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

CASE NO: 15996/2017

In the matter between:

ORGANISATION UNDOING TAX ABUSE NPC	**First Plaintiff**
SOUTH AFRICAN AIRWAYS PILOTS ASSOCIATION	**Second Plaintiff**

and

DUDUZILE CYNTHIA MYENI	**First Defendant**
SOUTH AFRICAN AIRWAYS SOC LTD	**Second Defendant**
AIR CHEFS SOC LTD	**Third Defendant**
MINISTER OF FINANCE	**Fourth Defendant**

CLOSING HEADS OF ARGUMENT

INTRODUCTION

1. In closing the First Defendant submits that the Plaintiffs have failed and to make out a case that supports the relief sought under Section 162 of the Companies Act 2008.

2. What follows are grounds why the court cannot find for the Plaintiffs and why the only outcome there can be in this case is one that favours the First Defendant.

3. The grounds upon which the First Defendant makes the above submission are that:

3.1. The evidence led by the Plaintiffs does not support the allegations pleaded by the plaintiffs in their particulars of claim.

3.2. The evidence led by the Plaintiffs on the Emirates MOU failed to prove the crucial allegation that was made in founding their cause of action, i.e. that Ms. Myeni acted on the instructions of the former president. They further failed to challenge the version of the First Defendant during cross examination on that particular crucial aspect of allegations.

3.3. The evidence led on the Airbus Swap transaction does not support the pleaded case on the papers.

3.4. The pleaded allegations on the alleged Section 54 amendment have been proven by the evidence to based on the incorrect premises.

3.5. In totality, the evidence led if proven and accepted by the court, does not fall into the legislated grounds for the court to make a finding of delinquency under Section 162(5) of the Companies Act 2008.

4. The First Defendant further submits that a finding of delinquency in the circumstances would be a violation of Section 9 of Constitution which guarantees the right to equality before the law.

5. The First Defendant further submits that the First Plaintiff has no standing to be granted any relief sought as they have not led any evidence that supports their claim to be acting in the public interest.

6. In light of the above the court is further asked to make a finding that the action brought by the Plaintiffs against the First Defendant was wholly misconceived and frivolous in that none of the evidence brought and led before court by them is competent to sustain a delinquency application as contemplated by Section 162(5) of the Companies Act.

EMIRATES MOU

7. The allegations made against the First Defendant about the Emirates MOU have not been proven and such failure is fatal to the Plaintiffs' case.

8. In particular, the Plaintiffs have failed to prove that the First Defendant acted under the instructions or influence of former President Zuma as alleged under Paragraph 85 of the particulars of claim.

9. The Plaintiff's entire cause of action on the Emirates allegations is anchored on the allegations made under paragraph 85 (of particulars of claim) and it thus follows that if that particular allegation has not been proven the entire ambit of the allegations and averments that follow from paragraph 86 to 89 cannot be sustained.

10. The allegation made about the First Defendant having acted on the instructions of the former president cannot be deemed to proven on the grounds that:

10.1. The First Defendant has consistently denied, both in the plea and evidence in chief that she uttered such words or anything to that effect to Mr Bezuidenhout.

10.2. The First Defendant has consistently denied, both in the plea and evidence in chief that in the text message sent on the morning of 16 June 2015, the “We” she was referring to was in reference to her and former president.

10.3. The witnesses, in particular Mr Bosc and Mr Bezuidenhout gave conflicting or inconsistent accounts of the events that unfolded on the evening of 15 June.

10.3.1. Mr Bosc testified that he was present when that particular call was received by Mr. Bezuidenhout at around 11pm. He also testified that there had been an earlier call at around 6pm of a similar nature which call was not mentioned by Mr Bezuidenhout, he only testified that he only received one call.

10.3.2. Mr Bezuidenhout testified that he was with Mr Meyer at time of the call and not Mr. Bosc.

10.3.3. Mr Meyer testified to being present when Mr Bezuidenhout received the call but stated that he never actually heard those specific words being spoken by the First Defendant when asked under cross examination.

