IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: 44095/2012

Date: 22 September 2016

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

22/9/2016 .....
DATE SIGNATURE

In the matter between:

TASIMA (PTY) LTD

APPLICANT

And

DEPARTMENT OF TRANSPORT

FIRST RESPONDENT

DIRECTOR GENERAL: DEPARTMENT OF TRANSPORT

SECOND RESPONDENT

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

PRETORIUS J,

(1) This application was launched as an urgent application to have been heard on 30 August 2016, contrary to the Practice Directive, as it was too voluminous to be placed on the ordinary urgent court roll. A special court should have been arranged for the hearing of the application. It was heard on 7 September 2016 due to the voluminous papers and length of argument, after a direction was sought from the Deputy Judge President. Furthermore, the respondents filed the answering affidavit out of time, although the applicants dealt with the launching of the application on a semi-urgent basis, providing the respondents from 5 August 2016, when the application was served, until 18 August 2016 to file and serve the answering affidavit. The

respondents requested an extension of time in which to file the answering affidavit due to counsel not being available to draw up the answering affidavit. This was not granted. The respondents filed the answering affidavit out of time, on 24 August 2016, unsigned and without annexures. The signed answering papers, with annexures, were filed on 25 August 2016. To add insult to injury the respondents only filed their heads of argument on 5 September at 12h18, after being directed by the court to file heads of argument on 5 September 2016 at 10h00. This time and date was already an indulgence as the Deputy Judge President had directed that heads of argument had to be filed and exchanged on Friday, 2 September 2016.

(2) I will, however, consider these papers, but cannot find that the unavailability of counsel grants automatic extensions of time within to comply with directives from the applicant and the court. There is no explanation at all from the respondents as to what had been done from 5 August 2016 to 18 August 2016 to consult with clients and to prepare an affidavit which could subsequently have been settled by their counsel.

(3) This application is an application to find the Department of Transport, Mr Kara-Vala and the Road Traffic Management Corporation and the other respondents in contempt of court orders which culminated in the order of Basson J on 6 May 2016 ("Basson 2"). Tasima seeks the

following relief:

> *"...an order compelling the respondents to comply with (1) their payment obligations; (2) their obligations to process the outstanding PRQs;*
>
> *an order compelling the DoT and the DG to revert to Tasima regarding the escrow arrangement;*
>
> *the removal of Mr Kara-Vala as the DG's delegee."*

Furthermore Tasima seeks declarations that the relevant respondents were in contempt of court orders and that these respondents should be committed to imprisonment, with an alternative that such committal be suspended on condition that the respondents do not commit any further breaches of the relevant orders.

BACKGROUND:

(4) There have been numerous court cases between the parties. Litigation between these parties has a protracted history. It is common cause that the applicant, Tasima, is the developer, maintainer and operator of the eNaTIS system, a national key point of immense practical and strategic importance, which services the public. On 11 April 2016 Basson J handed down an order ("the Basson 1 Order") which, *inter alia*, found various of the respondents in contempt of various orders granted by this court. Basson J ordered the payment of R176 million to the applicant ("Tasima"), in respect of payment certificates 96 to 101. Tasima is the contractor in this instance.

(5) Leave to appeal the Basson 1 order was to be heard on 6 May 2016 together with a counter application to declare the order to be immediately enforceable. On 6 May 2016, before the hearing an interim agreement was reached between the parties, which was to operate pending the final determination of an appeal which was heard in the Constitutional Court on 24 May 2016 and which decision is still pending.

(6) The February proceedings consisted of an application brought by Tasima seeking to hold the respondents in contempt of various orders of this court and an order of the Supreme Court of Appeal. It was the ninth contempt of court application that Tasima had brought against the respondents. It also consisted of a counter-application brought by the respondents in which they sought, *inter alia*, to discharge the orders of this court.

(7) The agreement which was made an order of court by Basson J ("the Basson 2 order") on 6 May 2016, provided, *inter alia* that:

> *"1. The first respondent will pay the amount of R104 225 581.04 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 102 of the order of the Honourable Madam Justice Basson, dated 11 April 2016 under this case number;

1.2 the balance thereof shall be paid to the applicant by 10h00, Wednesday 25 May 2016;"

(8) On 31 May 2016, when the DoT and the Director General had not made any payment as provided for in the Basson 2 order, Tasima launched an urgent application to this court requesting declarations of contempt of court and committal to prison. On 17 June 2016 Tuchten J handed down judgment, after having heard the application on 15 June 2016, finding the DoT and Director General in contempt of court and acting wilfully and *mala fide* by not adhering to the Basson 2 order.

