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TABLE OF CONTENTS (OVERLEAF)

NOTES

ARTICLES

BOOK REVIEWS

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CONTENTS

NOTES

ARTICLES

BOOK REVIEWS

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NOTES

DECLARING DIRECTORS OF STATE-OWNED ENTITIES DELINQUENT: *ORGANISATION UNDOING TAX ABUSE v MYENI*[*]

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This note discusses and critically analyses the judgment in Organisation Undoing Tax Abuse v Myeni *[2020] 3 All SA 578 (GP), in which the court declared a director delinquent for her lifetime in terms of s 162(5) of the Companies Act 71 of 2008. The basis of the application related to the director's conduct while she was a non-executive director and chairperson of South African Airways SOC Ltd. The judgment is commendable for its strict stance against errant directors of state-owned companies. It is the first delinquency application brought by a party acting in the public interest, and the first judgment to impose a lifelong delinquency declaration on a director.*

Delinquent directors – s 162(5) of the Companies Act 71 of 2008 – public interest – directors of state-owned entities

INTRODUCTION

In *Organisation Undoing Tax Abuse v Myeni* [2020] 3 All SA 578 (GP) ('*OUTA v Myeni*') the North Gauteng High Court, Pretoria was faced with an application by the Organisation Undoing Tax Abuse NPC ('OUTA') and the South African Airways Pilots' Association ('SAAPA') ('the plaintiffs') to declare delinquent Duduzile Cynthia Myeni ('Myeni') in terms of s 162(5) of the Companies Act 71 of 2008 ('the Companies Act'). The South African Airways SOC Ltd ('SAA'), Air Chefs SOC Ltd and the Minister of Finance were also cited as defendants, but no relief was sought against them. The basis of the application related to Myeni's conduct while she was a non-executive director and chairperson of SAA. At the time the judgment was handed down, SAA was under business rescue. The North Gauteng High Court, Pretoria declared Myeni delinquent for her lifetime.

[*] This note was written during leave granted to me by Unisa. I absolve Unisa from any responsibility for any opinions or conclusions contained in this note.

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The effect of a delinquency order is that a director is disqualified, for the duration of the order, from holding office as a director of a company (s 69(8)*(a)* of the Companies Act). This note critically evaluates the judgment in regard to the delinquency order against Myeni. The judgment is noteworthy for its strict stance against errant directors of state-owned companies, as it is the first time that a director has been declared to be delinquent for her lifetime.

THE FACTS

Myeni was appointed a non-executive director of the SAA board in 2009, and had served in the capacity of chairperson and non-executive director from 2015 to 2017. In her capacity as a director of a state-owned entity, Myeni was a member of the accounting authority of SAA as contemplated in s 49 of the Public Finance Management Act 1 of 1999 ('PFMA') — that is, a member of the board of a public entity. SAA is a state-owned entity and is listed as a major public entity under Schedule 2 of the PFMA. The basis of the plaintiffs' application to declare Myeni delinquent related to conduct with regard to the 'Emirates deal' and the 'Airbus Swap transaction', which are discussed below. The judgment is lengthy, comprising 114 pages. The court usefully set out the facts in detail. For the purposes of this note the essential facts which are relevant to the discussion in this note have been summarised.

The Emirates deal

In essence, the Emirates deal was a code-sharing arrangement between SAA and Emirates, in terms of which SAA could purchase tickets on Emirates flights at reduced rates and sell them to its customers at a profit for SAA (*OUTA v Myeni* para 41). This deal offered many benefits for SAA, including a guaranteed income for SAA to maintain a new route from Johannesburg to Dubai (para 46). The chief commercial officer of SAA was tasked with leading the discussion with Emirates and with drafting the initial non-binding memorandum of understanding between SAA and Emirates ('MOU') (para 48).

Witnesses for the plaintiffs alleged that Myeni had insisted on being directly involved in these discussions, which was unusual for a non-executive director and chairperson (para 54). It was further alleged that Myeni delayed the signing of the MOU on several occasions. For example, shortly before the MOU was intended to be signed at a signing ceremony at the Paris Air Show in June 2015, without consulting the other board members, Myeni instructed the acting chief executive officer of SAA not to sign the MOU because there was an instruction to this effect from then President Zuma (para 79). The failure to sign the MOU at this event caused extensive harm to SAA's reputation, not only with Emirates, but also locally and internationally (para 85). Further attempts by the acting chief

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executive officer to circulate a round-robin resolution to the board seeking approval for the signing of the MOU were frustrated by Myeni (para 93). The failure of SAA to sign the MOU in subsequent months resulted in its relationship with Emirates deteriorating further, as a result of which the MOU was never in fact signed (para 114). The plaintiffs argued that Myeni's actions in obstructing the signing of the MOU led to irreparable harm to SAA, its employees, and the country as a whole, and that she had acted recklessly in sabotaging the signing of the MOU (para 127).

The Airbus Swap transaction

The Airbus Swap transaction was an agreement between SAA and Airbus in 2015 to cancel a contract for the purchase of ten Airbus A320-200 aircraft and to substitute this with a new deal for SAA to lease five Airbus A330-300 aircraft directly from Airbus (para 134). This transaction was of critical importance to SAA, since it would enable SAA to escape onerous pre-delivery payments and inflated prices under the previous contract (para 135). If SAA defaulted on these payments, it faced the risk of triggering cross-default clauses on other loans and leases, with the effect that billions of Rand in debt would become due immediately (ibid). The conclusion of this transaction was also a key precondition to SAA receiving any further going concern guarantees from the state, which it relied on to remain afloat and to give comfort to its lenders (para 144). On 31 March 2015, the SAA board unanimously resolved to approve the Airbus Swap transaction (para 141), and on 11 September 2015 the Minister of Finance unconditionally approved the transaction (para 142). All that remained was for the SAA board to ratify the signing of the execution documents by the acting chief executive officer and the chief financial officer (para 143).