11. However, two points are fatal to this particular allegation and in effect fatal to the pleaded case on the Emirates MOU:

11.1. In Mr Bezuidhout's six pages long email of 20 June 2015[1] wherein he writes to the board giving a chronological account of the entire history of the Emirates MOU until the events in Paris; in detailing his recollection of his exchange with the First Defendant, he does not state that the First Defendant gave the alleged reasons in directing him not to sign the MOU.

11.1.1. When asked why under cross examination he had no answer to this glaring omission on his part which illustrates on a balance of probabilities that the allegation is a fabrication. It is most improbable that he would not mention something as crucial as that given all the negative sentiment and resentment he was obviously towards the First Defendant at the time. It is most improbable that he would not openly state such an irregularity to the entire board to demonstrate the alleged misconduct of the First Defendant.

[1] Emirates Bundle, Vol 2, Page 164

11.1.2. Mr Bosc's reply to this email states that it is "all perfectly true and documented' but he too does not correct this glaring omission on the part of Mr Bezuidenhot. He too had no answer under cross examination as to why he does not mention this glaring and material omission if it was indeed true further lending credence to the assertion that is a subsequent fabrication created post the fact in an attempt to discredit and frame the First Defendant.

11.1.3. Mr Meyer also had no answer as to why he did not highlight this omission on the part of Mr Bezuidenhout given that he stated that he was present when the call was received. This too further lends credence to the assertion that the allegation is indeed a falsehood created to sustain unfounded allegations that have been made against the First Defendant.

12. What is most fatal to this allegation however, is the Plaintiffs' failure to challenge the version of the First Defendant under cross examination. Not a single question was put to the First Defendant about having taken instructions from the president and in the circumstance, it is trite that if a version is not challenged under cross examination it prevails.

13. As already stated, the failure to prove this allegation in effect collapses the entire case pleaded on Emirates. The court cannot rely on any other allegations or evidence to find otherwise as the allegation about acting on the "wishes" of the former president is pillar upon which the allegations made about the Emirates MOU are founded in the papers. All other allegations along the lines of the First

Defendant having been an obstacle in signing the Emirates MOU bear no relevance or applicability as those are not pleaded by the Plaintiffs.

14. Further compounding the problem for the Plaintiffs is the unproven allegation made at Paragraph 80 about electronic approval of the Emirates MOU by the board read together with the allegation made at paragraph 85.2.

14.1. In the email of Mr Bezuidenhout's of 20 June 2015 he states that *"he had board concurrence*"[2] not electronic approval as alleged under paragraph 80 of the particulars.

14.2. No evidence was produced or led on the alleged "electronic approval", instead Mr. Bezuidenhout states in his e-mail that "*On 12 June I engaged with Yakhe (Kwinana) at the supplier day, who at the time confirmed that all her questions had been substantially answered and proposed that the Board engage, even if it was over the weekend, to understand any remaining concerns that may exist from the Chair*"

14.3. He goes on further to say in the following paragraph: "*Over the weekend of 13 and 14 June I attempted to gain any further input or areas of concern of concern, with Wolf further indicating his concurrence to the MOU signature."*

[2] Emirates Bundle, Vol 2, Page 168, Line 2

14.4. He makes no mention of getting concurrence from Dr. Tambi or Mr Dixon.

14.5. He makes no mention of the alleged electronic approval in this email nor anywhere in his evidence thus disproving the allegation made about there being clear and definite board approval as is alleged at paragraphs 80 and 85.2.

15. The First Defendant has raised a special plea of locus standi on the grounds that it is denied that OUTA has standing in terms of Section 157(1) (d) of the Companies Act.

