHNOLOGY SOLUTIONS LIMITED**

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