(9) The applicant once more, in this application, contended that the DoT, the Director General and the seventh respondent, Mr Kara-Vala, who is the Director General's delegatee, are in contempt of court, breaching both the Basson 1 and Basson 2 orders, as well as the other orders which are still extant. The reason for the application is that the DoT, the Director General and Mr Kara-Vala have unlawfully withheld payment of an amount of R5 236 029.12, of the total amount owing under payment certificates 96 – 101, which were the subject matter of

the Basson 1 order and are therefore in breach of paragraph 1.1 of the Basson 1 order.

(10) The second breach is that they have refused to approve dozens of purchase requisition orders ("PRO's") and are in breach of paragraphs 4 and 5 of the Basson 2 order. The third breach of the Basson 2 order is that they have unlawfully refused to make payment to Tasima of the full amounts owing under payment certificates 107, 108 and 109 within 2 days of presentation thereof. The outstanding amount is R27 556 626.41. The DoT and the Director General have failed to revert to Tasima to record their consent to the terms of the escrow arrangement proposed by Tasima, or to propose terms they deem acceptable to enable them to comply with the Basson 2 order.

(11) The DoT and the Director General explain that they are not wilfully in contempt of court and are acting in a *bona fide* manner. The principles applicable in cases of civil contempt of a court order have been well established in **Fakie NO v CCII Systems (Pty) Ltd**[1]. In **Compensation Solutions (Pty) Ltd v The Compensation Commissioner**[2] the court once more confirmed that an applicant has to prove wilfulness and *mala fides* beyond reasonable doubt and that the respondent has the evidentiary burden to rebut the inference that non-compliance with the court order was not *mala fide* and wilful. In

[1] 2006(4) SA 326 (SCA)
[2] (072/2015) [2016] ZASCA 59; (2016) 37 ILJ 1625 (SCA) (13 April 2016)

the present application it is common cause that the respondents were aware of the Basson 1 and 2 orders, as they had entered into an agreement to make the Basson 2 order an order of court. Service of the order has been admitted, due to the fact that the respondents had agreed to the order. The Supreme Court of Appeal in **Tasima (Pty) Ltd v Department of Transport**[3] held in paragraph 18:

> *"Should the respondent therefore fail to advance evidence that establishes a reasonable doubt as to whether his or her non-compliance was wilful and mala fide, the applicant would have proved contempt beyond a reasonable doubt (Fakie paras 22-24)."*

The court was referred to the **Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others**[4], but I find that the facts in the present matter is distinguishable, as here there is an agreement that the applicant would perform certain duties relating to the operation of the eNaTIS system. In the **Allpay case**[5] the agency stepped into the shoes of the department when dealing with payouts and took over the functions of the State.

(12) It is further common cause that an escrow arrangement has not been established as referred to in the Basson 1 order. I do not intend

[3] [2016] 1 All SA 465 (SCA)
[4] (CCT 48/13) [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) (29 November 2013)
[5] *Supra*

dealing with all the contempt orders previously granted against the respondents, but the orders were granted as follows:

a) The first order by Teffo J on 7 August 2012 provided that the DoT had to 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 and to comply with certain specific payment obligations, pending the finalisation of the main application.

b) On 17 October 2012 before Mabuse J a similar order was granted.

c) On 26 March 2013, Strijdom AJ interdicted the respondents from rerouting or diverting any of the services, which the applicant undertook to perform under the agreement, away from the applicants.

d) On 15 July 2013 Ebersohn AJ found certain of the respondents in contempt of the Mabuse court order and ordered the respondent to make certain payments to the applicant.

e) On 27 August 2013 Fabricius J granted a similar order as that granted by Strijdom AJ on 26 March 2013 and also ordered the respondents to grant the authorisations and approvals to the applicants.

f) On 5 November 2013 Nkosi AJ granted an order compelling the respondents to comply with the Mabuse J, Fabricius J, Strijdom AJ and Ebersohn AJ's orders.

g) On 21 January 2014 Rabie J held certain respondents in contempt.

h) Basson J on 11 April 2016 held at paragraph 26 of her judgment:

> *"...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."* (Court emphasis)

(13) This matter has been enrolled as an urgent application and all the parties are aware of the history of the contempt orders. This is the ninth application by Tasima in which the court is requested to declare the respondents in breach of the relevant orders, in this instance the Basson 1 and 2 orders. As set out above all these other orders are extant and operate pending the decision of the Constitutional Court. The court has been requested to consider the current application against this background.