16. Thus the two allegations of there being board approval and the First Defendant acting on the instructions of the former president have not been proven leading to an undisputable collapse of the entire pleaded case on the Emirates MOU. In the absence of those two pleaded allegations, there exists no other grounds upon which the court may make an adverse finding against the First Defendant.

17. The subsequent denied conclusions drawn under paragraph 86 also have not been proven i.e:

17.1. The Compromised relationship between SAA and Emirates. The evidence shows that communication and relations continued post the Paris

incident of 16 June 2015 without any proven strain or changes to the relationship.

17.2. The alleged forfeited benefits were never proven and were of a speculative nature through all the evidence.

17.3. The reputational harm suffered was not proven but was only a perception of those witnesses who stated feeling embarrassment in the eyes of Emirates executive. There is no evidence led that illustrated reputational harm beyond that.

17.4. No evidence was led to prove any threats made by Emirates to reconsider the entire strategic relationship, instead evidence was led of Mr. Bezuidenhout's letter of 16 June 2015[3] giving undertaking of support to Emirates' four daily flights to Johannesburg, two to Cape Town, one to Durban and an additional flight to Durban above the existing one. Which undertakings it is submitted he had no authority to make.

18. Even the instance that the court were to find differently regarding the submission made on the averments of paragraph 86, such finding would not find the grounds for the finding of delinquency as set out under Section 162(5) of the Companies Act.

[3] Emirates Bundle, Vol 2, Page 162

19. The conclusions drawn under paragraphs 87 to 88 cannot be sustained singularly or wholly on the grounds that the allegation made about the First Defendant acting on instructions or wishes of the former president has not been proven.

20. Any other finding the court may make in this regard has no relevance to the legislated grounds that constitute delinquency under the act, nor do they form part of the pleaded case which the First Defendant has come to answer to.

21. Thus, there exists no basis on the pleaded case for the court to grant the relief sought under the allegations made about the Emirates MOU. The Plaintiff's in this distance have failed to discharge the evidentiary burden required to sustain this cause of action.

AIRBUS SWAP TRANSACTION

22. The allegations made against First Defendant about the Airbus Swap Transaction have not been proven and such failure is fatal to the Plaintiffs' case.

23. The allegations made in the particulars of claim in this regard all depart from multiple fatally flawed premises that essentially render the entire cause of action pleaded a totally misdirected if not misinformed.

24. This first emerges at the denied paragraph 119 (of particulars of claim) wherein it is stated:

24.1. The Swap Transaction could not, however, be executed until Ms. Myeni signed the execution documents mentioned in paragraph 116 above.

25. The evidence led clearly demonstrated that such authority vested with the board and not with the chairperson. Even if the chairperson had signed the documents, such signature could not singularly give effect to the required approval. Equally, even if the chairperson had refused to sign such documents, the board could have given such approval on a simple majority vote that could not be overturned by the chairperson.

26. Thus, the assertion that approval was contingent of the chairperson's approval is holy flawed both in law and in fact. The same is applicable for the allegation made at Paragraph 120. All the evidence in this regard clearly illustrated that it was a board decision and not the chairperson on her own.

27. The chairperson had no powers to act individually in this regard nor was there any evidence led to suggest that the chairperson singularly frustrated or impeded the attempts of the board to grant such approval.

28. The allegation made at paragraph 121 about the letter sent to Airbus on 29 September 2015 was also not proven to be a misrepresentation of the intention or decision of the board. This submission is corroborated by:

28.1. The email of the Company Secretary of 3 October 2015[4] to Airbus wherein she stated that *"The Board has opted to engage an African aircraft leasing company which will provide the financing for the A330's"*

[4] Airbus Bundle, Vol 3, Page 196E

28.2. The minutes of the meeting of 29 September 2015[5] wherein it stated that under the heading Local Aircraft Leasing Company: *"the board requested Management to direct members to individuals or institutions which could unlock opportunities for SAA*".

28.2.1. Despite various disputes to the contents of these minutes, the Plaintiffs have not subpoenaed the Company Secretary to challenge the veracity of these minutes nor have they produced evidence that has impeached the veracity of these minutes.

