REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

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

5/03/2019
DATE

SIGNATURE

CASE NO: 2018/16

In the matter between:

PIONEER FOODS (PTY) LTD	Applicant
and	
ESKOM HOLDINGS SOC LIMITED	First Respondent
WALTER SISULU LOCAL MUNICIPALITY	Second Respondent
NATIONAL ENERGY REGULATOR OF SOUTH AFRICA	Third Respondent
PHAKAMANI HADEBE	Fourth Respondent

and

CASE NO: 11429/2018

The matter between:

PIONEER FOODS (PTY) LTD	Applicant
and	
ESKOM HOLDINGS SOC LIMITED	First Respondent
DIHLABENG LOCAL MUNICIPALITY	Second Respondent
NATIONAL ENERGY REGULATOR OF SOUTH AFRICA	Third Respondent
PHAKAMANI HADEBE	Fourth Respondent

JUDGMENT

INGRID OPPERMAN J

INTRODUCTION

[1] By agreement between the parties, Case No 2018/16 ("**the Walter Sisulu Municipality matter**") and Case No 2018/11429 ("**the Dihlabeng Municipality matter**") were heard together, although not formally consolidated.

[2] Both matters concern orders handed down on 11 December 2018 (collectively "**the 11 December 2018 orders**"), compliance therewith and contempt proceedings relating thereto.

[3] These matters came before me in the urgent court on Wednesday, 27 February 2019 and argument was recommenced on Friday, 1 March 2019. The urgent circumstances under which these applications were heard, and under

which a judgment and orders are required to be delivered, compel a judgment that would have been more comprehensive had more time been available.

CHRONOLOGY OF RELEVANT FACTS

[4] The first respondent in both matters ("**Eskom**"), gave notice of its intention to disconnect electricity supply to the Walter Sisulu and the Dihlabeng municipalities as a result of their non-payment of their electricity accounts. The applicant ("**Pioneer Foods**"), instituted proceedings against Eskom, the two municipalities and others, for relief couched in two parts.

[5] Pioneer Foods in the second part of its applications (the 'Part B' relief) sought orders setting aside and reviewing Eskom's decision(s) to implement interruptions in electricity supply to the municipalities and in that Part B relief Pioneer Foods, which depends on electrical power for the operation of its businesses within the jurisdictions of the municipalities, seeks an order that Eskom supply electricity *on an uninterrupted basis* to the municipalities on the basis that Pioneer Foods makes direct payment to Eskom for the supply of electricity.

[6] In Part A of its proceedings Pioneer Foods sought essentially the same relief alternatively interdicts prohibiting electricity cuts pending determination of Part B.

[7] The Walter Sisulu Municipality matter commenced before the Dihlabeng Municipality matter. In both matters, despite the matters having been commenced at the beginning of 2018, Part B is yet to be heard. In other words, the reviewability of Eskom's decisions to implement interruptions in electricity supply to the Municipalities has yet to be decided.

[8] On 16 January 2018, and by consent between the parties in the Walter Sisulu Municipality matter, an interim order was granted which required Eskom, pending the finalisation of Part B, to give Pioneer Foods 15 calendar days' notice before implementing any electricity interruptions to the Walter Sisulu Municipality. That order also provided for Pioneer Foods to re-enrol Part A of the application on the urgent court roll once such notice was received ("**the 16 January 2018 order**").

[9] On 19 March 2018, the Dihlabeng Municipality matter was instituted and on 29 March 2018 and by agreement, an order on all fours with the 16 January 2018 order, was made ("**the 29 March 2018 order**").

[10] On 14 September 2018, Eskom issued a notice of its intention to disconnect the electricity supply to the Dihlabeng municipality. Pioneer Foods enrolled Part A of such application on the urgent roll for hearing on 4 October 2018. On that day, a further order was granted by consent between the parties ("**the 4 October 2018 order**").

[11] The 4 October 2018 order provides, amongst other things, that, pending the final determination of Part B, Eskom is directed to ensure continuous and uninterrupted supply of electricity to the Dihlabeng municipality and Pioneer Foods and is interdicted and restrained from interrupting the supply of electricity to the Municipality and Pioneer Foods.

[12] On 29 November 2018, Eskom commenced with interruptions of the supply of electricity to the Walter Sisulu Municipality without providing Pioneer Foods with the required notice under the 16 January 2018 order.

