

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

CASE NO: 15996/17

In the matter between:

ORGANISATION UNDOING TAX ABUSE	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

**PLAINTIFFS' HEADS OF ARGUMENT:
SPECIAL PLEA ON OUTA'S STANDING**

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INTRODUCTION

- 1 The first defendant, Ms Myeni, has raised a special plea that the first plaintiff, OUTA, lacks standing under section 157(1) of the Companies Act 71 of 2008 to launch this delinquency action.¹ There is no dispute that the second plaintiff, the South African Airways Pilots Association, has standing.²

- 2 Ms Myeni's stance on this special plea is inconsistent to say the least, as is detailed in our heads of argument in the interlocutory applications:
 - 2.1 On 20 October 2019, Ms Myeni filed a notice of amendment in which she sought to delete the special plea in its entirety and to admit OUTA's standing. Ms Myeni's counsel further informed the Court that Ms Myeni would not pursue the challenge to OUTA's standing.
 - 2.2 On 7 November 2019, Ms Myeni filed a further amendment notice seeking to retract the first amendment notice and to reinstate the special plea.
 - 2.3 This about-turn remains unexplained. It also contradicts her affidavit in her amendment application, as she claimed that her abandonment of the special plea was proof of her good faith.³

- 3 Irrespective of the outcome of Ms Myeni's amendment application, we submit that it is appropriate and necessary to dispense with question of OUTA's standing now so as not to further delay the proceedings.

¹ Special plea, paras 1 – 5.

² PoC - Page 5 Pleadings Bundle para 2; Plea – Page 100 paras 1-5.

³ Amendment FA p 185 para 37.

THE NARROW SCOPE OF THE SPECIAL PLEA

4 OUTA has pleaded that it has standing on two grounds:

4.1 Under section 157(1)(c) of the Companies Act, as a “*member of, or in the interest of, a group or class of affected persons, or an association acting in the interest of its members*”; and

4.2 In the public interest, with the leave of this Court, in terms of section 157(1)(d) of the Companies Act.

5 OUTA persists in claiming standing on the basis of section 157(1)(c). It acts in its members interests and in the interest of all taxpayers affected by Ms Myeni’s actions. However, it not necessary to pursue this point given its clear public interest standing under section 157(1)(d).

6 In response, Ms Myeni’s special plea (as currently framed, pre-amendment) denies that OUTA has standing on either of these grounds:

“2. First Defendant denies that OUTA is acting as a member of, or in the interest of, a group or class of affected persons, or an association acting in the interests of its members, as contemplated in clause 157(1)(c) of the Companies Act.

3. First Defendant denies that OUTA is acting with the leave of this Court and avers that OUTA required the leave of this Court before instituting these proceedings.”⁴

7 Ms Myeni further pleads as follows:

“First Defendant avers, as she has in her special plea, that OUTA required the leave of this Court before instituting these proceedings

⁴ Special Plea page 100 of pleadings bundle paras 2 – 3.

and that without such leave, OUTA has no standing to bring these proceedings.”⁵

- 8 Ms Myeni’s objection to OUTA’s standing under section 157(1)(d) is therefore a narrow and technical one. Ms Myeni merely contends that OUTA ought to have obtained this Court’s leave before instituting this action, by means of a separate application.
- 9 Notably, Ms Myeni admits the clear public interest in this matter. She specifically admits that “[t]he public has an interest in the proper management of all major public entities” and that SAA is reliant on public funds as it is “the recipient of a shareholder guarantee loan of R19.1 billion issued by the state as at the date of this summons”.⁶
- 10 Ms Myeni also does not deny that OUTA is acting in the public interest in pursuance of its aims, which include “the protection and advancement of the Constitution as well as the promotion of effective, practical and enforceable taxation policies, which are free from corruption” and “the proper management of all major public entities.” Ms Myeni merely denies knowledge of OUTA’s aims.⁷
- 11 As a result, the only issues in dispute are narrow questions of timing and procedure: a) whether leave under section 157(1)(d) is required before instituting proceedings; and b) whether a formal application is required. The answer to both questions, in the circumstances of this case, is clearly “No”.

⁵ Special Plea page 100 of pleadings para 4

⁶ PoC page 9 - 10 para 15.2 – 18.2 of pleadings bundle ; Admitted at Plea – page 101 pleadings bundle para 11.

⁷ PoC page 9 pleadings bundle para 16; Plea page 101 pleadings bundle para 10.

A PRIOR APPLICATION FOR LEAVE IS NOT NECESSARY

12 Section 157(1)(d) states that a matter may be brought before a court in terms of the Companies Act by a person acting in the public interest “*with the leave of the Court*”.

13 In *Minister of Environmental Affairs v Recycling and Economic Development Initiative of South Africa NPC*⁸ Henney J held that leave to proceed in terms of section 157(1)(d) can be granted at the hearing of the matter, without the need for a prior application:

13.1 In that case, the respondents argued that the Minister of Environmental Affairs could not rely on section 157(1)(d) in bringing urgent provisional liquidation proceedings, as the Minister had not obtained leave before instituting proceedings.

13.2 The respondents further relied on case law dealing with class actions in civil claims, which requires a certification process prior to the institution of class action litigation.

