REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

11/4/2016.

CASE NO: 44095/2015

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

SIGNATURE 11/4/2016 DATE

Tasima (Pty) Ltd. — Applicant

and

THE DEPARTMENT OF TRANSPORT — First Respondent

THE DIRECTOR-GENERAL: DEPARTMENT OF TRANSPORT — Second Respondent

THE MINISTER OF TRANSPORT — Third Respondent

WERNER EDUARD KOEKEMOER — Fourth Respondent

ROAD TRAFFIC MANAGEMENT CORPORATION — Fifth Respondent

COLLINS LETSOALO — Sixth Respondent

KEVIN JOSHUA KARA-VALA — Seventh Respondent

MORNE GERBER — Eighth Respondent

GILBERTO MARTINS	Ninth Respondent
CHRIS HLABISA	Tenth Respondent
MAKHOSINI MSIBI	Eleventh Respondent

JUDGMENT

AC BASSON, J

The applicant

[1] The applicant, Tasima (Pty) Ltd, is the developer, custodian and operator of the Electronic National Traffic Information System (the so-called "eNatIS System"). The eNatIS System has also been designated as a national key point under the National Key Points Act.[1]

[2] The applicant brings this application in its own interest and in the public interest in light of the immense practical and strategic importance of the services rendered by the applicant as the custodian and sole operator of the eNaTIS System to the general public across all nine provinces.

[3] The applicant launched this application on an urgent basis seeking compliance with several extant orders granted by this court ("the High Court orders") and an order of the Supreme Court of Appeals ("the SCA") in the matter of *Tasima (Pty) Ltd v Department of Transport*[2] handed down on 2

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[1] Act 102 of 1980.
[2] (792/2015) [2015] ZASCA 200 (2 December 2015). Coram: Brand, Cachalia, Majiedt, Saldulker, Mbha JJA.

December 2015 ("the SCA order"). (I will refer to these orders in more detail herein below.)

[4] The applicant also seeks an order declaring that the 1st, 2nd, 5th and 10th respondents are in contempt of various paragraphs contained in the High Court orders. More in particular, the applicant seeks an order compelling the respondents to make payment of certain monies which are due (in the amount of R 176 683 116.70); process certain of the applicant's Purchase Requisition Orders ("PRQ's"); afford the applicant the benefit of a lease agreement and the LAN- Desk license and to grant the applicant full access to the eNaTIS Data/ Recovery Centre situated in Pretoria ("the DRC").

[5] The applicant further seeks an order in terms of section 18(3) of the Superior Courts Act[3] ("the Act") that the SCA order operates and be executed in full until the final determination of the respondents' appeal against the SCA's judgment and order to the Constitutional Court.

[6] The applicant claims that it is forced yet again to bring the present application not only to protect its own position (as endorsed by numerous extant High Court orders) but also to protect the integrity of the eNaTIS System. The applicant states that because of the respondents' persistence - even in the face of various binding High Court orders - in refusing to pay certain amounts necessary to enable the applicant to operate the eNaTIS system effectively, the eNaTIS Sytem faces the potential of total collapse. This pattern of non-compliance has repeated itself for 3 ½ years since about August 2012. Further, despite various court orders preventing the respondents from taking unlawful and premature transfer of the eNaTIS System and compelling them to abide by the contractual and data transfer management provisions, the respondents persist with attempts to transfer the eNaTIS System to a third party. (I will return to the so-called transfer management process herein below.)

[3] Act 10 of 2013.

The respondent and the counter-application

[7] This application is opposed by the first respondent (the Department of Transport - "the DOT"); the second respondent (the Director-General: Department of Transport); the third respondent (the Minister of Transport"); the sixth respondent (Mr Collins Letsoalo – previously the acting Chief Executive Officer of the fifth respondent) and the 10th respondent (Mr Chris Hlabisa - the Deputy Director-General of the DOT: Roads Transport). (I will refer to these respondents collectively as "the respondents" where applicable.)

[8] The respondents have brought a counter-application in which it seeks extensive relief discharging the various High Court orders. The respondents also seek an order extending the order by the Full Court ("the Full Bench order") preserving the *status quo* between the parties - (i) pending the determination by the Constitutional Court for leave to appeal against the judgment of the SCA; and (ii) until this court declares that the agreement (the Turnkey Agreement for the provision of the eNaTIS System) between the parties is of no force and effect. I should interpose here and point out that should this court extend the order of the Full Bench until this court declares that the agreement between the parties is of no force and effect, such order could have the effect of perpetuating the *status quo* for what could be an indefinite period.

[9] In respect of the Full Bench order it was also tendered on behalf of the DOT that should this court extend this order, the DOT tenders to pay the outstanding amounts in fact owed by the applicant to third party service providers and to pay what the applicant claims as its management fee into escrow (pursuant to a separate table with supporting documentation to be provided by the applicant evidencing its management fee up until the date of cancellation. (I will return to the merits of this submission herein below.)

Urgency

[10] This matter was originally enrolled for hearing on the urgent roll on 12 January 2012 but did not proceed. The matter proceeded on 26 February

2016. Although the respondents do not dispute the urgency of the applicant's application, the applicant disputes the urgency of the respondents' counter-application and submits that the respondents' counter-application ought to be struck from the roll or dismissed.

Background

[11] The papers are voluminous and in light of the fact that this matter has been enrolled as an urgent application, I do not intend giving a detailed exposition of the history that precedes this application and will suffice with a brief overview of some of the events that gave rise to this dispute.

[12] Pursuant to a tender process the applicant was awarded the contract in 2001 to develop, manage and operate the eNaTIS System. The applicant is the sole party operating and maintaining the eNaTIS System. The eNaTIS System operates across all nine provinces and operates the licensing of all motor vehicles, driver's license tests, learner licence tests, contraventions of road traffic legislation and the roadworthiness of vehicles. It is not in dispute that the eNaTIS System is of critical national importance.

[13] The applicant and the DOT are the parties to the so-called Turnkey Agreement for the provision of the eNaTIS System ("the agreement"). The agreement dated 3 December 2001 was subsequently amended and extended. This agreement initially was for a five year period commencing on 1 June 2002 and expiring on 31 May 2007.

Extension of the agreement

[14] The applicant made representations to the then Director-General (Ms Mpofu) for the extension of the agreement. Mpofu made it clear that the contract would not be extended and that the contract was in the transfer phase. The transfer of the eNaTIS System back to the DOT was, however, never finalised. The DOT also did not issue a notice for a Transfer Management Plan meeting as is required by the agreement whenever the agreement has expired or upon termination of the agreement.

[15] The appointment of Mpofu came to an end on 31 October 2009. Mr Mahlalela ("Mahlalela") was then appointed as the new Director-General in February 2010. In 2010 the latest extension for a further five-year period was granted by Mahlalela after new presentations were submitted to the DOT by the applicant. The agreement was extended from 1 May 2010 to 30 April 2015. The validity of this extension has been the subject of fierce litigation between the parties and is also now the subject of a criminal investigation. According to the respondents this extension was clearly unlawful.

[16] For obvious reasons this extension was of critical importance to the applicant in that it not only secured the applicant's continued operation of the eNaTIS System until 30 April 2015, but also provided for a phased handover of the system to the DOT pursuant to a negotiated transfer management regime under Clause 26 of, read with Schedule 15 to the agreement. (I will return to these provisions herein below.)

Mabuse, J order

[17] In March 2012, despite the extension granted on 2010 by Mahlalela, the applicant was informed by means of a letter from the DOT that the agreement between the parties would terminate on 31 May 2012. The DOT also challenged the validity of the extension and sought immediate transfer of the eNaTIS system.

