

**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**

Case number: 15996/2017

In the matter between

**DUDUZILE CYNTHIA MYENI**

Applicant

and

**ORGANISATION UNDOING TAX ABUSE NPC**

First Respondent

**SOUTH AFRICAN AIRWAYS PILOTS' ASSOCIATION**

Second Respondent

**SOUTH AFRICAN AIRWAYS SOC LIMITED**

Third Respondent

**AIRCHEFS SOC LIMITED**

Fourth Respondent

**MINISTER OF FINANCE**

Fifth Respondent

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**OUTA AND SAAPA'S ANSWERING AFFIDAVIT  
IN THE APPLICATION TO INTRODUCE NEW EVIDENCE**

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I, the undersigned,

**STEFANIE FICK**

state under oath as follows:

- 1 I am the Executive Director of the Accountability Division of the first respondent in this interlocutory application, OUTA. I am authorised to depose to this affidavit on behalf of OUTA and SAAPA.
- 2 The facts contained in this affidavit are within my personal knowledge, unless the context indicates otherwise, and are true and correct, to the best of my knowledge and belief.

## **INTRODUCTION**

- 3 This affidavit is filed in answer to Ms Myeni's application to introduce new evidence in her application for leave to appeal. An unsigned copy of this application was delivered to our attorneys late on 16 November 2020, just two court days before the hearing of this matter. A signed copy was only delivered on the afternoon of 17 November 2020.
- 4 In this application, Ms Myeni seeks to introduce extracts of transcripts of Ms Yakhe Kwinana's testimony at the Commission of Inquiry into State Capture (State Capture Commission) on 7 November 2020. On the basis of these extracts, Ms Myeni proceeds to make a series of unsubstantiated allegations of conspiracy and malfeasance against OUTA, which have no basis in any evidence.
- 5 This is the latest in a long string of obstructive and dilatory applications by Ms Myeni and her legal team, which have been repeatedly condemned by this Court.

By my count, Ms Myeni has now launched no less than four separate interlocutory applications, three separate applications for leave to appeal, and a host of other unmeritorious technical points, which have all sought to cause maximum disruption, distraction, and delay.

6 This latest application falls to be dismissed on at least three grounds:

6.1 First, Ms Myeni has not identified any legal basis for the admission of new evidence in a leave to appeal application, where the Court is *functus officio*;

6.2 Second, even if Ms Myeni's application is somehow permissible, it is hopelessly out of time and no proper grounds for condonation have been established.

6.3 Third, on a generous reading of Ms Myeni's application, she might be asking this Court to consider the value of the evidence she proposes to seek leave to introduce on appeal, if the Court grants leave to appeal. However, her application does not satisfy the stringent test for the admission of new evidence on appeal which requires, *inter alia*, the demonstration of exceptional circumstances, weighty and material evidence that is true and would change the outcome of the trial, and a clear explanation as to why this evidence was not led at trial.

7 These submissions will all be developed in argument. In the limited time available, I do not intend to address all of the factual allegations made by Ms Myeni in her affidavit. Any allegation which is not specifically addressed, and

which is inconsistent with the evidence and affidavits submitted by OUTA and SAAPA throughout this litigation, should be taken to be denied.

### **MS MYENI'S NEW EVIDENCE**

- 8 The transcripts from the 7 November 2020 proceedings of the State Capture Commission refer to two meetings held between Ms Kwinana and OUTA representatives in 2016.
- 9 The line of questioning pursued by the Commission's evidence leader suggested that Ms Kwinana's affidavit before the Commission was at odds with what she had previously told OUTA. I have not had sight of Ms Kwinana's affidavit in the Commission, which has not yet been made publicly available, and cannot comment further on this.
- 10 Ms Myeni now launches a series of wild and unsubstantiated allegations against OUTA, which have no basis in the Commission's transcripts. Ms Myeni accuses OUTA, *inter alia*, of "*striking a deal*" with Ms Kwinana, relying on "*illegally obtained evidence*", failing to disclose material information to this court, and engaging in unspecified "*abuses*" of process.
- 11 Ms Myeni's unsubstantiated allegations are entirely untrue. The true facts are as follows:
  - 11.1 Ms Kwinana approached OUTA in August 2016, shortly after she left SAA. Two meetings were held on 28 August 2016 and 2 September 2016.

