



DIRECTOR DELINQUENCY: OUTA v MYENI

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Introduction

On 27 May 2020 the Pretoria High Court (Justice Tolmay presiding) declared Ms Dudu Myeni a delinquent director **"for the remainder of Ms Myeni's lifetime"** and referred the matter to the National Prosecuting Authority **"for their consideration and determination of whether an investigation regarding possible criminal conduct should follow"**.

Ms Myeni was also ordered to pay the costs of 3 Counsel on a punitive scale.

These are extraordinary orders. They are far-reaching in their effect, not just for Ms Myeni but for company directors in general.

Ms Myeni had, according to the judgment, been appointed

- non-executive director of the board of the South African national carrier, South African Airways (SAA), in September 2009
- acting chairperson of the SAA Board in December 2012
- chairperson of the SAA Board in January 2015 and again in September 2016 until sometime in 2017

The judgment raises many issues including

- who has the right to ask a court to declare a director "delinquent"

- what are the implications of being declared a delinquent director
- what the requirements are for declaring a company director "delinquent"
- what the fiduciary duties of company directors are
- whether company directors have a collective responsibility rather than individual responsibility for their individual conduct
- whether non-executive directors are subject to one set of duties and executive directors to another
- whether those who approach a court asking it to declare a director "delinquent" are entitled to **"pick their target from a group of wrongdoers"** of directors who served together with the target in the same company over the same period as the target when the target asks that they also be joined in the proceedings
- whether the King Codes on Corporate Governance have the force of law

In this exposition I discuss these issues at a panoramic level.

A striking feature of this judgment is that it is lifted almost entirely from the plaintiff's heads of argument (OUTA) complete with spelling and syntactical errors. Even glaring date errors. An example is reference to a special meeting of **"27 and 28 May 2018"** in paragraph 62 of the judgment, instead of **"27 and 28 May 2015"** to do with discussion about

a 2015 MOU with Emirates. This is lifted from paragraph 128 of OUTA's heads of argument.

It is not unusual for Judges to request that Counsel provide their heads of argument in a format that would make for easy cutting and pasting. But the idea is never to adopt the heads as one's judgment. This is the sort of thing that may raise questions about the impartiality of a judge.

The judgment also makes credibility findings about Ms Myeni. One credibility finding was that her evidence **"stands in stark contradiction with her pleadings [and] the evidence that was put on her behalf"**. Ms Myeni denies the credibility findings in a short statement that she issued announcing her inclination to take the judgment on appeal. There is a link to that statement below under **"Related Documents"**

Nevertheless, we shall focus on the takeaways from this judgment.

Who Can Approach Court?

The judgment deals with this in paragraph 9. Effectively, it says anyone [whether a natural person or a juristic person] who acts in the public interest can ask a court to declare any director delinquent. But such a person will first require the court's permission before asking the court to declare a director delinquent. This is a process that is separate from the main "application"¹ to have a director declared delinquent.

This is an important takeaway from the judgment. One does not have to be a shareholder of the company, or associated with the company in any way, in order to seek an order from court declaring any director delinquent in the public interest, provided one first obtains the court's permission to bring such an application as a party.

Ms Myeni says in her statement she disputed OUTA's right to bring the application. It is not clear from the judgment whether OUTA first sought and obtained the court's permission to be an applicant [or plaintiff] acting in the public interest before issuing summons.

Generally, however, the following are the categories of person who may bring such an application without the court's prior permission:

- the company of which the target director is a director [in other words, the majority shareholders in general meeting or the board]
- a shareholder of the company
- a director of the company
- the company secretary
- a prescribed officer of the company
- a registered trade union that represents employees of the company or another representative of the employees of the company

What are the Implications of being Declared a Delinquent Director?