The plaintiffs argued that Myeni had repeatedly delayed the conclusion of this transaction. Even though the board had approved the transaction, it was alleged that Myeni engaged directly with Airbus in an attempt to renegotiate the deal (para 149). She sought unilaterally to change the terms of the transaction (in a letter to Airbus in September 2015) and to renegotiate a new deal with an African Aircraft Leasing Company without consulting with the other board members (paras 154–6), and she failed to heed warnings from SAA, Airbus and the Minister of Finance of the urgency regarding the conclusion of the Airbus Swap transaction (para 268). Furthermore, on 16 November 2015, Myeni submitted a new application to the Minister of Finance in terms of s 54(2) of the PFMA ('the s 54(2) application') to amend the approved transaction (para 193). This application was found to be grossly defective as it failed to disclose material facts, and was subsequently rejected by the Minister of Finance (paras 213 and 252). All the executive directors who had been opposed to Myeni's plan were removed from office, placed on special leave, or resigned on the basis that their relationship with Myeni had become

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intolerable (para 191). Eventually, on 22 December 2015, after the Minister of Finance and National Treasury intervened, the necessary approvals of the board were obtained and communicated to Airbus (para 220). The plaintiffs argued that had Airbus issued a default notice regarding the payment of the pre-delivery payments due to SAA's failure to conclude the transaction, SAA would have been forced into business rescue or liquidation (para 223). In this event, it was argued, the state would have faced a call on its guarantees, and this would have jeopardised the state at a time of economic and political turmoil and would have had a catastrophic domino effect on other state-owned entities and the economy (ibid).

JUDGMENT

The court, per Tolmay J, found that Myeni's testimony on the Emirates deal was confusing and contradictory, and that she failed to present evidence to support her testimony (paras 115–19). It held that Myeni's obstruction of the MOU was based on her failure to understand the workings of flight frequencies, which demonstrated a 'reckless lack of care' (para 125). Furthermore, by failing to take any steps to expedite the signing of the MOU, the court found that Myeni had contravened cl 12.2.3 of the 2014/2015 SAA Shareholder's Compact (which governed the affairs of SAA), and which stated that the board 'will use its best endeavours to prevent undue delays with regard to critical decisions' (para 126). The court stated that, based on the evidence, it would never know whether Myeni was indeed instructed by former President Zuma not to sign the MOU (para 127). But, the court stated, this was not determinative of the question of her delinquency, as it was common cause that Myeni had given instructions, to the detriment of SAA and the whole country, not to proceed with the signing of the MOU (ibid). The court found further that Myeni had no reasonable grounds to block the signing of the MOU, at the Paris Air Show or at any time thereafter (para 132). The court ruled that Myeni 'deliberately or through gross negligence' inflicted substantial harm on SAA (para 238), and that her belated attempts to justify her conduct showed that she had acted 'dishonestly, in bad faith and not in the best interests of SAA and the country' (ibid).

Likewise, the court stated that Myeni could not offer any plausible explanation for delaying the Airbus Swap transaction (para 153) and that her evidence was inconsistent (para 226). It ruled that Myeni's letter to Airbus in September 2015 was grossly negligent as it misrepresented facts to Airbus and was sent without the authority of the board (para 244). The court further ruled that this letter violated s 77(3)*(a)* of the Companies Act, read with s 162(5)*(c)*(iv)*(bb)*, since Myeni had acted in SAA's name and had signed the letter on behalf of SAA, despite knowing that she lacked the authority to do so (para 247). The court held that there was 'deliberate dishonesty and a gross abuse of power' by Myeni, 'as contemplated in

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s 162(5)*(c)*(i) of the Companies Act' (para 246). Her attempt unilaterally to renegotiate the Airbus Swap transaction indicated recklessness (para 249). A further ground of delinquency, the court stated, is that the s 54(2) application was 'dishonest and failed to disclose material facts' (para 252). Her failure to ensure that the s 54(2) application contained all the relevant information was also found to be grossly negligent (para 257). By delaying the conclusion of the Airbus Swap transaction and by failing to disclose material facts, Myeni had, according to the court, acted contrary to the duties of good faith and honesty as set out in s 50(1)*(b)*, s '50*(c)*' [sic] (which should be s 50(1)*(c)*), and s 54(2) (information to be submitted by accounting authority) of the PFMA (paras 253–4), and had wilfully and recklessly contributed to SAA breaching its financial reporting obligations under s 55(1) of the PFMA (para 265). The court stated that Myeni had knowingly taken SAA and South Africa to the brink of disaster by delaying the Airbus Swap transaction (para 260). Myeni's attitude to placing SAA, other state-owned entities and the economy at risk was found by the court to be one of 'supine indifference' (para 224).

The court imposed on Myeni an unconditional lifelong declaration of delinquency. The court also recommended that the National Prosecuting Authority ('NPA') investigate the evidence presented in the trial regarding possible criminal conduct, and ordered Myeni to pay the costs of the action on an attorney and client scale, including the costs of three counsel (para 285).

ANALYSIS AND DISCUSSION

The application to join all the SAA board members

Even though the plaintiffs had issued summons against Myeni in 2017 when she was still a director of SAA, the matter was delayed several times due to Myeni filing numerous interlocutory applications, and was only heard in court in January 2020. One interlocutory application filed by Myeni was to join all the board members that served with her at SAA during her tenure, on the basis that they had acted as a collective whole and as a result could be sued substantially on the same questions of fact and law (see *Myeni v Organisation Undoing Tax Abuse NPC* [2019] ZAGPPHC 565 para 61). The court dismissed this interlocutory application on the ground that the delinquency claim against the other directors had prescribed in terms of s 162(2)*(a)*, since a delinquency claim must be brought while a person is a director of the company or within 24 months after the director has vacated his or her position (ibid para 71). In any event, as correctly emphasised by the court in *OUTA v Myeni* para 20, a director may not use collective decision-making to evade individual responsibility, since the Companies Act sets out individual statutory duties of directors (see s 76(2) and (3)). The King III Report on Governance for South Africa

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2009 ('King III Report'), which was applicable during the relevant events covered in this case, likewise states that the board has a reflective role with collective authority and decision-making as a board, but directors carry individual responsibility (principle 2.14, recommended practice 16).