[13] On 5 December 2018 Eskom was declared by this Court (Siwendu J) to be in breach of the 16 January 2018 order; Eskom was ordered to cease acting

in contravention of the 16 January 2018 order and to supply electricity on an uninterrupted basis to the Walter Sisulu Municipality until such time as the required 15 days' notice of implementation of any further electricity supply interruptions was given by Eskom to Pioneer Foods ("**the 5 December 2018 order**").

[14] Eskom continued on 5 December 2018 to interrupt the supply of electricity to the Municipalities without providing Pioneer Foods with the required notice.

[15] Pioneer Foods instituted further applications on 8 December 2018 which led to the 11 December 2018 Walter Sisulu order ("**the 11 December 2018 Walter Sisulu order**"). That order provides that, pending the final determination of the 8 December 2018 applications, Eskom is ordered to comply with the 16 January and 5 December 2018 orders; it may not interrupt the supply of electricity to the Walter Sisulu Municipality and Pioneer Foods.

[16] The 11 December 2018 Dihlabeng order ("**the 11 December 2018 Dihlabeng order**") provides that, pending the final determination of the 8 December 2018 application, Eskom may not interrupt the supply of electricity to the Dihlabeng Municipality and Pioneer Foods. Eskom was also ordered to comply with the 4 October 2018 order.

[17] The 8 December 2018 applications have been postponed to be heard on 29 July 2019. These are the contempt applications relating to further load shedding 'transgressions' on 5 December 2018 and include a counter-application brought by Eskom praying for a variation of the 4 October 2018 order.

[18] During February 2019, despite the plethora of orders, Eskom again instituted interruptions to the electricity supply to the Municipalities and Pioneer Foods.

[19] In the Walter Sisulu Municipality matter, the electricity supply was cut for 3 hours on 11 February 2019, 5 hours on 12 February 2019 and 5 hours on 13 February 2019. In the Dihlabeng Municipality matter, electricity was cut for two and a half hours in the afternoon of 13 February 2019 and for 50 minutes in the evening of 13 February 2019.

[20] It is common cause that the power cuts in question were due to load shedding and were not due to non-payment of electricity accounts by the Municipalities.

[21] In the papers before this court, Eskom and Mr Hadebe, the Chief Executive Officer of Eskom, attempt to explain their non-compliance with the orders by relying on arguments relating to, *inter alia*, the effect of the leave to appeal application (against the 5 December 2018 order), purported impossibility, and lack of applicability of the Orders.

[22] The heads of argument filed on behalf of Eskom and Mr Hadebe called for a contextual interpretation of the 4 October 2018 order which would result in a finding that such order does not include interruptions attributable to load shedding.

[23] During argument it was conceded by Eskom's counsel that whatever the 4 October 2018 order might in time be interpreted to mean and whether or not the filing of the application for leave to appeal against the order of Siwendu J of 5 December 2018 suspended the order or not, does not detract from the fact that

both the 11 December 2018 orders (handed down by Modiba J), include within their ambit interruptions in the electrical supply attributable to load shedding.

[24] This concession was made, it appears, as both of the 11 December 2018 orders, in addition to incorporating the other orders by reference, state expressly: *'....and may not interrupt the supply of electricity to the second respondent and the applicant.'* The language is wide enough to include power cuts that arise from load shedding as well as power cuts imposed due to Eskom's belief that the Municipalities in question have not paid their electricity accounts timeously.

[25] The contempt applications (and the counter application/s) of 8 December 2018, were postponed *sine die* for dates to be arranged - which has now been done (29 July 2019) - and times for filing of affidavits were incorporated into the 11 December 2018 orders.

[26] The 11 December 2018 orders sought to regulate the period between 11 December 2018 and the hearing of the 8 December 2018 contempt applications (a date for which at that stage had not yet been arranged with the honourable Deputy Judge President), which have now been set down to be heard on 29 July 2019. This application thus concerns the question of whether there has been contempt committed by Eskom and Mr Hadebe of the 11 December 2018 orders.

[27] Mr Khoza SC, representing Eskom and Mr Hadebe, with two juniors conceded that the 11 December 2018 orders preclude interruptions attributable by load shedding. He explained that such orders were agreed to as they had erroneously thought that the orders would only have application for a short period of time. That now has turned out not to be the case.

[28] If that is so, it is inexplicable that Eskom and Mr Hadebe instructed their attorneys of record not to support Pioneer Foods' approach to the Deputy Judge

President on an urgent basis as per their response via their letter dated 21 December 2018 ("**the 21 December 2018 letter**").

