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DISPUTE RESOLUTION **ALERT**

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Post in haste, repent forever!

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Crash landing: The rise and fall of Dudu Myeni

From a legal technical point of view, Myeni's conduct ticked all the boxes for a finding of delinquency.

In a judgment delivered by the North Gauteng High Court last week, former non-executive chairperson of SAA, Dudu Myeni, was declared to be a delinquent director.

Myeni, and certain board members who supported her decisions, frustrated and sabotaged a number of important well motivated transactional initiatives developed by the executives of SAA to try to turn its fortunes around. What remains unexplained is why Myeni and her fellow board members behaved in this way with disastrous consequences for the airline. Myeni either refused to give explanations or gave evidence which the court found to be evasive, contradictory, unreliable and dishonest. She alleged - in the case of an abortive transaction with Emirates - that she was following instructions by former President Jacob Zuma. But the court found that even if this was true, it did not excuse her own conduct. The citizens of South Africa, who have paid the price of her failures, remain none the wiser as to her motivations. Criminal investigation has been recommended. It remains to be seen if this will provide the explanation as to whether she was simply enormously and arrogantly incompetent, or whether there were more sinister reasons behind her behavior.

From a legal technical point of view, Myeni's conduct ticked all the boxes for a finding of delinquency.

In terms of section 162 of the Companies Act, Directors will be found delinquent if they *"acted in a manner that amounted to gross negligence, willful misconduct or breach of trust in relation to the performance of the directors functions within, and duties to, the company"* as contemplated in sections of the dealing with directors' fiduciary duties. Such duties were, in the case of SAA, enhanced by the requirements of section 50 of the Public Finance Management Act (PFMA) which requires directors of public entities to *"act with fidelity, honesty, integrity and in the best interests of the public entity"*.

The scope of this alert is too short to permit a detailed description of the facts. Certain remarks made by the court speak for themselves. Ms Myeni's *"belated attempts to justify her misconduct show that she acted dishonestly, in bad faith and not in the best interests of SAA or the country"*. She was warned by then Minister of Finance, Nhlanhla Nene, that she and the Board were failing in their fiduciary duties but simply paid no heed to this advice. She interfered with executive decision-making or went behind the back of executives in dealing with third parties. She acted without Board authority. She acted with *"deliberate dishonesty and a gross abuse of power"* as contemplated by section 162. She was *"reckless"* in ignoring advice and recommendations.

As the court pointed out, a Minister can only *"exercise effective oversight over major transactions"* for SOE's *"if information is presented honestly, fully*

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Crash landing: The rise and fall of Dudu Myeni...*continued*

Of course, declarations of delinquency do not undo the damage that the underlying misconduct may have caused. By the time such findings are made it is usually too late.

and accurately", whereas the information presented by Myeni was replete with "*falsehoods, misrepresentations and omissions*". Myeni furthermore "*displayed complete disregard for public funds*".

The court ultimately concluded that, "*She was a director gone rogue, she did not have the slightest consideration for her fiduciary duty to SAA*" and that "*her actions did not constitute mere negligence but were reckless and willful*". As it is entitled to do under law, the court in measuring the culpability of her conduct, took into account both objective standards and Myeni's apparent extensive personal experience as a director: she professed herself to be an expert on corporate governance. Myeni was found to have completely betrayed the trust placed in her as a director of a public company – and it is this betrayal of the standards of proper corporate conduct and trust which underpins findings of delinquency in terms of the Companies Act.

Of course, declarations of delinquency do not undo the damage that the underlying misconduct may have caused. By the time such findings are made it is usually too late.

The court went on to make the following remarks which many South Africans would endorse: "*To serve on the Board of an SOE should not be the privilege of the politically connected. Government has, as custodian of the common good, an obligation to ensure that suitably qualified people, with integrity are appointed in these positions.... to ensure that state resources are not squandered, or the economy placed at risk*".

Amen to that.

Richard Marcus

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What NOT to do when under business rescue

In dealing with the merits of the application, the court also had to consider Lyndoch's application for a postponement, along with a condonation application for filing supplementary papers.

Once a company is placed under business rescue, it is of the utmost importance that from the commencement of the business rescue the board, members or directors of the company fully cooperate and work with the business rescue practitioner. The business recue practitioner is after all, there to try rescue their business.

In the matter between *First Rand Bank Limited and Dr LL Wolmarans and another* (2020) the Northern Cape High Court was asked to step in and protect the rights of an affected creditor where a business rescue was voluntary commenced, but it later emerged that the true reason for the business rescue was to afford the controlling minds of Lyndoch 432 CC (Lyndoch) more time to squeeze as much they could out of the business with no real intent to rescue the business.