[18] Upon receipt of the said letter the applicant invoked the dispute resolution mechanisms provided for in Clause 24 read with Schedule 13 of the agreement.[4] At the same time the applicant also brought an application for an order to compel the DOT to perform its obligations in terms of the agreement pending the finalisation of the dispute resolution proceedings it had instituted ("the main dispute"). Mabuse, J granted the application for an interim order to maintain the *status quo* and also directed the DOT to comply with its obligations in terms of the agreement (including the extended

[4] "Clause 24 DISPUTE RESOLUTION. The parties accept that disputes may arise between them during the course of this Agreement. Any dispute which cannot be resolved between the respective Project Managers of the Parties shall be dealt with in accordance with the provisions of Schedule 13 – Dispute Resolution."

agreement) pending the finalisation of the dispute resolution proceedings. Leave to appeal against this order was refused by Mabuse, J himself as well as by the SCA.

Transfer Management Provisions

[19] It is necessary to briefly explain what procedures must be followed to hand over the operations of the eNaTIS System once it is terminated or in the event the agreement expires.

[20] Clause 26 read with Schedule 15 to the agreement makes specific provision for a process to transfer the management of the eNaTIS System to a third party (or back to the DOT) once the main agreement is "terminated for any reason". According to the applicant the transfer management provisions contained in Clause 26 read with Schedule 15 to the agreement, expressly survive the termination of the agreement. (I will return to this submission where I deal with the respondents' refusal to make payment to the applicant for any services rendered by the applicant after 30 April 2015 which is the date upon which the agreement (as extended) came to an end.)

[21] Once the agreement is terminated "for any reason whatsoever", Schedule 15 of the agreement comes into operation. This schedule is fairly detailed and provides for a so-called "Transfer Management Plan". In terms of Clause 2.2 of Schedule 15, the DOT must submit a written request to the applicant for a transfer management plan meeting "which request shall be made no later than 90 (ninety) days after the Agreement Termination Date". The parties to the agreement are thereafter required to meet and agree on a transfer management plan with agreed time scales. This process is intended to ensure a phased in and gradual hand over of functions by the applicant to the DOT or a nominated third-party. In this regard the introductory paragraph to Schedule 15 specifically states that:

> "In view of the strategic importance of the eNaTIS to the State, it is necessary to make provision for the orderly transfer of the NaTIS and Services provided in respect thereof from Contractor

to the State or a third party provider should this Agreement or any part thereof terminate or expire for any reason whatsoever. This schedule contains the provisions relating to such a transfer."

[22] It is common cause thatagreement expired on 30 April 2015. As per the provisions of Clause 26, the procedure as set out in Schedule 15 became operative and obliged the parties from 1 May 2015 to operate in terms of the transfer management provisions. It is, however, common cause that these provisions have not yet been implemented nor has the DOT issued a written request to the applicant to meet and agree on a transfer management plan with agreed time scales.

Seven extant order granted by the North Gauteng High Court

[23] I have already referred to the fact that the applicant has successfully obtained various orders against the respondents (identified in the different orders) including seven contempt orders against various respondents for its persistent refusal to comply with various court orders and more in particular with the Mabuse, J order.

[24] All of these orders were obtained in this division. On behalf of the applicant it was pointed out that all of these orders are currently extant and that all of these orders operate pending the finalisation of the determination of the main dispute yet to be decided in terms of the agreement's dispute resolution mechanism. As already pointed out this process has not yet been finalised.

(i) On 7 August 2012 *Teffo,J* granted an order that the DOT will, pending the finalisation of the main application, pay the applicant for all the services rendered or to be rendered and obligations incurred or to be incurred by the applicant in connection with the eNaTIS System. In addition to ordering the respondent to comply with all of its obligations under the agreement, the respondent was further order to comply with specific payment obligations.

(ii) I have already referred to the order dated 17 October 2012 by *Mabuse, J* in terms of which it was ordered that, pending the finalisation of the dispute resolution proceedings instituted by the applicant in terms of Clause 24 and Schedule 15 of the agreement (dated 2 December 2001), the DOT is directed to perform its obligations in terms of the agreement and to comply with certain payment obligations.

(iii) On 26 March 2013 *Strydom, AJ* ordered that, pending the finalisation of the dispute resolution proceedings between the applicant and the DOT, the respondents (identified in that order) are interdicted from taking any steps (including entering into any contract with third parties) which have the effect of rerouting or diverting any of the services, which the applicant undertook to perform under the agreement, away from the applicant.

(iv) On 15 July 2013 *Ebersohn*, AJ held certain of the respondents to be in contempt of court of certain paragraphs of the *Mabuse,* J order. The court also ordered the respondents to make certain payments to the applicant and to grant certain authorisations and approvals.

(v) On 27 August 2013 *Fabricius, J*, with reference to the order by *Strydom*, AJ, also granted an order interdicting the respondents from taking any steps which have the effect of rerouting or diverging any of the services rendered by the applicant, including but not limited to the issuing of any instructions to the applicant or any third party to terminate any agreement or arrangement under or in relation to the agreement and/or the eNaTIS System. In addition, it was ordered that the respondents undertake not to interfere with, or censor or restrain any communications between the provinces and the applicant under, or in relation to the agreement or the eNaTIS System. The respondents (identified in the order) were also ordered to grant the authorisations and approvals contained in the schedule annexed to the papers.

(vii) On 5 November 2013 *Nkosi, J* granted an order, *inter alia*, compelling the respondents (identified in that order) to comply with the *Mabuse*, J order and the *Fabricius,* J order as well as with the orders of *Strydom*, AJ and *Ebersohn*, AJ.

(viii) On 21 January 2014 *Rabie, J* also held certain respondents to be in contempt.

[25] In addition to the these orders, a full bench of this court (Fabricius, J, Fourie, J and Wentzel, AJ) granted an order (on 30 October 2015) prior to the hearing of the appeal (which was set to be heard by the SCA on 23 November 2015) in terms of which it was ordered that pending the determination of the appeal the *status quo* would subsist. On behalf of the respondents it was submitted that this order should be extended pending the outcome of the appeal to the Constitutional Court. (I will return to these submissions herein below where I consider the counter-application.)

[26] In summary: In terms of the various High Court orders, the DOT and its officials were interdicted to take any steps to effect a premature transfer of the eNaTIS System contrary to the provisions of Schedule 15 to the agreement. Furthermore, for the duration of transfer of the eNaTIS System the DOT was directed to pay the applicant for all services rendered under the agreement; all PRQ's are to be processed in accordance with the agreement and material contracts and agreements required to be approved by the DOT would be approved within five days of the request by the applicant. In short, none of the respondents may take any steps designated to undermine the efficacy or implementation of the various High Court orders and none of them can act contrary to any of these orders.

[27] Of particular importance is the order by Mabuse, J in terms of which the DOT was ordered to comply with all its obligations pending the finalisation of the dispute referred in terms of the dispute resolution proceedings. More in particular the DOT was ordered to comply with all its payment obligations.

The other orders of particular relevance to this application is the order by Strijdom, J; Fabricius, J; Rabie, J; Nkosi, J and lastly the SCA order.

[28] Up to date no resolution has been reached in terms of the dispute resolution process. Consequently, so it was submitted on behalf of the applicant, all of these orders remain extant and of full force and effect.

[29] Despite these orders, the DOT and it's officers have adopted the position that the applicant is not to be paid for services rendered from 1 May 2015; no PRQ's will be processed; no agreements or contracts will be approved and the applicant is to be denied access to critical components of the eNaTIS System most notably the Disaster / Data Recovery Centre.