[29] Pioneer Foods' attorneys of record addressed a letter to the Deputy Judge President which recorded the following:

> " 6. Owing to the volume of paper in the applications, the counter-application and the condonation applications, the belated filing of papers on the part of the respondent and the bringing of the counter-application, Modiba J was unable to read all the papers and accommodate the matter on the urgent roll on 14 December 2018.
> 7. Given the circumstances and the complexity of the matter, with consent of the parties, the matter was removed from the roll and Modiba J directed the parties to apply for a special allocation with the office of the Deputy Judge President. The Honourable Modiba J confirmed that the 11 December orders continue to apply.
> .....
> 10. The parties anticipate that both matters may be heard in one day."

[30] The 21 December 2018 letter from Eskom's attorneys provides:

> "3. As you are aware and as contained in various emails addressed by our firm to your firm, our offices closed for the festive season on the 14th of December 2018.
> 4. Whilst on holiday the writer accidentally came across your email in which the letter under reply was attached.
> 5. Whilst we appreciate the importance of the matter and that it must be heard expeditiously, we are of the opinion that **because of the recent developments the matter is not sufficiently urgent to be enrolled as such.**
> .....
> 8. We do support the special allocation of the hearing of the matter **but not** because of the reasons that are contained in your letter. The matter was referred for special allocation because of the complexities of issues involved and not any other issues." (emphasis added)

[31] Eskom and Mr Hadebe thus expressly rejected an invitation to expedite the hearing of the 8 December 2018 contempt applications. They could have supported the approach to the Deputy Judge President for an urgent allocation but chose, expressly, not to. (In my view, this door is not closed and an approach to him to expedite the hearing of the 8 December 2018 applications, may be met with a favourable response.)

[32] Dates for opposed applications in this Division can be obtained for mid-April 2019, approximately 6 weeks from the date of the hearing of this urgent application. This suggestion, i.e. that the 8 December 2018 applications be heard mid-April 2019, was rejected by Mr Khoza on the basis that the 8 December 2019 applications are too complex, yet the estimated duration of 1 day, as contained in paragraph 10 of the Pioneer Foods' letter, seems to be common cause.

[33] I enquired from the parties as to when Part B was to be heard and suggested that the date of 29 July 2019 be utilised for this purpose. There seems to be no reason why this should not occur as at least one of the two applications appear to be ripe for hearing. Whether the review should succeed seems to be the decisive question in the matters looked at as a whole.

[34] It seems 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. 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.

[35] The disputes are confined to the non-payment of arrear accounts and Eskom's termination of electricity supply due to non payment of accounts by the

Municipalities. One can understand Pioneer Food's frustration, it is paying its electricity accounts to the Municipalities, they are not paying Eskom and so Eskom is cutting off electricity supplies to those Municipalities to compel them to pay their electricity bills. Pioneer Foods's operations in those Municipalities are unfairly deprived of electricity supply despite them having paid their electricity bills.

[36] It is trite that affidavits in motion proceedings serve as both pleadings and evidence. It appears to me that the dispute is, having regard to the founding affidavits, confined to disputes about the non-payment of arrear accounts. "*For an order to be competent and proper, it must, in the first place, 'relate directly or indirectly to an issue or lis between the parties.*' " [1] All of this is, of course, irrelevant to the current dispute. There is no application before me for the variation of the 11 December 2018 orders. The meaning and scope of such orders have been conceded by Mr Khoza and his two juniors and were in fact consented to.

POSITION AS AT 11 DECEMBER 2018

[37] The accepted and conceded position as at 11 December 2018 is thus the following: Pending the final determination of the 8 December 2018 contempt applications, Eskom has been ordered to comply with the court orders of 16 January 2018, 4 October 2018 and 5 December 2018 and may not interrupt the supply of electricity to the Walter Sisulu and the Dihlabeng municipalities and Pioneer Foods for both non-payment of accounts and for reasons attributable to load shedding.

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[1] *Eke v Parsons*, 2016 (3) SA 37 (CC) at para [25]

BREACH OF THE ORDERS

[38] Load shedding amounts to an interruption in the supply of electricity by Eskom.

Impossibility

[39] Eskom states that "*it is impossible for Eskom to meet the demands of [Pioneer Foods] and to provide a continuous supply of electricity which Eskom does not guarantee even in terms of its agreement with the Municipality*".

