REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 00016/2018

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED

31 OCTOBER 2019 **FHD VAN OOSTEN**

In the matter between:

PIONEER FOODS (PTY) LTD	**APPLICANT**
and	
ESKOM HOLDINGS SOC LTD	**FIRST RESPONDENT**
WALTER SISULU LOCAL MUNICIPALITY	**SECOND RESPONDENT**
NATIONAL ENERGY REGULATOR OF SOUTH AFRICA	**THIRD RESPONDENT**
PHAKAMI HADEBE	**FOURTH RESPONDENT**

J U D G M E N T

VAN OOSTEN J:

Introduction

[1] This matter primarily concerns the interpretation of a court order granted by Meyer J on 16 January 2018, within the context of contempt proceedings, brought by the applicant

against the first respondent (Eskom) and the fourth respondent, the then chief operating officer of Eskom (the main application).

Background: the issue between the parties

[2] In a nutshell the issue between the parties concerns the supply of electricity by Eskom to the second respondent (the Municipality), who in turn distributes electricity *inter alia* to the applicant's plant in Aliwal North, which is situated within the area of the Municipality. The Municipality fell into arrears with payment for electricity to Eskom. The arrears eventually amounted to some R115m. As part of a strategy to exert pressure on the Municipality to pay the arrears, Eskom decided in November 2016 to limit the electricity supply to the Municipality by way of disruptions in the supply. A settlement however was reached in January 2017, in terms of which Eskom agreed not to enforce the proposed disruptions. The municipality however, defaulted in payment in terms of the settlement agreement as well as a further settlement agreement entered into in September 2017, which resulted in a decision by Eskom to implement the daily disruptions which it had earlier suspended, with effect from 14 December 2017. The disruptions severely impacted on the applicant's operations at its plant in Aliwal North. On 22 December 2017 and by notice published in a local newspaper, Eskom extended the times of the supply interruptions, for the reason proffered that Eskom and the municipality had failed to reach an agreement in regard to the settlement of the debt owed to Eskom.

[3] Several attempts to overcome the impasse followed, including bypassing the Municipality and Eskom supplying electricity direct to the applicant, but for various reasons not relevant for present purposes, all failed.

[4] During December 2017 the applicant addressed correspondence demanding that steps be taken and undertakings given to ensure uninterrupted electricity supply to its Aliwal North plant. No positive response was received which prompted the applicant to launch urgent proceedings in this court against Eskom and the Municipality.

The litigation between the parties

[5] On 3 January 2018 the applicant brought an urgent application against Eskom, the second respondent and the third respondent (the first application). In the notice of motion, consisting of parts A and B, the review and setting aside of the decisions by Eskom to implement the electricity supply interruptions I have already referred to, is sought as well

as further orders aimed at compelling Eskom to supply electricity on an uninterrupted basis to the applicant's plant or to the Municipality.

[6] Eskom and the Municipality each filed a notice of intention to oppose the application and Eskom filed an answering affidavit. Prior to the hearing of the matter, the parties agreed on a draft order, which Meyer J at the hearing on 16 January 2018, made an order of court. The order reads as follows:

1. The first respondent shall give the applicant 15 calendar days' notice before implementing any further electricity interruptions to the second respondent, and the applicant may then re-enrol Part A of the application on the urgent roll;
2. Part A of the application is removed from the urgent court roll for 16 January 2018;
3. All costs are reserved for future determination.

(the Meyer J order)

[7] On 1 December 2018 the applicant brought a further urgent application against Eskom in which it sought an order declaring that Eskom was in breach and/or wilful contempt of the Meyer J order. The matter was heard by Siwendu J, who having heard argument on behalf of the applicant and Eskom, on 5 December 2018, granted an order in terms of a draft order prepared by counsel for the applicant. In terms thereof the declarator sought was granted and Eskom *and the Municipality* were ordered to cease acting in contravention of the Meyer J order and to supply electricity on an uninterrupted basis to the Municipality until such time as the required 15 days' notice of implementation of any further electricity supply interruptions is given by Eskom to the applicant. The fourth respondent, who without there having been compliance with the procedural steps providing for joinder, was merely added in the case heading as the fourth respondent, was ordered to ensure that the orders granted, were implemented by Eskom. A written judgment was delivered by Siwendu J, on 11 December 2018 (the Siwendu J judgment and order). On 6 December 2018 Eskom filed an application for leave to appeal the Siwendu J judgment and order. Leave to appeal was refused but the parties are still awaiting the judgment.