[30] More in particular, and despite the existence of the various High Court orders, various of the respondents continue to unlawfully attempt to - (i) take transfer of the eNaTIS System from the applicant; (ii) divert work away from the applicant; (iii) refuse to comply with required processes under the agreement and/or (iv) starve the applicant of funds. Moreover according to the applicant, the DOT and its officers simply refuse to implement the process mandated by Schedule 15 (which allows for a transfer management plan meeting and for a transfer management process) despite the fact that the main agreement had expired on 30 April 2015.

Application before Hughes, J

[31] Because of the DOT's and its officers' persistence in ignoring the provisions of Clause 26 read with Schedule 15 (to implement the Transfer Management Process) a dispute arose in March 2015. A dispute also arose regarding the DOT's and its officers' continued attempts to effect the transfer of the eNaTIS System from the applicant to a third party. This conduct again necessitated the applicant to approach this court in March 2015: The applicant, *inter alia*, sought declarations of breach and wilful contempt against the DOT in respect of specific paragraphs contained in the various High Court orders and more in particular with reference to orders by Mabusa, J; Strijdom, AJ; Fabricius, J and Rabie,J.

[32] In turn the DOT brought a counter-application seeking, *inter alia*, to declare the extension of the agreement in 2010 by the then Director-General of the DOT (Mahlalela) invalid on the basis of illegality.

[33] Hughes, J dismissed the application for contempt and granted the counter-application. The court also reviewed and set aside the decision by the then Director-General and declared the extended contract which took effect from 1 May 2010 and expired on 30 April 2015 to be void *ab initio*.

[34] The applicant successfully appealed this judgement and order to the SCA.

Supreme Court of Appeals

[35] On 2 December 2015 the SCA handed down its judgement and order. Subsequent to this judgment the respondents applied for Leave to Appeal against this judgment to the Constitutional Court.

[36] Although I am mindful of the fact that this judgement is currently the subject of an appeal process, it is necessary for purposes of this judgement to briefly refer to some of the findings of the SCA in so far as some of its findings have a bearing on the questions before this Court.

[37] The SCA declared that five of the respondents are in contempt of one or more paragraphs of the different High Court orders. The SCA also ordered that the respondents may not transfer the eNaTIS System and its services (as defined in the agreement dated 3 December 2001 as subsequently amended) *except* in terms of the transfer management plan as envisaged in Schedule 15 of the agreement. Moreover, it ordered that for the duration of the transfer of the eNaTIS System and its services - (i) the applicant is to be paid by the DOT for all services rendered under the agreement in accordance with the agreement and in accordance with paragraph 1.2 of the Mabuse, J order; (ii) all PRQ's are to be processed in accordance with the agreement and paragraph 4 of the Nkosi, J order; (iii) all material contracts and agreements required to be approved by the DOT will be so approved

within five days of the request by the applicant. The court also dismissed the respondents' counter-application dated 26 March 2015 and accordingly set aside the order of the court *a quo* reviewing and setting aside - on the basis of illegality - the decision of the then Director-General to extend the contract period for a further five years.

[38] Of particular importance to this application is the court's finding in respect of the various High Court orders since 2011 and the status of these orders. It is clear from the reasoning of the SCA that the various High Court orders remain extant and must be obeyed until such time they have been set aside by a court of competent jurisdiction:

> "[16] I do not share the court a quo's view that the setting aside of the impugned extension would insulate the respondents from a finding that they were in contempt of court. On the contrary, as I see it, the outcome of the review application is entirely irrelevant to the question whether the respondents were acting in contempt of the court's orders. Should the review application be successful, it may impact on the future in that it could serve as a basis for setting the court orders aside. But unless and until these orders are set aside by a court of competent jurisdiction, they stand and must be obeyed. That much was clearly stated by Streicher ADP in *Clipsa Australia (Pty) Ltd & others v GAP Distributors (Pty) Ltd & others* 2010 (2) SA 289 (SCA) para 22. In a constitutional democracy based on the rule of law, court orders must be complied with by private citizens and the State alike. As members of the executive organs of State, the respondents are held to an even higher standard. Not only must they act in strict compliance with court orders, but they are also bound to facilitate the efficiency of the judicial branch (see eg *Minister of Home Affairs & others v Somali Association of South Africa Eastern Cape (SASA EC) & another* 2015 (3) SA 545 (SCA) paras 34-36 and 27; and *Nyanthi v MEC for the Department of Health, Gauteng & another* 2008 (5) SA 94 (CC) para 43). The setting aside of a contract which forms the basis of a court order, does not

negate the force of the order nor does it excuse the failure to comply with it."

The current application

[39] On 2 December 2015, after receipt of the SCA order and judgement, the applicant requested payment of certain outstanding payment certificates which the DOT had refused to pay amounting to R 176 683 116.70. To this end the applicant relied not only on the SCA judgement and order but also on the various High Court orders.

[40] Despite a demand for payment and compliance with the agreement and despite the fact that the applicant is still operating the eNaTIS Sytem, no payments have been received from the DOT in respect of services rendered since May 2015. In addition hereto and despite the various High Court orders, the 10th respondent had failed to sign or approve any PRQ's since May 2015. According to the applicant the DOT has also failed to approve the applicant's lease contract in respect of the premises from which the eNaTIS System operates and similarly failed to approve the applicant's renewing of a LAN-Desk software license.

[41] The applicant explained in great detail how the eNaTIS System has been operating the past few years and how PRQs (which set out the necessary expenditure to operate, manage and maintain the system) are processed and approved by the DOT. It is for purposes of this judgement not necessary to give a detailed overview of these procedures. Suffice to point out that, according to the applicant, the respondents have failed to approve PRQs since May 2015 and have failed to effect any payments in terms of these PRQs. This failure has resulted in the non-payment of, *inter alia*, electricity bills, the South African Post Office (which renders various services to the public in respect of the eNaTIS System), security services, and services rendered by communication service providers. According to the applicant this non-payment may result in rendering the eNaTIS inoperable and may potentially jeopardise the entire eNaTIS System.

[42] This failure by the various respondents to comply with their obligations in terms of the agreement and in light of the SCA order, prompted the applicant to file an urgent application on 21 December 2015 for the relief sought in the Notice of Motion. As already pointed out the applicant is seeking an order to compel the respondents to continue with their obligations in terms of the agreement and to hold the various respondents in contempt of the High Court orders and the SCA order. As already pointed, out the applicant is also seeking an order in terms of section 18(3) of the Act. The applicant therefore approached this court on the strength of the various High Court orders which it submitted operate independently. Because they operate independently, so it was submitted, the DOT and its officers are still bound by them. As already pointed out, this was also the view held by the SCA that, unless and until these orders are set aside by a court of competent jurisdiction, they stand and must be obeyed.

[43] The applicant further explained that they are forced to approach the court yet again because the respondents only carry out their obligations after the applicant obtains mandatory orders compelling them to carry out their obligations. This was also why the applicant had to approach this court on numerous occasions in the past to prevent the respondents from affecting the unlawful and premature transfer of the eNaTIS system and to require them to comply with their contractual obligations. In terms of the SCA judgment the respondents were yet again found to be guilty of contempt of court and were yet again ordered to comply with the transfer management provisions of the agreement. More in particular, the respondents were yet again ordered to pay the applicant for services rendered and to process all PRQs submitted to the DOT.