[40] It is an unsubstantiated allegation which amounts to a bare assertion, not giving rise to any genuine dispute of fact, and thus the facts pleaded cannot possibly ground a defence.[2] In fact, what is clear from Eskom's own version is that who is the victim of load shedding or not, and the extent to which they are victims of load shedding, is entirely within the control of Eskom. The fact that load shedding is planned and scheduled is clear. Eskom admits that, "*load shedding is a controlled intervention… [which is] deliberately implemented*".

[41] It is also completely technically possible to maintain electricity supply specifically to Pioneer Foods. On Eskom's own version, "*Load shedding is defined as the deliberate reduction in electrical load disconnecting customers at selected points on the transmission or distribution systems*. Mr Koch, a senior manager at Eskom, states in no uncertain terms that it is possible to remove Pioneer Foods from the load shedding schedules.[3]

[42] There is a national electricity grid in South Africa. Eskom administers that grid and regulates when load shedding happens, in what areas and for how long. Moreover, many entities or areas are not subject to load shedding at all, and

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[2] *Ramakatsa and Others v Magashule and Others* 2013 (2) BCLR 202 (CC), paras [93] and [132]; and *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA), para [13].

[3] Paras [30] and [33] of the answering affidavit paginated pages 178 & 179

electricity supply to several large users is not interrupted despite a national program of load shedding, although it may be tapered from time to time.

Licencing Obligations

[43] Eskom appears to rely for its impossibility argument on an assertion that to comply with the 16 January 2018, 4 October 2018 and 5 December 2018 orders, would constitute a breach of its licence conditions and the requirement therein to treat all customers equitably; or that providing an uninterrupted supply of electricity to Pioneer Foods amounts to unfair discrimination.

[44] The licence conditions provide for various 'carve-outs' (exceptions to the general rule) in relation to interruptions, including large users, and other entities.

[45] The licence conditions are not a legal defence to non-compliance with a Court order. The Court order trumps any other alleged legal impediment from a constitutional perspective. Section 165 of the Constitution states unambiguously that a court order "*binds all persons to whom and organs of state to which it applies*" and must be obeyed on pain of contempt – and, where appropriate, imprisonment for the crime of contempt of Court[4].

[46] Eskom makes a passing reference to "emergency". Yet, there is no evidence to substantiate this. The source, extent and duration of the alleged "emergency" is not made clear. It is also not clear - or alleged - why continuing supply to Pioneer Foods specifically was impossible. Eskom does not indicate when it became aware of the potential emergency and why regulating load shedding in respect thereof was out of Eskom's control. Ultimately, Eskom does not show that it could not comply with the order in the present case: just because

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[4] *Pheko and Others v Ekurhuleni Metropolitan Municipality (No 2)* 2015 (5) SA 600 (CC), para [39]

it may be cumbersome and impractical to do so is not an answer, it is not impossible.

Duty to obey court orders

[47] As the Court held in *Bezuidenhout v Patensie Sitrus Beherend Bpk* [5]

> "A court order stands and must be strictly obeyed until set aside by a higher court, and the same court which granted the original order does not have the right to nullify its effect or interfere with that order except in very limited circumstances in the context of variation".[6]

The Court went on to hold as follows:

> "The issue in the present application is whether I have the competence to make an order that would nullify the effect of the earlier order made by another Judge of the High Court in respect of the same issue, between the same parties. I thought it obvious that I do not possess that competence.
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> An order of a court of law stands until set aside by a court of competent jurisdiction. Until that is done the court order must be obeyed even if it may be wrong (Culverwell v Beira 1992 (4) SA 490 (W) at 494A - C). A person may even be barred from approaching the court until he or she has obeyed an order of court that has not been properly set aside (*Hadkinson v Hadkinson* [1952] 2 All ER 567 (CA); *Bylieveldt v Redpath* 1982 (1) SA 702 (A) at 714). In *Kotze v Kotze* 1953 (2) SA 184 (C) Herbstein J provided the rationale at 187F:
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> 'The matter is one of public policy which requires that there shall be obedience to orders of Court and that people should not be allowed to take the law into their own hands.' "

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[5] 2001 (2) SA 224 (E)

[6] 2001 (2) SA 224 (E) at 229

[48] The Supreme Court of Appeal has stressed that it is furthermore the duty of our courts to enforce parties' obligations to make "*serious good faith endeavours to comply*" with orders of court.[7] The importance of ensuring compliance with court orders was emphasised by Froneman J in *Magidimisi v Premier of the Eastern Cape and Others*:

> "in a constitutional democracy based on the rule of law final and definitive court orders must be complied with by private citizen and the state alike. Without that fundamental commitment constitutional democracy and the rule of law cannot survive in the long run. The reality is as stark as that."[8]