(14) Mr Unterhalter, on behalf of the respondents, conceded during argument that the amount of R5 236 029.12 was due to the applicants. His argument was that it had not been paid due to a mistake on the part of the respondents. This concession was only made belatedly

during argument, as in the heads of argument the respondents still contended that they were not liable for this amount. The heads of argument were filed on 5 September 2016, two days before the hearing of the application and the relevant payment could have been made had the respondents been serious to comply with the court orders.

(15) In an instance where a party is brought to court on a contempt charge, one would expect an immediate investigation into the grounds for the application. This was obviously not done by the respondents. It seems as if they did not regard it as a serious matter, as they only conceded that they were in default, by not paying the amount, during counsel's argument. I cannot but find that their actions were thus wilful and *mala fide* in this regard. It is clear that the respondents had not applied their minds when opposing this relief and was in contempt of court by not paying the amount as was ordered by Basson J on 6 May 2016.

DEFENCES:

(16) The respondents' defences in respect to the other issues are that Mr Kala-Vala is processing the PRQ's and his queries in respect to the PRQ's are legitimate. Various PRQ's relating to training cannot be approved as they are no longer necessary or, the DoT's budgetary constraints prevent such requests or repayments must be deducted

and the Basson 2 order has extinguished the payments ordered under the Basson 1 order. The defence in respect to the escrow account is that the amount will be paid by the DoT in any event and that Tasima does not suffer any harm by the escrow account not being established.

BREACH OF COURT ORDERS:

(17) The breach of the court order is the refusal by the respondents to approve the outstanding PRQ's as it was ordered in paragraphs 4 and 5 of the Basson 2 order. The applicant takes issue with the respondents creating so-called "new work" and "standard" PRQ's as there had since the inception of the contract been no such distinctions and it is an artificial manner to deal with the relevant PRQ's.

(18) The complaints against Mr Kara-Vala are that he had not complied with the court orders as:

a) Over 40 PRQ's have not timeously been approved or have expressly been rejected;

b) Over 120 PRQ's were approved outside the five day window for approval;

c) The reasons for rejecting the PRQ's are not sustainable.

(19) Tasima has been responsible for many years for the general security of the premises through a sub-contractor, Enforce Security. Tasima

provided security services to man the control room through its own employees. This changed in May 2015, but the respondents had accepted the change as they paid for the security guards to man the control room up to June 2016.

(20) The reasons for the change was that the DoT and the RTMC had solicited Tasima's employees, which resulted in the control room being understaffed. Tasima replaced these employees with Enforce Security employees to ensure the security of the control room at all times. This arrangement has been in place since May 2015 and it was only during June 2016 that the DoT complained. PRQ's in respect of the control room services have been approved since May 2015.

(21) According to Tasima the DoT has instructed Tasima through its security officer, the DoT's Deputy Director: Chief Security Officer, Mr S Mahlo to employ more control officers. This took place during August 2016. There was no extension of the Enforce Security contract. Enforce was doing its duty as it had been doing and Tasima had been paid for it up to June 2016 and have even been requested to employ more officers for the control room.

(22) The PRQs that have not been approved do not relate only to the control room, but relate to general services as well. The respondents do not deal with the non-payment of the PRQs in this regard. The two

attached DoT-approved PRQs, approving the control room services of Enforce Security in April 2016 belies the respondents' defence.

(23) Tasima has not extended any security agreement with Enforce Security. In paragraph 71 of the answering affidavit the respondents concede that *"Tasima had an option to hire security personnel to staff the control room"*. There is no indication from the respondents as to how security will be provided for in the control room should Enforce Security no longer supply the personnel.

(24) The only inference I can draw is that the respondents acted wilfully and *mala fide* in refusing payment of the relevant PRQs. In the circumstances I find that these PRQs fall under the Basson 1 and Basson 2 orders and have to be paid. Therefor the respondents are in contempt of these orders, as they acted *mala fide* and wilful.