13.3 Henney J distinguished class action proceedings from public interest standing under section 157(1)(d).

13.4 He further held that the leave requirement under section 157(1)(d) is a flexible, context-sensitive requirement.

“In action proceedings, which are usually more delayed than proceedings on motion ..., as in this case, the exigencies of the matter would dictate whether the court can ascertain on the

⁸ *Minister of Environmental Affairs v Recycling and Economic Development Initiative of South Africa NPC* 2018 (3) SA 604 (WCC) at paras 184 – 191.

*papers whether relief should be granted without a special application, or whether a separate substantive application should be brought to determine whether the matter should be certified in order to grant extended standing ...*⁹

13.5 Henney J held that it was sufficient that the Minister made out a case for public interest standing in the papers filed in the main application. A separate, prior application for leave was not necessary.

14 The SCA subsequently overturned Henney J's judgment on other grounds, but did not take issue with this proposition.¹⁰

15 Relying on Henney J's judgment in *REDISA*, the authors of Henochsberg¹¹ summarise the position as follows:

"If a Court can, on the papers (whether in action or motion proceedings) decide whether relief should be granted, a separate application for certification to grant extended standing should not be required ... This case is not a class action, where a much more controlled method of certification is required."

16 This is indeed such a case where the Court can determine OUTA's public interest standing on the pleadings alone. There is no need for a separate substantive application.

OUTA SATISFIES THE REQUIREMENTS FOR LEAVE ON THE PLEADINGS

17 On the pleadings as they stand, OUTA satisfies the test for leave under section 157(1)(d) as there is no dispute that it is genuinely acting in the public interest.

⁹ Ibid at para 189.

¹⁰ *Recycling and Economic Development Initiative of South Africa NPC v Minister of Environmental Affairs* 2019 (3) SA 251 (SCA).

¹¹ Henochsberg *Commentary on the Companies Act*, 2008 at pp 560(14A) - 560(14B).

- 18 In the SCA's judgment in *REDISA*,¹² it held that public interest standing under section 157(1)(d) requires similar considerations to public interest standing under the Constitution. It held:

*“In Ferreira v Levin the Constitutional Court set out the criteria for evaluating whether an applicant should be given leave to act in the ‘public interest’. In the context of this case the evaluation includes considering: (i) the nature of the allegations advanced as to why the public interest is implicated; (ii) the relevant provisions of the 2008 Act, which provide the context of the allegations; (iii) the provisions of the 2008 Act for addressing such allegations; (iv) whether there [are] other reasonable and effective ways in which the challenge may be brought; and (v) the range of persons or groups who may be directly or indirectly affected by any order of the court and the opportunity that those persons or groups have had to present evidence and argument to the court.”*¹³

- 19 OUTA satisfies these requirements:

- 19.1 First, there is no dispute on the pleadings that the public interest is implicated by this matter;
- 19.2 Second, these proceedings concern gross breaches of directors' duties under the Companies Act and the PFMA, involving a major public entity. We emphasise that for the purposes of assessing standing, it must be assumed that OUTA's allegations of Ms Myeni's wrongdoing are correct.¹⁴
- 19.3 Third, delinquency proceedings under section 162(5) of the Companies Act were specifically enacted to address such breaches.

¹² *Recycling and Economic Development Initiative of South Africa NPC v Minister of Environmental Affairs* 2019 (3) SA 251 (SCA).

¹³ *Ibid* at para 134.

¹⁴ *Giant Concerts CC v Rinaldo Investments (Pty) Ltd* 2013 (3) BCLR 251 (CC) at para 32: “[I]n determining a litigant's standing, a court must, as a matter of logic, assume that the challenge the litigant seeks to bring is justified”.

19.4 Fourth, due to the inaction of SAA and other government agencies, it is left to the plaintiffs to pursue these delinquency proceedings.

19.5 Fifth, Ms Myeni and SAA are both cited in these proceedings and have had ample opportunity to respond.

20 This case stands in clear contrast with the SCA's judgment in *REDISA*. There the Minister had sought winding-up orders for two solvent companies primarily based on the directors' alleged breaches of fiduciary duties. The SCA held that it was not in the public interest for the Minister to pursue such a drastic remedy, especially when she had more appropriate remedies available, including a delinquency application.¹⁵ Here OUTA's delinquency application is narrowly targeted at Ms Myeni's wrongdoing.

21 Accordingly, we submit that OUTA should be granted leave to proceed in the public interest under section 157(1)(d), without the need for any further application to this effect.

22 As a result, we further submit that the defendant's special plea (in its amended or unamended form) should be dismissed with costs, including the costs of three counsel.

23 Regardless of the outcome, the question of standing should not hold up proceedings, given that the second plaintiff's standing is not in question.

¹⁵ *Ibid* paras 138, 143.

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20 November 2019

TABLE OF AUTHORITIES

24 *Giant Concerts CC v Rinaldo Investments (Pty) Ltd* 2013 (3) BCLR 251 (CC).

25 *Minister of Environmental Affairs v Recycling and Economic Development Initiative of South Africa NPC* 2018 (3) SA 604 (WCC).

26 *Recycling and Economic Development Initiative of South Africa NPC v Minister of Environmental Affairs* 2019 (3) SA 251 (SCA).