Apart from the 24-month restriction, a prescription period has not been imposed under s 162 of the Companies Act regarding the time period within which an application must be brought to declare a person a delinquent director (see further Rehana Cassim 'Delinquent directors under the Companies Act 71 of 2008: *Gihwala v Grancy Property Limited* 2016 ZASCA 35' (2016) 19 *PER/PELJ* 1 at 14 and Piet Delport *Henochsberg on the Companies Act 71 of 2008* (Service 24, 2020) 569). It is arguable that the Prescription Act 68 of 1969 would not apply in this instance because this statute applies primarily in regard to the acquisition of ownership by prescription, the acquisition and extinction of servitudes by prescription, and the prescription of debts, while s 162 of the Companies Act relates to a declaration which affects the status of a person. The plaintiffs' allegations against Myeni relate to her conduct during the period 2013 to 2016. Since a prescription period has not been imposed under s 162 of the Companies Act, Myeni's conduct as far back as 2013 could validly be used as a basis for the delinquency application, provided that such conduct took place while she was a director of SAA.

The locus standi of OUTA to bring the delinquency proceedings

The persons who have locus standi under s 162 of the Companies Act to apply to court to declare a director delinquent are the company, a shareholder, director, company secretary, prescribed officer, a registered trade union that represents employees of the company or another employee representative, the Companies and Intellectual Property Commission ('CIPC'), the Takeover Regulation Panel ('TRP') and an organ of state responsible for the administration of any legislation (s 162(2), (3) and (4)). The delinquency application against Myeni was brought by both SAAPA and OUTA. SAAPA is a branch of the Air Line Pilots' Association of South Africa, which is a registered trade union in terms of s 96 of the Labour Relations Act 66 of 1995, and represents pilots in the employ of SAA. While SAAPA's locus standi was not disputed, Myeni raised a special plea that OUTA did not have locus standi and that it required the leave of the court before instituting the delinquency proceedings in the public interest (see *Organisation Undoing Tax Abuse NPC v Myeni* [2019] ZAGPPHC 957) ('the public interest application').

Since OUTA does not appear on the face of it as a person or entity with locus standi under s 162 to institute delinquency proceedings, its summons was issued under s 157(1)*(d)* of the Companies Act, which provides for an extended right of standing. This section states that where an application may be made to, or a matter may be brought before a

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court, the Companies Tribunal, the TRP or the CIPC in terms of the Companies Act, the right to do so may be exercised by a person acting in the public interest, with leave of the court. OUTA argued that its public interest in the matter arose from its primary objectives, which include the protection and advancement of the Constitution of the Republic of South Africa 1996, the promotion of effective and enforceable taxation policies which are free from corruption, and the proper management of all major public entities (para 2).

A person acting in the public interest bears the onus of identifying the relevant public interest in which he or she is acting (Chris Jafta 'Critical analysis of the extended legal standing provisions under section 157(1) of the Companies Act 71 of 2008 to apply for legal remedies' (2015) 1 *Journal of Corporate and Commercial Law & Practice* 35 at 41). Yet, guidance on the meaning of the phrase 'acting in the public interest' is not provided in the Companies Act. In *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 (1) SA 984 (CC) para 234 the court held that relevant factors to determine whether a person is genuinely acting in the public interest are whether there is another effective manner in which the challenge could be brought; the nature of the relief sought and the extent to which it is of general and prospective application; the range of persons who may be affected by any court order, and the opportunity that those persons have had to present evidence and argument to the court. In *Recycling and Economic Development Initiative of South Africa NPC v Minister of Environmental Affairs* 2019 (3) SA 251 (SCA) para 135 the Supreme Court of Appeal regarded a consideration of alternative remedies as being a key factor in this context.

The court held that OUTA did indeed have a public interest in bringing legal proceedings against Myeni because it represents taxpayers, who partly foot the bill of SAA through paying their taxes, and who therefore have an interest in how a company such as SAA is run (the public interest application para 32). It is in the interests of justice, the court said, that the public interest is both advanced and protected due to the nature of SAA as a state-owned entity (ibid). On whether leave had to be obtained prior to the institution of the action by OUTA, the court was influenced by the dictum in *Minister of Environmental Affairs v Recycling and Economic Development Initiative of South Africa NPC* 2018 (3) SA 604 (WCC), which held that if a court could decide on the papers whether relief should be granted under s 157(1)*(d)*, a separate application for leave would not be required (para 189). The court ruled that leave of the court did not have to be obtained prior to the institution of the action by OUTA and, considering the allegations made in the particulars of claim, read with the special plea and admissions made in the plea, it could determine the issue by way of a special plea (the public interest application para 25). The fact that OUTA and SAAPA were represented by the same legal representatives and had the same legal case swayed the court in deciding

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that OUTA had locus standi, particularly since its involvement would not result in any significant increase in costs (para 33). Even if OUTA had been denied standing, the delinquency application could have been continued by SAAPA, assuming it had the means to do so, since SAAPA had locus standi by virtue of being a registered trade union representing pilots in the employ of SAA.

OUTA v Myeni considerably extends the list of persons who may apply to court to declare a director delinquent. In particular, it exposes directors of state-owned entities to delinquency proceedings by any persons who can show that they are acting in the public interest. While OUTA is to be commended for bringing delinquency proceedings against Myeni, together with SAAPA, it is submitted that directors, prescribed officers and the company secretary of a state-owned entity, who have first-hand knowledge of any directorial misconduct, must take steps at an early stage to hold such directors accountable. While these persons may be reluctant to do so due to the fear of personal repercussions and concerns over the legal costs associated with court proceedings, delaying such proceedings may have dire consequences for the South African public and economy, as was demonstrated with regard to SAA. In any event, if successful, a court may award costs in favour of the plaintiff, even on an attorney-and-client basis, as was done in *OUTA v Myeni*. It is submitted that the state too has a responsibility to take such steps. As the court emphasised, to serve on the board of a state-owned entity 'should not be a privilege of the politically connected' and that the '[g]overnment has, as custodian of the common good, an obligation to ensure that suitably qualified persons, with integrity are appointed in these positions' (*OUTA v Myeni* para 276).