[44] The applicant therefore persisted with its submission that the serving of the Application for Leave to Appeal to the Constitutional Court is of little moment and that it in no way entitles the respondents to ignore all of the other various High Court orders which remain extant and enforceable and have never been successfully appealed against.

[45] The court's attention was further drawn to the fact that in the Leave to Appeal application (against the SCA order), the various High Court orders are left unchallenged and undisturbed. The respondents' attempt to appeal the SCA judgment accordingly in no way excuse their non-compliance with the extant orders: These orders cannot simply be ignored and must therefore to be enforced. There, accordingly, exists no lawful basis for refusing to comply with these orders. The applicants submitted that, insofar as the respondents have failed to comply with these orders from 1 May 2015, they are therefore in contempt of court.

[46] It is instructive to note that the SCA in its judgment also was of the view that the Mabuse, J order subsists and that all the other orders granted by the High Court under case number 44095 from 2012 to 2014 subsist. In this regard the SCA held as follows:

> "[10] ... From the context of Mabuse J's judgment it is clear that by his reference to "the agreement" he intended to include the alleged extension of the contract period until 30 April 2015 (contended for by Tasima) as well as the period of transition contemplated in Clause 26 and schedule 15. Subsequently, the Department's application for leave to appeal against the Mabuse J order was refused, first by Mabuse J himself and then by this court. A debate arose on the papers as to who was to blame for the fact that the dispute proceedings instituted by Tasima in 2012 had not yet been finalised. As I see it, however, the outcome of this debate is of no consequence. No application was brought to discharge or terminate the Mabuse J order. So it remains extant."

[47] In this regard the SCA referred to the judgment in *Clipsal Australia (Pty) Ltd and OTHERS v GAP Distributors and Others* where the SCA emphasised the importance of obeying court orders until such time they have been set aside:[5]

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[5] 2010 (2) SA 289 (SCA).

"[22] In its judgment the court below itself refers to *Culverwell v Beira* 1992 (4) SA 490 (W) at 494A - E where Goldstein J said that orders of court have to be obeyed until set aside and that chaos may result if people were allowed to defy court orders with impunity. It also refers to the judgment of Froneman J in *Bezuidenhout v Patensie Sitrus Beherend Bpk* 2001 (2) SA 224 (E) at 228F - 230A where, relying on *Culverwell* and *Kotze*, Froneman J said that an order of a court of law stands and must be obeyed until set aside by a court of competent jurisdiction. Having done so with apparent approval and having stated that it is obliged to apply the judgment of this court, it is inexplicable how it could then, on the basis that the judgment could be wrong, have considered the outcome of the review application to be of any relevance to the contempt application."[6]

The questions before this court

[48] The following issues fall to be decided by this court in respect of this application:

(i) Whether or not the High Court orders exist independently of the SCA order and whether they will therefore have to be enforced on their own terms despite the pending Application for Leave to Appeal to the Constitutional Court.

(ii) In respect of the section 18(3) application, whether this court has jurisdiction to grant the relief sought and if so, whether the applicant has established the requirements set out in section 18 of the Act so that the SCA order may be enforced pending the appeal to the Constitutional Court. In this regard the court must decide - (a) whether exceptional circumstances exist that justify the implementation of the SCA order pending the appeal; (b) whether the applicant will suffer irreparable harm if the SCA order is not enforced in spite of the appeal; and (c) whether the DOT will suffer irreparable harm if this court orders

[6] Footnotes omitted.

that the SCA order be implemented pending the outcome of the appeal process.

[49] The following issues falls to be decided by this court in respect of the counter-application:

(i) Is the DOT's counter-application urgent?
(ii) Did the DOT demonstrate a basis for the discharge of the various High Court orders?
(iii) Whether the court should grant the extension of the order of the Full Bench (dated 30 October 2015)?

Status of the High Court orders

[50] I have already to the fact that the respondents in their Application for Leave to Appeal left the various High Court orders unchallenged.

[51] Because the respondents are well aware of the views expressed by the SCA that these orders remain extant, they have not launched a counter-application in which it seeks, *inter alia*, that these orders are discharged. (I will return to the merits of the counter-application herein below.)

[52] As far as the status of the various High Court orders is concerned, I am in agreement with the applicant that the orders remain extant until such time they have been set aside.

[53] Having concluded that the various High Court orders remain extant, it then needs to be determined whether the respondents are in contempt of these orders.

Contempt of the High Court orders including the SCA order

[54] The principles regarding civil contempt are well-known and are established where there is a wilful refusal or failure to comply with an order of court. See

this regard *Fakie NO CCII System (Pty) Ltd*[7] where the court held in this regard that the applicant must establish- (i) the order; (ii) service or notice of the order; (iii) non-compliance with the order; (iv) wilfulness and *mala fides* in the non-compliance. Once the applicant has proved (i) – (iii) *mala fides* is presumed.

[55] It is trite that there is a duty on parties to comply with court orders. This obligation is even more important in the case of the State. See in this regard: *Bezuidenhout v Patensie Sitrus Beherend Bpk:*[8]

> "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:
>
> > '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.' "[9]

See also: *Pheko and Others v Ekurhuleni City:* [10]

> "[1] The rule of law, a foundational value of the Constitution, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of the courts to carry out their functions depends upon it. As the Constitution commands, orders and decisions issued by a court bind all persons to whom and organs of state to which they apply, and no person or organ of state may interfere, in any manner, with

[7] 2006 (4) SA 326 (SCA).
[8] 2001 (2) SA p224 (E).
[9] *Ibid* at 229B – D.
[10] 2015 (5) SA 600 (CC).

the functioning of the courts. It follows from this that disobedience towards court orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced.

[2] Courts have the power to ensure that their decisions or orders are complied with by all and sundry, including organs of state. In doing so, courts are not only giving effect to the rights of the successful litigant but also and more importantly, by acting as guardians of the Constitution, asserting their authority in the public interest. It is thus unsurprising that courts may, as is the position in this case, raise the issue of civil contempt of their own accord.

....

[27] Notwithstanding this clear constitutional imperative that the authority of our courts is to be respected and upheld, certain state parties have, on occasion, displayed a troubling disregard for judicial orders. It is not difficult to reference examples of cases involving contempt, by state organs, of court orders where, most troublingly, constitutional rights are in issue. The cases are by no means exhaustive of state parties' non-compliance with the orders and decisions of our courts; they are included merely to illustrate the extent and nature of this phenomenon. What they show is not merely that state parties are failing, in a very serious way, to meet their constitutional obligations, but that these failures have real and serious consequences for those whose interests they are there to serve."[11]

[56] It is not in dispute that the High Court orders (in particular the orders by Mabuse, J, Strijdom, AJ and Fabricius, J) were made available to the respondents. The SCA judgement order was also served on the respondents on 2 December 2015. It is also not in dispute that the respondents have failed to comply with these orders at least since May 2015 in respect of

[11] Footnotes omitted.

payment for services rendered by the applicant; the PRQ's and that the respondent have failed to approve necessary agreement and contracts.

[57] The respondents attempt to justify the non-compliance with these orders and therefore the fact that they are in contempt, on the basis that an Application for Leave to Appeal the SCA order to the Constitutional Court has been lodged. Secondly, the respondents rely on their *bona fides* and thirdly, the respondents rely on their counter-application to justify their non-compliance. More in particular, the respondents claim that they are in any event not obliged to make any payments in that payments with reference to the allegations of fraud and corruption are precluded by law. Because of these allegations of criminality, the respondents therefore are *bona fide* in their refusal to make payments to the applicant as they are obliged to guard public funds and to prevent it being paid to a participant in corrupt activities "under the pretext of misconstrued court orders".

