community courts. A person cannot merely go to court and allege that a norm has been established. Community courts provide a better platform to deal with this conundrum because they will know if this is indeed the case.

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## THE DELINQUENT DIRECTOR REMEDY IN TERMS OF THE COMPANIES ACT 71 OF 2008

### *Organisation Undoing Tax Abuse v Myeni* 2020 3 All SA 578 (GP)

**OPSOMMING**

**Die misdadige direkteur-remedie kragtens die Maatskappywet 71 van 2008**

Die Maatskappywet 71 van 2008 (die "Wet") het 'n innoverende en unieke remedie daargestel wat dit moontlik maak om persone wat direkteure van maatskappye is, of was, as misdadige direkteure te verklaar, of onder 'n proeftyd te plaas. Sodra 'n persoon as misdadige direkteur verklaar word, of onder 'n proeftyd geplaas word, word sodanige persoon se bevoegdheid om as direkteur van 'n maatskappy te dien, beperk. Hierdie bespreking fokus op die remedie waarvoor artikel 162 van die Wet voorsiening maak. Artikel 162 verleen toestemming aan verskeie partye, onder andere die maatskappy, direkteure, aandeelhouers, werknemers, en reguleringsinstansies (soos die Kommissie vir Maatskappye en Intellektuele Eiendom en die Oornameregulerings paneel) om die hof te nader ten einde direkteure wat die pad byster geraak het as misdadige direkteure te verklaar. 'n Bykomende "laag" verantwoordbaarheid is gevolglik op direkteure van toepassing. *Organization Undoing Tax Abuse v Duduzile Cynthia Myeni* 2020 3 All SA 578 (GP) is een van die eerste gerapporteerde uitsprake waarin 'n direkteur van 'n staatsonderneming as 'n misdadige direkteur verklaar is. Hierdie uitspraak is dus van noemenswaardige openbare belang. Die aansoek, wat deur die *Organisation Undoing Tax Abuse* en *South African Airways Pilots Association* geloods is, is 'n belangrike stap om die publiek teen misdadige direkteure van maatskappye in staatsbesit te beskerm. 'n Verklaring van hierdie aard beïnvloed egter die status van persone wat as misdadig verklaar word, waarna 'n mate van statutêre inperking intree. Sodanige beperkings is soortgelyk aan dié wat in die volgende gevalle toepassing vind: (a) minderjarigheid; (b) 'n verklaring van kranksinnigheid; (c) insolvensie; of (d) skuldigbevindings aan kriminele optrede. Gegewe die erns van 'n bevel wat 'n persoon as 'n misdadige direkteur verklaar, word die hof se toepassing van artikel 162(5)(*c*) krities ontleed.

## 1 Introduction

The Companies Act 71 of 2008 (hereafter "the Companies Act" or "the Act") introduced an innovative and unique remedy that allows persons who are, or were, directors of companies, to be declared delinquent directors or to be placed under probation (s 162 of the Companies Act; F Cassim *Contemporary company law* (2012) 435; R Cassim "Delinquent directors under the Companies Act 71 of 2008: *Gihwala v Grancy Property* [2016] ZASCA 35" 2016 *PER/PELJ* 2; Du Plessis & Delport "'Delinquent directors' and 'directors under probation': A unique South African approach regarding disqualification of company directors" 2017 *SALJ* 275). An order declaring a person a delinquent director or placing a

person under probation restricts such person's capacity to serve as a director of a company.

The focus of this note is on the delinquency remedy in terms of section 162. The purpose of this section is to protect the company and corporate stakeholders from directors who have proven an inability to manage the business affairs of the company or who have otherwise been derelict in the execution of their duties as directors of the company (*Msimang NO v Katuliba* 2013 1 All SA 580 (GSJ) para 29). Also, the delinquency remedy seeks to protect: the investing public from the "type of conduct that leads to delinquency", and those dealing with companies from the harm that delinquent directors cause (*Gihwala v Grancy Property Limited* 2016 2 All SA 649 (SCA) para 142).

Section 162 empowers various stakeholders to approach the court to have "directors gone rogue" declared delinquent (s 162(2)–(4)). As a result, an additional layer of accountability is placed on directors (R Cassim 2016 *PER/PELJ* 3).

The matter of *Organisation Undoing Tax Abuse v Duduzile Cynthia Myeni* 2020 3 All SA 578 (GP) ("*OUTA v Myeni*") is one of the first reported judgments declaring a director of a state-owned entity ("SOE") delinquent. This judgment thus sets a precedent and is of considerable importance.