Grounds of delinquency

Section 162(5) sets out a closed list of delinquency grounds. The plaintiffs' action focused on a contravention of the grounds listed in s 162(5)*(c)*. Under this provision, a court must make an order declaring a person to be a delinquent director if the person, while a director: (i) grossly abused the position of director; (ii) took personal advantage of information or an opportunity contrary to s 76(2)*(a)* of the Companies Act (i e to gain an advantage for the director, or for another person other than the company); (iii) intentionally or by gross negligence inflicted harm upon the company contrary to s 76(2)*(a)* of the Companies Act; (iv) acted in a manner that amounted to gross negligence, wilful misconduct or breach of trust in relation to the performance of the director's functions within, and duties to, the company; or (v) acted in a manner contemplated in s 77(3)*(a)*, *(b) or (c)* of the Companies Act (unauthorised acts, reckless trading and fraud). A declaration of delinquency must be based on one of the statutory grounds listed in s 162 of the Companies Act (*Cook: Geoffrey v Hesber Impala (Pty) Ltd* [2016] ZAGPJHC 23 para 60). It follows that in assessing whether

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a director's conduct contravenes one of the grounds listed in s 162(5)*(c)*, the impugned conduct must be located in one of the specific legislated grounds (ibid).

It is settled that when interpreting legislation, the point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document (*Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18; *Airports Company South Africa v Big Five Duty Free (Pty) Ltd* 2019 (5) SA 1 (CC) para 29; *Airports Company South Africa SOC Ltd v Imperial Group Ltd* 2020 (4) SA 17 (SCA) para 22). A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results, or undermines the apparent purpose of the document (*Natal Joint Municipal Pension Fund* (supra) para 18).

In applying this approach to interpreting s 162 of the Companies Act, the purpose of the provision must be considered. Section 162 has an underlying protective purpose — it aims to ensure that those who invest in companies are protected against directors who engage in serious misconduct (*Msimang NO v Katuliiba* [2013] 1 All SA 580 (GSJ) para 29; *Gihwala v Grancy Property Ltd* 2017 (2) SA 337 (SCA) para 144; *Lewis Group Ltd v Woollam* 2017 (2) SA 547 (WCC) para 40). The *Memorandum on the Objects of the Companies Bill, 2008*, Companies Bill [B 61D-2008] para 8 stated that the core purpose of the regime set out in what was at that point cl 162 was to be a remedy available to shareholders and other stakeholders to hold directors accountable. A contextual approach suggests further that relevant legal and regulatory instruments must be considered in interpreting s 162. In this case, the PFMA is relevant to determining the delinquency of a director of a state-owned entity. In ascertaining whether Myeni's conduct infringed the delinquency grounds in s 162, the court commendably adopted a contextual approach by considering the relevant provisions of the PFMA and the (then applicable) King III Report (see *OUTA v Myeni* paras 34 to 37), which SAA bound itself to observe in its 2014/2015 SAA Shareholder's Compact (see paras 35 and 38). For example, principle 2.16 of the King III Report states that one of the core responsibilities of the chairperson is to set the ethical tone for the board and the company. The court stated that a failure by the chairperson to do this may support a finding of delinquency as set out in s 162(5) of the Companies Act (para 37). The court's discussion of the delinquency grounds in *OUTA v Myeni* is evaluated below.

(i) *Conflating the test of 'gross negligence' with the test of the duty of reasonable care, skill and diligence*

The court stated that an objective and subjective standard must be applied in assessing gross negligence, and that this is made clear by s 76(3)*(c)* of the Companies Act (para 16). Section 76(3)*(c)* imposes a duty on

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a director to exercise the powers and functions of a director with the degree of care, skill and diligence that may reasonably be expected of a person carrying out the same functions in relation to the company as those carried out by that director, and having the general knowledge, skill and experience of that director. In applying the test of care, skill and diligence to Myeni, the court held that, objectively, Myeni's conduct had to be weighed against the standards expected of a reasonable director in her position and, subjectively, her conduct had to be weighed against the skills, qualifications and experience possessed by her (ibid). The court thus applied a dual objective and subjective test in the context of the duty of care, skill and diligence in order to determine whether Myeni's conduct constituted gross negligence.

It is submitted, with respect, that the court misapplied the test for the duty of care, skill and diligence in order to ascertain gross negligence in the context of s 162(5)*(c)*(iii) and s 162(5)*(c)*(iv)*(aa)* of the Companies Act. The duty of care, skill and diligence in s 76(3)*(c)* is not a fiduciary duty but is based on delictual liability for negligence (*Ex parte Lebowa Development Corporation Ltd* 1989 (3) SA 71 (T) at 106; *Du Plessis NO v Phelps* 1995 (4) SA 165 (C) at 170), and is assessed in accordance with the principles of the common law relating to delict (see s 77(2)*(b)*). In *MV* Stella Tingas*: Transnet Ltd t/a Portnet v Owners of the MV* Stella Tingas 2003 (2) SA 473 (SCA) the Supreme Court of Appeal stated that while gross negligence is not an exact concept capable of precise definition, it differs from ordinary negligence in that it involves a departure from the standard of the reasonable person to such an extent that it may properly be categorised as extreme (para 7). In explaining the meaning of the term 'gross negligence' in the context of s 162(5)*(c)*(iv)*(aa)* of the Companies Act, the Supreme Court of Appeal in *Gihwala* (supra) found that there was a long history of courts treating gross negligence as the equivalent of recklessness when dealing with the conduct of those responsible for the administration of companies, and that recklessness is plainly serious misconduct (para 44). (See e g *Philotex (Pty) Ltd v Snyman*; *Braitex (Pty) Ltd v Snyman* 1998 (2) SA 138 (SCA) at 143–4; *Ebrahim v Airport Cold Storage (Pty) Ltd* 2008 (6) SA 585 (SCA) para 13 and *Tsung v Industrial Development Corporation of South Africa* 2013 (3) SA 468 (SCA) paras 29–31.) In *Msimang* (supra) para 39 the court ruled that in the determination of 'gross negligence' in the context of s 162(5)*(c)* of the Companies Act, a court must have regard to the conduct of the directors in the performance of their duties as directors of the company in terms of the company's memorandum of incorporation and the statutory framework. This approach was approved in *Cape Empowerment Trust Ltd v Druker* 2013 JDR 1360 (WCC) para 84. It is evident from the above dicta that the duty of reasonable care, skill and diligence is not a test to be used to assess gross negligence, as the court advocated in *OUTA v Myeni* para 16.

