IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case No: 15996/2017

In the matter between:

DUDUZILE CYNTHIA MYENI	Applicant
and	
ORGANISATION UNDOING TAX ABUSE	First Respondent
SOUTH AFRICAN AIRWAYS PILOTS ASSOCIATION	Second Respondent
SOUTH AFRICAN AIRWAYS SOC LTD	Third Respondent
AIR CHEFS SOC LTD	Fourth Respondent
MINISTER OF FINANCE	Fifth Respondent

NOTICE OF APPLICATION FOR LEAVE TO APPEAL

PLEASE TAKE NOTICE THAT the applicant hereby makes application for leave to appeal to the Supreme Court of Appeal, alternatively a full bench of the Gauteng

Division of the High Court against the judgment of the Honourable Judge RG Tolmay handed down on 27 May 2020, in terms of which the learned judge ordered that:

1. The applicant is declared a delinquent director in terms of section 162(5) of the Companies Act.

2. This declaration of delinquency is to subsist for the remainder of the applicant's lifetime, subject to provisions of sections 162(11) and (12) of the Companies Act.

3. The applicant is directed to pay the costs of this action on an attorney and client scale, including the costs of three counsel.

4. This judgment and the evidence led is referred to the NPA for their consideration and determination of whether an investigation regarding possible criminal conduct should follow.

PLEASE TAKE NOTICE FURTHER that the grounds upon which leave to appeal is sought are that the court erred in the following respects:

Section 17(1)(a)(i)

There are reasonable prospects that an appeal would have success based on the following grounds:

1. Having regard for the principles set out in *Shoprite Checkers (Pty) Ltd v Ramdaw NO and Others* (DA12/00) [2000] ZALC 5, the learned judge, with respect:

    1.1. Misdirected herself by interpreting section 162 of the Companies Act 71 of 2008, ("the Act") to mean that the first respondent has *locus standi*

to bring application in terms of section 162 when Section 162(2) of the Act specifically provides for the parties that have *locus standi* for the relief sought and if the relief were to be granted as per Section 157(d) of the Act it can only be granted by the leave of the court.

1.2. Having granted the first respondent *locus standi*, failed to establish from the evidence led that public interest or any interest in the litigation upon which the *locus standi* of the first respondent was conferred.

1.3. Did not address the issue of the *locus standi* of the first respondent but effectively rendered the issue as moot in that the second respondent's *locus standi* was not in dispute. This however could not be considered moot as it set precedent and becomes authority for:

1.3.1. the interpretation of Section 157(d) of the Companies Act 71 of 2008;

1.3.2. the expansion of the closed category of parties granted standing under Section 162(2) of the Companies Act 71 of 2008

1.4. Erred in finding that the respondents did not have a legal duty to join the rest of the directors of the company in the circumstances.

1.5. In view of the novelty and importance of section 162, it is in any event in the interests of justice that this issue be decided and settled by a higher court.

2. The learned judge erred in finding that:

2.1. The applicant's conduct fits the conduct envisaged in Section 162(5)(c) where:

2.1.1. Gross abuse of the position of director was not proven.

2.1.2. Taking personal advantage of information obtained as director was not proven.

2.1.3. Harm inflicted on the company was not proven.

2.1.4. Gross negligence or wilful misconduct was not proven.

3. The learned judge erred in finding that:

3.1. The version of the applicant had not been put to the witnesses of the respondents in circumstances where the respondents had led evidence on issues outside of the pleadings while the version on the relevant issues in the pleadings had been put to all the witnesses who had testified to them.

4. The learned judge erred and/or misdirected herself in finding that the allegation of the applicant having acted on unlawful instructions of former President Zuma was immaterial to proving the case when that was the pleaded case of the respondents. Even if such instructions had been given, which is denied, the fact of the matter is that, at all material times hereto, President Zuma was the highest-ranking representative of the shareholder.

5. The learned judge erred in disregarding crucial evidence that disproved crucial allegations made by the respondents, including that:

5.1. The board minutes of 10 July 2015 signed by the applicant wherein the board expressed its support of the Emirates MOU.

5.2. The letter written by the Company Secretary to Airbus on 3 October 2015 wherein a decision of the board is confirmed as a board decision and not that of the applicant.

5.3. The testimony of Avril Halstead wherein she stated that the applicant had been in continuous communication with Finance Minister Gordhan on 21 December 2015 and was one of three board members who passed the resolution of the Swap Transaction as directed by the Minister.

5.4. The testimony of Nico Bezuidenhout wherein he stated that it was the norm within the organisation for letters to be drafted by the executive on behalf of the chairperson.