The application, brought by the Organisation Undoing Tax Abuse (OUTA) and the South African Airways Pilots Association (SAAPA), constitutes a significant step towards protecting the public against delinquent directors of SOEs. However, a delinquency declaration impacts on the status of persons who are declared as such and results in a legal disability, similar to being a minor, declared insane, declared insolvent; or found guilty of criminal conduct (*Gihwala* para 147). Given the gravity of such an order, it is imperative critically to analyse the court's finding. Accordingly, this note analyses section 162 and the court's approach in handling the delinquency application.

## 2 Facts

OUTA and SAAPA (the plaintiffs) initiated proceedings in the High Court for an order to declare Myeni a delinquent director in terms of section 162(5) of the Companies Act (paras 1 and 2). The proceedings were based on her conduct while she was the non-executive chairperson of the South African Airways (SAA) board from 2015 to 2017. Myeni acted in this capacity from December 2012 before her official appointment in January 2015 (para 3). The proceedings against Myeni were based on four sets of transactions: the Emirates deal, the Airbus swap transaction, the BNP Capital deal, and the report by Ernst and Young (para 5). However, at trial, the plaintiffs opted to lead evidence only relating to the Emirates deal and the Airbus swap transaction to prove their case (para 5).

### 2.1 *Emirates deal*

Emirates approached SAA regarding an enhanced code-sharing arrangement (para 44). The proposed code-sharing arrangement offered substantial benefits to SAA, which included revenue guarantees of approximately R1,5 billion per annum (para 46); code-sharing in respect of Emirates flights from Dubai to destinations in Europe and Asia (para 47); secondment opportunities for SAA pilots and other staff training exchanges; and the potential employment of retrenched SAA employees. These benefits were set out in a non-binding memorandum of understanding ("MOU") (para 47).

The MOU was a precursor to further binding agreements. Its non-binding nature rendered the MOU an operational matter, which required the approval of only SAA executives in terms of the company's Delegation of Authority Framework (para 49). The approval of the shareholder, represented by Minister Nene, then the Minister of Finance, was not required (para 50). Board approval would have been required only once negotiations had taken place and the binding agreements were ready for consideration (para 49). The Network and Fleet Plan, which had been approved on 2 April 2015, specifically recommended an enhanced code-sharing arrangement with Emirates (para 52). This document was prepared by aviation experts pursuant to a review and analysis of SAA's network and fleet (para 39(c)).

Even though the MOU did not require board approval at this stage, Myeni, a non-executive director, insisted on personal meetings with Emirates (para 54). Her request was acceded to, and two meetings were scheduled for 5 and 12 May 2015. On both occasions, Myeni cancelled these meetings at the last minute (paras 54–58). There were further delays in finalising the matter, such as seeking external legal advice when an internal legal advisory panel was available. In any event, the external legal counsel had no objection to the MOU (para 62). There were also delays in feedback from Myeni (para 64) and she constituted a review committee, comprising of middle managers appointed without engaging the SAA executives and the rest of the board (para 65). Although it was unusual for a non-executive chairperson to constitute her own committee, the committee fully supported the Emirates MOU, subject to minor amendments (paras 68 and 69).

The remainder of the board at the time, which included Tambi, Dixon, and Kwinana, supported the conclusion of the MOU and showed such support between May and June 2015 (paras 72 and 73). Although further opportunities to conclude the MOU presented themselves, Myeni frustrated its conclusion. In some instances, she purportedly invoked the President's name as the reason for her instruction not to sign the MOU (paras 75 and 79–80).

Myeni's version of the Emirates deal was confusing and, at times, contradicted her pleadings and her later evidence (paras 115–128). Ultimately, members of the SAA team responsible for engaging Emirates either resigned or were removed, and the Emirates deal was left to perish (paras 112 and 114). The court stated that it was unclear why the deal was delayed and sabotaged (para 118).

### 2.2 *Airbus swap transaction*

The Airbus swap transaction was an agreement between SAA and Airbus to cancel a legacy contract to purchase ten Airbus A320-200s from Airbus and to substitute the sale with the lease of five Airbus A330-300 aircraft (para 134). The transaction was important for SAA to escape certain onerous pre-delivery payments ("PDPs") – the PDPs could have triggered a liability of over R1 billion, as well as exaggerated prices in terms of the old sale contract. Also, a default on any of these PDPs would trigger certain cross-default clauses in other loan and lease agreements, resulting in billions of rands in debt becoming due and payable with immediate effect, which would have adversely impacted government debt (para 135).