[58] I am in agreement that the respondents cannot rely on the lodging of the Application for Leave to Appeal to the Constitutional Court. In this regard I have repeatedly referred to the fact that the Application for Leave to Appeal to the Constitutional Court leaves the various High Court orders unchallenged.

[59] I am particularly not persuaded by the argument that the refusal to comply with these orders is *bona fide*: Court orders must be obeyed and cannot be ignored or disobeyed. Furthermore, these orders must be obeyed regardless of whether there is a perception that these orders are wrong and/or whether such persons believe *bona fide* or otherwise that there exists some or other basis for those orders to be set aside or discharged at some future point. This was also the view of the SCA. Despite the fact that the SCA judgment makes it absolutely clear that the Mabuse, J order and the other orders remain extant, the respondent's actions display a total disregard for these orders. The fact that a public body persists with this conduct of total defiance of various orders of this Court's orders is simply unacceptable. Furthermore, the fact that the respondents may hold the view that these orders were

"misconstrued" is irrelevant and of no consequence: These orders stand irrespective of whether the respondents may hold this view. Furthermore, I am in agreement with the submission on behalf of the applicant that the conduct of the respondents is even more egregious as they are state entities: In breach of their obligations under section 165 of the Constitution each of the respondents has now made it plain in their answering affidavit that they have no intention to abide by any of this court's orders. It was precisely this conduct that had necessitated the applicant to approach this court on numerous occasions in the past.

[60] Lastly, the respondents cannot and do not deny that the court orders are extant and enforceable. This is borne out by the fact that the respondents now seeks on an extremely urgent basis in a counter-application to discharge these order on the basis that all of these orders were granted by the various Judges of this division whilst not being aware of the serious allegations of fraud and corruption. I will return to these allegations herein below. Suffice to point out that the fact that there are these allegations of fraud and corruption does not mean that the various High Court orders are therefore invalid. They remain valid and binding until such a time that they have been set aside or discharged. The counter-application is not a defence to contempt of court proceedings as it is trite that court orders must be obeyed right up until they are set aside. I should also point out that the SCA was aware of these allegations and still handed down its judgment despite these allegations.

[61] Accordingly, in so far as the DOT and its officials have failed and/or refused to comply with the various High Court orders, including the SCA order, they are held in contempt.

[62] It was also submitted on behalf of the respondents that the judges who granted the various orders were not aware of "the allegations of fraud and corruption". I have already referred to the fact that these allegations were in fact before the SCA and that the court handed down the judgement and order despite these allegations. These allegations also pertinently featured in

the matter that served before Hughes, J. It should also be pointed out that even if the respondents are successful in discharging the previous orders, in other words in the event that the counter-application succeeds, it does not follow that the respondent's contempt *prior* to the date of discharge is excused.

[63] As already pointed out the defence of the contempt application is premised substantially on the counter-application. Before I turn to the counter-application, it is necessary to briefly consider the application in terms of section 18(3) of the Act.

Section 18(3) of the Superior Courts Act

[64] The applicant seeks an order providing for the enforcement of the SCA order and other orders pending the final determination of an appeal against the SCA order to the constitutional court. Section 18 reads as follows:

> "18. Suspension of decision pending appeal.—(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.
>
> (2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.
>
> (3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.
>
> (4) ....

(5) For the purposes of subsections (1) and (2), a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules.

[65] Before I turn to a consideration of the relief sought in terms of this section, it is necessary to first determine whether or not this court can grant, what essentially is exceptional relief, bearing in mind that what is being asked for is for an order by the SCA to be executed pending the final determination of an appeal against that order. Put differently, is it competent for the High Court to consider and/or grant an order to execute a judgement and order of a higher court (the SCA)?

[66] On behalf of the respondents it was submitted that under the common law it is clear that it is the court granting the order which has the power to control its order. Absent any clear provisions to the contrary the legislature is presumed not to have intended to alter the common law. However, in the event that the court decides that it has jurisdiction to consider and grant such an application, it was submitted that the respondents will indeed suffer irreparable harm.

[67] It should be borne in mind that once the SCA made the order, that order became the order of the High Court. This much is clear from the order itself. Furthermore, the SCA is not a court of first instance and does not entertain applications such as this especially in light of the fact that the order made by the SCA became an order of this Court. I am therefore of the view that this Court has the necessary jurisdiction to entertain an application whether or not to order the execution of an order by the SCA (which became the order of this court) pending the outcome of an appeal. See in this regard: *Occupiers of Saratoga Avenue v City of Johannesburg Metropolitan Municipality and Another*[12] where the Constitutional Court held that where an order is made on appeal, the effect thereof is that the order effectively

[12] 2012 (9) BCLR 951 (CC).

becomes an order of the High Court and that execution of that order should be done by that court:

> "[7] It is usual that in a successful appeal, the appellate court may make the order that the court of first instance should have made. That order then becomes the order of the court of first instance. Execution and enforcement of the order should then take place in that court."
>
> [8] This Court has jurisdiction to hear matters other than as a court of appeal. *Blue Moonlight I* was, however, not that kind of case. It was an appeal against the judgment of the Supreme Court of Appeal. Paragraph (e) of the order made it clear that it was the usual "set aside and replace" kind of order made in an appeal. It effectively became an order of the High Court.
>
> [9] The reason for enforcing orders in the original court is logical and practical. The order on appeal merely corrects the original order and the court of first instance is usually best equipped to deal with matters relating to the enforcement of that order."

[68] I will now turn to a consideration of whether this court should grant the relief sought in terms of section 18(3) of the Act.

[69] It is trite that, pending the final determination of an appeal and order by a court (against which an Application for Leave to Appeal has been lodged or which is the subject of an appeal) will be suspended until the final determination of the appeal. In terms of section 18(1) of the Act a court may, however, in exceptional circumstances and upon proof by the applicant of the irreparable harm to them if the court does not so order and lack of irreparable harm to the respondent, order the operation and execution of a judgement order.

[70] The court in *Incubeta Holdings (Pty) Ltd v Ellis*[13] confirmed that the test to be applied in considering this relief is twofold: Firstly, whether or not "exceptional circumstances" exist; and secondly, proof on a balance of probabilities by the applicant of - (i) the presence of irreparable harm to the applicant who wants to put into operation and execute the order; and (ii) the absence of irreparable harm to the respondent with seeks leave to appeal. Sutherland, J summarised the requirements in respect of "exceptional circumstances" as follows:

> "[22] Necessarily, in my view, exceptionality must be fact-specific. The circumstances which are or may be 'exceptional' must be derived from the actual predicaments in which the given litigants find themselves. I am not of the view that one can be sure that any true novelty has been invented by s 18 by the use of the phrase. Although that phrase may not have been employed in the judgments, conceptually the practice as exemplified by the text of rule 49(11), makes the notion of the putting into operation an order in the face of an appeal process a matter which requires particular ad hoc sanction from a court. It is expressly recognised, therefore, as a deviation from the norm, ie an outcome warranted only 'exceptionally'."

[71] I am of the view that the applicant has made out a case for "exceptional circumstances". I have already referred to the fact that the eNaTIS system (a national key point) is of critical importance in respect of the service that it renders to the whole of South Africa. The applicant is furthermore also the only entity that renders this service to the public. Any payments made to the applicant is therefore not only for the benefit of the applicant, it is crucial and in the interest of the public that the integrity of this service to the public is maintained. This service (the eNaTIS system) has not yet been handed over to a third party or to the DOT. In fact, that process has not even begun as is required in terms of the agreement.

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[13] 2014 (3) SA 189 (GJ).