[8] On 10 December 2018 a further urgent application was instituted. In this application the applicant sought a declarator of contempt of court against Eskom in respect of both the Meyer J and Siwendu J orders and, once again, for orders for compliance similar to those sought by the applicant against Eskom before Siwendu J. The matter came up for

hearing on 11 December 2018, before Modiba J, who ordered that pending the final determination of the application, Eskom was to comply with the Meyer J and Siwendu J orders and not to interrupt the supply of electricity to the Municipality and the applicant (the Modiba J order). The learned judge did not deliver a judgment.

[9] In terms of a directive issued by the Deputy Judge President, dated 25 January 2019, this matter as well as a parallel running, almost identical matter between the applicant and Eskom and the Dihlabeng Local Municipality (case no 2018/11429) (the Dihlabeng matter) were enrolled for hearing together on 29 July 2019 and directions given in order to ensure trial readiness of the matters. The matters came before me on 29 July but, by agreement between the parties, were postponed on 30 July 2019, to 21 October 2019, and directions issued in regard to a core bundle of documents and the delivery of supplementary heads of argument. These are the matters presently before me. In view thereof that the matters were not consolidated, separate judgments will be delivered, which because of their similitude, should be read together.

The Opperman J judgment and order

[10] On 19 February 2019 the applicant launched urgent applications against Eskom for contempt of court in respect of the Modiba J order, in the present as well as in the Dihlabeng matter. These matters although not consolidated, were heard together by Opperman J. On 5 March 2019 Opperman J delivered a written judgment and order in favour of the applicant in both applications (reported *sub nom Pioneer Foods (Pty) Ltd v Eskom Holdings Soc Limited* 2019 JDR 0564 (GJ)) (the Opperman J judgment and order). I shall revert to the judgment and the question whether *stare decisis* applies in respect thereof.

Eskom's application in terms of Rule 6(5)(e)

[11] At the commencement of the hearing before me, Eskom in terms of an earlier filed notice of motion, applied for the admission of a further affidavit and annexures thereto, under the provisions of Rule 6(5)(e). In short, the documents sought to be admitted are all the papers filed in the first application.

[12] The applicant vehemently opposed the admission of those documents on the grounds which I shall presently deal with.

[13] Before the commencement of argument before me, I ruled that the question of admissibility of the documents was to be argued in context and as part of the argument on the merits of the main application.

The orders granted

[14] At the conclusion of argument before me, I made the order appearing at the end of this judgment and indicated to the parties that written reasons for the order will be delivered in due course. What follows are those reasons.

Evaluation

[15] The heart of the applicant's case is the Meyer J order. An interpretation of the order by this court is called for and consequently in the light thereof, a consideration of the Siwendu J judgment and order, the Modiba J order and finally, the Opperman J judgment and order.

[16] First then, the Meyer J order. A plain reading of the Meyer J order reveals that it is purely procedural in nature and that it does not impose a duty on Eskom to supply uninterrupted electricity, let alone whether in circumstances of electricity supply interruptions or load shedding. The order simply imposes a duty on Eskom to give notice before implementing any further electricity interruptions. The reason for imposing a time limit to the notice is apparent from the order. It permitted the applicant to re-enrol part A of the application in the urgent court. The order accordingly plainly does not deal with nor dispose of any of the relief sought in part A of the notice of motion. As much is apparent in that part A was removed from the roll with the expressly stated reservation of the applicant's right to re-enrol the matter on the urgent roll after due notice had been given by Eskom.