[49] The compulsion contained in section 165(5) of the Constitution that court orders are binding lies at the heart of the judicial authority of the Republic and hence at the effectiveness of the Constitution to perform its function. The state, which includes Eskom and the Court, holds a constitutional duty to ensure that court orders are adhered to and enforced. As held by the Constitutional Court, "*[t]he Constitution imposes a positive duty on organs of state to assist courts and to ensure their effectiveness.*"[9]

[50] The duty to obey court orders is important not only because it vindicates the rule of law and the legal rights of the parties, but also because it fortifies and protects the dignity of the Courts, in furtherance of the public interest:

> "it is clear that contempt of court is not merely a mechanism for the enforcement of court orders. The jurisdiction of the Superior Courts to commit recalcitrant litigants for contempt of court when they fail or refuse to obey court orders has at

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[7] *Meadow Glen Home Owners Association and Others v City of Tshwane Metropolitan Municipality and Another* [2015] 1 All SA 299 (SCA), paras 7 to 8. See too S v Mxhosa, 1986 (1) SA 346 (C) at 353F

[8] 2006 JDR 0346 (B), para 1.

[9] *Zulu and Others v eThekwini Municipality* 2014 (4) SA 590 (CC) at paras [70] - [71]. This arises by virtue of section 165(4) of the Constitution and section 7(2) of the Constitution. In Zulu the Court stated that "*Failing to fulfil these obligations falls short of the constitutional mandate. Further, government officials have a duty not only to discharge their functions, but also to account for when they have not*".

> its heart the very effectiveness and legitimacy of the judicial system ... That, in turn, means that the Court called upon to commit such a litigant for his or her contempt is not only dealing with the individual interest of the frustrated successful litigant but also, as importantly, acting as guardian of the public interest."

[51] The Courts are mere instruments of enforcement of the Constitution. If Court orders are not complied with the Constitution is not complied with and hence the reference to a Constitutional crisis is not an exaggeration. It is thus not merely a matter of the Court's honour. It is the functionality of our society as one governed by the rule of law. If a party truly experiences difficulty in complying with the interim order (for example, because its wording is vague), then it is incumbent upon that party immediately to pursue the appropriate legal avenues to seek a variation of the order. It is not appropriate for such a party to adopt a supine attitude amounting to disdain for the order.

[52] In *Meadow Glen Home Owners Association and Others v City of Tshwane Metropolitan Municipality and Another*,[10] the Supreme Court of Appeal held that public bodies are:

> "obliged . . . to make serious good faith endeavours to comply with [orders of court]. That is what we are entitled to expect from our public bodies. If they experienced difficulty in doing so then they should have returned to court seeking a relaxation of its terms. If there was a dispute between them and the appellants regarding the scope of the order and what needed to be done to comply with it, it was not appropriate for the Municipality to wait until the appellants came to court complaining of non-compliance in contempt proceedings. It should have taken the initiative and sought clarification from the court. Its failure over a protracted period to take these steps is to be deprecated."[11] (emphasis added)

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[10] 2015 (2) SA 413 (SCA)

[11] *Meadow Glen supra* at para 8

[53] Eskom has not successfully varied the order. In any event, even if the counter-application ultimately succeeds, this does not excuse non-compliance with court orders in the interim. All orders must be obeyed fully until set aside, on pain of contempt,[12] for the good reasons adverted to above.

[54] The Constitutional Court (in the majority judgment of the Honourable Khampepe J in *Department of Transport v Tasima (Pty) Ltd*) pronounced definitively on the import of court orders, which warrants full citation (emphases added; footnotes omitted):[13]

> "The general rule is that orders that do not concern constitutional invalidity do have force from the moment they are issued. And in light of section 165(5) of the Constitution, the order is binding, irrespective of whether or not it is valid, until set aside.
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> The common law has long recognised this position. In *Honeyborne*, De Villiers CJ found that if an agent—
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> "were to be allowed to defy the authority of the court on the ground of an error of judgment on the part of the court, the question would in every case be whether the magistrate is right in his reading of the law or whether the agent is correct in his, but there would be no tribunal on the spot to decide between them. Undoubtedly it is the duty of the agent to bow to the decision of the court and to seek his remedy elsewhere; and it is equally the duty of the court to uphold its own dignity and see that its authority is respected by the practitioners before the court."
>
> This reading of section 165(5) accepts the Judiciary's fallibilities. As explained in the context of administrative decisions, "administrators may err, and even . . . err grossly." Surely the authors of the Constitution viewed Judges as equally human. The creation of a judicial hierarchy that provides for appeals attests to this understanding. Like administrators, Judges are capable of serious

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[12] *Clipsal Australia (Pty) Ltd & others v GAP Distributors (Pty) Ltd & others* 2010 (2) SA 289 (SCA) para [22]

[13] 2017 (2) SA 622 (CC), paras [180] - [188].

error. Nevertheless, judicial orders wrongly issued are not nullities. They exist in fact and may have legal consequences.