[72] On behalf of the applicant it was therefore submitted that there is a need for the immediate enforcement of the orders as without such enforcement there is an immediate and real likelihood that the applicant may not be able to continue as a going concern if the respondents continue with its conduct of non-payment. The consequences resulting from such continued non-payment may result in the eNaTIS Sytem being compromised. In fact, it was submitted that a total collapse of the eNaTIS System is a real likelihood. This state of affairs will in turn render the SCA order meaningless. The applicant confirmed that the DOT has not paid it under the agreement since May 2015 and that the amount outstanding to date is over R176 million. Since May 2015 the applicant had to rely on its own reserves in an attempt to continue operating the system. Should the DOT persist in non-payment, the applicant will also not be able to continue employing an optimal staff component and will not be able to continue to operate essential functions required for the proper functioning of the eNaTIS System.

[73] In light of the fact that the eNaTIS Sytem faces collapse, the applicant will also suffer total collapse in light of the fact that the applicant performs no other functions save for that in terms of the eNaTIS agreement. In other words, the income derived by the applicant under the agreement constitutes its sole income.

[74] Since 1 May 2015 the applicant, in an attempt to support the eNaTIS System, therefore had to turn to its own pockets to run the system as no income is channelled to the applicant despite the fact that it is fully protected by numerous court orders. The applicant submits that the harm that it will suffer cannot be made good with any form of a damages claim. The applicant further submits that no harm will be suffered by DOT as all that is required is payment necessary to run the eNaTIS System and to ensure that vital contracts must be entered into by the respondents which are necessary for the effective running of the eNaTIS System. Furthermore, it is submitted that payments received will be passed on to the service providers to ensure the continued operation of the system. Such payment would in any event have to be made irrespective of who runs the eNaTIS System. Accordingly,

so it was submitted, the DOT will suffer no financial prejudice as the payments will be paid over to the service providers. Furthermore, the amounts to be paid in terms of the relief sought are in any event covered by the transaction fees generated by the eNaTIS System.

[75] The applicant has also tendered to agree to an arrangement whereby the 10- 15% of its management fee be paid into an escrow account until the final determination of the respondents' current appeal to the Constitutional Court. I am in agreement with the applicant that this arrangement should be implemented and I have made that part of my order.

[76] I will deal in more detail with the counter-application herein below. Suffice to point out that basis for the relief sought in the counter- application centres on allegations made by the DOT that the agreement has been tainted by fraud and corruption and that, in any event, the DOT has now cancelled the agreement on the basis of the alleged fraud and corruption. I interpose here to point out that once the agreement is terminated for any reason, the transfer management process will have to be implemented. This has never been implemented and there is no indication that the DOT intends to implement these proceedings now that it has, on its own version, cancelled the contract. This agreed process (as already pointed out) is mandated by the original agreement and becomes operative once the contract has been terminated for any reason.

[77] On behalf of the respondents it was further contended that because of the allegations of fraud and corruption, the DOT can no longer be expected to pay between R30 to R40 million per month over to the applicant.

[78] The respondents also contended that, in light of the fact that the eNaTIS System is the only source of income to the applicant, there is no realistic chance of the DOT ever recovering any of these amounts if it is paid over to the applicant pursuant to a damages claim.

[79] The applicant disputed the allegation that there is a basis for alleging that the amounts paid by the DOT would not be able to be recovered through a damages claim. In this regard the applicant pointed out that it pays out millions of rand in respect of salaries and third-party service providers and that the DOT has received full value for these payments and will continue to receive full value for the payments when the DOT makes payment to the applicant.

[80] I have considered the submissions in respect of the section 18(3) of application. I am of the view that the applicant has made out a proper case for the relief sought. Exceptional circumstances exist as to why the payments should be made. It is of paramount importance to maintain the integrity of the system until such time as the system is handed over to the DOT or to a third party. This, as already pointed out, can only be done in terms of the procedures provided for in the agreement. Importantly, it is for the DOT to commence the process and it has not done so.

[81] I am further persuaded that the applicant will suffer irreparable harm should the order not be granted. I am not persuaded that the respondent will suffer irreparable harm: The DOT continues to receive value for these payments. A substantial percentage of these payments are also used to pay the various service providers. In order to take care of some of the DOT's concerns, I have made it part of my order that the management fee be paid over and held in an escrow account.

[82] The application is therefore granted in terms of section 18(3) of the Act. It is accordingly ordered that the SCA order will operate and be enforceable immediately in terms of section 18(3) of the Act despite the delivery of an application for Leave to Appeal of the SCA order to the Constitutional Court.

Extension of the *status quo* order

[83] On behalf of the respondents it was submitted that there can in principle be no objection against extending the *status quo* order previously granted by the Full Bench (by consent) especially in that no new factual developments

have occurred in the intervening two months. The respondents further proposed to pay all outstanding payments owed to service providers (3rd parties). It was further proposed that the applicant's management fee (that they have earned) be paid into escrow. The respondents made it clear that they did not required that the applicant hand over the eNaTIS System back to them.

[84] I am not persuaded that there exists a basis upon which this court should extend the order by the Full Bench. There certainly have been new factual developments: Firstly, when the Full Bench order was granted, it was granted pending the outcome of the appeal before the SCA. The SCA has now handed down its judgment. I am therefore of the view that this order is no longer extant having been overtaken by the SCA order and judgment. Secondly, when the order was granted by the Full Bench, the hearing of the SCA was a mere weeks away. A further four months have now passed since that order was granted without the applicant having received any payments. Thirdly, the applicant is in a position to indicate exactly what it is owed and I can see no reason why the applicant should not be paid. Fourthly, as I understand the submissions, the respondents are merely willing to pay outstanding amounts up until the cancellation of the agreement. In this regard two observations should be made: Firstly, the cancellation was unilateral and is not accepted by the applicant. Secondly, the agreement between the parties is clear: Once an agreement comes to an end for whatever reason, the transfer management procedures come into play. No such procedures have been invoked by the DOT. In this regard I should briefly point out that the respondents argued that Schedule 15 does not apply in the event of the DOT cancelling the eNaTIS contract based on its own default having corrupted the DOT officials and the then Minister. There is no merit in this argument. Schedule 15 is not capable of being terminated and becomes operative upon cancellation of the contract for any reason.

[85] The application to extend the *status quo* order of the Full Bench is therefore not granted.

Is the counter-application urgent?

[86] Before I turn to the merits of the counter-application to discharge the various High Court orders, it must first be determined whether the counter-application is urgent.

[87] The respondents brought this counter-application on an extremely urgent basis and submitted on behalf of the applicant that the counter-application was brought merely in an attempt to frustrate the applicant's present application.

[88] It is trite that the merits (and therefore also the issue of urgency) of a counter-application stand on its own legs. See in this regard *Luster Products Inc v Magic Style Sales CC*:[14]

> "The present proceedings consist of separate applications, having a certain overlap and being argued at a combined hearing, but separate and independent applications nonetheless. The proper approach in these circumstances is that while the respondent's version must be looked to insofar as the main application is concerned, the reverse is the case with the counter-application."[15]

[89] Urgency in regard to the counter-application must therefore be dealt with on its own merits. The principles governing urgent applications are trite and are set out in the well-known case of *Luna Meubel Vervaardigers (Edms) Bpk v Makin And Another (t/a Makin's Furniture Manufacturers)*.[16] They need not be restated.