In March 2015, the SAA board unanimously approved the transaction (para 141). Also, in September 2015, the Minister of Finance unconditionally approved the transaction (para 142). What remained was the board's ratification

of signatories. This ought to have happened swiftly as it was a mere formality (para 143). The conclusion of the Airbus swap transaction was important for SAA's financial position. It was also a critical condition for SAA to receive further "going concern guarantees" from government (para 144).

At this stage, there were five board members (Myeni, Kwinana, Tambi, Dixon, and Meyer) (para 147). Even though the transaction had initially been approved, three of the non-executive board members (Myeni, Kwinana, and Tambi) started to question the Airbus swap transaction. Instead of ratifying the signatories, these directors attempted to renegotiate directly the Airbus deal (paras 148–149). By 18 September 2015, the signatories were still not ratified, despite the Minister's instruction to conclude the swap transaction and Meyer's warnings to the rest of the board (para 152). On 27 September 2015, Meyer warned that Airbus would send a default notice in the following week, since it did not receive feedback from the board (para 151).

On 29 September 2015, Myeni sent a letter to the president and CEO of Airbus, Fabrice Bregler, unilaterally attempting to amend the swap transaction (para 154). She sought to add, as a pre-condition to concluding the swap transaction, the African Aircraft Leasing Company (paras 154 and 160). However, Airbus was not willing to accede to this request (para 160). Meyer, Bosc (SAA's former General Manager: Commercial), and Mpshe (a former acting CEO and General Manager: Human Resources) were unaware of, and surprised by, the letter (para 156). The implication of the delay was that SAA would be held liable for the outstanding PDPs, which would have amounted to USD 40 million by the end of November 2015 (para 160). Despite the impending risk, Myeni, Kwinana, and Tambi decided to push for the appointment of transaction advisors (para 161). Myeni recommended Quartile Capital to the board, without following proper procurement processes (paras 170 and 175).

Myeni's proposed amendment of the terms of the Airbus swap transaction was material and accordingly required the approval of the Minister of Finance, in terms of section 54(2) of the Public Finance Management Act 1 of 1999 ("PFMA") (para 186). Accordingly, exchanges pertaining to the requisite section 54(2) approval took place between Myeni and Minister Nene (paras 186–190). The Minister imposed a deadline of 16 November 2015. Failure to meet this deadline would mean that no further proposed changes would be entertained (para 189). On 16 November 2015, Myeni submitted a new section 54 approval request to the Minister to amend the Airbus swap transaction to include the African Aircraft Leasing Company (para 193). Minister Nene pointed out serious flaws in the application and directed the SAA board to conclude the swap transaction (paras 209–210). Subsequently, a new Minister of Finance, Minister Gordan, was appointed (para 210). After affording Myeni a further opportunity to submit the section 54 application, the incumbent minister rejected the application (paras 212–213). Minister Gordhan directed the board to conclude the Airbus swap transaction by 21 December 2015 (para 214). Eventually, the SAA company secretary reported to Treasury that she had received the approvals required, whereby the board has merely confirmed the resolution of March 2015 (paras 220–222).

Myeni was unable to provide a clear answer to the court regarding her position and failure to expedite the process (para 153). None of the evidence led or presented explained the delay in obtaining the signatories' consent timeously (para 225). Actually, the court highlighted that Myeni's attitude appeared to be

one of "supine indifference", despite all the risks that SAA faced at the time (para 224). The reason for the delay in concluding the transaction was, again, unclear.

## 3 Court decision

The court found that Myeni was a delinquent director, and she was declared as such for life, subject to section 162(11) and (12) of the Act (para 285). Subsequently, on 18 June 2020, the matter was taken on appeal (*Myeni v Organisation Undoing Tax Abuse NPC* (15996/2017) [2021] ZAGPPHC 56 (15 February 2021) para 2) (hereafter "2021 appeal judgment"). The appeal application sought to suspend the order pending the outcome of the appeal (para 2). In response, on 9 July 2020, OUTA filed a counterapplication to enforce the principal order whilst the outcome of the leave to appeal application was pending (*ibid*). On 22 December 2020, Myeni's application for leave to appeal was dismissed and OUTA's counterapplication was upheld (para 3).

Myeni then sought leave to appeal against the 22 December 2020 order. However, her application ran out of time. Consequently, the order emanating from the principal judgment remained in full force and effect (2021 appeal judgment para 22). The court indicated that Myeni's prospects of success at the Supreme Court of Appeal were very slim (para 26). Accordingly, the application was struck from the roll and Myeni was ordered to pay costs (para 28).