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The obligation to obey court orders "has at its heart the very effectiveness and legitimacy of the judicial system". Allowing parties to ignore court orders would shake the foundations of the law, and compromise the status and constitutional mandate of the courts. The duty to obey court orders is the stanchion around which a state founded on the supremacy of the Constitution and the rule of law is built.

This is because the legal consequence that flows from non-compliance with a court order is contempt. The "essence" of contempt "lies in violating the dignity, repute or authority of the court." By disobeying multiple orders issued by the High Court, the Department and the Corporation repeatedly violated that Court's dignity, repute and authority and the dignity, repute and authority of the Judiciary in general. That the underlying order may have been invalid does not erase the injury. Therefore, while a court may, in the correct circumstances, find an underlying court order null and void and set it aside, this finding does not undermine the principle that damage is done to courts and the rule of law when an order is disobeyed. A conclusion that an order is invalid does not prevent a court from redressing the injury wrought by disobeying that order, and deterring future litigants from doing the same, by holding the disobedient party in contempt.

The essence of contempt brings us back to the Constitution. Section 165(4) provides that "[o]rgans of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the court". Fundamentally, these measures must include complying with a court order. As the Supreme Court of Appeal in Meadow Glen explained, we are "entitled to expect" that our public bodies "make serious good faith endeavours to comply with [court orders]", including by taking the initiative to challenge decisions with which they disagree. Neither the effectiveness nor the dignity of the Judiciary is protected when an organ of state ignores a court order, let alone several. The Department, an organ of state, had a duty, above and beyond that of the average litigant, to comply with the court orders. The integrity of the Constitution demanded this.

The Department nevertheless contends that there has been "no valid basis ex contractu [arising from the contract] for the purported extension. Accordingly the

> orders giving effect to the purported extension could not have been granted." The first judgment similarly finds that "[i]n law conduct or a decision taken in contravention of a statutory prohibition is invalid", and that the court orders therefore had no consequence. I disagree."

[55] The above pronouncement underscores the constitutional basis for the requirement to obey court orders and judicial authority. Court orders trump other alleged legal obligations, such as the license in this case. After all, under the Constitution, the authority to interpret, apply and enforce all law vests exclusively in the Courts.[14] In this regard, as the Constitutional Court held above, the fact that a party may consider the legal position or requirements to be different to what they have been held by a Court to be, or if they are actually different, is irrelevant to the efficacy and enforceability of the court order. As such, once granted, the order is enforceable against the world, even if it is wrong or contrary to other law.

[56] Moreover, the fact that the requirements of a court order may conflict even with a statutory provision also does not mean that such an order cannot be granted. A court order may be granted even in the face of conflicting provisions in statute, let alone a transmission licence. This is an intrinsic part of the constitutional authority and discretion vested in our courts.

[57] I find that there can be no legal impediment to the enforcement of the Orders.

CONTEMPT OF COURT

[58] Civil contempt is the wilful and *mala fide* refusal or failure to comply with an order of court. This was confirmed in *Fakie NO v CCII Systems (Pty) Ltd.*[15] In

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[14] Section 165(1) of the Constitution.

[15] 2006 (4) SA 326 (SCA).

Fakie, the Supreme Court of Appeal held that whenever committal to prison for civil contempt is sought, the criminal standard of proof applies.[16] A declaration of contempt (other than the prayers relating to imprisonment) and any mandatory or interdictory order can, however, be made on the civil standard.[17]

[59] For the purposes of a finding of contempt, an applicant must establish the order, service or notice of the order, non-compliance with the terms of the order; and wilfulness and *mala fides* in the non-compliance. However, once the applicant has proved the order, service thereof and non-compliance therewith, wilfulness and *mala fides* are presumed. The respondents then bear the evidentiary burden in relation to wilfulness and *mala fides*. Should the respondents fail to advance evidence that establishes a reasonable doubt as to whether their non-compliance was wilful and *mala fide*, the applicant would have proved contempt beyond a reasonable doubt.[18]

[60] Eskom's defence was initially, certainly in respect of the Dihlabeng matter, an alleged interpretative dispute as to the meaning of the 11 December 2018 order[19]. This was abandoned when, during argument, Mr Khoza conceded that the 11 December 2018 also had application in respect of load shedding.

