**IN THE HIGH COURT OF SOUTH AFRICA**

**(GAUTENG DIVISION, PRETORIA)**

Case number: 15996/2017

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

12/12/2019
DATE

SIGNATURE

In the matter between:

**ORGANISATION UNDOING TAX ABUSE NPC** — **FIRST PLAINTIFF**

**SOUTH AFRICAN AIRWAYS PILOTS ASSOCIATION** — **SECOND PLAINTIFF**

and

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| **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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**JUDGMENT- SPECIAL PLEA**

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**TOLMAY, J:**

[1] The First Plaintiff (OUTA) and Second Plaintiff (SAAPA) issued summons against the Defendants in which the Plaintiffs seek an order that the First Defendant (Ms Myeni) be declared a delinquent director in terms of section 162(2) of the Companies Act 71 of 2008 (the Act). OUTA also seeks leave in terms of section 157(1)(d) of the Act to pursue this action.

[2] OUTA in its particulars of claim stated that it has legal standing for the declaration of Ms Myeni as a delinquent director in terms of section 162(2) of the Act. OUTA based its standing on the public interest

element, which it submits arises from its primary objectives, which include a) the protection and advancement of the Constitution, as well as the promotion of effective, protocol and enforceable taxation policies, which are free from corruption and b) the proper management of all major public entities.

[3] In par 18 of the particulars of claim the Plaintiffs alleged that South African Airways (SAA) is a major public entity under Schedule 2 of the Public Finance Management Act 1 of 1999 and that the public has an interest in the proper management of all major public entities and was the recipient of a shareholder guarantee loan of R19.1 billion issued by the state at the date of the summons. These allegations are admitted in the plea.

[4] In par 21 and prayer (a) of the particulars of claim OUTA seeks leave of the Court in terms of sec 157(1)(d) of the Act to bring this action in the public interest. In the plea it is alleged that OUTA required the leave of the Court before it instituted the action.

[5] A special plea was raised that OUTA does not have *locus standi* in terms of the Act and it was submitted that the claims against Ms Myeni should be dismissed for this reason alone.

[6] In an affidavit requesting postponement Ms Myeni initially abandoned this special plea, but later retracted it, and as a result it was decided

that the special plea would be argued and determined prior to the commencement of the trial.

[7] The special plea and the reliance on section 157(1)(d) of the Act, which extends standing in company law requires an investigation into what is required of a litigant to obtain leave from a Court based on public interest.

[8] Mr Buthelezi argued that OUTA should have obtained the leave of the Court prior to instituting action and that in any event OUTA is not entitled to the relief envisaged in section 162(2) of the Act, as it does not fall under any of the categories of persons or entities mentioned therein. Ms Steinberg conceded that the leave of the Court is indeed required and that it was sought, but submitted that such leave could be obtained at any time prior to the commencement of the trial. She pointed out that SAAPA's standing is not in dispute, that the Plaintiffs share the same legal representatives and that irrespective of the Court's ruling on the special plea, SAAPA will in any event proceed with the action. She further argued that no additional costs will be incurred due to OUTA being a co-litigant in the action and even if the Court may find that OUTA is not entitled to the relief sought, SAAPA will unquestionably be entitled to the relief, if it succeeds in proving its claim.

[9] Ms Steinberg pointed out that in the plea filed it was admitted that SAA is a major public entity and that the public has an interest in its proper management, by making this admission, Ms Myeni had actually already admitted to the public interest element. She therefore submitted that the question of OUTA's standing is actually academic. Despite the attractiveness of this argument, I deem it appropriate to investigate the merits of the argument raised on behalf of Ms Myeni.

[10] The determination of the issue before Court requires a contextual investigation, which should start with the purpose and scope of the Act and how it differs from the historical position. In the past there was a distinctly different approach applied in commercial law than in constitutional law, however the amendment of the Act changed all that.