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In assessing the duty of care, skill and diligence in the context of s 76(3)*(c)*, both an objective and subjective test are applied (Farouk H I Cassim 'The duties and the liability of directors' in Farouk H I Cassim et al (ed) *Contemporary Company Law* 2 ed (2012) 559). In a similar vein, it is submitted that in determining whether the grounds in s 162(5)*(c)* of the Companies Act have been breached, courts apply both an objective and a subjective assessment (Rehana Cassim *The Removal of Directors and Delinquency Orders under the South African Companies Act* (2020) 268). The objective element lies in ascertaining whether the conduct in question meets the benchmarks of one of the delinquency grounds — for instance, whether it amounts to 'gross abuse', 'gross negligence' or 'wilful misconduct', as referred to in s 162(5)*(c)* of the Companies Act and as defined in our law — while the subjective element lies in considering the background, qualifications and experience of the particular director.

For example, in *Cape Empowerment Trust Ltd v Druker* (supra) the directors had consistently failed to hold annual general meetings and to prepare financial statements for presentation at annual general meetings. The court found this conduct to be grossly negligent, bordering on wilful misconduct or breach of trust in relation to the performance of their functions within, and duties to, the company (ibid para 88). In declaring the directors delinquent, the court drew attention to the fact that all the board members were persons with significant tertiary qualifications, there being a medical practitioner, a legal practitioner, an accounting practitioner and other directors who held doctoral qualifications in their respective areas of knowledge (ibid). For this reason, the court asserted that each one of the members of the board of directors ought to (and must) apply such skill as each of them possesses for the benefit of the company. In *Gihwala* (supra) a director had, inter alia, failed to ensure that the share register of the company had properly reflected the persons who were entitled to be registered as shareholders; failed to ensure that the company kept proper accounting records; and had appropriated financial benefits for himself to the exclusion of a shareholder. In declaring the director delinquent, the Supreme Court of Appeal held that his conduct amounted to gross abuse of the position of a director, gross negligence akin to recklessness, and breach of trust in relation to the performance of the director's duties to the company (ibid paras 138–9). The court stressed that the director was both a businessman and attorney, the chairman of one of South Africa's largest law firms, and one of the largest JSE-listed property loan stock companies (ibid para 136). These personal traits swayed the court to declare the director delinquent on the basis that his conduct was inexcusable.

Based on the authority of these dicta, it is submitted that in *OUTA v Myeni* the court correctly applied both an objective and subjective test to determine whether Myeni's conduct constituted gross negligence. But, with respect, it did so in the context of misapplying the test of

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reasonable care, skill and diligence. It is submitted that the court reached the correct conclusion on Myeni's conduct being grossly negligent, but for the wrong reasons. It is essential for courts to apply the correct legal principles in their reasoning, even if the end result may be the same, as failing to do so runs the risk of setting questionable legal precedents.

While directors do not need to have any special qualifications or experience for their office (unless a particular company makes this a requirement in its memorandum of incorporation), the reality is that nowadays directors, particularly of state-owned entities, are often carefully selected because of their skills, business experience and qualifications in the relevant industry. It is submitted that such directors have a greater responsibility to use their skills and experience for the company's benefit. Their failure to do so may weigh against them in a delinquency application, as Myeni experienced.

(ii) *Equating gross abuse of 'the position of director' with 'gross abuse of power'*

The court ruled that the letter which Myeni sent to Airbus in September 2015 constituted 'a gross abuse of power by her, as contemplated in s 162(5)*(c)*(i) of the Companies Act' (*OUTA v Myeni* para 246). With respect, the court misstated the delinquency ground in s 162(5)*(c)*(i), as this ground is not a 'gross abuse of *power*' but a gross abuse of 'the *position* of director' (emphasis supplied).

In *Lewis Group Ltd* (supra) the court stated that gross abuse of 'the position of director' must relate to the use of the *position* as director, and not the performance by the person concerned of his or her duties and functions as a director, because that is a matter dealt with in terms of s 162(5)*(c)*(iv) of the Companies Act (ibid para 14). In *Gihwala* (supra) the Supreme Court of Appeal held that a gross abuse of the position of director is not a trivial misdemeanour or an unfortunate fall from grace, and that '[o]nly gross abuses of the position of director qualify' (ibid para 143). In this case, the conduct of a director who had appropriated financial benefits for himself and had excluded a shareholder from the benefits of such investments to which he was entitled, was found by the court to constitute a gross abuse of the position of director as contemplated in s 162(5)*(c)*(i) (ibid para 138). (See further on gross abuse *Demetriades v Tollie* [2015] ZANCHC 17 para 60.)

It is submitted that a gross abuse of the position of director must relate directly to one's position of directorship, while a gross abuse of power is much wider and may relate to any power that has been conferred on the individual in any capacity, and not necessarily in the capacity of a director. By ruling that Myeni's conduct constituted a 'gross abuse of power by her, as contemplated in s 162(5)*(c)*(i) of the Companies Act' the court, with respect, misconstrued the ground of gross abuse of the position of

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director, and equated it with a gross abuse of power, thereby conferring a much wider interpretation to the ground of gross abuse of 'the position of director' — an unwarranted interpretation that goes beyond the scope of the statutory ground in s 162(5)*(c)*(i). As the Supreme Court of Appeal cautioned in *Natal Joint Municipal Pension Fund* (supra) para 18 '[j]udges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used' as this 'crosses the divide between interpretation and legislation'. It is submitted that Myeni's conduct nonetheless did amount to a gross abuse of the position of director in that by sending the letter to Airbus in September 2015 in her capacity as a non-executive director of the SAA, she sought unilaterally to change the terms of the Airbus Swap transaction and to renegotiate a new deal without the approval of a board resolution authorising her to do so (see *OUTA v Myeni* paras 154–7).