The applicant, First Rand Bank Limited (the Bank) in its capacity as the main creditor, brought an application in terms of section 133(1)(b) of the Companies Act to lift the mortarium on legal proceedings against a company under business rescue, and if so lifted, that the court order, (1) the setting aside of the voluntary business rescue resolution adopted by the members of Lyndoch and (2) for the winding-up of Lyndoch. Notwithstanding the Bank's interest in the matter, the application also arose pursuant to and in circumstances where the appointed business rescue practitioner and first respondent, Dr LL Wolmarans' (Dr Wolmarans) powers had clearly been curtailed and his ability to do his work hamstrung from the very start by the members of Lyndoch. The court later held that Dr Wolmarans was a business rescue practitioner of a "*blatantly uncooperative*" second respondent, Lyndoch.

In dealing with the merits of the application, the court also had to consider Lyndoch's application for a postponement, along with a condonation application for filing supplementary papers.

What is clear from this judgment is that the court will not allow respondents, under business rescue, to abuse its process in order to avoid and delay the consequences of legitimate litigation against it and in particular where there is no prospect of rescuing the business.

The background of this case dates back almost four years. During 2016, the Bank, Lyndoch and certain sureties entered into a deed of settlement agreement in an attempt to avoid litigation. In breach of the agreement, Lyndoch, only made two payments resulting in its outstanding debt to the Bank growing to R5.5million. To recover the amounts owed, the Bank arranged for an auction of Lyndoch's main asset, the Lyndoch farm. However, as is frequently the case with unscrupulous business rescue proceedings, Lyndoch placed itself under business rescue by adopting a resolution in the nick of time, bringing the Bank's auction plans to a halt, in accordance with the moratorium imposed in terms of section 133 of the Act.

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What NOT to do when under business rescue...*continued*

Having granted the Bank leave to bring the application, the court, in deciding the issues before it, first had to consider Lyndoch's application for postponement and the request to file further papers brought by the members of Lyndoch.

Subsequently, 27 months passed and no business rescue plan had been adopted. Dr Wolmarans contended that this was due to Lyndoch's lack of cooperation and their unwillingness to provide funding for the business rescue proceedings. It had also come to light that the members of Lyndoch failed to disclose to the business rescue practitioner certain of the business' income streams and that those same members had been keeping some of these profits for themselves. Finally, in February 2018, Dr Wolmarans issued a notice to all affected parties, stating that there was no possibility of rescuing the company and that he will apply to court for liquidation order. The Bank beat him to it, resulting in this judgment.

Having granted the Bank leave to bring the application, the court, in deciding the issues before it, first had to consider Lyndoch's application for postponement and the request to file further papers brought by the members of Lyndoch (not the business rescue practitioner, who decided to abide by the court's decision). The court found that Lyndoch's postponement application was without merit and that in the submissions made on its behalf, no good cause had been shown on part of Lyndoch. In refusing Lyndoch's application, the court also considered and criticized Lyndoch's general attitude throughout the course of the business rescue proceedings, and specifically the members' actions toward Dr Wolmarans.

It is trite that in order for a business rescue practitioner to perform its duties properly, the practitioner needs to be aware of all the activities of the business, have access to its full financial statements and receive the necessary funding from the business in question to formulate, and implement, its business rescue plan. On the facts, it was clear that this had not been the case, with a member of Lyndoch conceding in an affidavit filed as part of the proceedings that "*In this respect I might have not fully taken the business rescue practitioner into my confidence*". This was a slight understatement, as the court found that Dr Wolmarans had been kept in complete darkness. The court made it clear that it will not tolerate an abuse of process in order to delay the inevitable and given the clear statement by Dr Wolmarans that there is no prospect of rescuing the business, a postponement of the matter would not be entertained.

Turning then to the application for winding up brought by the Bank, the court made reference to the Supreme Court judgment in *Naidoo v Absa Bank* 2014 (4) SA 597 (SCA), where it was held that sequestration proceedings are not legal proceedings to enforce an agreement, but rather a way to set the machinery of law in motion. Although the application in question was one for liquidation of a close corporation and not the sequestration of a private person, the law relating to the two are similar. As such the Bank is entitled to bring an application for liquidation.

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What NOT to do when under business rescue...*continued*

This judgment once again reminds us of the importance of cooperation between the members/directors of a company/close corporation in business rescue and the business rescue practitioner.