28.3. The email of Tony Dixon of 7 October 2015[6] where in the last paragraph he states the following"

28.3.1. "…. *I understand that if we were to find local funders at an acceptable cost we can extricate ourselves from the lease with Airbus – we can just need to make sure that this is properly included in the concluding agreement."*

28.3.2. The only objection Tony Dixon is on record to have made was against the appointment of a transaction advisor and not a local leasing entity.

28.4. Minister Nene's letter to the chairperson of 3 November 2015[7] wherein he states as follows at paragraph 7:

[5] Airbus Bundle, Vol 3, Page 178
[6] Airbus Bundle, Vol 3, Page 191

28.4.1. "I note that SAA is reviewing the transaction and, based on our meeting on 2 November 2015, I understand that the Board is considering a local leasing company or an outright purchase."

29. The First Defendant testified that not all decisions of the board were reduced to resolutions which was not challenged or disproved. Thus, there can be no adverse finding made on the letter of 29 September 2015 being a misrepresentation of board decisions or something that had been unlawfully conjured up by the First Defendant as alleged at paragraph 122.

30. The failure to prove the letter of 29 September 2015 as a misrepresentation by First Defendant therefore collapses all the allegation contained under paragraph 124 and 125 together with the relief prayed for under paragraph 126.

31. The allegation made about the amendment of the Section 54 Application also stands to be dismissed in that it is also on the flawed premise that the First Defendant submitted a Section 54 application amendment in her capacity as chairperson.

32. Section 54(1) and Section 54(2) of the PFMA clearly state that Section 54 applications are only submitted by the accounting officer of a public entity.

33. The chairperson of SAA is not the accounting officer of SAA and thus no Section 54 application or amendment would have been considered by National

[7] Airbus Bundle, Vol 4, Page 221.1

Treasury or any Minister if it was not submitted the accounting officer of SAA. Thus, the denied allegation made at paragraph 132 about the First Defendant submitting an amended Section 54 Application is not only legally misguided but erroneous in it's conception. Chairpersons cannot submit Section 54 applications.

34. The allegations that follow at paragraph 133 which attribute the Section 54 Application to the First Defendant and not the company itself cannot be sustained as the premise under which they are made is erroneous. The chairperson is, as the evidence has shown, a signatory to a Section 54 application and not an initiator. The initiator is the accounting officer and only they are authorized under Section 54 to submit Section 54 applications.

35. No evidence was led to the effect that the First Defendant misrepresented the Section 54 application to be that of the accounting officer nor submitted a Section 54 application contrary to what the law allows.

36. The only dispute raised by some of the witness was about the substance and comprehensiveness of the amended Section 54 application and not the process followed in its submission. There was no evidence led on the irregular status of the amended Section 54 application nor was there any evidence led on how the First Defendant acted irregularly in the process of submitting the amended Section 54 application.

37. Thus, the allegations of omissions or any other defect in the amended Section 54 application cannot be made against the First Defendant as she was not the

compiler or initiator of the application but was a signatory as is required. It was not in her sphere of competence to know the technical and specialized aspects of a Section 54 application.

38. The allegations made under paragraph 128 about a proposal made by the First Defendant at a meeting with Airbus on 10 October 2015 were also not proved. Instead, Mr Meyer testified that he was leaving when the First Defendant arrived at that meeting and thus had no knowledge of what she said in that meeting. He further went on to admit under cross examination that what he knew was what he had been told by Mr Akum of Airbus. Even on that hearsay version of Mr Meyer, he did not state that Mr Akum had told him that the First Defendant had proposed amending the Swap Transaction in that meeting.