(iii) *Dishonesty and failure to disclose material facts as a delinquency ground*

As mentioned earlier, the court stated that a 'further ground for declaration of delinquency' is that Myeni's application to the Minister of Finance to approve the s 54(2) application was 'dishonest and failed to disclose material facts' (*OUTA v Myeni* para 252). While Myeni's actions may have been dishonest and she may have failed to disclose material facts, this is not a statutory ground of delinquency listed in s 162(5)*(c)* of the Companies Act. As discussed earlier, since the delinquency grounds in s 162 are a closed list, a court must identify a specific delinquency ground in order validly to declare a director delinquent and must locate the relevant conduct in one of the specific legislated grounds, as the court directed in *Cook: Geoffrey* (supra) para 60.

Even though the court did not locate Myeni's dishonest conduct in one of the specific legislated grounds in s 162 of the Companies Act, it is nevertheless arguable that Myeni's dishonesty and failure to disclose material facts with regard to the s 54(2) application would fall under the delinquency ground in s 162(5)*(c)*(iv)*(aa)* of breach of trust in relation to the performance of the director's functions and duties to the company. This argument is reinforced by the fact that directors of state-owned entities have an augmented duty of honesty and disclosure under the PFMA, as discussed further below. Section 50(1)*(b)* of the PFMA states that the board of a state-owned entity must act with fidelity, honesty, integrity and in the best interests of the entity in managing its financial affairs. Under s 50(1)*(c)* of the PFMA, the board of a state-owned entity must on request disclose to the executive authority or the legislature all material facts, including those reasonably discoverable, which may influence its decisions or actions. Myeni's dishonesty and failure to disclose material facts in regard to the s 54(2) application contravened ss 50(1)*(b)* and *(c)* of the PFMA, which arguably amounts to a breach of trust in relation to the

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performance of her functions and duties to SAA. This is a delinquency ground in terms of s 162(5)*(c)*(iv)*(aa)* of the Companies Act.

The criminalisation of a breach of fiduciary duties under the PFMA

Directors of state-owned entities must comply with the provisions of the PFMA. The objects of the PFMA are to secure transparency, accountability and sound management of the revenue, expenditure, assets and liabilities of the institutions to which the Act applies (see s 2 of the PFMA; *Nyathi v MEC for Department of Health, Gauteng* 2008 (5) SA 94 (CC) paras 29 and 54; and *Premier, Limpopo Province v Speaker of the Limpopo Provincial Government* 2011 (6) SA 396 (CC) paras 26–7). This means that directors of state-owned entities have a duty to comply not only with the requirements of the Companies Act, but also with the requirements of the PFMA, as well as any other specific legislation governing the relevant state-owned entity. There is thus an enhanced duty on directors of state-owned entities (*OUTA v Myeni* para 28).

The board of a state-owned entity is the accounting authority of that entity (s 49(2) of the PFMA), and is in turn accountable to the 'executive authority' which, in the case of SAA, is the Minister of Finance (see s 1 of the PFMA and Proc 88 in *GG* 38354 of 19 December 2014). Boards of state-owned entities must exercise the duty of utmost care to ensure reasonable protection of the assets and records of the public entity (s 50(1)*(a)*); act with fidelity, honesty, integrity and in the best interests of the public entity in managing the financial affairs of the public entity (s 50(1)*(b)*); on request, disclose to the executive authority or the legislature all material facts which may influence its decisions or actions (s 50(1)*(c)*); and seek to prevent any prejudice to the financial interests of the state (s 50(1)*(d)*). Board members may not use their position or confidential information obtained as a board member for personal gain or to improperly benefit another person (s 50(2)). A duty of disclosure is also imposed in that directors of state-owned entities are required to disclose to the board any personal business interest in any matter before the board and withdraw from that matter (unless the board decides that the interest is trivial or irrelevant) (s 50(3)).

Section 51 of the PFMA sets out further responsibilities of the board, which include ensuring that the company maintains an efficient and transparent system of financial and risk management and internal control; that it takes effective steps to prevent irregular and wasteful expenditure; and that it manages available working capital efficiently and economically. The board of a state-owned entity is also subject to more stringent financial reporting duties than other companies, as set out in ss 55 and 65 of the PFMA. Notably, in terms of s 86(2) of the PFMA, the board will be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding five years if it wilfully or

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in a grossly negligent way fails to comply with ss 50 (fiduciary duties), 51 (general responsibilities) or 55 (duties relating to annual reports and financial statements) of the PFMA.

By delaying the conclusion of the Airbus Swap transaction and failing to disclose material facts, Myeni was found to have acted contrary to the duties of good faith and honesty in ss 50(1)*(b)* and *(c)* of the PFMA (*OUTA v Myeni* para 253). She was also found to have contributed wilfully and recklessly to SAA breaching its financial reporting obligations under s 55(1) of the PFMA (para 265). Notably, since a contravention of these provisions constitutes a criminal offence under s 86(2) of the PFMA, Myeni could be subjected to a fine or imprisonment for a period not exceeding five years.

In sharp contrast, a breach by a director of his or her fiduciary duties under s 76 of the Companies Act will not constitute a criminal offence. A director may instead be held liable for any loss, damages or costs sustained by the company as a consequence of such breach (s 77(2)*(a)*). Yet, a breach by a director of a state-owned entity of the same or substantially similar fiduciary duties, including a failure to disclose a conflict of interest, will constitute a criminal offence, and may even result in imprisonment. This is contrary to the stance adopted by the Companies Act of decriminalising most of its provisions (see the *Memorandum on the Objects of the Companies Bill, 2008* op cit paras 1.2.5 and 12 and Cassim 'Introduction to the new Companies Act' in Cassim et al *Contemporary Company Law* op cit at 26).