## 4 Analysis of court's findings

### 4.1 *Introduction*

To establish Myeni's delinquency, the court assessed her conduct against her duties at common law, and under the PFMA and the Companies Act (para 18). This analysis is, in the main, based on the principal judgment. It includes a critical discussion of section 162 of the Companies Act in relation to (a) standing; (b) the time-bar to a delinquency declaration; (c) grounds for delinquency in terms of section 162(5)(*c*); (d) the consequences of a delinquency declaration; and (e) the interplay between the PFMA and the Companies Act.

### 4.2 *Standing*

The standing provisions in terms of section 162 are broad (s 162(2)–(4) of the Companies Act). In this regard, there are three main categories of persons who have standing to approach the court to have a person declared a delinquent director (Du Plessis & Delport 276–277). The first category comprises of the company, shareholders, directors, the company secretary, prescribed officers, and trade unions or other representatives of the employees (s 162(2)). The second category comprises of two regulatory bodies – the Companies and Intellectual Property Commission (CIPC) and the Takeover Regulation Panel (TRP) – (s 162(3)). The third category consists of any organ of state that is responsible for the administration of any legislation (s 162(4)).

Whilst the regulatory authorities may approach the court based on any of the grounds for delinquency that are listed in section 162(5), there are limitations on persons who fall within the first and third categories. For example, those in the first category may approach the court to declare a person a delinquent director only where the latter: (a) consented to serve as a director or serve in the capacity of a prescribed officer, whilst ineligible in terms of section 69 of the Companies

Act; (b) acted as a director whilst under probation in terms of the Close Corporations Act 69 of 1984; or (c) fell within the grounds listed in section 162(5)(*c*) of the Companies Act (s 162(5)(*a*)–(*c*)). The third category (organs of state) is entitled to approach the court where the person concerned has either been subject to a compliance notice or a similar enforcement notice in his or her personal capacity, has personally been convicted of an offence at least twice, or has been subjected to an administrative fine or penalty in terms of any legislation.

In so far as the offence is concerned, there does not appear to be any restrictions or limitations as to the nature of the offences to be considered. For example, a limitation is included in section 69(8)(*b*)(iv) of the Act relating to instances in which persons may be disqualified from acting as directors in a company. In that subparagraph, offences of a specific nature are listed. These include offences that involve dishonesty, offences relating to the company, or contraventions of specified statutes. To avoid abuse of this ground of delinquency, section 162 should be revised to either cross-refer to the relevant parts of section 69 or to provide its own list of offences that will justify a delinquency declaration.

Section 157 of the Companies Act extends standing to a broader category of persons than those for which section 162 provides. Section 157 provides extended standing for remedies contemplated in the Act. In this regard, where it is possible for a matter to be brought before a court, the Companies Tribunal, the TRP, or the CIPC, the right to bring the matter in terms of section 157 may be exercised. This may be done by (a) persons contemplated in the Act; (b) those acting on behalf of others who are not able to act in their own name; (c) those acting as members (or in the interest) of a "group or class of affected persons or an association acting in the interest of its members"; and (d) those acting in the public interest with the permission of the court (s 157(1)(*a*)–(*d*)).

OUTA brought the present application as a matter in the public interest (para 9). A question that arises is whether a person who is not specifically included in section 162 of the Act may bring legal proceedings on this basis. The court addressed this matter in OUTA's interlocutory application for standing in *Organisation Undoing Tax Abuse NPC v Myeni* (15996/2017) [2019] ZAGPPHC 957 (12 December 2019) ("2019 standing judgment"). The court here indicated that although there may appear to be room for an interpretation that OUTA would be excluded from the ambit of section 162, a contextual interpretation was required (para 19).

The court indicated that the extended standing provisions in terms of section 157(1)(*d*) of the Act are equivalent to those in terms of section 38(d) of the Constitution of the Republic of South Africa, 1996 (para 28). Also, the court recognised broader considerations of accountability and responsiveness that should apply when determining standing, if the interests of justice so require (para 29; *Giant Concerts CC v Rinaldo Investments (Pty) Ltd* (CCT 25/12) [2012] ZACC 28 (29 November 2012); 2013 3 BCLR 251 (CC) para 34). The court held that OUTA represents taxpayers, who contribute financially to SAA through their taxes and thus have an interest in how such a state entity is run. Accordingly, the public has an interest in persons who are appointed as directors in an SOE and are entitled to hold them accountable when they fail to execute their duties (2019 standing judgment para 32). Consequently, the court was satisfied that OUTA had proven its standing in terms of section 157(1)(*d*) of the Act (para 34). Therefore, standing based on section 157 of the Act, at least in

delinquency applications, must be an interest of justice consideration on a case-by-case basis.