[17] The relief sought in the notice of motion is anything but a model of clarity. Meyer J was not required to consider and consequently did not consider the nature of the relief sought in the notice of motion, as the learned judge was informed in a practice note submitted by counsel for the applicant, filed prior to the hearing, that a draft order had been agreed upon between the parties and that the court was only required to make the draft order, a copy of which was attached, an order of court like any other order of court. Once the order was made, it for all intends and purposes became an order of court. I do not consider it relevant for purposes of this judgment to deal any further with the

confusing and inelegant manner in which the relief sought in the notice of motion was formulated. Suffice it to say that in no less than two separate prayers of part A, direct orders are sought concerning Eskom's electricity supply. First, in prayer 3 thereof, an order is sought that 'the first respondent is ordered to supply electricity on an uninterrupted basis to the applicant's premises located at Parson Street in Aliwal North *alternatively* to the second respondent'. Second, an order is sought, in prayer 5 thereof, '*in the further alternative* to paragraphs 3 and 4 above' and 'pending the final determination of the relief sought in part B below' for Eskom 'to supply electricity on an uninterrupted basis to the applicant's premises *alternatively* the second respondent'. For the sake of completeness, prayer 3 of part A is mirrored in part B of the notice of motion, as prayer 2, which, together with the other relief, is sought 'to the extent that such relief had not been granted under part A of the application'.

[18] Against this backdrop the conclusion is ineluctable that had it been the intention of the order to impose a duty on Eskom to supply uninterrupted electricity, either prayer 3 or 4 of part A would have been incorporated into the order. It is inconceivable that an order imposing a duty on Eskom to supply uninterrupted electricity, when part A was before the court, would not have been made effective pending the adjudication of part B. It was notably assumed in argument before me, that the Meyer J order was an interim order, subject to the finalisation of the application. I am unable to interpret in any way or to read anything into the Meyer J order, as it stands, indicating that it was an interim order.

[19] The result is that this court is now urged by the applicant to interpret the Meyer J order, rather opportunistically, as rightly submitted by counsel for Eskom, to the effect that it imposed a duty on Eskom to supply uninterrupted electricity. This is what I now turn to deal with, on the basis that the findings I have thus far made are wrong.

[20] Counsel for the applicant contended for the order of Meyer J to apply to *all* electricity interruptions by Eskom, whether pursuant to its enforcement of payment of debt strategy on the one hand, or, general load shedding on the other hand. The order, so the argument went, is clear and unambiguous and therefore does not require interpretation. Counsel heavily relied on the judgments and orders of Siwendu J and Opperman J as constituting definitive binding precedents which counsel submitted, must be followed by this court, based on the principles of *stare decisis* and issue estoppel.

[21] Concerning the 'admission' of the papers filed in the first application, counsel for the applicant contended that those documents were irrelevant and therefore inadmissible for the purpose of determining the meaning of Meyer J order, which so the argument went, is clear as to its meaning as it stands.

[22] Counsel for Eskom, in comprehensive heads of argument and helpful argument before me, raised the concern, in my view not without justification, that the applicant's objection to the admission of the documents was merely to hide from this court, the facts and circumstances that served before the court in that application.

[23] The point of departure is to consider the merit of the applicant's objection to the admission of the documents. The objection is ill-conceived. The judgments relied upon by counsel in support of the objection, are clearly to be differentiated and are accordingly not applicable to this matter. In *Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others* 2008 (2) SA 184 (SCA) the court dealt with reliance on pages or passages in annexures to an affidavit that were not specifically referred to or explained in the affidavit. An analogous *ratio* was expressed in regard to a statement appearing in an annexure to the affidavit not relied upon, in *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA). On the same footing are arguments raised at the hearing that have not been specifically raised in the papers and therefore not dealt with (*Eskom Holdings Ltd and Another v New Reclamation Group (Pty) Ltd* 2009 (4) SA 628 (SCA)). Lastly, counsel referred to the well-established principle in actions, that parties are held to their pleadings and it is impermissible to have recourse to issues falling outside the scope of the pleadings (*Minister of Safety and Security v Slabbert* [2010] 2 All SA 474 (SCA)).

[24] In the present matter the Meyer J order is pivotal to the applicant's case as well as in the consideration of the orders made subsequent thereto, all in the very same matter, between the same parties and equally based on the Meyer J order. In accordance with the well-established canons of construction, the order must be interpreted in its context and in the light of relevant circumstances which are only to be found in the papers filed in the first application. Put differently, the court will not consider the order in isolation but in its contextual setting and with regard to relevant prevailing circumstances (Cf *Engelbrecht and Another NNO v Senwes Ltd* 2007 (3) SA 29 (SCA) para [6] and [7]). In *Natal Joint Municipal Pension Fund v Endumeni Municipality* (920/2010) [2012] ZASCA 13; 2012 (4) SA 593 (SCA), Wallis JA, writing for the court, in dealing with the proper approach to

interpretation, reformulated the traditional approach to the interpretation of contracts and other documents as follows:

> 'The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable 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.'