[90] On behalf of the respondents it was submitted that the extension of the eNaTIS agreement in 2010 came about as a result of fraud and corruption which renders the contract illegal and therefore invalid "*ex tunc*". I have already referred to the fact that the respondent has, as a result of these

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[14] 1997 (3) SA 13 (A).
[15] *Ibid* at 21G – H.
[16] 1977 (4) SA 135 (W).

allegations of fraud and corruption, indicated to the applicant that they intend cancelling the extended contract and that they are of the view that it would be reckless to effect payment in these circumstances.

[91] In a letter dated 24 December 2015 to the applicant, the Director-General of the DOT informed the applicant of its intention to cancel the contract. In this letter the DOT relied on the fact that a provisional indictment has been issued in terms of which serious allegations of fraud, corruption and money laundering are made. In response to this letter the attorneys on behalf of the applicant stated that they are not in a position to respond to the letter of cancellation particularly in light of the fact that the letter does not set out the factual or legal basis on which the contract is cancelled by the DOT. More in particular, the letter records that the DOT and its officers have been aware of the interim indictment since at least 1 December 2015 and that, in any event, the DOT and its officers have been aware of the vast majority of the allegations underpinning the indictment since at least March 2015 and even before that since February 2013 when the criminal investigations were initiated.

[92] In response to this letter, Mr Simelane (the Director: Corporate Legal) accepted that the DOT relied on allegations of corruption and that this "has been a matter known to it at least since the exchange of affidavits eight months ago". Simelane further conceded that that it is "correct that some of the allegations surrounding the unlawful extension of the eNaTIS contract were known to the Department, [but that] it is only after receipt of the provisional indictment that the full basis of the charges of corruption, fraud and money laundering that your client faces were fully understood".

[93] In its response the applicant dismissed these allegations and contended that the picture painted by the respondents is entirely false and misleading. More in particular, it was submitted that the issuing of the provisional indictments, including the bringing of the applicant before the criminal courts, were engineered by the respondents to bolster its latest civil case against the applicant and that the whole process smacks of an abuse of state power. In

this regard the applicant referred the court to the fact that the Minister of Transport, the DOT and the fifth respondent (the Road Traffic Management Corporation – "the RTMC") as well as the legal representatives of the respondents have actively been applying pressure on the prosecuting authorities to issue the provisional indictment and to make arrests despite the fact that the prosecuting authorities have repeatedly stated that they were not in a position to issue or to act upon an indictment because material evidence is missing; investigations have not been completed; the available evidence does not support the charges; and the fact that the prosecuting authorities recognise the real risk of civil liability on the part of the State being sued if it acts prematurely in charging various suspects. The applicant also referred the court to a letter dated 2 December 2015, in which the National Commander of the Directorate for Priority Crime Investigation Anti-corruption Investigation recorded the following:

> ".. The main reason for the requested arrest is a request by the legal representatives of the Department of Transport and/or the Road Traffic Management Corporation to arrest. They requested the premature arrest in order to use it as exceptional circumstances as contemplated in section 18(3) of the Superior Courts Act 10 of 2013."

[94] The court was also referred to an email from Lieutenant Colonel Cloete addressed to Major General Zintle in which he stated that he had no intention to arrest any of the suspects without a warrant of arrest and that the earliest that this can be obtained would be in the morning: "While the Criminal Procedure Act provides for an arrest without a warrant, it is my submission that given the circumstances under which I am being compelled to execute an arrest, that I will be complete the application for the issue of warrants of arrest and that a prosecutor must apply to a Magistrate for the issue of such warrants." Following this email, Cloete also deposed to an affidavit stating that the investigation was still ongoing and that no suspects have yet been interviewed and afforded an opportunity to respond to the allegations against them. He concluded: "There is a reasonable possibility that if the suspects get an opportunity to answer to the allegations against

them, they may be able to give an explanation that may refute the allegations. Any such explanation may be the subject of further investigations".

[95] In respect of the allegations of fraud and corruption, the applicant submitted that the evidence relied upon by the respondents in the counter-application are unsubstantiated and still the subject of investigation. In this regard the court was referred to the fact that the prosecutor responsible for the matter had stated under oath that the provisional indictment is subject to change; that the matter is still in the process of being investigated and that the proceedings have been postponed to 20 July 2016. The provisional indictment sought to be relied upon by the respondents has therefore not been finalised and remains the subject of further investigation and change. Furthermore, as already pointed out, the indictment refers to a large number of relevant documents that have up to date not been furnished to the applicant.

[96] The applicant further categorically denies any impropriety and unlawful conduct on its part and points out that the mere existence of a provisional indictment cannot form the basis for the non-enforcement of the SCA order as well as the other High Court orders.

[97] The applicant further submitted that the counter-application is also in breach of what the respondents themselves undertook under oath in this court when the matter served before Hughes, J: While being aware of the factual basis for corruption and fraud as set out in the Schriven-affidavit, Mr Selepe on behalf of the respondents stated that "[s]hould the respondents' counter-application [in those proceedings] not prevail however, I, as the accounting officer of the [DOT] undertake to ensure that all officials of the Department comply with the agreement and the Court order by this Honourable Court".

[98] Having briefly set out the nature of the counter-application, has a basis been established on which the counter-application should be heard on an urgent basis?

[99] Apart from the unreliability of the evidence relied upon in the counter-application and apart from the fact the applicant has not yet had sight of the facts underlying the indictment and more importantly, apart from the fact that the investigation is still ongoing, it appears from the facts before this court that it is not so that the evidence of fraud and corruption "only came to light this month [December 2015] following the SIU's provisional indictment". In this regard it is clear from the facts that the respondents have been aware of most of the facts now relied upon many months ago and in some instances even years ago. Furthermore, the respondents have not complied with the requirements of the North Gauteng High Court Practice Directive in respect of urgent applications by failing to stipulate a reasonable time period prior to 12H00 on the Thursday prior to the hearing date for the applicant to file an answering affidavit in the counter-application. No provision was also made for the filing of replying papers before 12H00 on Thursday at any time. In fact, the applicant has been afforded a mere three court days to deal with a very lengthy counter-application which makes serious allegation of fraud and corruption involving several participants who are either not parties to the application or who were never involved or who are no longer employed by the applicant. Reference is also made in the counter-application to events dating from many years ago.

[100] In this regard the court was referred to the fact that concerns about the lawfulness of the extension of the agreement has been raised by Mr Lesoalo (the Department's Chief Financial Officer – "Letsoalo") at the time when Mahlalela granted the extension. At the time Mahlalela, however, overruled Letsoalo. After Mahlaela vacated his position in 2013, Letsoale opened a criminal case against, *inter alia*, Mahlalela. He also appointed a forensic firm (Gobodo Forensic and Investigative Accounting (Pty) Ltd - "Gobodo") to investigate the circumstances surrounding the extension. The Gobodo report was finalised on 21 August 2014. Letsoalo also reported this matter to the SIU. The SIU was then tasked by the President to investigate this alleged illegal extension. Ms Scriven ("Scriven") was the Chief Forensic Investigator (of the SIU). She had deposed to an affidavit as far back as March 2015 ("the Scriven affidavit). This affidavit is extensive and also served before

Huges, J. The Scriven affidavit also form part of the appeal record that served before the SCA.

[101] In her affidavit Scriven concluded that "the approval and extension of the contract contravenes the mentioned legislative requirements and therefore renders all the expenditure incurred from 1 May 2010 to date as irregular expenditure" and that these allegations suffice to support the case of corruption.

[102] When the matter served before Hughes, J the DOT relied upon this very affidavit in opposing the application that served before her. This affidavit was also relied upon in challenging the very lawfulness of the purported extension of the contract. The DOT also sought condonation for its failure in discharging its duty to act against corruption. Hughes, J considered this application and granted condonation in the exceptional circumstances and accordingly dismissed the applicant's application and upheld the DOT's counter-application.