However, it has been argued, with merit, that the broad standing provisions may be open to abuse and give rise to frivolous and vexatious litigation (see R Cassim 2016 *PER/PELJ* 2n1; R Cassim "The launching of delinquency proceedings under the Companies Act 71 of 2008 by means of the derivative action: *Lewis Group Limited v Woollam* 2017 (2) SA 547 (WCC)" 2017 *Obiter* 683–685). Indeed, there are several persons who have standing to bring applications against directors of companies. Regardless of the outcome of the legal proceedings, there may still be an adverse impact on that company, or the specific director(s) concerned, such as decreased share values or general reputational damage (R Cassim 2017 *Obiter* 683). This makes it crucial for the courts to ensure, once standing is established, that their consideration of a delinquency application is in line with section 162.

### 4.3 *Time bar*

Regardless of which category a person may fall into, the delinquency remedy is applicable to current directors, or to persons who were directors within 24 months prior to the application (s 162(2)–(4)). However, there appears to be an arbitrary prescription period of two years that applies to directors who cease to hold office and does not apply to those still in office (R Cassim 2016 *PER/PELJ* 15; Delport *et al Henochsberg Commentary on the Companies Act 71 of 2008* (2011) 570–571). The arbitrariness stems from the fact that the 24-month prescription period is not aligned with the three-year prescription period that applies to similar contraventions contemplated in section 77(7) of the Act, which would warrant a delinquency declaration in terms of section 162(5)(*c*) (R Cassim 2016 *PER/PELJ* 16). Also, it is unclear why those who have ceased to be directors are subject to a prescription period that does not apply to directors who are still in office. This seems unfair to directors who are in office for extended periods, such as small business owners. As Cassim argues, the prescription period should be aligned with that of section 77 (*ibid*). This period should apply to all conduct of all directors (current and past). Furthermore, prescription should run from the moment the applicant becomes aware of the conduct that warrants a delinquency application against the director concerned to avoid directors becoming immune as a result of the effluxion of time. However, the time-bar was not a pertinent issue in *OUTA v Myeni*. Nevertheless, it is an aspect that the legislature should revisit.

### 4.4 *Grounds for delinquency*

Section 162(5) sets out the grounds for finding delinquency. In sum, a person may be declared a delinquent director if that person (a) consented to serve as a director whilst disqualified or ineligible in terms of section 69 of the Act; (b) acted in a manner that contravened a probation order issued in terms of the Close Corporations Act; (c) contravened section 162(5)(*c*) of the Act; (d) has repeatedly been personally subject to a compliance or similar enforcement notice in terms of any legislation; (e) has at least twice been personally convicted of an offence or been subjected to an administrative penalty under any legislation; or (f) has been a director of a company that was convicted of an offence and subjected to an administrative fine and the court is of the view that a delinquency order is suitable in the circumstances. Section 162(5)(*c*), which is most pertinent for

present purposes, states that a court must make an order declaring a person to be a delinquent director if the person, while a director –

> "(i) grossly abused the position of director;
>
> (ii) took personal advantage of information or an opportunity, contrary to section 76(2)(*a*);
>
> (iii) intentionally, or by gross negligence, inflicted harm upon the company or a subsidiary of the company, contrary to section 76(2)(*a*);
>
> (iv) acted in a manner –
>
> (*aa*) 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; or
>
> (*bb*) contemplated in section 77(3)(*a*), (*b*) or (*c*)".

This section directly refers to other provisions – sections 76(2)(*a*) and 77(3)(*a*)–(*c*) of the Companies Act. Section 76(2)(*a*) prevents the director from using his or her office to gain a personal advantage or an advantage for any person other than the company or its wholly-owned subsidiary. The section also prevents a director from knowingly causing harm to the company or its subsidiary. Section 77(3)(*a*)–(*c*), in turn, broadly refers to instances where the director is dishonest and acts without authority, recklessly, or fraudulently. Once a ground for delinquency is established, the court is obliged to declare the person in question a delinquent director (Delport *et al* 572).