[25] These principles are consistent with the dictum of the Constitutional Court in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC), that 'the emerging trend in statutory construction is to have regard to the context in which the words occur, even where the words to be construed are clear and unambiguous'. (See also *Shakawa Hunting & Game Lodge (Pty) Ltd v Askari Adventures CC* (44/2014) [2015] ZASCA 62 (17 April 2015); *Eke v Parsons* 2016 (3) SA 37 (CC) para [25]; and *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) (Bpk)* 2014 (2) SA 494 (SCA), where Wallis JA emphasised, that while the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being.)

[26] In the present application the applicant, in the founding affidavit, selectively refers to certain facts in the first application: reference is made to the interim interdictory relief that was sought 'to prevent the implementation of electricity supply interruptions to the Municipality and to review and set aside the decision made by Eskom to implement interruptions in electricity supply to the Municipality'. Having sketched a mere skeleton background, the deponent then arrives at the conclusion:

> 'The relief in the main application was required by Pioneer Foods on account of, and was based on, the substantial and irreparable harm that would be experienced by Pioneer Foods should <u>any</u> interruptions of electricity supply to the Municipality be implemented.' [underlining in the original]

[27] Two observations are apposite: first, the motivation for seeking the relief, as I have alluded to, contains incomplete information as to the background facts pertaining to obtaining the Meyer J order. But, it goes further: the information provided cannot be gleaned from the Meyer J order when read in isolation. Thus seen, the applicant did not confine itself to the words of the order in isolation, as counsel for the applicant painstakingly urged this court to do, but proceeded way beyond those words for the unsubstantiated conclusion that the order referred to *any* interruptions. Secondly, the applicant's reason for obtaining the interim interdictory relief, is directed at a review and setting aside of 'the decision made by Eskom to implement interruptions in electricity supply to the Municipality'. That, seemingly, is at odds with the attempt to extend the ambit of the Meyer J order to *any* interruptions. And finally, had it been the intention for the order to apply to all interruptions, the question arises why then seek a review and setting aside of the decisions of Eskom to implement interruptions in electricity supply to the Municipality?

[28] Applied to this court's interpretation of the Meyer J order, the order refers to 'any further electricity interruptions' which logically is premised on previous interruptions. Exactly what kind of interruptions pre-ceded the order cannot be ascertained from the order. It requires a consideration of the facts of the matter as set out in the affidavits and annexures thereto. It is imperative that all relevant facts are before this court. I am unable to find any sound reason for excluding the application papers from the consideration of this matter. No formal application for its 'admission', in my view, was necessary. The recalcitrant attitude adopted by the applicant in objecting thereto, prompted Eskom to formally apply for its admission. Eskom cannot be faulted for ensuring, by way of a formal

application, that this court was apprised of the full content of the application in order for it to come to a just decision.

[29] In this matter the cardinal difference between interruptions in Eskom's electricity supply to a Municipality, due to non-payment to Eskom, one the one hand, and general load shedding applied countrywide, on the other hand, as is comprehensively dealt with in the papers, is of crucial importance. Counsel for the Eskom have referred me to the judgment of Van der Linde J in *Resilient Properties (Pty) Ltd v Eskom Holdings SOC Ltd and Others* 2019 (2) SA 577 (GJ) where the learned judge dealt with the differentiation in the different forms of electricity supply interruption. The main application is wholly based on the non-payment scenario, indeed, no mention at all is made of load shedding. It is trite that a party will be held to the case made out in the affidavits and that another issue may not be canvassed at the trial (*Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) 107G-H; *Mostert v Firstrand Bank t/a RMB Private Bank* 2018 (4) SA 443 (SCA) para [13]). The Meyer J order accordingly did not nor could it have referred to load shedding. It is only when the urgent contempt applications were brought that load shedding was brought to the fore. Eskom explained that the alleged breaches of the orders all resulted from load shedding and thus had nothing to do with supply interruptions. This has not been disputed by the applicant. The terminology used to describe each is vastly different: electricity supply interruptions are not referred to as load shedding and *vice versa*.