It is nevertheless submitted that s 86(2) of the PFMA is a commendable provision, as it underscores the gravity of a breach of fiduciary duties by directors of state-owned entities. A criminal conviction for a breach of duties under the PFMA may serve as a deterrent to stem the high level of corruption currently prevalent in state-owned entities in South Africa. Moreover, compliance with the duties relating to annual reports and financial statements in a state-owned entity is imperative, since a failure to comply with such duties would deprive the public at large of effective oversight of the finances of the state-owned entity, and would jeopardise its ability to raise funding (*OUTA v Myeni* para 269). A director serving on the board of a state-owned entity 'has a sacred duty to society and should ensure that state resources are not squandered, or the economy placed at risk' (para 276).

The court ordered its judgment and the evidence led in the trial to be referred to the NPA for determination of whether an investigation regarding possible criminal conduct should follow (para 285). It directed the NPA to include the other relevant SAA board members in such an investigation (para 271). The court's reason for the referral of its judgment to the NPA is not entirely clear from the judgment. All that the court stated was that Myeni's actions during the negotiations of the Emirates deal were inexplicable, and that there existed a reasonable possibility that

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'something sinister was going on behind the scenes' (ibid). This, the court stated, constituted sufficient ground for the NPA to consider the evidence presented and investigate the circumstances surrounding the Emirates deal and the Airbus Swap transaction (ibid).

One basis for the referral of the matter to the NPA could be that Myeni's breach of her fiduciary and other duties under the PFMA constitutes a criminal offence. Notably, s 162 of the Companies Act is a civil remedy, but does not invoke criminal liability (see further *Grancy Property Ltd v Gihwala* 2014 JDR 1292 (WCC) para 155). The assessment of whether Myeni was delinquent was thus determined by the court on a civil standard of proof and on a balance of probabilities. Since the NPA must prove its case on a criminal standard of proof and beyond a reasonable doubt, which is a heavier onus, it may not necessarily be able to rely solely on the evidence presented in the trial.

Another possible reason for the referral of the matter to the NPA could be perjury, which is a criminal offence (see *R v Beukman* 1950 (3) SA 261 (O) at 263; *S v Thompson* 1968 (3) SA 425 (E) at 427; *Black v Joffe* 2007 (3) SA 171 (C) para 15). In Myeni's earlier postponement application she had pleaded poverty as the reason for not attending the court proceedings, but later claimed that it was unfair to expect her to spend her own money on the court proceedings when she believed that SAA's insurers ought to have covered these costs (*Outa v Myeni* para 282). This claim, the court found, substantially contradicted Myeni's previous pleas of poverty and demonstrated that she had perjured herself on affidavit (ibid). The court found that Myeni had failed to put a proper version to the witnesses in the course of cross-examination, and that she could have been in a better position to instruct her counsel properly had she attended the court proceedings (para 235). It is notable that the court's credibility findings against Myeni impacted its costs order. For example, the court's finding that Myeni had admitted to exercising a deliberate choice not to attend the court proceedings despite its repeated warnings that this would compromise her defence, together with its findings that she had been dishonest with the court and an unreliable witness, led the court to impose a punitive costs order on her (paras 279, 282 and 284).

The duration of delinquency order

Under s 162(6)*(a)* of the Companies Act, an unconditional lifetime delinquency declaration must be imposed on a person who consented to serve as a director or acted in the capacity of a director or prescribed officer while ineligible or disqualified to do so, and on a person who acted in a manner that contravened a probation order. In all other instances, the delinquency declaration subsists for seven years from the date of the order or such longer period as determined by the court, and may be made subject to any conditions the court considers appropriate, including conditions

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limiting the application of the declaration to one or more particular categories of companies (s 162(6)*(b)*). In exercising its discretion to extend the delinquency declaration to Myeni's lifetime, the court did not impose any conditions to the order. This is the first time in South African law that a lifelong declaration of delinquency has been imposed on a delinquent director.

In *Companies and Intellectual Property Commission v Zwane* [2019] ZAGPPHC 381, which was the first delinquency declaration against a director of a state-owned entity, the court did not exercise its discretion to extend its order for longer than seven years. It held that a director of the South African Nuclear Energy Corporation SOC Ltd ('NECSA') who had solicited and accepted director's emoluments in circumstances in which he was not entitled to do so, had acted in a manner that amounted to wilful misconduct and breach of trust in relation to the performance of his duties to NECSA, as contemplated by s 162(5)*(c)*(iv)*(aa)* of the Companies Act (ibid para 56). Zwane argued that it was a grey area whether he was entitled to receive such emoluments. The court, however, found that Zwane knew that he was not entitled to receive director's emoluments from NECSA without the requisite permission to do this (ibid para 53). It ruled that Zwane had deliberately avoided seeking permission for the receipt of such emoluments, because he knew that if he drew attention to his position by requesting permission to be paid, such permission would be refused (ibid). Such conduct, the court held, amounted to wilful misconduct and breach of trust in relation to the performance of the director's duties to NECSA (ibid para 56). In the course of its judgment, the court drew attention to Zwane's business experience and the fact that he was an experienced chartered accountant (ibid para 3). Notwithstanding Zwane's wilful misconduct and breach of trust as a director of a state-owned entity, together with his extensive business experience, the court did not deem it necessary to impose a delinquency declaration of longer than seven years.

In imposing a lifelong delinquency declaration in *OUTA v Myeni*, the court appears to have been influenced by its finding that Myeni contributed significantly to the position in which SAA and the economy finds itself today (*OUTA v Myeni* para 271). It held that a lifelong delinquency order was justified since Myeni did not act as a reasonable director in light of her extensive experience as a director; she failed to give any reasonable explanation for her numerous failures, misrepresentations and actions, and 'failed abysmally in executing her fiduciary duty' (para 273). The court ruled further that Myeni was not a fit and proper person to be appointed as a director of any company, let alone a board member of a state-owned entity (ibid).

The court stated that a lifelong delinquency declaration still offers the 'hope of some redemption' (para 274) in that Myeni may apply to court after three years for the declaration of delinquency to be suspended in

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terms of s 162(11) and (12) (ibid). Under s 162(11)*(a)*, a delinquent director may, at any time three years after the order of delinquency was made, apply to court to suspend the delinquency order and to substitute it for a probation order (see s 162(7)), with or without conditions. A person who is subsequently placed under a probation order by way of substitution of the delinquency order may apply to court at any time more than two years thereafter for an order setting aside the probation order (s 162(11)*(b)*(i)). The implication of a successful application under s 162(11) is that, in effect, the minimum period of a delinquency order is three years. A court may grant the order if, having regard to the circumstances leading to the original order and the applicant's conduct in the ensuing period, it is satisfied that the applicant has demonstrated satisfactory progress towards rehabilitation and there is a reasonable prospect that the applicant would be able to serve successfully as a director of a company in the future (s 162(12)*(b)*).