Delport *et al* submit that the delinquency provisions apply only to directors (*idem* 565). This is the case even though other provisions of the Act that pertain to directors, such as sections 75–78, apply more broadly to prescribed officers and board committee members. For the most part, this view is aligned with the wording of section 162(5). Yet, there is a slight anomaly in so far as section 162(5)(*a*) is concerned. It provides for persons who have consented to act as "a director … or *prescribed officer*, while ineligible or disqualified in terms of section 69" (emphasis added). The implication of this reference is unclear as the section deals only with delinquent directors. Also, it is unclear why prescribed officers are mentioned in this subsection but not in the balance of section 162. This appears to be an oversight on the part of the legislature that ought to be rectified.

There is a closed list of instances in which persons may be declared delinquent directors. Given the far-reaching impact of a delinquency declaration on an individual, it is imperative that a court keeps the basis for a finding of delinquency within the confines of section 162. A question that arises is whether this was so in *Myeni*. In this regard, the finding against Myeni was based on the grounds listed in section 162(5)(*c*), which grounds have collectively been described as instances of "substantive abuses of office" or "serious misconduct on the part of a director" (para 14; Delport *et al* 567; *Grancy Property Limited v Gihwala; In re: Grancy Property Limited v Gihwala* (1961/10; 12193/11) [2014] ZAWCHC 97 (26 June 2014) para 156). Accordingly, to declare Myeni a delinquent director, the court had to determine whether the grounds for serious misconduct, as contemplated in section 162(5)(*c*), were present.

In the first instance, the court found that Myeni's conduct in blocking the Emirates transaction satisfied multiple grounds for a declaration of delinquency in terms of section 162(5)(*c*). The court found that Myeni inflicted harm on SAA, which constitutes a recognised ground in terms of section 162(5)(*c*)(iii). However, the court also highlighted that Myeni's "belated attempts to justify her

misconduct show that she acted dishonestly, in bad faith and not in the best interests of SAA or the country" (para 238). It is submitted that a breach of the duty to act in good faith and in the best interest of the company constitute contravention of section 76(3)(*a*)–(*b*) of the Act, neither of which constitute grounds for delinquency in terms of section 162(5)(*c*). The court should have distinguished between breaches of general fiduciary duties (whether codified or not) and grounds for delinquency. Whilst breaches of fiduciary duties may result in director liability in terms of section 77 or at common law, they do not constitute bases for a delinquency declaration considering the limited grounds for such declaration in terms of section 162(5).

Secondly, in respect of the Airbus swap transaction, Myeni was found to have been grossly negligent (para 244). The court regarded Myeni's attempt unilaterally to renegotiate the swap transaction as an indication of recklessness – she should have known better (para 249). This constituted a breach of section 77(3)(*a*), a further recognised ground for delinquency in terms of section 162(5)(*c*)(iv)(*bb*). Although she was warned by then Minister of Finance, Minister Nene, that she and the board were failing in their fiduciary duties, Myeni ignored him (para 243). Accordingly, the court found that Myeni acted with "deliberate dishonesty and a gross abuse of power", as contemplated in section 162(5)(*c*)(i) (para 246). Furthermore, the court considered Myeni's failure to disclose material facts to the Minister, in the application under section 54 of the PFMA, including her failure to reveal that there was no board resolution to bring the application and her misrepresentation that Airbus would not insist on payment of the PDPs, as "reckless and wilful" (paras 252 and 272). This ground for delinquency, based on a contravention of the provisions of the PFMA, is discussed in further detail below.

To determine her gross negligence, the court considered Myeni's conduct on a subjective and an objective scale. It indicated that objectively, in terms of section 76(3)(*c*) of the Companies Act, Myeni's conduct had to be assessed "against the standards expected of a reasonable director in her position". Subjectively, her conduct was assessed "against the skills, qualifications and experience she possessed". The court considered Myeni's more than nine years' experience as a director of SAA and that she was, by her own account, a corporate governance expert (para 16). The court concluded that she did not act as a reasonable director (para 273).

The court's approach is not free from criticism.

In *Gihwala*, the court noted, among others, that "recklessness" is akin to "gross negligence" (*Gihwala* para 144). Essentially, gross negligence and recklessness refer to the failure to consider the consequences of a person's actions and an attitude of reckless disregard (*Transnet Ltd t/a Portnet v Owners of the MV 'Stella Tingas'* [2002] ZASCA 145 para 7; *Philotex Pty Ltd v Snyman; Braitex Pty Ltd v Snyman* 1998 2 SA 138 (SCA) 144A; *S v Goertz* 1980 1 SA 269 (C) 270H; *S v Dhlamini* 1988 2 SA 302 (A) 308D–E). The test for gross negligence goes beyond what is contemplated in section 76(3)(*c*). Whilst the section provides for an objective and a subjective leg to the test of determining whether directors breached their duties, it does not necessarily translate to gross negligence. At most, this demonstrates negligence on the part of the director concerned. In light of what our courts have considered in determining gross negligence, there must be an element of recklessness for gross negligence to be

present. Accordingly, it is submitted that the court erred in applying section 76(3)(*c*) to the test for determining gross negligence.