- A director who has been declared delinquent is disqualified from being appointed director of any company.
- The disqualification lasts for a lifetime and is unconditional if the reason for it is that the director acted as one despite being ineligible or disqualified.
- The disqualification lasts for at least 7 years if the reason for it is, among other things, that the director (1) grossly abused the position of director; (2) took personal advantage of company information or opportunity; (3) intentionally, or by gross negligence, inflicted harm on the company or a subsidiary of the company, (4) acted in a manner that amounted to gross negligence, wilful misconduct or breach of trust in relation to the performance of the director's functions within and duties to the company. For this category of delinquency,

¹ Although it is referred to as an application in the Companies Act, it is in truth a trial

a court may decide to order a longer period of delinquency and impose conditions.

- A director who has been declared delinquent for gross negligence, abuse of position, etc. may after 3 years ask a court to suspend the declaration of delinquency or set aside the order of delinquency after 2 years of its suspension.
- A court may suspend or set aside the order of delinquency if, having regard to the circumstances that led to the declaration of delinquency and her subsequent conduct, it is satisfied that the director has rehabilitated herself.
- A director who has been disqualified for life for acting as director despite being ineligible can never have the order of delinquency suspended or set aside. Life means life.

What Must you Show to have a Director Declared Delinquent?

The judgment touches on some of the requirements for delinquency as informed by the facts as accepted by the Judge. Here is a fuller list of requirements in terms of the Companies Act, 2008:

- that the person is now, or has been for the 24 months immediately preceding the application, a director of the company. So, a director cannot avoid being declared delinquent by resigning within 24 months of the application
- that the person consented to serve as a director while ineligible or disqualified, unless the person was acting
- that the person, while under an order of probation, acted as a director in a manner that contravened that order
- that the person grossly abused the position of director
- that the person took personal advantage of company information or an opportunity
- that the person intentionally, or by gross negligence, inflicted harm on the company or a subsidiary of the company
- that the person acted in a manner that amounted to gross negligence, wilful

misconduct or breach of trust in relation to the performance of the director's functions within, and duties to, the company

- that the person has repeatedly been personally subject to a compliance notice or similar enforcement mechanism, for substantially similar conduct, in terms of any legislation
- that the person has at least twice been personally convicted of an offence, or subjected to an administrative fine or similar penalty, in terms of any legislation
- that the person was, within a period of five years, a director of one or more companies or a managing member of one or more close corporations, or controlled or participated in the control of a juristic person, irrespective of whether concurrently, sequentially or at unrelated times, that were convicted of an offence, or subjected to an administrative fine or similar penalty, in terms of any legislation, and the person was a director of each such company, or a managing member of each such close corporation or was responsible for the management of each such juristic person, at the time of the contravention that resulted in the conviction, administrative fine or other penalty.

What are a Company Director's Duties?

Directors owe what is generally referred to as "**fiduciary duties**" to the company on the board of which they serve. These involve acting in the best interests of the company at all times, especially when the director's interests clash with those of the company.

These duties have now been codified in the Companies Act, 2008, especially in sections 76 to 78.

The fiduciary duties of people in positions of trust are also to be found in other pieces of legislation, such as the Public Finance Management Act, 1999 and the Financial Institutions (Protection of Funds) Act, 2001 among others. It is imperative for every director, trustee, member of a close

corporation and everyone who is in a position of trust to be acquainted with ALL these duties.

As the judgment makes clear, there is no such thing as "collective responsibility" to the exclusion of individual responsibility. While a company board of directors has collective responsibility, that does not absolve each director from liability for his or her own conduct, whether by commission or by omission.

Directors' duties, some of which are highlighted in the judgment, include:

- A director must not use his or her position as director, or any information obtained while acting in the capacity of a director (1) to gain an advantage for herself or for another person other than the company or a wholly-owned subsidiary of the company and (2) to knowingly cause harm to the company or a subsidiary of the company
- A director must communicate to the board at the earliest practicable opportunity any information that comes to her attention, unless she reasonably believes that the information is immaterial to the company or is generally available to the public or is known to the other directors, or unless she is bound not to disclose that information by a legal or ethical obligation of confidentiality
- A director must, when acting in that capacity, exercise the powers and perform the functions of director (1) in good faith and for a proper purpose, (2) in the best interests of the company, and (3) with the degree of care, skill and diligence that may reasonably be expected of a person carrying out the same functions in relation to the company as those carried out by her and having her general knowledge, skill and experience
- A director must take reasonably diligent steps to become informed about any matter affecting the company
- A director is entitled to rely on the performance by any of the persons to whom the board may reasonably have delegated, formally or informally, the authority or duty to perform one or more of

the board's functions that are delegable under applicable law

- A director is entitled to rely on any information, opinions, recommendations, reports or statements, including financial statements and other financial data, prepared or presented by designated persons
- A director is entitled to rely on one or more employees of the company whom the director reasonably believes to be reliable and competent in the functions performed or the information, opinions, reports or statements provided
- A director is entitled to rely on legal counsel, accountants, or other professional persons retained by the company, the board or a committee as to matters involving skills or expertise that the director reasonably believes are matters within the particular person's professional or expert competence or as to which the particular person merits confidence
- A director is entitled to rely on a committee of the board of which the director is not a member, unless the director has reason to believe that the actions of the committee do not merit confidence.

This is not an exhaustive list. The guiding principle is for the director to always do what she think is right, is in the best interests of the company, and is justifiable on rational grounds.

Are Non-Executive Directors Subject to the same Duties as Executive Directors?

There is generally no hierarchy of responsibility or liability among members of a board of directors in relation to the duties to which each director is subject. In other words, duties of directors apply to all directors equally, regardless of whether one is a non-executive director or an executive director.

However, ordinarily more tends to be expected of an experienced director and so s/he tends to be held to a higher standard than most. The judgment takes into account that Ms Myeni is an experienced director of numerous

companies and a self-styled “**corporate governance expert**”.

The judgment also took into account that Ms Myeni was a non-executive director of a State-Owned Enterprise which receives billions of Rand in government guarantees. It says:

“In my view the plaintiffs were correct when they submitted that a higher duty rests on non-executive directors of SOE’s who are appointed by the government of the day as the shareholder. It is a matter of public knowledge that SAA received billions in government guarantees, leaving government liable should SAA default on any of its liabilities. Not only the courts, but also government should hold Board members of SOE’s accountable when they fail to execute their duties.”

Holding a director to a higher standard by virtue of her experience and seniority is understandable and the courts have expressed that view in other contexts when considering the fitness and propriety of, for example, advocates and attorneys. But to do so by reason of the nature of the company and where it gets its funds is open to doubt and appears to flirt with sentiments often expressed in social media posts, newspaper editorials and general political commentary.

But, in the final analysis, the takeaway from the judgment in this regard is that appointment on the board of directors is not a privilege; it is a responsibility fraught with potential liability if not carried out with care, requisite skill, honesty, diligence and in the best interests of the company.

Can You Pick your Target to the Exclusion of Others?

The judgment says yes. This arises in the context of an application by Ms Myeni to join other members of the SAA board with whom she served as defendants in her case. This is

not unusual and does not necessarily demonstrate Ms Myeni’s wish to shift the blame to others.

In terms of the rules of the High Court, a defendant is entitled to demand that other defendants be joined

“whenever the question arising between them or any of them and the plaintiff ... depends upon the determination of substantially the same question of law or fact which, if such defendants were sued separately, would arise in each separate action.”

The standard that has emerged over the years from South African courts is that a person should be joined as a party in court proceedings if s/he has a “**direct and substantial interest**” in the order that the court might make, or if such order cannot be sustained or carried into effect without prejudicing that party, unless the court is satisfied that the party has waived his or her right to be joined.

Ms Myeni’s application to the court to join other directors was dismissed. Yet in its order the court directed that at least 2 other non-executive directors should be investigated by the National Prosecuting Authority together with Ms Myeni with a view possibly to instituting criminal proceedings against them even though there is no evidence from the judgment that either of those two other directors waived their right to be joined. This, it seems to me, is a prejudicial order in relation to those directors.

