

**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**

**CASE NO: 44095/2012**

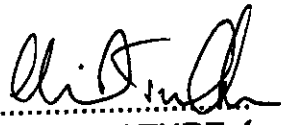
In the matter between:

17/6/2016

**TASIMA (PTY) LIMITED**

Applicant

and

(1)	<u>REPORTABLE:</u>	<u>YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES:</u>	<u>YES / NO</u>
	16/06/16 DATE	 SIGNATURE

**DEPARTMENT OF TRANSPORT**

First Respondent

**DIRECTOR GENERAL: DEPARTMENT OF**

**TRANSPORT**

Second Respondent

**MINISTER OF TRANSPORT**

Third Respondent

**WERNER EDUARD KOEKEMOER**

Fourth Respondent

**ROAD TRAFFIC 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

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**JUDGMENT**

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Tuchten J:

- 1 This is the latest in a series of court cases between the parties, or most of them. The applicant (Tasima) describes itself as the current custodian at the behest of the first respondent (DoT) of the electronic national information system (eNaTIS) which enables the DoT to administer, nation wide, many aspects relating to the administration of motor vehicles and motor vehicle drivers.
- 2 On 11 April 2016, Basson J made an order (Basson 1) finding various of the respondents in contempt of other orders of this court, all relating to the administration of eNaTIS and ordering the payment of R176 million to Tasima.
- 3 Certain of the respondents in that application applied for leave to appeal and contended that they were not obliged to comply with Basson 1 while that order was on appeal. Tasima then applied by counter-application for an order declaring that Basson 1 was not suspended pending the appeal and was therefore immediately enforceable.

- 4 The applications for leave to appeal and enforceability were set down for hearing on 6 May 2016. That morning an agreement was reached to operate "pending the final determination of an appeal currently pending before the Constitutional Court."<sup>1</sup>
- 5 The background to the order for payment is that the bulk of the payments were required by Tasima to make payments itself to third parties pursuant to the work it had apparently done for the first respondent (DoT). The balance of the amounts, after provision for payments to third parties, were, broadly speaking, Tasima's fees.
- 6 The agreement reached on 6 May 2016 was made an order of court by Basson J (Basson 2). The relevant portion of Basson 2 reads:

Pending the determination by the Constitutional Court of the proceedings in case CT5/2016, the parties agree as follows, without prejudice to their rights in those proceedings:

- 1 [The DoT] will pay the amount of R104 225 561,04 in respect of payment certificates 102 -106 as follows:
- 1,1 that portion thereof that constitutes the 10-15% management fee reflected in each of the purchase requisitions which make up the total amount, will be paid into the escrow account established in terms of paragraph 1.2 of [Basson 1].

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The case was argued in the Constitutional Court on 24 May 2016. Judgment is pending.

1.2 the balance thereof shall be paid to [Tasima] by  
10:00, Wednesday 25 May 2016.

- 7 Payment was however not made as agreed and ordered. By email dated 25 May 2016, Tasima's attorney wrote to the State Attorney, Pretoria who was representing the respondents, pointing this out. The email demanded proof of payment by 16h00 on the following day, failing which, Tasima said, it would take steps to protect its rights.
- 8 On 25 May 2016, the day upon which payment was to be made, the State attorney wrote to ask for Tasima's proposals for the "terms of reference" for the escrow account. The letter said that the finalisation and subsequent opening of the escrow account would enable the DoT to transfer the relevant monies.
- 9 But Tasima, took the view, correctly, that Basson 2 was not subject to the creation of the escrow account contemplated in paragraph 1.1 quoted above. The DoT's obligation was to pay over any portion of the amount of R104 225 561,04 not paid into the escrow account to Tasima as provided for in paragraph 1.2. And I think I should emphasise too that the general purpose of the settlement agreement, and thus Basson 2, was to preserve Tasima's fee claims until judgment was delivered in the case before the Constitutional Court and to provide for the payment over of the balance of the amounts

claimed for distribution to Tasima's third party creditors. It would, as I see it, be inevitable, if these third party creditors were not paid, that the entire eNaTIS system would be threatened with instability.