[11] The purposes of the Act set out a new vantage point from which company law should be approached. Significantly the Act is brought within the purview of our constitutional dispensation. This is revealed in the Act. The Act sets out its purposes as follows:

> "7. The purposes of this Act are to— (a) promote compliance with the Bill of Rights as provided for in the Constitution, in the application of company law;
> (a) …
> (b) …
> (i)
> (ii)
> (iii) encouraging transparency and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation;
> (c) …
> (d) …

(e) continue to provide for the creation and use of companies, in a manner that enhances the economic welfare of South Africa as a partner within the global economy;"

[12] There is accordingly no question that the Act has significantly broadened and enhanced the scope of the Act in order to ensure that it meets constitutional muster.

[13] In my view, Chapter 7 of the Act and specifically section 157(1)(d) envisages that a broader group of litigants should be awarded standing to approach the Court, if they meet the requirement of representing a public interest and if the Court grants the required leave.

[14] Chapter 7 of the Act's heading is "Remedies and enforcement" and section 156 to 184 falls under this chapter. The relevant part of Section 156 reads as follows:

"Alternative procedures for addressing complaints or securing rights
156. A person referred to in section 157(1) may seek to address an alleged contravention of this Act, or to enforce any provision of, or right in terms of this Act, a company's Memorandum of Incorporation or rules, or a transaction or agreement contemplated in this Act, the company's Memorandum of Incorporation or rules, by—
(a) ...
(b) ...
(c) applying for appropriate relief to the division of the High Court that has jurisdiction over the matter; or...
(d) ..."

[15] The relevant part of section 157 reads as follows:

"Extended standing to apply for remedies
157. (1) When, in terms of this Act, an application can be made to, or a matter can be brought before, a court, the Companies Tribunal, the Panel or the Commission, the right to make the application or bring the matter may be exercised by a person—
(a) ...

(b) ...
(c) ...;
(d) acting in the public interest, with leave of the court. "

[16] In order to better understand the impact and context of the extended standing referred to in section 157, the contents of section 157(3) is also of importance this reads as follows:

"(3) For greater certainty, nothing in this section creates a right of any person to commence any legal proceedings contemplated in section 165(1), other than—
(a) on behalf of a person entitled to make a demand in terms of section 165(2); and
(b) in the manner set out in section 165."

[17] The wording of section 156, read with section 157(1) seems to grant a person who qualifies under section 157, the right to approach the Court to address any alleged contravention of the Act or to enforce any provision or right in terms of the Act, except for a right as envisaged in section 165.

[18] The Plaintiffs seek relief in terms of section 162 (2) to declare Ms Myeni a delinquent director. This section reads as follows:

"162 (2) A company, a shareholder, director, company secretary or prescribed officer of a company, a registered trade union that represents employees of the company or another representative of the employees of a company may apply to a court for an order declaring a person delinquent or under probation if—
(a) the person is a director of that company or, within the 24 months immediately preceding the application, was a director of that company; and
(b) any of the circumstances contemplated in—
(i) subsection (5)(a) to (c) apply, in the case of an application for a declaration of delinquency; or
(ii) subsections (7)(a) and (8) apply, in the case of an application for probation."

[19] On a reading of the wording of section 162 it would seem as if there is room for an interpretation that OUTA might be excluded from the categories referred to in section 162 and therefore not entitled to the relief envisaged therein, but this section must be read in the context of chapter 7 and specifically with sections 156 and 157, which seems to indicate the contrary. However for purposes of this judgment I am of the view that this Court need not interpret the wording of these sections nor venture into the merits and decide at this point whether OUTA will ultimately be entitled to the relief claimed in terms of section 162. This should in my view only be dealt with at the trial.

[20] The Act is silent on when leave needs to be sought in terms of section 157(1)(d), neither is the procedure that should be followed to obtain such leave prescribed.

[21] In the *Minister of Environmental Affairs v Recycling and Economic Development Initiative of South Africa NPC*[1] it was 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. 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. The respondents in that case further relied on case law

[1] 2018 (3) SA 604 (WCC) (*REDISA*).

dealing with class actions in civil claims, which requires a certification process prior to the institution of class action litigation.[2]

[22] The Court distinguished class action proceedings from public interest standing under section 157(1)(d). It was 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 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…*"[3]

[23] The Court held that it was sufficient that the Minister made out a case of public interest standing in the papers filed in the main application. A separate, prior application for leave was not necessary. The SCA[4] subsequently overturned the aforementioned judgment on other grounds, but did not take issue with this proposition.