6. The learned judge erred in accepting evidence that was denied in the pleadings and not proven in the trial, including that:

6.1. The allegation that the applicant had attended a meeting with Airbus accompanied by a person from a company called Quartile Capital.

6.2. The letter written to the board that the applicant denied any knowledge of and had clearly shown the language and format to be inconsistent with all the correspondence of the applicant.

7. The learned judge erred and/or misdirected herself in making favourable credibility findings in respect of a number of witnesses where the record clearly demonstrates multiple contradictions and inconsistencies in their evidence.

8. The learned judge erred in finding that the applicant had attempted to unilaterally renegotiate the Swap Transaction when no such evidence had been proven at the trial. The evidence was clearly that Dr Tambi and Ms Kwinana had been the ones leading the negotiations with Airbus.

9. The learned judge erred in finding that the evidence of Mr Meyer had been supported by correspondence presented at the trial.

10. The learned judge erred in finding that it had been argued on behalf of the applicant and the respondents were obliged to prove other causes of action that had been pleaded when no such argument was in fact made in oral argument or in the applicant's heads of argument.

11. The learned judge erred in accepting the erroneous submissions made by the respondents on the role of the applicant in the submission of Section 54 applications by failing to distinguish between the representative capacity of the applicant as chairperson of the board that is as per the Section 49 of the PFMA, the accounting authority and her individual capacity as a director.

12. The learned judge has created reasonable grounds of apprehension of bias and/or failure to apply an independent mind, more particularly in that:

    12.1. The judgment is effectively a carbon copy of the respondents' heads of argument where at least 265 of the 285 paragraphs including the orders of the judgment are either:

        12.1.1. The exact wording, verbatim, of the respondents' heads of argument.

12.1.2. A paraphrasing or summary of the respondents' heads of argument.

12.1.3. Consolidation of the respondents' heads of argument.

12.1.4. Appear and flow in the same logic sequence as in the respondents' heads of argument

12.2. The judgment does not consider or give reasons as to why the court rejects any submission or argument made for the applicant.

12.3. The opinions expressed in the judgment as those of the court were in effect the submissions of counsel for the respondents which have been merely elevated in status into the opinions of the learned judge.

13. The abovementioned method of judgment has been correctly criticised and discouraged by the higher courts.

14. The learned judge erred in imposing such a harsh penalty on the applicant, which permanently affects her livelihood.

Section 17(1)(a)(ii)

15. A number of aspects of this case have not been the subject of judicial consideration by South African Courts with the result that there are compelling reasons why the appeal should be heard as understood within the meaning of Section 17(1)(a)(ii) of the Superior Courts Act 10 of 2013. These aspects *inter alia* include:

15.1. A delinquency application as per Section 162 of the Companies Act 71 of 2008 by parties claiming *locus standi* Section 157(d) of the

Companies Act 71 of 2008 where Section 162(c) of the Act specifically provides otherwise.

15.2. The respondents led evidence that sought to prove a different case from the pleadings. The court in tandem relied extensively on issues that fell outside the pleadings in deciding the case.

15.3. The interpretation and application of Section 54 read with Section 49 of the Public Finance Management Act 1 of 1999 in as far as defining the powers and role of the Accounting Authority as defined in the Act.

15.4. An order referring the judgment for criminal investigation and prosecution where there is no finding or evidence led on criminal conduct.

15.5. A finding that other board members be included in the investigation by the National Prosecuting Authority where the court had refused a joinder application of other directors where that application had been founded on the grounds that other directors had a direct interest in the litigation.

15.6. Adverse findings on the evidence and plea of the applicant where the court dismissed an application to amend pleadings at the start of the trial with punitive costs.

15.7. There exist grounds of reasonable apprehension of bias in the judgment as a whole that a fair minded and reasonable observer can be led to have a reasonable apprehension of bias by the court in delivering its judgment.

15.8. The harshness of the lifetime ban on the applicant and the implications thereof on her rights in terms of section 22 of the Constitution.

Section 17(1)(c)

16. The learned judge erred in finding that the applicant had drafted and submitted PFMA Section 54 applications when as per the definitions set out in at Section 49 and Section 54 of the PFMA it is only the Accounting Authority that has the legal capacity to submit such application. This issue was pertinently raised in argument but is not addressed in any part of the judgment.

PLEASE TAKE NOTICE FURTHER that the applicant hereby reserves the right to supplement the grounds of this application before the hearing.

KINDLY SET THE MATTER DOWN ACCORDINGLY.

DATED AT **JOHANNESBURG** ON THIS THE **18TH** DAY OF **JUNE 2020**.

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