(25) The further refusal to pay PRQs relate to the Data PRQs which had been belatedly approved. Mobile data services are required to be in place 24 hours a day. The reason for the 3G data connectivity required from MTN and Vodacom is that it acts as a back-up mechanism should the Telkom infrastructure fail. The respondents requested further information from the applicant in respect of high data usage by certain operators, as well as which actions the applicant would implement to deal with the higher data usage. Tasima has

always been monitoring data usage. Tasima's response and the relevant explanations were delivered to the respondents by 14 July 2016 and should have been approved on 22 July 2016. A letter of demand[6] was sent to the respondents on 29 July 2016, to which no reply was forthcoming. There is no explanation as to the subsequent delay after 14 July 2016. This is another breach of the Basson 2 order and due to the lack of explanation and disregard of the letter of 29 July 2016, I must find that the breach of the order in this instance was wilful and *mala fide*.

(26) Payment for the training PRQs are still outstanding. Tasima explains that at all relevant times training PRQs were generated on the basis of specific requests by provincial governments' transport departments. They have consistently been approved. Unfortunately for the respondents they have provided three reasons for not paying the outstanding PRQs in this regard. The first reason provided on 2 August 2016, in response to Tasima's query was provided by Mr Kara-Vala that there had been a failure to budget for the expense. The second reason he provided was that Tasima had not complied with procurement prescripts. In the answering affidavit he set out that Tasima had already previously trained facilitators in all the provinces who could train other employees and Tasima's services were not more required anymore in this regard. Therefore they are not complying with the Strijdom AJ and Fabricius J's orders by diverting work away

[6] RA paragraph 106-108 p1142

from Tasima. Once more the only inference the court can draw from the DoT's stance and providing three different reasons for the DoT's failure to deal with the relevant PRQs is that the respondents are *mala fide* and wilful. On the eve of launching these proceedings on 5 August 2016, the relevant data PRQs were approved by Mr Kara-Vala without any further queries.

(27) The respondents have not approved the site PRQs. These are requests for new sites to be established. It has always been governed by the needs of the provinces and has always been approved. Even Mr Kara-Vala, since his appointment as PM delegee has approved 318 site PRQs. The first argument by the respondents is that the request from the Northern Cape was not a request to establish a new site, but was only done as an enquiry. I have read the e-mail and cannot find it was only an enquiry, as it sets out the date in which the Northern Cape want to establish 10 sites. The respondents only deal with new sites in Gauteng and the Western Cape, but fail to deal with the North West PRQ's which should have been approved.

(28) Furthermore Tasima disputes that any site PRQs had been withdrawn in Gauteng. The establishment of sites and the training of government officials is an integral part of the eNaTIS system under the agreement. Tasima avers that each of the instances of site and training PRQs has been requested by the provinces and that it is not open to the

respondents to impose a blanket ban on such services.

(29) I find that the respondents are acting wilfully and *mala fides* in these instances and are breaching not only the Strijdom AJ and Fabricius J's orders, but also the Basson 1 and Basson 2 orders.

(30) The Basson 2 order provided that payment would take place of payment certificates 107 and further within 21 days of presentation thereof to the DoT, with the portion thereof that constitutes the 10-15% management fee, reflected in each of the PRQs, being paid into an escrow account, and the balance to Tasima.

(31) On 11 May 2016, five days after the Basson 2 order was granted, payment certificate 107 was delivered to the DoT. It was thus due for payment on 1 June 2016. R2 679 021.30 had to be paid into the escrow account by the DoT as management fees, with the balance of R33 457 082.17 having to be paid to Tasima.

(32) Payment certificate 108 was delivered to the DoT on 6 June 2016 and payment was due on 27 June 2016. The amount payable to Tasima was R21 327 769.02 and an amount of R909 588.84 in respect of management fees into the escrow account. The DoT paid both these certificates, not only late, but they were paid short, as on 28 June 2016

they paid R32 393 978.45. The short payment on these certificates was R22 316 066.58 and no amount could be paid into the escrow account as the escrow account had not been established as ordered by the Basson 2 order.

(33) Payment certificate 109 was delivered on 6 July 2016 and payment was due on 27 July 2016. The amount payable was R20 783 840.52 and the amount that had to be paid into the escrow account was R790 558.18. The amount of R15 543 280.69 was paid on 1 August 2016. The short payment was R5 240 559.83 and once more no payment into the escrow account.