[30] I merely need to add, for the sake of completeness, that the relief sought in the first application cannot in any way be reconciled with an application for unrestricted uninterrupted electricity supply by Eskom, as in now contended for by the applicant. Negating any such inference or interpretation is the relief sought, both in part A and B, 'to review and set aside the decision of Eskom to implement interruptions in the electricity supply to the second respondent defined as 'the first decision' and 'the second decision' in the founding affidavit of Tertius Alwyn Carstens …'. No doubt, the review relief would have been superfluous and indeed irrelevant in regard to load shedding.

[31] The main application accordingly flounders at this hurdle. I do, however, consider it necessary to comment on the Siwendu J judgment and order and the Opperman J judgment and order, for the purpose of dealing with counsel for the applicant's contention relating to *stare decisis*.

[32] At the outset it is necessary to once again stress the binding effect of judgments which is basic to *stare decisis*. The exception allowing for a departure from stare decisis is where the earlier decision is held to be clearly wrong. In *Patmar Explorations (Pty) Ltd and Others v Limpopo Development Tribunal and Others* 2018 (4) SA 107 (SCA), Wallis JA dealt with the basic principle and exception thereto, as follows:

> 'The basic principle is stare decisis, that is, the Court stands by its previous decisions, subject to an exception where the earlier decision is held to be clearly wrong. A decision will be held to have been clearly wrong where it has been arrived at on some fundamental departure from principle, or a manifest oversight or misunderstanding, that is, there has been something in the nature of a palpable mistake. This Court will only depart from its previous decision if it is clear that the earlier court erred or that the reasoning upon which the decision rested was clearly erroneous. The cases in support of these propositions are legion. The need for palpable error is illustrated by cases in which the court has overruled its earlier decisions. Mere disagreement with the earlier decision on the basis of a differing view of the law by a court differently constituted is not a ground for overruling it.'

The Siwendu J judgment and order

[33] The matter before Siwendu J initially was for an order that Eskom was in wilful contempt/breach of the Meyer J order. Siwendu J mentions in her judgment that the applicant amended the relief sought in that it no longer wished to pursue the order for wilful contempt but merely 'to compel enforcement of the order', the meaning of which escapes me. In paragraph 1 of the Siwendu J order, a declarator is issued that Eskom is in breach of the Meyer J order. No instances of Eskom's breach of the Meyer J order are mentioned in the judgment of Siwendu J, and in respect of load shedding, the learned judge found, 'There is no doubt that there are compelling reasons and justifications for these interruptions which have become a fact of life countrywide'.

[34] Having found the issue before the court concerned the interpretation of the Meyer J order, Siwendu J held:

> 'The order as it stands constitutes the common intention of the parties at the time and is complete memorial of the agreement ultimately made an order of court and extrinsic evidence may not be lead contradicting its terms….The issue is not what either of them may have had in mind or a reasonable explanation by a party. Where the language is clear and unambiguous, the court must give effect to it.'

[35] The finding of Siwendu J in the excerpt quoted, that Meyer J order was clear and unambiguous, seems to be at odds with the further finding ‘notwithstanding the genesis of the application and the dispute between the parties’ the Meyer J order refers to ‘any further interruptions’ which ‘is not qualified, making it impossible to distinguish between the various categories of interruptions that may arise’. Had the learned judge considered the context of and the relevant circumstances relating to the Meyer J order, the findings I have referred to, would have been in direct conflict therewith. The learned judge moreover, closed the door to a consideration of context and relevant surrounding circumstances, which having regard to the judgments I have alluded to, is plainly incorrect.

[36] Siwendu J then reasoned, in order to overcome the apparent difficulty, that had Eskom sought ‘to exclude the multiple categories of interruptions it would have included this in the order’. I am unable to approve of the reasoning. The court was required to interpret the Meyer J order in the process of determining the true meaning thereof, as I have dealt with above. The onus placed on Eskom to have included this in the Meyer J order and further disapproving Eskom’s failure in seeking ‘to vary the order either before or during the proceedings’, in my view, are irrelevant considerations in the adjudication of the dispute between the parties. Nor could these considerations, in the absence of an interpretation of the Meyer J order, have served as ‘securing’ the applicant’s contention ‘that it is in respect of all interruptions implemented by Eskom’.