[24] Relying on *REDISA* SCA, the authors of Henochsberg summarise the position as follows[5]:

> "*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*

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[2] *Children Resources Centre Trust & Others v Pioneer Food (Pty) Ltd* 2013 (2) SA 89 (CC), *Mukaddam v Pioneer Foods & Others 2013* (5) SA 89 (CC).

[3] *Supra* par 189 p651.

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

[5] Henochsberg *Commentary on the Companies Act 2008* at pp560 (14A) -560 (14B).Prior to this in *Giant Concerts CC v Rinaldo Investments (Pty) Ltd* it was also held that the question of standing should be determined *in limine*.

*case is not a class action, where a much more controlled method of certification is required."*

[25] In my view, logic dictates as supported by *REDISA* and *REDISA SCA* that this issue must be determined prior to the commencement of the trial. Ms Steinberg tendered during argument to launch a separate application to clarify this aspect, if required to do so. Mr Buthelezi, correctly in my view, indicated that he was satisfied that the Court could determine this matter by way of the special plea. How leave should be obtained i.e by way of application, a point *in limine* or a special plea should be determined by the circumstances of each case. In this instance I am of the view that in the light of the allegations made in the particulars of claim, read with the special plea and admissions made in the plea, this Court can determine this aspect by way of a special plea, and there exist no requirement that leave should have been obtained prior to the institution of the action.

[26] In *Giant Concerts CC v Rinaldo Investments (Pty) Ltd*[6] where the Court dealt with an own interest litigant in terms of section 38(a) of the Constitution, it was held that a party should show that her rights or interests were directly affected by the challenged conduct. The following that was stated is of importance:

"[32] And in determining Giant's standing, we must assume that its complaints about the lawfulness of the transaction are correct. This is because in determining a litigant's standing, a court must, as a matter of logic, assume that the challenge the litigant seeks to bring is justified. As Hoexter explains:

[6] 2013 (3) BCLR par 32-34 p261 & 262 (*Giant's*).

*"The issue of standing is divorced from the substance of the case. It is therefore a question to be decided in limine [at the outset], before the merits are considered."*

[33] The separation of the merits from the question of standing has two implications for the own-interest litigant. First, it signals that the nature of the interest that confers standing on the own-interest litigant is insulated from the merits of the challenge he or she seeks to bring. An own-interest litigant does not acquire standing from the invalidity of the challenged decision or law, but from the effect it will have on his or her interest or potential interest.

[34] .. As the Supreme Court of Appeal pointed out, standing determines solely whether *this* particular litigant is entitled to mount the challenge: a successful challenge to a public decision can be brought only if "the right remedy is sought by the right person in the right proceedings". To this observation one must add that the interests of justice under the Constitution may require courts to be hesitant to depose of cases on standing alone where broader concerns of accountability and responsiveness may require investigation and determination of the merits. By corollary, there may be cases where the interests of justice or the public interest might compel a court to scrutinise action even If the applicant's standing is questionable. When the public interest cries out for relief, an applicant should not fail merely for acting in his or her interest."[7]

[27] In the *REDISA* SCA, it was 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 have had to present evidence and argument to the court."*[8]

[28] Section 38(d) of the Constitution grants anyone acting in the public interest the right to approach a Court if a right in terms of the Bill of Rights has been infringed. Section 157(1)(d) of the Act extended the

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[7] *Ibid.*
[8] 2019 (3) SA 251 (SCA) at par 134.

same standing in company law to a litigant acting in the public interest. In *Giant's* it was held that standing determines solely whether this particular litigant has the standing to mount the challenge.

[29] *Giant's* emphasised that the interests of justice under the Constitution may require Courts to be hesitant to dispose of cases on standing alone. In this instance broader concerns of responsiveness and accountability are indeed at play. OUTA as a non-profit organisation whose aim is to protect taxpayers and to ensure accountability of public enterprises, not only meet the public interest requirement, but it is in my view also in the interest of justice that it be afforded the opportunity to bring the challenge. *Giant's* seem to say that broader considerations of accountability and responsiveness should apply to determine standing. In this regard OUTA, represents a public interest in the presentation and outcome of the matter, despite potentially failing to prove that it is entitled to the relief sought, especially in the light of the fact that SAAPA will be entitled to the relief, if it succeeds in proving its case. In this regard there may at least be one plaintiff who will be entitled to the relief.