(34) The respondent dealt with these short payments in one paragraph in the answering affidavit. According to the respondent Tasima was not entitled to advance payments, furthermore that unsigned PRQ's are generally rejected or have outstanding explanations. The amounts are disputed by the respondents without setting out any particulars as to why each payment certificate was not approved as it was submitted. The correspondence between the parties in this connection confirms that the respondents are in breach of the Basson court orders.

(35) The DoT made the following deduction on payment certificates 107 and 108:

"Deductions of R14,599,320.00, being the management fee for

payment certificates 96 – 106 (later claimed to be 108);

R2,184,873.00, in respect of unsigned PRQ's, which, according to the DoT, could not be approved because they remain unsigned; and

R6,000,000.00, in respect of advance payments"

(36) The DoT has been making advance payments since the start of the agreement to enable Tasima to pay SAPO and Telkom and has reconciled these amounts throughout against amounts actually paid to SAPO and Telkom. Although Tasima had requested a breakdown of the respondents' calculations and the reason for deducting some amounts on 30 June 2016, no breakdown has been supplied. There is thus no defence to justify the short payment on payment certificates 107, 108 and 109 and the amount of R32 792 655.53 is owing and payable to Tasima.

(37) An escrow arrangement between the parties is fundamental to the Basson 1 and Basson 2 orders. On 3 June 2016 Tasima proposed the terms of the escrow regime, which proposal was acknowledged by the respondents' attorneys on the same day. On 9 June 2016 the respondents set out in court papers before Tuchten J *"the escrow account was and still is essential to protect the interest of the [DoT] and [Tasima]"* and furthermore *"the proposed terms of [the escrow account] were presented to me [the acting Director General of the*

DoT] on Monday 6 June 2016". On 27 June 2016 the DoT undertook to consider the proposed terms of the escrow arrangement and to provide comments. Two and a half months ago the respondents regarded the escrow account as essential, but now has changed tack and argues that although no escrow account has been established, DoT will in any event pay the outstanding fees.

(38) The respondents' answer to the failure to establish the escrow regime reflects the cavalier attitude they have in respect to court orders. The respondents declare:

> *"In terms of the extant Court orders, Tasima can only be paid the amount reflected in the payment certificates minus 10-15% management fee reflected in each of the PRO's.* ***The management fee ought to be paid into an escrow account pending the final determination by the Constitutional Court of the proceedings in case no. CCT5/2016****. However, this escrow account has not been created yet.* ***The Department consequently retains this management fee and will pay it over to an escrow account upon its creation****. If the parties do not create an escrow account, the Department undertake to pay the management fees it retains to Tasima in the event of the Constitutional Court dismissing the appeal."* (Court emphasis)

(39) In the heads of argument it was once more said that the Acting Director-General would respond to Tasima's proposals with regard to the escrow account before the hearing of this application. Once more nothing was forthcoming from the respondents, even when it was indicated during oral argument that the respondents would deal with the escrow agreement immediately and the court would not be burdened to consider the issue of the escrow account. I find that the applicant's counsel is correct when stating that *"the disregard of the clear terms of the Court Orders, the explanations are obviously fallacious and contrary to the DG's own arguments before this Court"*.

(40) This is confirmed by the Director-General's explanation in the Tuchten J application where the Director-General contended that the Director-General's obligation to pay in terms of paragraph 1.2 of the Basson 2 order was subject to the setting up of the escrow account. This contention is irreconcilable with the present stance of the Director-General that the establishment of the escrow account is of no real consequence.

(41) In these circumstances I have no option but to find the Director-General's explanation contemptuous of both the Basson orders as they demonstrate *mala fides* and wilfulness to the extreme.

(42) I have been requested to make an order removing Mr Kara-Vala as the delegee. The grounds for this are that Mr Kara-Vala has a conflict of interest as he is designated by the RTMC and is the delegee of the first and second respondents. He entered into correspondence with Tasima on 17 June 2016 and 5 July 2016 and signed these letters as Divisional Head: Road Traffic Information Systems (an RTMC designation).

(43) According to the applicant, Mr Kara-Vala is seeking to wrest the operation and control of the eNaTIS system from Tasima not only in his capacity as the PM delegee, but also as the representative of RTMC.

(44) I have considered the fact that Mr Kara-Vala will be a state witness in the pending criminal trial against Tasima, but cannot find that his involvement with the agreement is compromised on the facts placed before me. I have not dealt with the alleged criminal charges, although I was urged to do so by the respondents counsel. However, the criminal case has not even commenced and the persons indicted have the right to claim innocence until proven guilty. It does not advance the respondents' case at this stage.