39. The denied allegations made at paragraph 138 and 139 are made off the wrong premise that presupposes that the First Defendant submitted the amended Section 54 application when in fact it was the accounting officer that submitted the application. No evidence was led to prove that it was the First Defendant was the one who submitted the Section 54 Application as alleged and all the evidence led clearly demonstrates that all she did was sign the applications as the chairperson of the company and that such application cannot be said to be applications made individually by the First Defendant in her capacity as chairperson.

40. The denied allegations made paragraphs 141 and 142 of the First Defendant individually causing delays in the signing of the Airbus Swap transaction are not supported by any evidence. The evidence clearly demonstrates that the delay was

caused by the board's decision to consider a local aircraft leasing company which decision was not overruled by both Ministers Nene and Gordhan.

41. None of the evidence singles out the First Defendant as the individual that either caused the board or individuals on the board to delay the finalization of the transaction.

42. What instead vindicates the First Defendant is the letter of Minister Gordhan of 15 December 2015[8] wherein he states the following:

42.1. "As I indicated in our discussions, I am willing to afford you with the opportunity to provide me with a comprehensive explanation of the merits of pursuing an alternative transaction structure to that approved by Minister Nene."

43. What further vindicates the First Defendant is the email of 16 November 2015[9] by Mr Akoum from Airbus directly to the chairperson wherein he states:

43.1. "*Airbus is willing to exceptionally to give SAA another 30 days exemption from its obligations on the A320 due PDP payment until we have a clear understanding on how Nedbank would be financing the direct purchase by SAA of the A330-300s"*

[8] Airbus Bundle, Vol 4, Page 286(13)
[9] Airbus Bundle, Vol 4, Page 246

44. Thus, the inherent risks that lay in the delay of the Swap Transaction were in effect condoned by both Ministers Nene and Gordhan. Minister Nene had directed that on 3 December that the transaction be concluded by 21 December 2015, on 15 December 2015 Minister Gordhan afforded SAA another opportunity to persuade him on the merits of the local aircraft leasing company.

45. Although the transaction was declined on both occasions it was not from rejection of the idea of a local leasing company but was on both occasions because of the time constraint issues within which the decision had to be made.

46. Minister Gordhan only warned in his letter of 20 December 2015[10] that the failure to sign the transaction would lead to breaches of PFMA.

47. No evidence was led to prove that the delays as alleged under paragraphs 142 and 143 were directly attributable to the First Defendant as Chairperson but the board in its entirety.

48. The denied allegations made under paragraph 144 of violations of the PFMA have not been proven. No evidence was led on violations of Section 50 of the PFMA nor was there any questions put to the First Defendant on the same. Thus, there can be no finding made violations of Section 50 of the PFMA.

[10] Airbus Bundle, Vol 4, Page 286A

49. The denied allegations made under paragraph 145 are not supported by any evidence to that may persuade the court to grant any of the relief prayed for at paragraph 146.

50. In totality the Plaintiff have failed to discharge the onus to prove the allegations on a balance of probabilities as set out in the authorities of *Mabaso v Felix 1981* (3) SA 865 (A); *Ferreira v Ntshingila* 1990 (4) SA 271 (A)).

51. In addition, there exists no basis for the court to declare the First Defendant outside of the legislated reasons set out under Section 162(5) of the Companies Act 2008. In *Cook v Hesber Impala (Pty) Limited and others* where the applicant the applicant sought a declaration of delinquency on grounds which were not stipulated in section 162 of the Companies Act. The court warned that a declaration of delinquency can only be made in relation to one of the legislated grounds stipulated in section 162 of the Companies Act, and that there must be clear “evidence” of any conduct that warrants a director being declared delinquent.

52. Furthermore, it has become an established principle in our law that to declared a delinquent, the director’s conduct has to be such a grossly negligent nature or that of willful misconduct. In this case, all the evidence revealed are typical boardroom battles over business strategy and personality clashes. There is no conduct directly attributable to fit the description of gross negligence and willful misconduct. Even the possible errors of judgment conceded by the First

Defendant are in essence bona fide errors of judgment and do not amount to gross negligence or willful misconduct.