4.5 *Consequences of a delinquency declaration*

A delinquency declaration in terms of section 162(5)(*a*) or (*b*) is not subject to any conditions and *subsists* for the lifetime of the director concerned (s 162(6)(*a*)). However, a delinquency declaration in terms of section 162(5)(*c*)–(*f*) may be conditional and subsists for a minimum period of seven years (s 162(6)(*b*)). The conditions imposed by a delinquency declaration may include participating in community service programmes, paying compensation to persons who may have been adversely affected by the director's conduct, or undertaking remedial education (s 162(10)(*a*)–(*c*)). Once a director has been declared delinquent, the director is automatically removed from the board (*Kukama v Lobelo* 2012 JDR 0663 (GSJ) para 21; see also R Cassim 2016 *PER/PELJ* 2).

A delinquent director may apply to court to suspended or substitute a delinquency order after three years, and to set it aside after two years (s 162(11)). However, the court will grant such an application only where the applicant has satisfied all the conditions of the original order ("demonstrated satisfactory progress towards rehabilitation") and where there is a reasonable prospect that the person would be able to serve as a director of the company in future (s 162(12)).

The court declared Myeni a delinquent director for life, subject to her right to apply for a suspension of the order after a three-year period in terms of section 162(11)–(12) (paras 273–274). This would require her to demonstrate sufficient progress towards rehabilitation as well as a reasonable prospect of successfully serving as a director in future (para 274; s 162(12)). As I mentioned, a lifetime delinquency declaration is usually applicable where section 162(5)(*a*) and (*b*) was contravened. However, it is not beyond the discretion of the court to increase this period, as was done *in casu*. However, this is a long period for a section 162(5)(*c*) delinquency declaration (for example, in a *locus classicus* of delinquency declarations, the court in *Gihwala* imposed a seven-year delinquency ban on the directors, even though they had embezzled millions of rands from the joint venture investment company. Instead of an extended delinquency period, the court ordered the directors to compensate the applicant for the stolen funds. The imposition of the lifetime declaration on Myeni seems to demonstrate the court's strong disapproval of her conduct, particularly as a director of an SOE in which the public has a vested interest.

4.6 *Interplay between the Companies Act and the PFMA*

The court considered the failure honestly to disclose material facts in the section 54(2) request for approval, as is required in terms of the PFMA (para 252). This was also considered in the context of the breach of the duties in terms of section 50 of the PFMA (para 256). It is accordingly important to analyse the interplay between the PFMA and the Companies Act. The PFMA regulates financial management at a national and provincial government level. Also, it seeks to ensure that, among others, revenue and expenditure is properly managed. To achieve these aims, the PMA imposes responsibilities on persons in charge of government entities, particularly from a financial management perspective (preamble to the PFMA).

Section 8 of the Companies Act provides for various categories of companies, including a state-owned company (s 8(2)(*a*)). Section 9 goes further and provides for the modified application of the Act to State-owned companies. The effect of this section "is that State-owned companies are, for all intents and purposes, to be treated as public companies", unless the relevant Minister granted an application for exemption (*Minister of Defence and Military Veterans v Motau* 2014 8) BLR 930 (CC) para 74). The Companies Act and the PFMA apply to SOEs, such as SAA. If there is any conflict between the PFMA and the Companies Act, the PFMA prevails (s 3(3) of the PFMA read with s 5(4)(*b*)(*ee*) of the Companies Act). Therefore, directors of SOEs are subject to "heightened fiduciary duties", in terms of sections 50 and 51 of the PFMA (para 28).