(45) It seems as if the respondents have not heeded the decision of

Bezuidenhout v Patensie Sitrus Beherend Bpk[7] where the court held:

> ***"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."*** (Court emphasis)

(46) The main objectives of contempt proceedings are to vindicate the authority of the court and coerce litigants to comply with court orders. In **Victoria Park Ratepayers v Greyvenouw CC**[8], Plaskett AJ described contempt proceedings as follows:

> *"...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.**"* (Court emphasis)

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[7] 2001(2) SA 224 (E) at 229
[8] [2004]3 All SA 623 (SE) paragraph 23

(47) The Supreme Court of Appeal held in **Meadow Glen Home Owners Association and Others v City of Tshwane Metropolitan Municipality and Another**[9] that public bodies are:

> *"...obliged it to make serious good-faith endeavours to comply with it* [court orders]. *That is what we are entitled to expect from our public bodies.* ***If it experienced difficulty in doing so then it should have returned to court seeking a relaxation of its terms****. If there were 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."* (Court emphasis)

This applies equally in the present instance where the respondents failed to approach the court. It is even more important where the respondents know and has known from the first application for contempt of court what the result would be if the respondents fail to comply with court orders.

(48) In **Zulu And Others V Ethekwini Municipality And Others**[10] the Constitutional Court found:

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[9] 2015(2) SA 413 (SCA) at paragraph 8
[10] 2014(4) SA 590 (CC) at paragraphs 70-71

*"'**Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts**.'*

This duty echoes obligations of organs of state under s 7(2) of the Constitution to respect, protect, promote, and fulfil the rights in the Bill of Rights, including 'the right to have any dispute that can be resolved by the application of law decided in a fair public hearing'. 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. A court should be able to rely on the submissions of organs of state. Otherwise our very constitutional order would be undermined." (Court emphasis)

(49) In **Nyathi V MEC for Department of Health, Gauteng and Another**[11] the court found:

*"**Deliberate non-compliance with or disobedience of a court order by the State detracts from the 'dignity, accessibility and effectiveness of the courts'**. Yet s 165(4) of the Constitution expressly imposes an obligation on organs of State 'through legislative and other measures [to] assist and protect the courts to ensure the . . . dignity, accessibility and effectiveness of the courts'. Indeed in Mjeni Jafta J had the*

[11] 2008 (5) SA 94 (CC) at paragraph 43

following to say:

A deliberate non-compliance or disobedience of a court order by the State through its officials amounts to a breach of [a] constitutional duty [imposed by s 165 of the Constitution]. Such conduct impacts negatively upon the dignity and effectiveness of the Courts.

. . .

The constitutional right of access to courts would remain an illusion unless orders made by the courts are capable of being enforced by those in whose favour such orders were made. The process of adjudication and the resolution of disputes in courts of law is not an end in itself but only a means thereto; the end being the enforcement of rights or obligations defined in the court order. To a great extent s 3 of Act 20 of 1957 encroaches upon that enforcement of rights against the State by judgment creditors." (Court emphasis)

(50) It seems as if the respondents do not comply with court orders and this result in endless expensive litigation. I find that the respondents deliberately disobey court orders wilfully and *mala fides* as set out in the decisions referred to.

(51) The court has already found that the first three requirements as set out

in the **Fakie case**[12] have been complied with. The respondents bear the evidentiary burden to prove that they have not acted wilfully and *mala fides* in their non-compliance of the relevant orders.

(52) I find that due to the prior findings above that the respondents have given no valid explanation for not complying with the previous court orders, in particular with the Basson 1 and 2 orders and have not discharged the burden of proof that they were not *mala fide* and wilful.

(53) The DoT, the Director-General, Mr Kara-Vala and the RTMC have once more failed to comply with the Basson 1 and Basson 2 orders, as well as the relevant prior court orders. The reason for including RTMC is that it had knowingly, through Mr Kara-Vala, interfered with the proper execution of the court orders and is complicit in breaching the orders.

(54) I have considered all the facts, arguments and authorities and find that the DoT, the Director-General, Mr Kara-Vala and the RTMC are in contempt of the Basson 1 and 2 orders. This is the second time that Tasima seeks relief in respect of the Basson 2 order, as Tuchten J had to deal with a contempt of court application on 14 June 2016 and now barely two and a half months later the respondents are in breach of the Basson orders and the extant orders.