[61] The Orders were, at all relevant times, well known to Eskom and Mr Hadebe.

[62] In this regard, as this Court has held,[20] *dolus eventualis* is applicable to the wilfulness element in contempt, as it is in every other context where intention

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[16] *Ibid*, para [19].

[17] *Ibid*, para [42]; *see also Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Limited* 2017 (11) BCLR 1408 (CC) at paras [50] to [55].

[18] *Ibid*, paras [19], [22] – [24].

[19] Paras 84 and 85 of Eskom's heads of argument in the Dihlabeng matter

[20] *H v M* 2009 (1) SA 329 (W), para [12].

needs to be established. As such, a party will be held to be in contempt of court if such party foresees the *possibility* that it is acting contrary to an order of court, but still continues so to act, reconciling itself to that possibility eventuating.[21] In this case, Eskom indeed closed its eyes to what the law required.[22]

[63] It is trite law that court orders must be adhered to in their terms, and that it is a serious matter of foundational constitutional import if court orders are ignored or breached. The very effectiveness of the rule of law is undermined.[23]

[64] Although a punitive element is involved, the main objectives of contempt proceedings are to vindicate the authority of the court and coerce litigants into complying with court orders. Elaborating upon this, Plasket AJ pointed out in *Victoria Park Ratepayers v Greyvenouw CC*[24] that contempt of court has obvious implications for the effectiveness and legitimacy of the legal system and the judicial arm of government. There is thus a public interest element in every contempt committal:

> "it is clear that contempt of court is not merely a mechanism for the enforcement of court orders. The jurisdiction of the Superior Courts to commit recalcitrant litigants for contempt of court when they fail or refuse to obey court orders has at its heart the very effectiveness and legitimacy of the judicial system... That, in turn, means that the Court called upon to commit such a litigant for his or her contempt is not only dealing with the individual interest of the frustrated successful litigant but also, as importantly, acting as guardian of the public interest."

[65] A Court is permitted to issue orders clarifying its own orders. There was clearly some confusion regarding the enforceability of the prior orders. This

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[21] *S v Humphreys* 2015 (1) SA 491 (SCA), para [12].

[22] *H v M* (supra), para [12].

[23] *Tasima* (supra), para [183].

[24] [2004] 3 All SA 623 (SE) para 23.

judgment hopefully eliminates that and makes clear that the order must be complied with. The basis for my not declaring Eskom or Mr Hadebe to be in wilful contempt, even though they have breached the order is to be found primarily, in the following three reasons:

65.1. There is a dispute about whether the 5 December 2018 order is final in effect and whether the filing of the application for leave to appeal has suspended its operation. This issue was referred, by agreement between the parties, for hearing to 29 July 2019. Eskom and Mr Hadebe do not hold the subjective belief that they are contravening the order granted on 5 December 2018 as it has been suspended, it being final in effect. There can, under such circumstances, not have been wilfulness and the version cannot be rejected on the papers as they stand. However, clearly the 11 December 2018 orders resurrected the 5 December 2018 order (assuming without finding that its operation was suspended) by incorporating it by reference into the 11 December 2018 Walter Sisulu order and by ordering compliance with it.

65.2. An attorney, Mr Jafta, representing Eskom and Mr Hadebe, deposed to an affidavit in which he stated the following in respect of the hearing before Modiba J which led to the 11 December 2018 order:

> "4. Eskom opposed the relief sought and the draft order that the applicant wanted to have made an order of court. Eskom's legal representative made the submissions before Modiba J, inter alia, the draft order, if made an order of court, would mean that Eskom, in trying to comply with it, would contravene the provisions of its Transmission Licence.....

> 5. Judge Modiba, reacting to the aforesaid submission, stated that in that event Eskom will use that defence (the above submission) if contempt proceedings are brought against Eskom."

The transcription was subsequently filed and accords in the main with the aforegoing summary. The suggestion seems to be that there can be no wilfulness as a judge had already declared that it could be raised as a defence in the contempt proceedings. As already indicated earlier in this judgment, a court order trumps the license requirements. I want to make it clear that I am not considering the exchange in court to interpret the orders granted on 11 December 2018 as that approach would, probably be inadmissible as an aid in interpretation. The court orders and their meanings have in any event been conceded. What I am using the exchange in court for, is to assess the wilfulness of the non-compliance, and the admissibility for this purpose does not appear to me to be contentious.

