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CORPORATE & COMMERCIAL ALERT

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Delinquent Directors

In a judgment delivered by Judge Tolmay on 27 May 2020 in *Organisation Undoing Tax Abuse and Another v Myeni and Others* (case number 15996/2017), the High Court of South Africa (Gauteng Division, Pretoria) declared Dudu Myeni, the previous non-executive chairperson of South African Airways SOC Limited (SAA), a "*delinquent director*" in terms of the Companies Act 71 of 2008 (Companies Act).

The JSE issues further guidance on financial reporting and trading statements

As discussed in our previous [Alert](#), the COVID-19 pandemic has had an impact on reporting obligations for listed entities, and in particular, property entities. Listed entities are reminded of their continuing obligations to report financial information and to disclose price sensitive information.

Delinquent Directors

Given Ms Myeni's conduct, the court found it appropriate to impose a lifelong delinquency order, which Ms Myeni may apply to be suspended after three years if certain circumstances exist.

In a judgment delivered by Judge Tolmay on 27 May 2020 in *Organisation Undoing Tax Abuse and Another v Myeni and Others* (case number 15996/2017), the High Court of South Africa (Gauteng Division, Pretoria) declared Dudu Myeni, the previous non-executive chairperson of South African Airways SOC Limited (SAA), a "delinquent director" in terms of the Companies Act 71 of 2008 (Companies Act). The court found that Ms Myeni acted dishonestly, recklessly and with gross negligence and breached her fiduciary duties during the tenure of her directorship, causing significant harm to both SAA and the country as a whole.

An order of delinquency in these circumstances is to subsist for a minimum of seven years. However, given Ms Myeni's conduct, the court found it appropriate to impose a lifelong delinquency order, which Ms Myeni may apply to have suspended after three years if certain circumstances exist.

The Companies Act contains a number of grounds on which a person may be declared a delinquent director. These include that a person, while a director:

- grossly abused the position of director;
- took personal advantage of information of an opportunity to gain an advantage for another person (other than the company on whose board the director serves) or to knowingly cause harm to the company or a subsidiary of the company;
- intentionally, or by gross negligence, inflicted harm upon the company or a subsidiary of the company; or
- 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.

In the Myeni case, Tolmay J, referred to the case of *Gihwala v Grancy Property Ltd* 2017 (2) SA 337 (SCA) and noted that a declaration of delinquency can only be made in consequence of serious misconduct. However, where grounds of delinquency are established, the court must grant this order and has no discretion in this regard (only in respect of the conditions that may be attached to the order).

The court explored the concept of "serious misconduct on the part of a director" and noted that it involves "a person who grossly abuses the position of director" and that it is equivalent to "recklessness". It was confirmed that "recklessness" and "gross negligence" involve "a complete obtuseness of mind...or a total failure to take care" and "an entire failure to give consideration to the consequences of one's actions, in other words, an attitude of reckless disregard of such consequences, which includes both foreseen and unforeseen consequences".

In a 114-page judgment, the court analysed Ms Myeni's conduct with reference to the so-called "Emirates Deal" and "Airbus Swap Transaction". The court held that Myeni had frustrated and ultimately caused the demise of the lucrative "Emirates Deal", she had no reasonable grounds to block it, she knowingly made misrepresentations, deliberately acted dishonestly and grossly abused her powers. With regards to the "Airbus Swap Transaction", she had taken no care with regards to a significant letter that jeopardised the entire "Airbus Swap Transaction" and exposed SAA to financial ruin, she unilaterally renegotiated the transaction with Airbus, following nine months' work by specialists and experts on the existing deal, she backtracked on

Delinquent Directors...continued

Only time will tell whether Ms Myeni will take steps to appeal the finding against her or whether the National Prosecuting Authority will launch an investigation into possible criminal conduct.

the resolution authorising the deal and wilfully made misrepresentations to the then Minister of Finance in a last attempt to alter the terms of the transaction. Having regard to the foregoing, and other instances of abuse, gross negligence, dishonesty and recklessness by Ms Myeni, the court found that Ms Myeni breached her fiduciary duties to act in good faith, for a proper purpose and in the best interests of SAA and inflicted irreparable harm to SAA and the country. The judgment and evidence of the case are also to be sent to the National Prosecuting Authority to determine whether an investigation into possible criminal conduct should follow.

The court also reiterated two important principles – firstly, that a non-executive director is not absolved of his/her fiduciary duties. The legal duties of all directors (executive and non-executive) are the same. Secondly, a director cannot hide behind the collective board – each director must take responsibility for his or her own actions.

Only time will tell whether Ms Myeni will take steps to appeal the finding against her or whether the National Prosecuting Authority will launch an investigation into possible criminal conduct. In the meantime, it serves as a reminder to directors, both individually and acting as a collective, to take steps to ensure that they abide by the high standards expected of them.

Jaco Meyer and Rachel Kelly



The JSE issues further guidance on financial reporting and trading statements

Paragraph 8 of the JSE Listings Requirements sets out a comprehensive framework for reporting financial information.

As discussed in our previous [Alert](#), the COVID-19 pandemic has had an impact on reporting obligations for listed entities, and in particular, property entities. Listed entities are reminded of their continuing obligations to report financial information and to disclose price sensitive information. The JSE previously dealt with accounting and auditing related matters and has now issued two further letters dealing with the reporting of financial information and results. These letters emphasise the need for accurate and transparent financial reporting given the uncertainties created by the COVID-19 pandemic.

General principles and obligations

Paragraph 8 of the JSE Listings Requirements sets out a comprehensive framework for reporting financial information. Paragraph 8 of the JSE Listings Requirements regulates the manner in which financial information must be presented when issuers publish profit forecasts, interim results and annual financial statements. Financial results are required to conform to the International Financial Reporting Standards (IFRS) and International Accounting Standards (IAS). As per our [Alert](#), issuers are entitled to apply to the JSE in order to approve any variations in reporting occasioned by COVID-19.

In terms of paragraph 3.4(b) of the JSE Listings Requirements, all issuers must publish a trading statement as soon as they are satisfied that a reasonable degree of certainty exists that the financial results for

the period to be reported upon next will differ by at least 20% (or 15% for certain property entities which elect distribution per share (DPS) as their relevant measure of financial results) from (i) the most recent financial results for the previous corresponding period or (ii) a profit forecast previously provided to the market in relation to such period.

Paragraph 3.4(b)(ix) of the JSE Listings Requirements provides that issuers who have a policy of publishing quarterly results will be exempt from the requirement to publish trading statements, but must instead include a general commentary in each quarterly results announcement to ensure that shareholders are guided on the expected performance of the issuer for the next quarter (which may be as detailed or broad as the issuer chooses).

In terms of paragraph 3.4(a) of the JSE Listings Requirements there is a general and continuing obligation to announce price sensitive information without delay. Price sensitive information is defined as unpublished information that is specific or precise which if it were made public would have a material effect on the price of the issuer's securities.

Financial Information

The JSE recommends a cautious approach in relation to the compilation of quantitative explanations and considerations for financial results. Practically, this means that issuers are required to provide a full and detailed (i) disclosure of the estimates and judgments made in applying IFRS and (ii) risk disclosures required under IFRS 7.

The JSE issues further guidance on financial reporting and trading statements...*continued*

The JSE recognises that issuers may wish to present additional financial information and analysis in relation to COVID-19 when communicating their interim reports, preliminary/provisional reports, abridged results and annual financial statements.

Paragraph 8.57 of the JSE Listings Requirements sets out the minimum contents and presentation requirements applicable to interim reports, preliminary reports, provisional reports and abridged reports. The JSE points out that issuers may be required to provide additional disclosures when compliance with the specific IFRS or IAS standard is insufficient to enable a full understanding of the impact of an event such as the COVID-19 pandemic and lockdown. This may lead to the need for further disclosures which are normally only included in the unabridged annual financial statements. It is essential that issuers provide investors with the most comprehensive and realistic view of the impact and future impact of COVID-19 on their IFRS financial results.

The JSE's letter refers to various instances in which an issuer should consider a presentation requirement in the light of COVID-19. For example, an issuer should include an explanation of events and transactions that are significant to an understanding of the changes in financial position and performance since the end of the last annual reporting period. As such, issuers should include disclosures for events and transactions such as a write-down of inventories, changes in the business or economic circumstances that affect the fair value of the issuer's financial assets or liabilities and any loan default.

The JSE recognises that issuers may wish to present additional financial information and analysis in relation to COVID-19 when communicating their interim reports, preliminary/provisional reports, abridged results and annual financial statements. Shareholders need to receive full information, and investor confidence in standards of disclosure and corporate governance should be promoted. When presenting additional information and analysis, issuers must ensure that such information complies with IAS 1 and is:

- transparent;
- not misleading;
- understandable;
- reliable;
- consistently presented between reporting periods; and
- does not obfuscate or detract from the financial information required in terms of paragraph 8 of the JSE Listings Requirements.

