

**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 NPC

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

in

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

HEADS OF ARGUMENT RULE 10(3) APPLICATION

INTRODUCTION

1. The Applicant/First Defendant has brought two interlocutory applications:
 - 1.1. Rule 28 Notice to Amend
 - 1.2. Rule 10.3 – Joinder Application

2. The Plaintiffs have opposed both applications and have filed an answering affidavit that deals with both applications. Thus, these heads of argument shall consolidate the legal merits of both applications under the respective headings of each application.

3. It is submitted at the outset that both these interlocutory applications are both bona fide and legally justifiable applications that fall within the ambit of what is permissible within the Rules of Court. Both these applications are not frivolous or hollow in substance but are founded on sound legal principles and reasoning.

4. The Plaintiffs have in objection, not raised any legally tenable reasons as to why both applications should not succeed. As will be advanced, the thrust of all their objections can be reduced to being issues extraneous to the merits or legal issues of the case. None of the objections speak to the substance of what is to be determined and established by the court in, as far as the merits of the case are concerned.

5. The prejudice alleged by the Plaintiffs also falls short of what legally constitutes prejudice and all the complaints in that regard are at best points about

inconvenience, which it will be further argued were not occasioned by any deliberate actions of the First Defendant.

6. In both these applications the First Defendant only seeks to have the merits of the case properly ventilated and place as much information before the court as is necessary for the court to make a properly considered ruling on the merits.

NOTICE TO AMEND IN TERMS OF RULE 28

7. The substantive grounds for the proposed amendments are detailed in the founding affidavit and are in summary the following:

- 7.1. To correct factual errors in the plea.

- 7.2. To cure legal defects in the plea, in particular bare denials.

8. The legal principles regarding the objective of a plea are trite but would need restating in this instance in as far as asserting that:

- 8.1. The purpose of a pleading is to clarify issues between parties and the allegations in the plea must be of sufficient precision to enable the Plaintiff to know what the case is he has to meet¹.

- 8.2. The Defendant cannot rely on a defence that is not pleaded or which he is not allowed to incorporate into plea by an amendment.

¹ Hlongwane v Methodist Church of South Africa 1933 WLD 165

- 8.3. A pleader cannot be allowed to direct the attention of the other party to one issue and then at the trial, attempt to canvass another point².
- 8.4. The court sits to try issues raised by the pleadings³.
- 8.5. A defendant who has missed his true defence, or who has learned of it only from facts which appeared during the trial, must raise the defence formally and have it placed on record⁴. If no amendment is made to the pleadings, defence will in general not be adjudicated upon⁵.
9. Based on the above principles of pleading, all the proposed amendments are seek to attain the principles pleading as the plea as it stands in it current form falls short of the above said principles.
10. In circumstances where the trial has not commenced, there can be no real legal basis or justification to disallow amendments, especially where such grounds are not in dispute. Grounds that would cause amendments to be disallowed include:
- 10.1. Mutually contradictory defences being created in the proposed amendments.
- 10.2. Defence which is inconsistent with a previous admission.

² Nyandeni v Natal Motor Industries Ltd 1974 (2) SA 274 D, Niewoudt v Joubert 1988 (3) SA (SE) at 90A

³ Dinath v Breedts 1966 (3) SA 712 (T) at 717

⁴ Cornelius & Sons v McClaren 1961 (2) SA 604 (E)

⁵ Circle Construction (Pty) Ltd v Smithfield Construction 1982 (4) SA 726 (N) at 730

11. The proposed amendments do not give rise to the above stated scenarios as stated at *para 10 supra*. Thus not creating a basis for the amendments to be disallowed.
12. The proposed amendments that can be considered withdrawals of admissions are in the circumstances permissible in that it can be proven that the said admissions have been made in error⁶. If admitted, the affidavits of the Applicant's erstwhile attorneys vindicate this point in full.
13. The true essence and slant of the withdrawn admissions are in fact factual in nature and are not material to proving the Plaintiffs' cause of action to the point that new witnesses would need to be considered or solicited by the Plaintiffs.
14. The objection raised by the Plaintiffs over the lateness of the amendments cannot be sustained either as it is an established principle that a delay in effecting an amendment is not a ground to refuse an amendment⁷.
15. Rule 28(10) allows for amendments at any stage before judgment and in this particular instance, the amendments are being effected before the trial has even begun thus the allegations of lateness are in themselves without any credence.
16. In addition, new facts have been discovered since the filing of the plea in 2017 and such facts are material to the First Defendants defence. Such is allowed in law as per the principles set out in *Flemmer v Ainsworth*⁸.

⁶ *Amod v Mutual Fire and General Insurance Co Ltd* 1971 (2) SA 611 (N) at 614F-G

⁷ *Trans-Drakensberg Bank Ltd v Combined Engineering Investment Co Ltd* 1967 (3) SA 632 D at 642C-D

⁸ *Flemmer v Ainsworth* 1910 TPD 81

17. The *audi alteram* rule is regarded as the cornerstone of our law and places an obligation on the court to ensure that the right of a party to place a version before court is always upheld⁹.
18. Preventing the First Defendant to amend would in the circumstances amount to a violation of the *audi alteram* rule. It is an established principle that a breach of the *audi alteram* rule can amount to a reviewable gross irregularity.
19. Disallowing the proposed amendments would also create reasonable grounds to infer transgression of the *nemo iudex in sua causa* principle which is also at the heart of the principles of natural justice.
20. Disallowing the proposed amendments in the this circumstance will cause severe prejudice in confining the First Defendant to a version the court already knows is not complete and accurate.
21. It has been stated in the application that the amendment of a pleading is not in itself irregular if good cause is shown as pleadings are not sworn statements.
22. In the circumstances, it submitted that:
 - 22.1. A proper case has been made out for the amendments to be allowed.
 - 22.2. It is in the interests of justice that the First Defendant be allowed to plead a defence that they can fully stand by.

⁹ First National Bank of South Africa v Ganyesa Bottle Store (Pty) Ltd 1998 (4) SA 565 (NC)

22.3. It is in the interests of justice that the court be placed in a position where it can adjudicate matters knowing that all parties have properly pleaded their cases.

22.4. The objections are starved of merits and can not stand to the legal standard that would persuade the court to refuse the amendments.

22.5. The timing of the amendments is not unreasonable given that the trial has not started.

JOINDER APPLICATION

23. The joinder application is borne out of the case made out by the Plaintiffs in that all the allegation are anchored in the decisions of the board.

24. It would thus lead to grossly iniquitous and untenable legal outcomes if the core of the allegations made by the Plaintiffs are adjudicated with the court strapped with horse-like blinkers.

25. The Plaintiffs admit in their answering affidavit that they deliberate in their pursuit of a single board member and provide no reasons as to why the conduct of other board members should not be simultaneously scrutinized.

26. The above said admission by the Plaintiffs undermines their own assertions and claims of acting the public interest. In the circumstances, the public interest

cannot be a single individual but the entire collective of individuals who have fiduciary duties over taxpayer funds.

27. The selective pursuit of the chairperson seeks to suggest that the chairperson had the capacity to either act extraneously to the board or had exclusive powers to act as an individual by virtue of the position they occupied on the board.

28. The selective pursuit of the chairperson makes obvious the disingenuous motives of the Plaintiffs in alleging that they act in the public interest.

29. The selective pursuit of the chairperson is done by the Plaintiffs in circumstances where they know the following:

29.1. The First Defendant was never found guilty of any misconduct.

29.2. Several investigations were carried out against the First Defendant and none have found her guilty of any misconduct or unlawful conduct.

29.3. The Hawks are on record on 20 January 2016 stating that the First Defendant is actually the one assisting them investigate corruption.

29.4. The second Plaintiff conducted in-depth investigations and had scathing findings on a number of directors that would meet the delinquency threshold.

29.5. Several directors, some of whom they have added as witnesses in this case, were themselves found guilty of various forms of misconduct.

Others in the same pool of witnesses resigned to avoid investigations and other disciplinary steps being taken against them.

30. The application cites about 20 paragraphs with their subparagraphs where the allegations made are actually being allegations being made against the board in its entirety.
31. The Plaintiffs have wittingly used furtive wording in the construction of the paragraphs to isolate the First Defendant and through innuendo attempt to isolate her from the collective actions and decisions of the board.
32. It has been submitted in the application that the Plaintiffs in essence seek in all instances to impute unlawfulness and culpa to the First Defendant as an individual while relying on allegations made against the decisions and actions of the board of directors as a collective.

PARTIES TO BE JOINED AS DEFENDANTS

33. The First Defendant was first appointed as Chairperson of SAA on or about December 2012 and remained in that position until October 2017. In this regard the list of persons to be joined are all members (non executive and executive) of boards that passed resolutions on some or all of the board decisions that are the subject of this litigation in the time that the First Defendant was in the position of chairperson of the board.
34. If it is indeed true the this case brought in the public interest and is about fighting instances of tax abuse and corruption at SAA then it should follow that

the court would be interested in the conduct of the board in its entirety where similar allegation exist against other board members.

35. It is submitted that the public interest is not served in deliberately making allegations against a single individual where the collective stands to be subjected to equal scrutiny.

36. There are several individuals whose conduct cannot escape scrutiny if it is true that this case has been brought in public interest. These are the following:

36.1. Wolf Meyer – He was under investigation for negotiating with a service provider before a contract had been advertised. Evidence will be led about him making misleading and false submissions to the board to motivate for certain transactions. He resigned to avoid investigation and disciplinary processes. Some of the transactions he approved are the subject of criminal investigation at present. There is evidence of Yakhe Kwinana telling him in 2015 that his decision to issue out a tender for financiers without following due process constituted a gross irregularity and violation of the PFMA.

36.2. Musa Zwane – He co-wrote the BNP Capital cancellation fee motivation. He then voted against a resolution that he had written the motivation for. He was subsequently subjected to a disciplinary process and found guilty of misconduct relating to his role in the BNP Capital transaction.

- 36.3. Nico Bezuidenhout – He misstated his academic qualifications and resigned upon refusing to be vetted as a director. He seconded several motivations by Wolf Meyer that were subsequently found to be factually inaccurate and misleading. He wrote motivation requesting the board to change the financiers of the Airbus transaction from Bank of China to Pembroke. He has presided over what one Mr Vlok working at Mango called “evergreen contracts’ in the ENS investigation report.
- 36.4. Yakhe Kwinana - was party to the decisions on the Emirates Deal and the Airbus transactions.
- 36.5. Phumeza Nhantsi- Co-wrote the BNP Capital cancellation fee motivation
- 36.6. Anthony Dixon
- 36.7. Monwabisi Kalawe- Is found guilty in the ENS report of failing to taking interal legal advice and violating the PFMA in the appointment of Bagport as a service provider, caused prejudice to the value of R11 329 110, was instrumental in the irregular appointment of McKinsey, approved a salary increase of 123% for one Mr Phalane, acted outside his delegated authority in the Senegal Airlines transaction.
- 36.8. Thuli Mpshe – Was party to the Airbus transactions and was included in correspondence from Airbus executives without knowledge of the board.

36.9. Raisibe Lepule- Was in private discussions with Wolf Meyer over getting support of the board to approve the Pembroke decision despite knowing that such discussions were irregular.

37. The remainder of the board members who were party to the impugned decisions that form the allegations are the following:

- 37.1. Thandeka Mgoduso
- 37.2. Tryphosa Ramano
- 37.3. Swazi Tshabalala
- 37.4. Akhter Moosa
- 37.5. Gugu Sepamla
- 37.6. Siphile Buthelezi
- 37.7. Peter Maluleka
- 37.8. Mzimkhulu Malunga
- 37.9. Martha Mbatha
- 37.10. Nazmeera Moola
- 37.11. Peter Tshisevhe
- 37.12. Andile Khumalo
- 37.13. Andile Mabizela
- 37.14. Carol Roskruge
- 37.15. Nonhlanhla Kubheka
- 37.16. Lindiwe Nkosi-Thomas
- 37.17. Bongisizwe Mpondo
- 37.18. Rajesh Naithani
- 37.19. John Tambi

38. It has been submitted in the main applications that the direct and substantial interest in that, if the board decisions or conduct to which they were party to, are found to be in breach of statutory provisions that can lead to a declaration of delinquency, the judgment and order of the court can be used as a basis for subsequent legal process to have them declared delinquent directors as well.

39. It is submitted that it is in the interest of justice that the court be placed in a position where all the facts and issues are fully ventilated, for and against all implicated parties.

40. It is submitted that a refusal to join other board members would lead to an injustice and a miscarriage of justice as it is the case of the chairperson that all the impugned decisions and conduct as alleged by the plaintiffs was that of the board as a collective. The King Report principles find application here.

Adv. BN Buthelezi

Counsel for Applicant/ First Defendant

TABLE OF AUTHORITIES

1. Hlongwane v Methodist Church of South Africa 1933 WLD 165
2. Nyandeni v Natal Motor Industries Ltd 1974 (2) SA 274 D
3. Niewoudt v Joubert 1988 (3) SA (SE) at 90A
4. Dinath v Breedt 1966 (3) SA 712 (T) at 717
5. Cornelius & Sons v McClaren 1961 (2) SA 604 (E)
6. Circle Construction (Pty) Ltd v Smithfield Construction 1982 (4) SA 726 (N) at 730
7. Amod v Mutual Fire and General Insurance Co Ltd 1971 (2) SA 611 (N) at 614F-G
8. Trans-Drakensberg Bank Ltd v Combined Engineering Investment Co Ltd 1967(3)SA 632D at 642C-D
9. Flemmer v Ainsworth 1910 TPD 81
10. First National Bank of South Africa v Ganyesa Bottle Store (Pty) Ltd 1998 (4) SA 565 (NC)