65.3. Eskom tried to amend (vary) the 4 October 2018 order. It in fact brought an application but was then not given a hearing due to the complexity of the matter. In addition, the issue as to whether or not the 5 December 2018 order was suspended by the filing of the application for leave to appeal, was also postponed for determination at a later date. All these issues which have a direct bearing on wilfulness and mala fides have, by agreement between the parties, been postponed for determination on 29 July 2019.

[66] To issue the same orders repeatedly is obviously erroneous. What I have found, however, is that the reasons advanced for non-compliance, whilst being sufficient to have averted the finding of wilfulness and mala fides, are not sufficient for non-compliance and I trust that in the light of this judgment such excuses have been deprived of all further usefulness to Eskom and Mr Hadebe. I intend ordering compliance with the 11 December 2018 orders. Eskom and Mr Hadebe had thought that Eskom could comply, albeit for a short period of time. Eskom nonetheless chose to attempt to delay the hearing of the 8 December 2018 contempt applications by failing to support Pioneer Foods' request to the Deputy Judge President for an expedited hearing date. Eskom is, as far as I can see, largely to blame for the date of those hearings being so far distant i.e. 29 July 2019.

[67] Eskom can, and should, in my view, particularly in regard to its constitutional duties, have Part B of the applications heard as soon as possible – that hearing would put an end to the interim orders. Eskom could also, approach the Deputy Judge President for another hearing date for the 8 December 2018 contempt applications, a date sooner than the 29 July 2019. Eskom could further ensure that the part B applications become ripe for hearing and suggest to Pioneer Foods that the 29th of July 2019, be used for this purpose.

[68] Much time in court was wasted debating the interpretation of the 11 December 2018 orders. In the end the interpretation was conceded. In the end too, the licence argument was conceded to be bad in law. I will, despite all these features dictating that a costs order be made against Eskom, reserve the costs

of this application for determination when the 8 December 2018 applications are decided.

[69] I accordingly make the following orders:

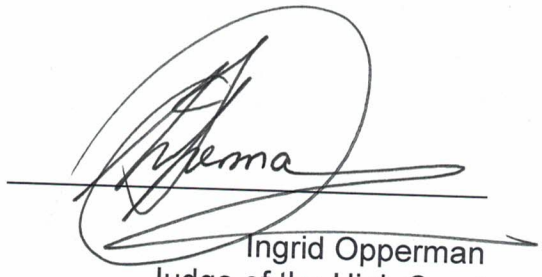
Walter Sisulu Municipality matter – Case – 16/2018

1. This application is enrolled as an urgent application.
2. The first Respondent is declared to be in breach of the order of the Honourable Madam Justice Modiba handed down on 11 December 2018 ("**the 11 December 2018 Walter Sisulu order**").
3. The First and Fourth Respondents are ordered to cease acting in contravention of the 11 December 2018 Walter Sisulu order.
4. The Fourth Respondent is to ensure that the First Respondent complies with the 11 December 2018 Walter Sisulu order and paragraph 3 of this order.
5. Costs of this matter are reserved for determination in the application dated 8 December 2018 and defined in the 11 December 2018 Walter Sisulu order as 'this application'.

Dihlabeng Municipality matter – Case No – 11429/2018

1. This application is enrolled as an urgent application.
2. The first Respondent is declared to be in breach of the order of the Honourable Madam Justice Modiba handed down on 11 December 2018 ("**the 11 December 2018 Dihlabeng order**").
3. The First and Fourth Respondents are ordered to cease acting in contravention of the 11 December 2018 Dihlabeng order.

4. The Fourth Respondent is to ensure that the First Respondent complies with the 11 December 2018 Dihlabeng order and paragraph 3 of this order.
5. Costs of this matter are reserved for determination in the application dated 8 December 2018 and defined in the 11 December 2018 Dihlabeng order as 'this application'.



Ingrid Opperman
Judge of the High Court
Gauteng Local Division, Johannesburg

Heard: 27 February 2019 & 1 March 2019
Judgment delivered: 5 March 2019
Appearances:
For Applicant: Adv JPV McNally SC
Instructed by: Webber Wentzel
For 1st and 4th Respondent: Adv M Khoza SC
Adv M Gwala
Adv L Rakgwale
Instructed by: Ngeno & Mteto Inc
No appearance for other Respondents