[103] In his report dated 30 June 2015, the Auditor-General found that "the approval and extension of the contract contravenes the mentioned legislative requirements and therefore renders all the expenditure incurred from 1 May 2010 to date as irregular expenditure".

[104] I am not persuaded that the respondents have made out a persuasive case for the urgency under which the counter-application was brought before this court. I am persuaded that the respondents have been aware of the majority of the facts underlying their counter-application at least since the Gobodo-report and the affidavit filed by Scriven.

[105] I am also in agreement with the submission that if the DOT had any belief in the merits of the counter-application seeking to discharge the numerous High Court orders, it would have launched this application many months ago.

They cannot now on an extreme urgent basis approach this court in a counter- application for such a relief.

[106] The counter-application in which the respondents seek to set aside and/or discharge various extant orders of this court is therefore not urgent and is accordingly struck form the roll.

[107] Apart from the fact that the counter-application is not urgent, it is in any event clear from a reading of the counter-application that oral evidence and cross-examination in action proceedings is indicated in this matter regarding the allegations of fraud and corruption which are strongly disputed. Furthermore, the respondents have not attached to its papers any of the documentation which are alleged to form the basis of the provisional indictment. If these documents have been provided, the applicant would in any event be granted a reasonable period to prepare a response thereto. The applicant simply is not in a position to answer to these allegations within the unreasonable time afforded to the applicant and in the context of an application brought on an extreme urgent basis. The SIU alone has spent over a year (since August 2014) investigating the allegations of fraud and corruption. It is therefore unreasonable to expect of the applicant to respond to these serious allegations of fraud and corruption in an abbreviated time and without being placed in possession of the specific documents on which the respondents rely. In this regard the court was also referred to the fact that the applicant had already in April 2015 when the matter served before Huges, J, requested that the documents referred to in the affidavit of Schriven be disclosed to the applicants. These documents have to date not been disclosed to the applicant.

Order:

1. It is ordered that -

1.1 The first respondent pay the amount of R 176,683,116.70 to the applicant, within two days of this order, in satisfaction of payment certificates 96 - 101;

1.2 The management fee earned by the applicant for services rendered must be paid into an escrow account pending the final determination of the respondents' current appeal to the Constitutional Court.

1.3 The tenth respondent, or his lawful delegate, approve, alternatively process, all purchase requisition orders set out in annexure "FM24" to the supporting affidavit which supports this application, within three days from the date of this order;

1.4 The fifth and eleventh respondents afford the applicant the full benefit of the -

1.4.1 Lease agreement entered into by the fifth respondent in respect of the premises the applicant currently occupies and operates the eNaTIS system from, and

1.4.2 LAN-Desk licence until the earlier of such licence expiring or the applicant fully transferring the electronic national traffic information system;

1.5 The first, second, sixth and tenth respondents, within one day of the date of this Order, afford the applicant full access, with no restriction, to the eNaTIS Data / Disaster Recovery Centre, situated at the State Information Technology Agency building, 459 Tsitsa Street, Erasmuskloof, Pretoria.

2. Declaring -

2.1 The first and second respondents to be in breach and willful contempt of:

2.1.1 Paragraphs 1.1 and 1.2 of the order by Mabuse, J issued under case number 44095/2012 and handed down on 17 October 2012.

2.1.2 Paragraph 3 of the order by Strijdom, AJ issued under case number 44095/2012 and handed down on 26 March 2013.

2.1.3 Paragraphs 5 and 6 of the order by Fabricius, J issued under case number 44095/2012 and handed down on 27 August 2013.

2.1.4 Paragraph 1 of the order by Rabie, J issued under case number 44095/2012 and handed down on 21 January 2014.

2.1.5 Paragraph 2(b) of the order of the Supreme Court of Appeal issued under case number 792/2015 and handed down by Brand JA (Cachalia, Majiedt, Saldulker, Mbha JJA concurring) on 2 December 2015.

2.2 The fifth respondent to be in breach and willful contempt of:

2.2.1 Paragraphs 5 and 6 of the order by Fabricius, J.

2.3 The tenth respondent to be in breach and willful contempt of:

2.3.1 Paragraph 1.1 of the order by Mabuse, J;

2.3.2 Paragraph 3 of the order by Strijdom, AJ;

2.3.3 Paragraphs 5 and 6 of the order by Fabricius, J;

2.3.4 Paragraph 4.1 of the order by Nkosi, J issued under case number 44095/2012 and handed down on 5 November 2013.

2.3.5 Paragraph 2(b)(ii) of the SCA Order;

3. It is ordered that -

3.1 The second respondent be committed to imprisonment for a period of 30 days.

3.2 The order in paragraph 3.1 above will not come into operation unless there is a breach of the order in paragraph 1.1 above;

3.3 A warrant of committal is to be issued by this Court on the same papers, duly supplemented as necessary, if the first and/or second respondent breaches the order in paragraph 1.1 above.

4. It is ordered that -

4.1 The tenth respondent be committed to imprisonment for a period of 30 days.

4.2 The order in paragraph 4.1 above will not come into operation unless there is a breach of the order in paragraph 1.3 above;

4.3 A warrant of committal is to be issued by this Court on the same papers, duly supplemented as necessary, if the tenth respondent breaches the order in paragraph 1.3 above.

4.4 If the tenth respondent breaches the order in paragraph 1.3 above, the Sheriff of this Court is authorised and directed to, by his/her signature, approve such of the outstanding PRQs which the tenth respondent has

failed to approve, alternatively process, within the time set forth in paragraph 1.3 above;

5. It is ordered that -

5.1 The eleventh respondent be committed to imprisonment for a period of 30 days.

5.2 The order in paragraph 5.1 above will not come into operation unless there is a breach of the order in paragraph 1.4 above;

5.3 A warrant of committal is to be issued by this Court on the same papers, duly supplemented as necessary, if the fifth and/or eleventh respondent breaches the order in paragraph 1.4 above;

6. It is ordered that:

6.1 The second, sixth and tenth respondents be committed to imprisonment for a period of 30 days.

6.2 The order in paragraph 6.1 above will not come into operation unless there is a breach of the order in paragraph 1.5 above;

6.3 A warrant of committal is to be issued by this Court, on the same papers, duly supplemented as necessary, if the first, second, sixth and/or tenth respondent breaches the order in paragraph 1.5 above.

7. It is ordered in terms of section 18(3) of the Superior Courts Act, 2013 that -

7.1 The SCA Order operate and be executed to the extent necessary until the final determination of the present appeal in respect of the SCA judgment in the Constitutional Court.

8. The counter-application is struck from the role for want of urgency.

9. It is ordered that the first, second, fifth, sixth, tenth and eleventh respondents, jointly and severally, the one paying the other to be absolved, pay the costs of this application, including the costs incurred in opposing the counter-application, on the scale as between attorney and own client, including the costs of two counsel.

AC BASSON

JUDGE OF THE HIGH COURT

Appearances:

For the applicant	:	Adv. AE Franklin (SC) Adv. JPV McNally (SC) Adv. AWT Rowan
Instructed by	:	Webber Wentzel Attorneys
For the Respondents	:	Adv. DN Unterhalter (SC) Adv. JA Motepe (SC) Adv. M Du Plessis Adv. FB Pelser

For the first to third, sixth and tenth Respondents

Instructed by	:	State Attorney, Pretoria

For the fifth and eleventh Respondents

Instructed by	:	Seleke Attorneys