[37] In paragraph 2 of the Siwendu J order both Eskom and the Municipality are ordered to cease acting in contravention of the Meyer J order. From a reading of the Siwendu J judgment it is apparent that no case for such relief against the Municipality is made out. The reason for making this order is hard to find. A court order must be obeyed at all times and a further order in the event of a breach thereof, to cease such breach or contravention, in my view, is toutologous and unnecessary.

[38] In paragraph 3 of the Siwendu J order, Eskom is ordered ‘to supply electricity on an interrupted basis’ to the Municipality ‘until such time as the required 15 days’ calendar notice of implementation of any further electricity supply interruptions’ to the Municipality is given by Eskom to the applicant ‘as required by the 16 January 2018 order’. This part of the order evidently constitutes an amendment of paragraph 1 of the Meyer J order: Eskom is now ordered to supply electricity on an uninterrupted basis, words one looks in vain for in the Meyer J order. Siwendu J does not deal with this aspect in her judgment.

[39] For all the given reasons I am driven to conclude that the Siwendu J judgment and order are clearly wrong and I accordingly decline to follow it.

The Opperman J judgment and order

[40] In the applications before Opperman J, the applications for contempt of court were based on the Modiba J orders of 11 December 2018. In setting out the chronology of relevant facts, the learned judge refers to the Meyer J order. In the course of the judgment, Opperman J refers to the common cause fact that all power cuts alleged to have constituted breaches of the Modiba J order, were due to load shedding and not to non-payment of electricity accounts by the Municipality to Eskom. The learned judge accordingly, as is readily apparent from other portions of the judgment, was acutely alive to the difference between electricity supply interruptions on account of non-payment and load shedding.

[41] Opperman J considered the arguments advanced in regard to the interpretation of the Meyer J order as 'a waste of time' thereby disregarding the importance of considering the nature and interpretation of the Meyer J order. In my view, as I have alluded to, the Meyer J order constitutes the genesis in all the inter-related applications. An interpretation of any of the subsequent orders, including the Modiba J order, without first having properly interpreted the Meyer J order, would result in an exercise in futility. As much must by now be apparent from my consideration of and findings in regard to the Siwendu J judgment and order.

[42] The reasoning of Opperman J in upholding the applicant's contentions reveals a misdirection as to concessions made during oral argument by counsel. It is dealt with as follows. Having found it 'strange' that 'the scope of the interim orders have been interpreted to be wider than that which defines the *lis* between the parties in the part B relief' the learned judge continues as follows:

> 'There is no review of the load shedding pending. What is being reviewed is interruption of electricity supply to the municipalities on a basis other than national load shedding. Although the relief itself is couched in wide terms the founding affidavits do not mention load shedding. The disputes are confined to non-payment of arrear accounts and Eskom's termination of electricity supply due to non-payment of accounts by the Municipalities.'

[43] The learned judge, in my view, correctly embarked upon an interpretation of the orders in their context and having regard to the relevant circumstances, much in line with

the process of interpretation I followed. And, I hasten to add, all the considerations referred to by the learned judge before turning to the concession, definitively militate against the applicant's interpretation of the orders.

[44] Regrettably, with respect to the learned judge, the exercise of interpretation was interrupted by the learned judge's reference to and weight afforded to a concession that had been made by counsel for Eskom. The concession is referred to in the judgment as follows:

> 'The meaning and scope of such orders (that the Madiba orders include within their ambit interruptions in the electrical supply attributable to load shedding) have been conceded by Mr *Koza* and his two juniors and were in fact consented to.'
>
> and further
>
> '[M]uch time in court was wasted debating the interpretation of the [Meyer J] order. In the end the interpretation was conceded.'

The concession made persuaded the learned judge that load shedding was included in the ambit of the Madiba J orders and a declarator that Eskom was in breach of the Modiba J order, was issued.