In terms of the PFMA, the SAA board is accountable to the "executive authority", which role has been filled by the Minister of Finance since December 2014 (para 27). As a point of departure, section 50 of the PFMA provides that the accounting authority of the SOE must (a) exercise a duty of "utmost care" to ensure that the assets and records of the entity are protected; (b) act with fidelity, honesty, integrity, and in the best interests of the public entity; (c) disclose material facts to the executive authority responsible for the SOE; and (d) seek to prevent any prejudice to the financial interests of the State (s 50(1)(*a*)–(*d*) of the PFMA). Furthermore, section 50(2) of the PFMA provides that a member of the accounting authority is prevented from acting inconsistently with his or her assigned responsibilities, or from using the position or privilege or the confidential information that he or she is privy to by virtue of being part of the accounting authority, for personal gain or for someone else's benefit. Also, there is a duty on members of an accounting authority to disclose any personal or other interest (s 50(3) of the PFMA). Section 51 sets out further responsibilities of the accounting authority of an SOE, including the responsibility to ensure the maintenance of financial and risk management, and an appropriate procurement system. The accounting authority is also responsible for expenditure and reporting.

The court outlined the importance of the section 54 application, which application requires a board of an SOE to submit to the Minister of Finance certified resolutions by the board or an appropriate board committee, as well as the information on which the board or committee based its resolution. The court referred to Myeni's failure to disclose material facts in respect of the section 54(2) approval (para 252). As mentioned above, the section 54 application was made in respect of the Airbus swap transaction in an attempt by Myeni to amend the terms of the transaction (para 193). However, the information that Myeni presented in respect of the section 54 application was replete with "falsehoods, misrepresentations and omissions" (para 254).

Of interest is the interplay between section 162 of the Companies Act and the "heightened fiduciary duties" of SOE directors. The court indicated that, considering section 50(1)(*b*)–(*c*) of the PFMA, Myeni failed to disclose material facts and was not acting in the best interest of SAA in sabotaging the Emirates deal and the Airbus swap transaction (para 253). The court indicated that the evidence, which includes evidence that relates to the PFMA, proved Myeni's delinquent conduct in terms of section 162(5)(*c*) of the Companies Act. Although directors of SOEs are subject to "heightened fiduciary duties", it does not follow that a breach of the heightened duties constitutes a ground for delinquency. In this regard, the court's contemplation of the contravention of section 50 of the PFMA appears to consider best interest considerations when determining

delinquency in terms of section 162(5)(*c*) of the Companies Act. This does not detract from the fact that the breach of those duties could constitute wilful misconduct or gross negligence or one of the other grounds in terms of section 162(5)(*c*). However, it is important that our courts apply the legal principles in a succinct manner to avoid misleading legal precedent.

## 5 Concluding remarks

Whilst the *OUTA v Myeni* judgment is welcome in so far as it demonstrates the seriousness with which our courts consider conduct that constitutes a ground for delinquency, it is not without criticism. The key takeaways from this analysis can be summarised as follows: (a) The categories of persons with standing, in terms of section 162 of the Companies Act, to bring applications for persons to be declared delinquent directors, are important in holding directors accountable. However, courts should guard against an abuse of this provision. (b) Where standing to utilise the delinquency remedy is based on the extended standing provisions, as contemplated in section 157 of the Companies Act, the court must ensure that the interests of justice are considered when granting an applicant the platform to bring the application before the court. (c) The time-bar in terms of section 162 should be revisited and extended to a three-year prescription period. Also, the prescription period should start to run from the moment the applicants become aware of the conduct that could lead to delinquency and it should apply to existing and previous directors. (d) Although the court was correct in its finding of delinquency, the process in arriving at the conclusion is criticised. Section 162(5) of the Companies Act provides limited grounds on which a delinquency declaration may be based. To avoid a wrong legal precedent, the court must carefully and clearly articulate the bases of delinquency, in line with section 162(5)(*c*). This is also applicable to the test that the court applied to determine gross negligence, which appears to be a misguided reliance on section 76(3) of the Companies Act.

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## THE LEGAL STATUS OF A CONTRACT CONCLUDED IN CONTRAVENTION OF SECTION 11 OF THE BANKS ACT 94 OF 1990, ESTOPPEL AND OSTENSIBLE AUTHORITY

***Stols v Garlicke & Bousfield* (10146/2010) [2020] ZAKZPHC 53 (8 September 2020)**

### OPSOMMING

**Die Regstatus van 'n kontrak wat in stryd met artikel 11 van die Bankwet 94 van 1990 gesluit is, estoppel, en oënskynlike magtiging**

In *Stols v Garlicke & Bousfield* het 'n konsultant by 'n prokureursfirma, met die oënskynlike magtiging van die firma, beleggers oorreed om in 'n skema te belê. Die firma was onbewus dat dit 'n piramiede-skema was. Een van die beleggers het 'n eis teen die