The JSE advises that the above can be achieved by considering the following:

- labels or abbreviations should be meaningful and not misleading, and should be accompanied by a definition which clearly explains the basis of the calculation and distinguishing between information that is factual and/or based on assumptions and/or hypothetical information;

The JSE issues further guidance on financial reporting and trading statements...*continued*

The JSE has also issued a letter dealing with the specific impact that COVID-19 has had on the disclosure obligations of property entities.

- detailed calculations should be presented to demonstrate how the definition referred to above was applied to the specific period and should either take the form of a reconciliation to the most directly comparable line item (or subtotal or total) presented in the IFRS financial statements where possible or provide an explanation if it is not possible to reconcile to an IFRS equivalent;
- an explanation should be provided if an issuer decides in a subsequent period to no longer provide a specific COVID-19 financial analysis that was previously provided; and
- the definitions referred to in the analysis should be applied consistently from one period to the next or if there is a change (in either application or the definition itself), then an explanation of the nature and reasons for that change should be provided.

Property Entity Trading Statements

The JSE has also issued a letter dealing with the specific impact that COVID-19 has had on the disclosure obligations of property entities.

Paragraph 3.4(b)(vi) of the JSE Listings Requirements defines financial results as relevant criteria that are of a price sensitive nature and then prescribes certain measures that must be applied. Pursuant to paragraph 3.4(b)(vii) of the JSE Listings Requirements, property entities may elect DPS as their relevant measure

of financial results. Property entities making this election, are then required to publish a trading statement as soon as it becomes reasonably certain that DPS will differ by at least 15% from that of the prior corresponding reporting period.

The COVID-19 pandemic and lockdown has led to many property entities deferring their distributions, as discussed in our previous [Alert](#), which may render DPS an insufficient measure.

If DPS is no longer an appropriate measure, property entities may choose to revert to reporting headline earnings per share (HEPS), earnings per share (EPS) or net asset value per share (NAVPS) as performance measures for trading statement purposes (the Standard Measures). If property entities elect to use one of the Standard Measures, the reporting variation regime must be followed and such entities will be required to issue a SENS announcement which addresses the adoption of a different measure.

Price Sensitive Information

Furthermore, as set out above, issuers are required to announce material price sensitive information in terms of paragraph 3.4(a) of the JSE Listings Requirements. Therefore, regardless of whether DPS is still a relevant measure or if the property entity defaults back to the Standard Measures, general price sensitive information requires further and separate consideration.

The JSE issues further guidance on financial reporting and trading statements...*continued*

The JSE is of the view that, in line with the trading statement approach on DPS, at the very least any difference of at least 15% from each or both of these elements (distributable income and the percentage of distributable income declared) is likely to be price sensitive and should be announced.

In terms of Practice Note 2 of 2015 issued by the JSE (PSI Practice Note), directors of issuers are required to apply their own discretion in determining what will constitute price sensitive information. The PSI Practice Note provides guidelines to directors when making such an assessment.

The JSE acknowledges that numerous variables may affect, contribute to or impact on the assessment of price sensitive information in the context of property entities but requests that diligent attention be awarded to distributable income (as defined by the property entity) and the percentage of distributable income declared. The JSE's view is that there is a strong argument that both of these elements may comprise general price sensitive information and should be announced in accordance with paragraph 3.4(a) of the JSE Listings Requirements as read with the PSI Practice Note.

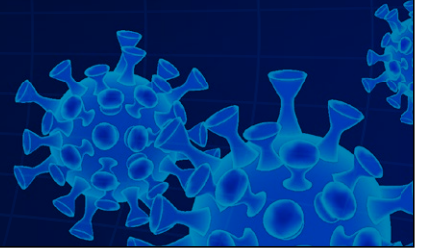
The JSE is of the view that, in line with the trading statement approach on DPS, at the very least any difference of at least 15% from each or both of these elements (distributable income and the percentage of distributable income declared) is likely to be price sensitive and should be announced.

The publication of such an announcement will enable investors to engage in a comparative analysis with the last reporting period's distributable income and total dividend with the current (interim) period, providing insight into the operating performance despite the postponement, cancellation or deferral of a distribution.

Johan Green, Clara Hofmeyr and Simone Nel

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BBBEE STATUS: LEVEL TWO CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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