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[12] *Supra*

(55) The applicant requests the court to grant punitive costs orders against the respondents, but more in particular costs orders *de bonis propriis* against Mr Hlabisa, the Director-General and Mr Kara-Vala. I have seriously considered this request due to the fact that the respondents are serial transgressors of court orders. However, as the Constitutional Court decision is pending, I will not grant the costs orders against Mr Hlabisa and Mr Kara-Vala in their personal capacity. Unfortunately it means that once more the costs will come out of public funds.

(56) In the result I make the following order:

1. The application is urgent;
2. The first respondent is ordered to pay the amount of R27 556 626.41 to the applicant, within two days of this order, in satisfaction of payment certificates 107, 108 and 109;
3. The first respondent is ordered to pay the amount of R5 236 029.12 to the applicant, within two days of this order, in satisfaction of paragraph 1.1 of the Basson 1 order;
4. The tenth respondent is ordered to approve all purchase requisition orders listed in annex "FA13" ("the Outstanding PRQ's) to the supporting affidavit within three days from the date of this order;
5. The first and second respondents is ordered to, within two days of this order, revert to the applicant, in writing:

5.1 recording their consent to the terms of the escrow arrangement proposed by the applicant in its email of 3 June 2016; or

5.2 proposing the terms of an escrow arrangement acceptable to the first respondent.

6. The first and second respondents are declared to be in breach and wilful contempt of:

6.1 paragraphs 1.1 and 1.2 of the Mabuse order, as defined in the supporting affidavit;

6.2 paragraph 3 of the Strijdom order, as defined in the supporting affidavit;

6.3 paragraphs 5 and 6 of the Fabricius order, as defined in the supporting affidavit;

6.4 paragraph 2(b) of the SCA order, as defined in the supporting affidavit;

6.5 paragraph 1.1 and 1.2 of the Basson 1 order;

6.6 paragraphs 4 and 6 of the Basson 2 order, as defined in the supporting affidavit.

7. The fifth respondent is declared to be in breach and wilful contempt of paragraphs 5 and 6 of the Fabricius order and paragraphs 4 and 5 of the Basson 2 order.

8. The seventh and tenth respondents are declared to be in breach and wilful contempt of:

8.1 paragraph 1.1 of the Mabuse order;

8.2 paragraph 3 of the Strijdom order;

8.3 paragraphs 5 and 6 of the Fabricius order;

8.4 paragraph 2(b)(ii) of the SCA order;

8.5 paragraph 1.1 and 1.2 of the Basson 1 order;

8.6 paragraphs 4 and 6 of the Basson 2 order.

9. The second respondent:

9.1 is committed to imprisonment for a period of 30 days;

9.2 the order in paragraph 7.1 above will not come into operation unless there is a breach of any one or more of the following:

9.2.1 the order in paragraph 2 and 3 above;

9.2.2 any of the Mabuse, Strijdom, Fabricius, Basson 1 or Basson 2 orders;

9.2.3 the Nkosi order, as defined in the supporting affidavit; or

9.2.4 the Rabie order, as defined in the supporting affidavit.

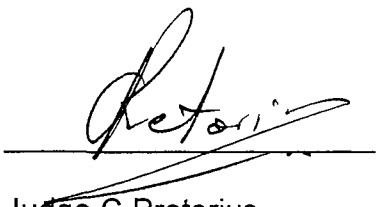
10. The seventh and tenth respondents:

10.1 are committed to imprisonment for a period of 30 days;

10.2 the order in paragraph 10.1 above will not come into operation unless there is a breach of the order in paragraph 4 above or of any part of one or more of the orders;

10.3 a warrant for 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 4 above or any part of one or more of the orders;

11. The first, second, fifth, seventh and tenth respondents 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 of two counsel.



Judge C Pretorius

Case number	: 44095/2012
Matter heard on	: 7 September 2016
For the Applicant	: Adv AE Franklin SC
	Adv JPV McNally SC
	Adv AWT Rowan
Instructed by	: Webber Wentzel Attorneys
For the Respondent	: Adv D Unterhalter SC
	Adv J Motepe SC
	Adv M du Plessis
Instructed by	: State Attorney
Date of Judgment	: 22 September 2016