[45] Interpretation is a matter of law. It is trite law that the court is not bound by a legal concession made by counsel if in the view of the court, such concession is clearly erroneous. In this regard the remarks of Ngcobo J in *Matatiele Municipality and Others v President of the Republic of South Africa and Others* 2006 (5) BCLR 622 (CC); 2006 (5) SA 47 (CC) (para [67]) are apposite:

> 'Here, we are concerned with a legal concession. It is trite law that this Court is not bound by a legal concession if it considers the concession to be wrong in law. Indeed, in *Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others* [1996 (4) SA 671 (CC); 1996 (8) BCLR 1015 (CC)] this Court firmly rejected the proposition that it is bound by an incorrect legal concession, holding that [Id at para 16], 'if that concession was wrong in law [it], would have no hesitation whatsoever in rejecting it'. Were it to be otherwise, this could lead to an intolerable situation where this Court would be bound by a mistake of law on the part of a litigant. The result would be the certification of law or conduct as consistent with the Constitution when the law or conduct, in fact, it is inconsistent with the Constitution.'

[46] Applied to the concession made counsel for Eskom before Opperman J, it would only have been of any value, had it been assessed by the learned judge as correct or, for example, where it was made by way of confirmation by counsel of the court's *prima facie* view in argument which in the judgment is made final. Put differently, a concession, for it to be accepted, must accord with the findings of the court on the legal matter so conceded. The court should not blindly accept a concession on a legal matter in substitution of its own adjudication of that matter.

[47] As I have alluded to, Opperman J commenced with the exercise of interpreting the order. The learned judge however did not conclude the exercise but solely relied on the concession made by Eskom's counsel that the applicant's interpretation was correct. The concession, in my view, was wrongly made and should have been rejected by the court. Another difficulty is apparent from the reasoning: I fail to understand the significance or relevance of counsel for Eskom having 'consented' to the meaning and scope of the orders.

[48] In view of Opperman J's reliance that was wrongly placed on the concession, I do not consider myself bound to follow the judgment.

Conclusion

[49] For all the above reasons I have come to the conclusion that the application must fail. Turning to costs, the first and fourth respondents are entitled to their costs and the employment of two counsel was clearly warranted.

[50] One last observation. The part B review is still pending. The applicant went to great lengths in bringing numerous urgent applications in this court. What seems to have been overlooked is the real purpose of the application which is the review of the Eskom decisions. It is now almost two years since the first application was launched and part B is still not ready for trial. It would have been finalised long ago had the same vigour and industriousness displayed in the launching of the numerous urgent applications, persevered. The finalisation of the application is still not nigh. In the meanwhile, Mr Hadebe, the fourth respondent, has left the employ of Eskom. The Eskom decisions sought to be reviewed, were taken in a specific set of circumstances that existed at the time, which by now and almost certainly when the matter is eventually heard, will have gathered dust probably having paled into insignificance. The question is: even assuming that the Eskom decisions were to be reviewed and set aside, where does that take the

applicant? The matter may well have become moot and pursuing the matter just for some ulterior motive, absent any practical impact, necessitates careful re-consideration (*National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs* 2000 (2) SA 1 (CC) para [21]). I do however derive comfort from the absence of any doubt that this aspect will not escape the attention of the court hearing part B.

Order

[51] In the result the following order is made:

1. The first respondent's further affidavit with annexures thereto, is allowed in terms of Rule 6(5)(e).
2. The main application is dismissed.
3. The applicant is to pay the costs of:
   2.1 the first respondent's application in terms of Rule 6(5)(e); and
   2.2 the main application,
   such costs to include the costs consequent upon the employment of two counsel.

____**(*ORIGINAL SIGNED)***_____
FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANT	***ADV PL CARSTENSEN SC***
APPLICANT'S ATTORNEYS	***WEBBER WENTZEL***
COUNSEL FOR 1ST & 4th RESPONDENTS	***ADV SL SHANGISA*** ***ADV L RAKGWALA***
1st & 4th RESPONDENTS' ATTORNEYS	***NGENO & MTETO INC***
DATE OF HEARING	***21 OCTOBER 2019***
DATE OF ORDER	***21 OCTOBER 2019***
DATE OF JUDGMENT	***31 OCTOBER 2019***