53. In *Companies and Intellectual Property Commission v Cresswell and Others* the Western Cape High Court expanded upon the meaning to be ascribed to the words “gross negligence” or “wilful misconduct” within the prescripts of section 165(5)(c)(iv)(aa). In this case, a director of a company allowed the company to carry on trading, while knowing that the company was insolvent. The director, inter alia, made withdrawals from the company’s bank account and also received payments from the company’s bank account into his personal account.

54. In finding that the director’s conduct constituted gross negligence or wilful misconduct, the court referred to the case of S v Dhlamini 1998 (2) SA 302 (A), where the Appellate Division indicated that gross negligence is characterised by an attitude of reckless consideration for the consequences of one’s actions.

55. It is submitted that there is clear evidence on both the Emirates MOU and Airbus Swap transaction of the First Defendant showing clear signs of acting in the companies best interests.

56. There was no evidence led of the First Defendant acting in pursunce of personal gain or interests external to those of the company.

57. The grounds upon which courts have found directors to have abused their positions as directors have often involved instance where directors have

misappropriated funds or used their position for personal gain as was the case in Gihwala v Grancy Property. No such evidence or similar conduct has been proven against the First Defendant in this case.

58. The evidence clearly shows the First Defendant showing the expected independence of a board member by always apply her mind and discretion to all decisions. There is no evidence of the First Defendant acting in defiance of the board or being on a frolick of her own at any given time.

59. Other allegations around the First Defendant causing the delay in the release of annual financial statements and holding of the AGM are not occurrences that can be, on the evidence, placed specifically at the door of the First Defendant. The evidence in that regard clearly shows that it was always the board as a collective that drove the agenda of SAA and not the chairperson on her own.

60. Section 9(1) of the Bill of Rights states that:

60.1. “Everyone is equal before the law and has the right to equal protection and benefit of the law.”

61. Thus a declaration of delinquncy against the First Defendant on her own when the evidence has clearly demonstrated her to have acted as part of a board which has it’s own legal personality would be an act of unfair discrimination and violation of the First Defendant’s Constitutional Right to equality before the law.

62. The boards of state owned enterprises are all goverened by the provisions of Section 89 of the PFMA and are expected to demomstrate indepence from politically appointed Ministers as was stated in *Democratic Alliance v South African Broadcasting Corporation SOC Ltd* thus there can be no basis for the court to draw a negative inference from how the board may have responded to ministerial interventions except instances where the minister directed to board to act.

63. It is again submitted that OUTA has no standing on the following grounds:

63.1. OUTA has not established that it is acting in the public interest.

63.2. No evidence was led that dealt with public interest issues or rights of individuals affected by the alleged conduct.

63.3. OUTA is not entitled in law for any relief granted under Section 162 of the Companies Act as they are not a party listed with standing under Section 162(2) of the Act.

64. The First Defendant submits that plaintiffs have not proven their case on a balance of probabilities and the case stands to be dismissed with costs.

BN Buthelezi

Counsel for First Defendant

TABLE OF AUTHORITIES

1. *Mabaso v Felix 1981 (3) SA 865 (A); Ferreira v Ntshingila 1990 (4) SA 271 (A)).*

2. *Cook: Geoffrey v Hesber Impala (Pty) Ltd and Others (2014/45832) [2016] ZAGPJHC 23*

3. *Companies and Intellectual Property Commission v Cresswell and Others 921092/2015) [2017] ZAWCHC 38*

4. *Gihwala v Grancy Property Ltd (20760/2014) [2016]*

5. *Democratic Alliance v South African Broadcasting Corporation SOC Ltd (SABC) and Others; Democratic Alliance v Motsoeneng and Others (3104/2016; 18107/16) [2016] ZAWCHC 188; [2017] 2 BLLR 153 (WCC); [2017] 1 All SA 530 (WCC) (12 December 2016)*