It is submitted that Myeni's prospects of success of an application under s 162(11) are slim, particularly since the court did not impose any conditions to the delinquency declaration. If, for instance, the court had imposed a condition restricting Myeni to act as a director of a private company, she would have been in a position to demonstrate to the court, after three years, that she had successfully carried out her duties as a director in this capacity, that she had made satisfactory progress towards rehabilitation, and that there was a reasonable prospect of being able to serve successfully as a director in the future. It would be challenging for Myeni to demonstrate this to the court when she has been absolutely prohibited from acting as a director. It is nevertheless submitted that Myeni could present evidence to the court demonstrating progress towards rehabilitation in a capacity other than a director, such as a manager of a company (in the capacity of an employee). In considering the circumstances leading to the original order, it is submitted that it is likely that the fact that Myeni was found to have been dishonest with the court (see *OUTA v Myeni* para 279) would weigh against her application (on the application under s 162(11) and (12) see further Jean du Plessis & Piet Delport '"Delinquent directors" and "directors under probation": A unique South African approach regarding disqualification of company directors' (2017) 134 *SALJ* 274 at 284; Rehana Cassim 'The suspension and setting aside of delinquency and probation orders under the Companies Act 71 of 2008' 2019 (22) *PER/PELJ* 2 and Cassim *The Removal of Directors and Delinquency Orders under the South African Companies Act* op cit at 300–24). Thus, while there is 'some hope of redemption' (*OUTA v Myeni* para 274) for Myeni to serve as a company director after three years, it is submitted that such hope is slim.

In *Kukama v Lobelo* 2012 JDR 0062 (GSJ) para 21 the court ruled that it is not necessary to order the removal of a delinquent director from the company due to the 'automatic inherent effect of the order declaring a person to be delinquent in terms of s 162(5) of the Companies Act'.

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(See further *Msimang* (supra) para 32.) It was thus not necessary for the court to order Myeni's removal as a director from the other companies of which she is currently a director, since this would be automatic.

CONCLUSION

While *OUTA v Myeni* is not the first case in which a director of a state-owned entity has been declared delinquent, it is the first judgment in which a court has imposed a lifelong delinquency declaration on a director. The judgment is also noteworthy for the reason that it highlights the impact of the PFMA (with regard to directors of state-owned entities) on the interpretation of the delinquency grounds under s 162 of the Companies Act. A further reason why this judgment is noteworthy is that it is the first delinquency application brought by a party acting in the public interest. While the judgment affirms that any person acting in the public interest may apply to court to declare a director delinquent, it is submitted that directors, prescribed officers, the company secretary and the state must take the initiative at the earliest stage possible to hold delinquent directors of state-owned entities accountable, as failing to do so may have severe consequences for the South African public and the economy, as has occurred with SAA.

Regrettably, it is submitted that the court, with respect, misapplied the test for the duty of care, skill and diligence in order to ascertain gross negligence in the context of s 162(5)*(c)* of the Companies Act. Nevertheless it is arguable that the court reached the correct conclusion on Myeni's conduct being grossly negligent. It is further submitted that the court erroneously equated a gross abuse of 'the position of director' with a 'gross abuse of power', thereby giving a much wider interpretation to the phrase gross abuse of 'the position of director' that goes beyond the scope of the statutory ground in s 162(5)*(c)*(i). It is nonetheless submitted that Myeni's conduct did amount to a gross abuse of the position of director. It is also of concern that the court appeared to construe dishonesty and a failure to disclose material facts as a ground of delinquency, when this ground is not listed in s 162(5) of the Companies Act. Despite this, it is submitted that the ground of breach of trust set out in s 162(5)*(c)*(iv)*(aa)* would encompass the dishonesty offence in this case, and that there are other grounds of delinquency which justified the court's delinquency order, such as Myeni acting without authority, in contravention of s 162(5)*(c)*(iv)*(bb)* of the Companies Act.

An notable feature of this judgment is that large portions of it are lifted, almost verbatim, from OUTA's heads of argument. This applies not only to the court's discussion of the facts, but also to its discussion of the legal principles and the orders proposed by OUTA in its heads of argument. As the Constitutional Court has stated, while some reliance on and invocation of counsel's heads of argument is not improper, it is preferable for a judgment to be written in the own words of the judge instead of

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reproducing counsel's heads of argument, in order to avoid any perception of bias (*Stuttafords Stores (Pty) Ltd v Salt of the Earth Creations (Pty) Ltd* 2011 (1) SA 256 (CC) paras 11–12; see further on this point *Minister of Police v Vowana* 2019 (4) SA 297 (ECM) paras 21–5).

A lifelong declaration of delinquency does not mean a criminal sanction — but it would substantially interfere with Myeni's entrepreneurial freedom, and carry a stigma and consequent extensive reputational damage. While Myeni may apply to court after three years for the suspension of her delinquency order, as argued above, the prospects of success of such an application are poor. It remains to be seen whether Myeni succeeds in appealing this judgment and whether the NPA pursues a criminal investigation into Myeni's conduct. The judgment nevertheless serves to send a stern warning to errant directors of state-owned entities about their conduct, which they would be wise to heed.

POSTSCRIPT

On 22 December 2020 the North Gauteng High Court, Pretoria dismissed Myeni's application for leave to appeal (*Myeni v Organisation Undoing Tax Abuse*; *Organisation Undoing Tax Abuse v Myeni* [2020] ZAGPPHC 779). The court also granted the application by OUTA and SAAPA for the immediate enforcement of the delinquency order against Myeni, pending the finalisation of all appeal processes. This meant that Myeni had to relinquish all her directorships immediately, pending any further appeal processes.

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