[30] In *Ferreira v Levin No & Others; Vryenhoek & Others v Powell No & Others*[9] the following was said regarding the public interest element, (at that stage still with reference to the interim Constitution).

> " [234] ... Factors relevant to determining whether a person is genuinely acting in the public interest will include considerations such as: whether

[9] 1996 (1) SA 984 CC at par 234.

there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the Court and the opportunity that those persons or groups have had to present evidence and argument to the Court. These factors will need to be considered in the light of the facts and circumstances of each case."

[31] In *Lawyers for Human Rights and Another v Minister of Home Affairs and Another*[10] the following that was further said regarding the public interest element supports this court's view:

"[18] The issue is always whether a person or organisation acts genuinely in the public interest. A distinction must however be made between the subjective position of the person or organisation claiming to act in the public interest on the one hand, and whether it is, objectively speaking, in the public interest for the particular proceedings to be brought. It is ordinarily not in the public interest for proceedings to be brought in the abstract. But this is not an invariable principle. There may be circumstances in which it will be in the public interest to bring proceedings even if there is no live case. The factors set out by O'Regan J help to determine this question. The list of relevant factors is not closed. I would add that the degree of vulnerability of the people affected, the nature of the right said to be infringed, as well as the consequences of the infringement of the right are also important in the analysis."

[32] OUTA, representing taxpayers who partly foot the bill of SAA through paying their taxes must have an interest in how a company like SAA is run. The public has an interest in who is appointed as directors and if such directors fail in their duties, to hold them to account. It is also importantly in the interests of justice that the public interest is both advanced and protected due to the nature of SAA as a state owned company. It is important to note that in *Lawyers for Human Rights* it was envisaged that it may be in the public interest to proceed even if there is no live case. This informs and supports my view that even if in the end OUTA is ultimately denied the remedy envisaged in section

[10] 2004 (4) SA 125 CC at par 18.

162(2) it retains its standing as a representative of the public who has an interest in the presentation and outcome of the case.

[33] In my view OUTA did prove its standing in terms of section 157(1)(d), and should be awarded the opportunity to pursue its claim, in any event their involvement will not result in any significant, if any, increase in costs, as they are represented by the same legal representatives and their case and that of SAAPA is based on exactly the same facts and even the same particulars of claim. Consequently the same witnesses will probably be called to prove the case. If in the end, OUTA's presence is found to have unjustifiably inflated the costs, the Court could deal with that issue at the end of the hearing.

[34] In light of all the facts, I am of the view that the special plea should be dismissed and OUTA should be granted leave to bring the action in terms of section 157(1)(d) of the Act together with SAAPA.

**COSTS**

[35] The parties agreed that the costs occasioned by the postponements and the applications for amendment and joinder should be dealt with in this judgment.

[36] The matter stood down initially due to Ms Myeni's absence and then again to afford her an opportunity to bring a substantive application for

postponement. Although she was not granted a lengthy postponement, she was afforded some time to consult and prepare her interlocutory applications. As she sought an indulgence and did not offer a satisfactory explanation why she did not launch these applications timeously, I am of the view that she should pay the wasted costs occasioned by the delay in the matter.

[37] Regarding the applications for joinder, amendment and the special plea, I cannot see any reason why this Court should deviate from the principle that the unsuccessful litigant should pay the costs. I am however not of the view that any punitive costs orders should be awarded at this point, nor should the Court at this point order that the costs be immediately taxable and/or payable, the taxation should be left in the discretion of the taxing master.

**The following order is made:**

1. **The special plea is dismissed;**

2. **First Plaintiff is granted leave in terms of section 157(1)(d) of the Companies Act 71 of 2008 to proceed with the action.**

3. **First Defendant is ordered to pay the wasted costs occasioned by the postponement and**

4. First Defendant is ordered to pay the costs of the amendment and joinder applications, as well as the costs of the special plea.

R G TOLMAY
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DATE OF HEARING: 2 DECEMBER 2019

DATE OF JUDGMENT: 12 DECEMBER 2019

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