- 10 By notice of motion dated 31 May 2016 Tasima applied urgently for orders declaring the DoT and the second respondent to be in "breach and wilful contempt" of Basson 2 and committing the second respondent to prison in relation to the failure to pay the amount of R101 826 723,72 to Tasima. A punitive costs order was also sought.
- 11 In its founding affidavit, Tasima demonstrated that the calculation of the amount to be paid over, after the deductions pursuant to paragraph 1.1 from the amount of R104 225 561,04, (giving the figure of R101 826 723,72) was a simple arithmetical calculation. This calculation must be made from six sets of documents called purchase requisitions which were at all relevant times in the hands of the DoT. Tasima did not make any point against the DoT that the escrow account had not been opened, although on a strict reading of Basson 2, if no amounts were paid into the escrow account by 25 May 2016, the DoT was obliged to pay the full amount of R104 225 561,04 to Tasima.

- 12 Tasima also explained that the reference in paragraph 1.1 of Basson 2 to the "10-15% management fee" came about because different management fees applied to the various categories of payment certificates. In the event, however, payment certificates 102-106 all attracted a management fee of 15%, so no differential calculations needed to be made. All that was required was that the relevant officials in the DoT (a) apply themselves to items 3.1-3.7 in each of purchase requisitions 102-106; (b) add up the amounts there reflected; (c) multiply those amounts by a factor of 15 divided by 115; and (d) deduct the sum of the these amounts from R104 225 561,04. After this calculation, the figure to be paid to Tasima under paragraph 1.2 of Basson 2 is R101 826 723,72.
- 13 The second respondent was appointed acting Director-General of the DoT on 4 May 2016. He instructed the DoT's attorneys to settle on the terms reflected in Basson 2. In his answering affidavit, the second respondent submitted that the obligation to pay in paragraph 1.2 of Basson 2 was subject to the opening of the escrow account referred to in paragraph 1.1. He says that he only received Tasima's proposal for the terms of the escrow account in 6 June 2016, upon which he instructed immediate payment of the amount of R101 826 723,72 to be made under reservation of rights. He did not say what rights he was purporting to reserve.

- 14 The second respondent waited until the last minute to raise the escrow account issue. He also asked Tasima to calculate what Tasima thought ought to be retained in escrow. But Basson 2 did not make the payment under paragraph 1.2 contingent upon agreement as to the amount to be paid over, It was the clear obligation of the DoT, and of the second respondent, the administrative head of the DoT, to calculate the amount due and pay it over. It is not in my judgment conceivable that the second respondent could have thought otherwise and although counsel for the respondents suggested that the second respondent believed that he need not pay over anything under paragraph 1.2 until Tasima had satisfied him that such amount was owing, no such belief is alleged by the second respondent in his affidavit.
- 15 Civil contempt consists in the wilful and *mala fide* failure or refusal to comply with a court order.<sup>2</sup> Once there is, as in this case, proof of the order itself, notice of the order to the respondents and non-compliance, the respondent bears an evidential burden in relation to wilfulness and *mala fides*.

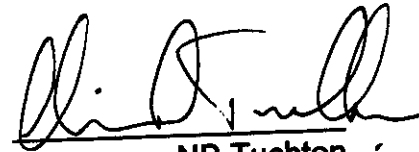
16 As the amount in question has been paid, Tasima no longer asks that the second respondent be imprisoned for contempt but persists in the other relief sought. The onus on Tasima, subject to the evidential burden I have mentioned, is proof on a balance of probabilities, not proof beyond a reasonable doubt. I have nevertheless considered whether it could be said that there is a reasonable doubt that in failing to make payment in terms of Basson 2, the second respondent acted wilfully and *mala fide*. I find nothing in the evidence of the second respondent, viewed against the facts as a whole, upon which I might conclude that the second respondent acted otherwise than wilfully and *mala fide*. It follows that Tasima has proved that the first and second respondents were deliberate, wilful and *mala fide* in their failure to comply with Basson 2 and were thus in contempt of court.

17 This finding must carry with it a punitive costs order. I regret that this will give rise merely to an additional disbursement from the public purse. I regret that the relief as sought does not enable me to consider making costs orders operating personally against those who offended.

18 I make the following order:



- 1 The first and second respondents are declared to be in breach and wilful contempt of paragraph 1.2 of the order of Basson J dated 6 May 2016.
- 2 The first and second respondents are ordered, jointly and severally, the one paying the other to be absolved, to pay the costs of this application on the scale as between attorney and own client, including the costs consequent upon the employment of two counsel.



NB Tuchten  
Judge of the High Court  
16 June 2016