In assessing the merits of the application, the court held that Lyndoch was clearly indebted to the Bank, commercially insolvent and in financial distress. The only instance in which the court can exercise its discretion to not grant the liquidation order, is where Lyndoch can establish that it will pay its debts if not liquidated. From the facts, this was clearly not the case. Having regard to the prejudice to the Bank and a possible concursus of creditors, the court found that it was in the interest of justice that a provisional winding up order be granted.

This judgment once again reminds us of the importance of cooperation between the members/directors of a company/close corporation in business rescue and the business rescue practitioner. It is essential for all the parties to work together towards the same goal, otherwise the business rescue is destined for failure and liquidation becomes inevitable. Trust, transparency and teamwork is the key to a successful business rescue.

Lucinde Rhoodie, Pauline Manaka and Kara Meiring

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Post in haste, repent forever!

Offenders face virtual justice presented by the evolving and ubiquitous *"cancel culture"* that targets anyone whose social media posts offend (even marginally) the court of public opinion.

Tuning in to the news - morning or evening, local or international - you are inevitably met with headlines such as, *"Acting judge steps down from the bench after lashing out at Government policy in Facebook rant"*; and *"Aspiring Miss SA contestant forced to withdraw from the pageant following the re-emergence of controversial tweets published when she was 14"*. These are just two of the headlines (the titles may vary per publication or news source) that have done the rounds in the past month alone.

Cautionary tales regarding controversial content published on social media and internet platforms are not new. Offenders face virtual justice presented by the evolving and ubiquitous *"cancel culture"* that targets anyone whose social media posts offend (even marginally) the court of public opinion. They also face the risk of defamation claims which can be costly to fight and very costly to lose.

With those risks to profile and pocket, why do people still publish potentially harmful or controversial content on social media platforms? Is freedom of expression regarded as an absolute (online) right? Does a perception of online anonymity fuel a misplaced and ill-advised bravado amongst keyboard warriors?

Hard questions and no straight answers. Maybe those posting harmful / hateful content have no understanding that posting on social media constitutes publication. If so, a good place to start in understanding defamation is the legal authorities. The Constitutional Court in *Le Roux v Dey* 2011 3 SA 274 confirmed that the law of defamation is designed to compensate a victim for any publication that injures the victim in their good name and reputation. The court set out the elements of defamation succinctly as: the wrongful and intentional publication of a defamatory statement concerning the wronged party.

As the online environment develops it is the notion of publication that we focus on here. Before the internet, what constituted *"publication"* was limited generally to hardcopy print. But with the advent and evolution of electronic communication, the internet and social media, examples meeting the requirement of *"publication"*, as set out in the Le Roux case, will self-evidently include email but also:

- posts on any social media platforms, Instagram; Facebook; Twitter; LinkedIn; and TikTok included;
- WhatsApp messages;
- comments on online news articles; and
- any other publicly accessible medium.

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Post in haste, repent forever!*...continued*

So just by clicking share, you could be perpetuating the defamation, exposing yourself to a damages claim for defamation or to potential dismissal by your employer.

What is even more important to understand is that South African law considers repeating or sharing defamatory content as sufficient to constitute "*publication*" and, thus, defamation in its own right, even if the repeater or sharer was not the author of the original defamatory post. So just by clicking share, you could be perpetuating the defamation, exposing yourself to a damages claim for defamation or to potential dismissal by your employer. Disciplinary proceedings against employees in relation to their social media activity and online conduct is now well established in our law, as detailed in our employment alerts of 18 November 2019 and 3 December 2019.

With 1.62 billion users visiting Facebook each day (as at 4 May 2020) - and approximately 145 million daily active users on Twitter (as at 30 November 2019), the chances of a defamatory post going undetected are slim – in fact, you have more chance of the opposite result - going viral. The internet and social media are immensely powerful but so dangerous for the innocent and unwary. Many children have access to electronic devices and social media platforms, and it is so important that children are aware of the grave consequences of irresponsible conduct, consequences that might only be manifest years down the line. Just like an elephant, the internet never forgets.

We should have no sympathy for bigots and online "*trolls*" – they should get what's coming to them. But children, young adults and the uninitiated need to be made aware that, no matter how innocently they publish or share something online, that publication could jeopardise their future. The last thing anyone wants, having posted rashly or carelessly, is to be left quoting JK Rowling's Rubeus Hagrid: *"Shouldn't have said that...I should not have said that... shouldn't have said that!"*.

Tim Smit and Elizabeth Sonnekus

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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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