The judgment says OUTA is entitled to pick its target because it has “**limited means**” and that it is up to others to target the other directs. This is hardly the standard in joinder applications. “**Direct and substantial interest**” is the established standard. The two non-executive directors that the court has directed the NPA to investigate for purposes of instituting criminal charges clearly had a direct and substantial interest in that order.

But, on the facts as appear from the judgment, it would seem that someone in Ms Myeni position may have had another avenue of joining the other directors by way of what lawyers call “**Third Party Procedure**”. Whether that approach would have availed her is a moot question.

Do the King Codes have Legally Binding Effect on Directors?

According to the Rules of the Johannesburg Securities Exchange the King Codes are binding on directors who serve on the boards of companies listed on that bourse. Some companies, including SAA, have incorporated the Codes with reference as binding on their directors.

Whether they are binding on private companies and close corporation that have not incorporated them in their own governance documents is open to doubt. Nevertheless, it seems to me prudent to err on caution’s side by treating them as applicable and binding on all directors and persons in positions of trust.

The judgment found that they are binding on Ms Myeni in this case as they have been incorporated by reference in SAA’s governance prescripts. This appears to be an unnecessary inclusion because, if the facts as provided in the judgment are undisputed, a breach of the King Code does not make Ms Myeni’s position any worse or better but seems rather indicative of an inclination to throw the proverbial “**kitchen sink**” at her.

Factors on which Ms Myeni was declared a Delinquent Director

So why did the court feel so strongly that Ms Myeni is deserving of being cast adrift in the wilderness? Among the factors taken into account by the court in declaring Ms Myeni a delinquent director are:

- that Ms Myeni missed 2 important meetings in Dubai and Cape Town with the "largest international airline in the world" for

"unspecified" reasons which other non-executive directors also missed

- that Ms Myeni "created a climate of fear as executives who crossed her were subjected to disciplinary proceedings and victimisation"
- that Ms Myeni created a committee to advise her on the MOU with Emirates without consulting the rest of the SAA board [yet the Learned Judge finds that "**No Board resolution was in fact required**"]
- that Ms Myeni scuppered the signing of a non-binding MOU with Emirates on the instruction of President Zuma but without consulting with the SAA board [But the Learned Judge finds, at once, that this was "**not determinative**" of her delinquency and that it was an "**aggravation**"]
- that she failed to sign a non-binding but potentially lucrative MOU with Emirates for no valid reason [But the Learned Judge finds that this is an operational issue not requiring the board]
- that she was not a credible witness as regards the signing of the MOU [But the Learned Judge finds that this is an operational issue not requiring the board]
- that she had the mistaken belief that SAA would by signing the MOU give Emirates new rights to fly domestic routes in South Africa [The Learned Judge says this is a function of the Minister of Transport]
- that her failure to acquaint herself with how flight frequencies work demonstrate her "reckless lack of care"
- that she failed to treat the non-binding Emirates MOU signature issue with the urgency it deserved thereby breaching the SAA Shareholder Compact
- that her attempt to cast doubt on the authenticity of a s 54 [of the PFMA] application to the Minister of Finance for the approval of the amendment of the Airbus Swap transaction which she had herself prepared "**can only point to dishonesty**"
- that she, together with two other non-executive board members, sought to have the Airbus Swap transaction amended for no discernible advantage to SAA and at a potentially ruinous cost to SAA had

National Treasury not intervened on the very last day

- that as chairperson of the SAA Board she **"did not show any concern for the catastrophic consequences of her actions not only for SAA but the country"**
- that **"[a]lthough all of SAA's woes can certainly not be attributed to her alone, she surely contributed significantly to the position SAA and the economy finds itself in today"**

Conclusion

Whether this judgment will stand up to legal scrutiny on appeal or review [if that should come to pass] remains to be seen.

I express no view on that.

But what is clear is that this judgment is an overdue reminder to directors and those who appoint them that a directorship is not a privilege reserved for a few politically and/or familially connected individuals.

There is potentially a heavy price to pay for treating a board appointment as a joy ride.