- 11.2 From these meetings, it was immediately apparent that Ms Kwinana was self-interested, unreliable, and could not be trusted.
- 11.3 No “pact” or “deal” was ever concluded with Ms Kwinana or any other SAA employee, in relation to any contemplated litigation or otherwise.
- 11.4 In fact, OUTA proceeded to file a complaint against Ms Kwinana with the South African Institute of Chartered Accountants (SAICA) which referred the matter to the Independent Regulatory Board of Auditors (IRBA).
- 11.5 The meetings with Ms Kwinana formed no part of the evidence against Ms Myeni that was led at the trial.
- 11.6 Indeed, the applicants’ legal representatives had no contact with Ms Kwinana.
- 11.7 OUTA’s dealings with Ms Kwinana are confirmed by Mr Hendrik Roedolf Heyneke in his confirmatory affidavit that will be filed with this affidavit.
- 12 In these circumstances, the alleged new evidence that Ms Myeni seeks to introduce is no evidence at all. It is mere conjecture and conspiracy theories which are not worthy of further consideration.
- 13 This evidence has no relevance whatsoever to this Court’s findings that Ms Myeni is a delinquent director. The evidence on record, including Ms Myeni’s own disastrous testimony, amply demonstrates her delinquency and would not change through the admission of evidence of Ms Kwinana’s testimony in the Commission.

- 14 This new evidence also has no bearing on OUTA's standing or questions of joinder. As this Court has repeatedly held, OUTA plainly brought this application in the public interest. The fact that other SAA directors may have been implicated in Ms Myeni's delinquent conduct is no basis for any finding of non-joinder. These issues and the relevant law were all extensively addressed in this Court's judgments of 2 and 12 December 2019.
- 15 Furthermore, Ms Myeni had ample opportunity to call Ms Kwinana as a witness at the trial if she believed that her evidence would be of assistance to this Court. Ms Myeni repeatedly argued that Ms Kwinana was also implicated and that she was being unfairly singled out. Ms Myeni's latest complaints of unfair treatment and appeals to "collective responsibility" are nothing new and were addressed in detail in this Court's judgment of 27 May 2020.
- 16 Finally, we point out that Ms Myeni has been highly selective in the evidence that she wishes to introduce from the State Capture Commission. She is silent on her own disastrous testimony and the extensive evidence that has accumulated implicating her in a range of other alleged corrupt and unlawful activities. It could never be in the interests of justice to permit Ms Myeni to adopt such a self-serving and selective approach.

## **DELAYS AND COSTS**

- 17 On her own version, Ms Myeni was fully aware of Ms Kwinana's testimony on 7 November 2020. No mention was made of her intention to introduce new evidence during the case management meeting on 11 November 2020.

- 18 Ms Myeni's legal representatives then waited until Friday, 13 November 2020 to inform OUTA and SAAPA's legal representatives of their intention to introduce new evidence. This appears from the letter attached to Ms Myeni's affidavit as Annexure DMA 18, dated Tuesday 10 November 2020, but only delivered on the morning of Friday 13 November 2020.
- 19 The 10 November 2020 date of this letter is significant. It suggests that Ms Myeni's legal representatives were already contemplating launching this application well before the meeting on 11 November 2020, but failed to disclose their intentions to this Court.
- 20 Our legal representatives responded on 13 November 2020, warning Ms Myeni's legal representatives that there was no basis for such an application and that it would be met with a request for punitive costs, including an order holding Ms Myeni's legal representatives jointly and severally liable for these costs, in their personal capacity. This is reflected in the letter attached to Ms Myeni's affidavit as Annexure DMA 19.
- 21 Ms Myeni and her legal team then waited until late on Monday 16 November 2020 to deliver unsigned papers via email.
- 22 On 17 November 2020, our legal representatives wrote to Ms Myeni's legal representatives stating that until we received a signed version the application was of no legal consequence. A copy of this correspondence is attached as **Annexure SF 1**. Our experience in this litigation has shown that the signed and unsigned versions of Ms Myeni's affidavits often contain material changes.

- 23 Signed papers were only delivered at 15:07 pm on 17 November 2020.
- 24 These delays have caused prejudice to the applicants. Our legal representatives have now been forced to respond to yet another belated application, which has interfered with their preparations for the hearing on 19 November 2020. OUTA and SAAPA have once again been forced to incur additional, unforeseen costs in addressing unmeritorious applications.
- 25 Ms Myeni's manifestly unreasonable conduct is again deserving of a punitive costs order. In the circumstances, it would also be appropriate for Ms Myeni's legal representatives to be held jointly and severally liable for these costs, *de bonis propriis*.
- 26 Following the warning issued by our legal representatives on 13 November 2020, any legal representative exercising sufficient care and diligence would have advised their client that the intended application is manifestly hopeless and a waste of the court's resources. However, Ms Myeni's legal representatives have persisted in pursuing this application and have done so vigorously. They have become party to an abuse and ought not to escape the consequences.

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**STEFANIE FICK**

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of his knowledge both true and correct. This affidavit was signed and sworn to before me at \_\_\_\_\_ on this the \_\_\_\_ day of November 2020, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended, have been complied with.

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COMMISSIONER OF OATHS

Full names:

Address:

Capacity: