

**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**

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**FOUNDING AFFIDAVIT- RULE 10(3) APPLICATION**

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I the undersigned


**DUDUZILE CYNTHIA MYENI**

do hereby under oath and say the following:

1. I am an adult female and the Former Chairperson of the South African Airways SOC Ltd (SAA), residing at **102 Kolsterkring, Meerensee, Richards Bay.**
2. The facts set out below are, to the best of my knowledge, both true and correct. Save where the contrary is expressed or appears from the context, they lie within my personal knowledge.
3. I so far as I make the submission and draw the conclusion in the affidavit, I do so on the advice or advises of my legal representatives which advice I accept.

**PARTIES**

4. The First Respondent is **ORGANISATION UNDOING TAX ABUSE NPC**, a non-profit company incorporated under the laws of the Republic of South Africa and having its registered office at **318 Oak Avenue, Randburg, Johannesburg.**
5. The Second Respondent is **SOUTH AFRICAN AIRWAYS PILOTS' ASSOCIATION**, a branch of the Air Line Pilots' Association of South Africa, which is a registered trade union in terms of section 96 of the Labour Relations Act 66

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of 1995, having its principal place of business at **10 Blockhouse Street, Kempton Park, Johannesburg.**

6. The Third Respondent is **SOUTH AFRICAN AIRWAYS SOC LTD**, a state-owned company duly established in terms of company laws of the Republic of South Africa and the South African Airways Act, 2007 ('SAA Act'), having its registered office at **Airways Park, 32 Jones Road, Kempton Park, Johannesburg.**
7. The Fourth Respondent is **AIR CHEFS SOC LTD**, a state-owned company duly established in terms of the company laws of the Republic of South Africa, having its registered office at **Airways Park, 32 Jones Road, Kempton Park, Johannesburg.**
8. The Fifth Respondent is **MINISTER OF FINANCE**, a member of the National Cabinet who has his principal office at **40 Church Square, Pretoria.** The Minister of Finance is, since 12 December 2014, the Cabinet member responsible for administering and regulating SAA under and in terms of the SAA Act.

#### **PURPOSE OF APPLICATION**

9. This is an application brought in terms of Rule 10(3) of the Uniform Rules to join as co-defendants, board members that served as board members with the First Defendant in the time that the First Defendant was Chairperson of the board of South African Airways.



10. Rule 10(3) provides for joinder of defendants in instances where the issues in dispute between the parties depend upon determination of substantially the same question of law or fact, which if such defendants were sued separately, would arise in each separate action.
11. It is submitted that the questions of law and fact as pleaded by the Plaintiffs that could lead to the declaration of the First Defendant as a delinquent director under provisions of Section 162 of the Companies Act 2008 would substantially be the same if the other board members were sued separately.

#### **GROUND FOR JOINDER**

12. The entire case of the Plaintiffs is specifically and exclusively centered around the First Defendant being the chairperson of the board of directors of South African Airways. There is nothing alleged or pleaded that pertains to anything else outside the First Defendant's activities outside that particular function of chairperson of the board.
13. The case of the Plaintiffs as stated in the particulars of claim is subdivided into four subheadings which are:
- 13.1. The BNP Capital Deal
  - 13.2. The Emirates Deal
  - 13.3. The Airbus Deal
  - 13.4. The Ernst & Young Report

14. The allegations contained in the particulars of claim in as far as they seek to establish a cause of action against the First Defendant under all four subheadings, all stem from actions or resolutions of the board.
15. The Plaintiffs in essence seek in all instances to impute liability and culpa to the First Defendant as an individual while relying on allegations against the decisions and actions of the board of directors as a collective.
16. The board members to be joined in this action can by virtue of having acted as a collective as a board of directors together with the First Defendant, could be sued on substantially the same questions of fact and law.
17. It is submitted that there exists no rational basis upon which they could be precluded from liability as a collective if the court were to determine the issues of law and fact as alleged by the plaintiffs in the particulars of claim.
18. I turn to deal with specific paragraphs of the particulars that bear out this point.

#### THE BNP CAPITAL DEAL

#### AD PARAGRAPH 23

19. It is alleged that; **"THE BOARD**, led by Ms Myeni as Chairperson, **AUTHORIZED** the publication of the RFI on Transaction Advisory Services." (all bold and upper case words are of own emphasis)

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**AD PARAGRAPH 41**

20. It is alleged that: "On 21 April 2016, **THE BOARD**, led by Ms Myeni as Chairperson, **PASSED WRITTEN RESOLUTION** No 2016/B11".

**AD PARAGRAPH 42**

21. It is alleged that: "In conducting itself in the manner described in paragraphs 23 to 41 above **THE BOARD**, led by Ms Myeni as Chairperson, **FAILED** inter alia"

**AD PARAGRAPH 43**

22. It is alleged that: "In conducting itself in the manner described in paragraphs 23 to 41 above **THE BOARD**, led by Ms Myeni as Chairperson, **CAUSED SAA to violate its SCM POLICY** in inter alia".

**AD PARAGRAPH 47**

23. It is alleged that: "Between 20 and 25 May 2016, **THE BOARD**, led by Ms Myeni as Chairperson, **RESOLVED** to extend BNP's Transaction Advisor contract".

**AD PARAGRAPH 48**

24. It is alleged that: "**THE BOARD PASSED** the BNP **RESOLUTION** despite the fact that:"

**AD PARAGRAPH 51**

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25. It is alleged that; "Ms Myeni knew, alternatively ought to have known, that by voting in favour of the BNP extension, she and **THE BOARD ACTED UNLAWFULLY** in that they **FAILED** inter alia to:"

#### **AD PARAGRAPH 52**

26. It is alleged that; "The **CONDUCT OF THE BOARD**, led by Ms Myeni as Chairperson, as described in paragraphs 46 to 51 amounted to a **FAILURE** inter alia to"

#### **THE EMIRATES DEAL**

#### **AD PARAGRAPH 68**

27. It is alleged that: "On or about February 2014, **THE BOARD** of SAA, led by Ms Myeni as Chairperson, **ADOPTED** a three year corporate plan.

#### **AD PARAGRAPH 69**

28. It is alleged that: "On or about February 2015, **THE BOARD** of SAA, led by Ms Myeni as Chairperson, **ADOPTED** a Network and Fleet Plan."

#### **AD PARAGRAPH 74**

29. It is alleged that: "On or about February 2015, **THE BOARD** of SAA, led by Ms Myeni as Chairperson, **APPROVED** a Network and Fleet Plan."



**THE AIRBUS DEAL****AD PARAGRAPH 95.2**

30. It is alleged that: "THE BOARD of SAA, including Ms Myeni, **RESOLVED to APPROVE** the 2009 Revised Agreement."

**AD PARAGRAPH 96**

31. It is alleged that: "On about 8 May 2013, the Chief Financial Officer of SAA requested **APPROVAL** by THE BOARD, led by Ms Myeni as Chairperson, of a draft application to the Minister of Public Enterprises in terms of Section 54(2) of the PFMA".

**AD PARAGRAPH 97**

32. It is alleged that: "On or about 27 May 2013, THE SAA BOARD, led by Ms Myeni as Chairperson, **APPROVED** the BOARD'S Pembroke **RESOLUTION**".

**AD PARAGRAPH 112**

33. It is alleged that: "On or about 31 March 2015, THE SAA BOARD, led by Ms Myeni as Chairperson, unanimously, alternatively duly, **RESOLVED TO APPROVE** the Swap Transaction between SAA and Airbus..."

**AD PARAGRAPH 130**



34. It is alleged that: "On or about 15 October 2015, the Chief Financial Officer of SAA informed the Director-General that the delay occasioned by **THE SAA BOARD'S FAILURE** to sign-off the Swap Transaction..."

#### **THE ERNST & YOUNG REPORT**

##### **AD PARAGRAPH 148**

35. It is alleged that: "In or about 10 December 2015, EY sent a draft report to SAA, including to **THE BOARD**".

##### **AD PARAGRAPH 154**

36. It is alleged that: "Ms Myeni knew, alternatively ought to have known, that **THE BOARD OUGHT TO HAVE TAKEN STEPS** to protect the interests of SAA within a reasonable period..."

##### **AD PARAGRAPH 155**

37. It is alleged that: "Ms Myeni and **THE BOARD HAVE TAKEN NO MATERIAL STEPS** to address or remedy any of the issues and concerns raised in the EY Report.

38. I am advised that in light of all the references to the board in above cited paragraphs, it is clear and cannot be disputed that:



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38.1. The Plaintiff's cause of action cannot be sustained without making allegations against the board. Otherwise stated; the allegations made against the First Defendant cannot stand without allegations being made against the board as a collective. The failure by the Plaintiffs to join the board is fatal to the Plaintiffs' case.

38.2. The relief sought against the First Defendant, should in law, also be sought against the Board. The Plaintiffs have do not state in their particulars the basis upon which it is only the conduct of the chairperson of the board that is impeachable and not the board in its entirety.

#### **PARTIES TO BE JOINED AS DEFENDANTS**

39. 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 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.

40. In this regard, leave of the court is requested that the following persons be joined as co-defendants:

40.1. Wolf Meyer

40.2. Musa Zwane

40.3. Nico Bezuidenhout

40.4. Yakhe Kwinana

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- 40.5. Phumeza Nhantsi
- 40.6. Anthony Dixon
- 40.7. Monwabisi Kalawe
- 40.8. Thuli Mpshe
- 40.9. Thandeka Mgoduso
- 40.10. Tryphosa Ramano
- 40.11. Raisibe Lepule
- 40.12. Swazi Tshabalala
- 40.13. Akhter Moosa
- 40.14. Gugu Sepamla
- 40.15. Siphile Buthelezi
- 40.16. Peter Maluleka
- 40.17. Mzimkhulu Malunga
- 40.18. Martha Mbatha
- 40.19. Nazmeera Moola
- 40.20. Peter Tshisevhe
- 40.21. Andile Khumalo
- 40.22. Andile Mabizela
- 40.23. Carol Roskruge
- 40.24. Nonhlanhla Kubheka
- 40.25. Lindiwe Nkosi-Thomas
- 40.26. Bongisizwe Mpondo
- 40.27. Rajesh Naithani
- 40.28. John Tambi

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**DIRECT AND SUBSTANTIAL INTEREST**

41. It is submitted that all the persons listed to be joined have a 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.
42. It is submitted that the above submission is not speculative but speaks to the legal effect of a judgment and orders made in this case having full legal implications on board members that were party to decisions of the chairperson, which legal implications amount to a legal interest in the outcome of this litigation.

**INTERESTS OF JUSTICE**

43. In light of the fact that OUTA as the first plaintiff has instituted this action in the public interest and asserts its' *locus standi* under Section 157(1)(c) and Section 157(1)(d) of the Companies Act, it is submitted that it is in the public interest that all the board members who were led by the chairperson, as is repeatedly averred, should be party to the case that has been brought in the public interest.
44. It is submitted that it would be against the public interest for the board members to be excluded in this case and the plaintiffs have not made out a case as to why the other board members cannot be tried on the same issues. The allegations as made by the plaintiffs render other board members complicit in the allegations against the chairperson.

45. 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.

46. 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 alleged by the plaintiffs was that of the board as a collective.

47. It is common cause that boards pass decisions through voting processes that bind each member of the board regardless of how they had voted. Thus, all members of each board tenure are bound by the decisions taken as decisions of the board.

48. As chairperson of the board, I did not have powers to overrule majority decisions of the board nor did I have powers to act outside the mandate of the board. If the contrary is to be found from the evidence, that evidence can only emerge from other board members revealing such in their own defence.

**WHEREFORE** I pray that the court grant leave to join all the persons listed under Paragraph 41 as co-defendants to this action.

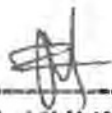


**DEPONENT**



I HEREBY CERTIFY that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn before me at Umhlanga on this the 04 day of November 2019, the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.



  
CST  
N. KHUMALO  
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COMMISSIONER OF OATHS

ADDRESS: Umhlanga