

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case No: 2023/062380

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

SIGNATURE

13/11/2023
DATE

In the matter between :

BROADBAND INFRACO SOC LIMITED

Applicant

and

ESKOM HOLDINGS SOC LIMITED

First Respondent

CALIB CASSIM

Second Respondent

Coram: Ingrid Opperman J

Heard: 12 October 2023

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email on 13 November 2023. The date and time for hand-down is deemed to be 10h00 on 14 November 2023

ORDER

- (a) This application is enrolled and heard in terms of the provisions of Rule 6(12)(a).
- (b) The first respondent Eskom) is declared to be in contempt of paragraphs 2.2 and 2.3 of the order recorded in paragraph 29 of the judgment delivered by the Honourable Acting Justice Du Plessis on 7 August 2023 (as corrected) under case number 2023/062380.
- (c) The first respondent (Eskom) is directed to comply with paragraphs 2.2 and 2.3 of the order within five days of the granting of this order.
- (d) The first respondent (Eskom) is to pay the costs of this application.

JUDGMENT

INGRID OPPERMAN J

Introduction

[2] This application arises from the first respondent's (Eskom's) alleged failure to comply with an order granted by Acting Judge du Plessis on 7 August 2023 (*Acting Judge Du Plessis's order*).

[3] Acting Judge Du Plessis's order in relevant part reads:

1.
2. Pending the conclusion of the dispute resolution process contemplated in prayer 4 of Part B of this notice of motion:
 - 2.1. The action instituted by the Respondent against the Applicant out of the above Honourable Court on 30 March 2023 under case number 12662/23, is stayed;

2.2. The Respondent is directed within 10 (ten) days of this order to:

2.2.1. reconnect all the disconnected optic fibres it leased to the respondent in terms of the lease agreement concluded between the parties on or about 16 October 2019;

2.2.2. provide the lease services in accordance with the terms of the lease agreement.

2.3. The Respondent is directed to:

2.3.1. resume providing the services contemplated by the maintenance agreement concluded between the parties on 10 May 2018;

2.3.2. provide the maintenance services in accordance with the terms of the maintenance agreement as and when required by the Respondent.

[4] The relief sought in the application under consideration, in relevant part reads:

1.
2. The first respondent (Eskom) is declared to be in contempt of paragraphs 2.2 and 2.3 of the order recorded in paragraph 29 of the judgment delivered by the Honourable Acting Justice Du Plessis on 7 August 2023 (as corrected) under case number 2023/062380;
3. The first respondent (Eskom) is directed to comply with paragraphs 2.2 and 2.3 of the order within five days of the granting of this order;
4. The second respondent is sentenced to a period of imprisonment for a period of three months or such other period determined by the court;
5. The order in paragraph 4 above is suspended for such period as the court deems appropriate, subject to compliance by the first respondent (Eskom) with the order in paragraph 3 above;

[5] Eskom has one defence to the relief the applicant seeks. Based on the advice it contends it received from its legal representatives, Eskom explains that it was not obliged to comply with Acting Judge Du Plessis's order because, in terms of section

18(1) of the Superior Courts Act, 10 of 2013 (*the Superior Courts Act*), the application for leave to appeal that it delivered on 22 August 2023, suspended its obligations to comply with such order.

The issues

[6] Two issues fall for determination. The first is whether the filing of the application for leave to appeal suspended the operation of Acting Judge Du Plessis's order and the second is, if it did not, whether the failure by Eskom to have complied with the order occurred wilfully or *mala fide*.

[7] Urgency was not in issue and it was accepted that the matter could be treated as such.

Suspension of Acting Judge Du Plessis's order

[8] Section 18 of the Superior Courts Act provides 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."

[9] Mr Notshe SC representing Eskom argued that Acting Judge Du Plessis's order resorted under section 18(1), i.e. that it was a final order which was suspended by the filing of the application for leave to appeal. The applicant, represented by Mr Cook SC, argued that Acting Judge Du Plessis's order was one which fell squarely within the ambit of section 18(2), being an interlocutory order which was not suspended by the filing of the application for leave to appeal because it is interlocutory and is not final in effect.

[10] It was common cause between the parties that what this court ought to embark upon is an analysis of the relief which was granted by Du Plessis AJ and to compare the relief granted, with the relief which will be sought at the hearing of Part B. If the relief which is sought in Part B revisits the relief granted by Acting Judge Du Plessis, then the order granted is interim (as opposed to final) and although interim in name, also interim in effect and the filing of the application for leave to appeal did not suspend the operation of the order.

[11] Mr Notshe argued relying on *National Commissioner of Police and Another v Gun Owners of South Africa*¹ that the inquiries are confined to whether the issues raised by Acting Judge Du Plessis's order, are to be reconsidered in the main proceedings.

[12] The relief sought in Part B is the following:

PART B

TAKE NOTICE THAT the applicant intends to apply to the above Honourable Court for an order in the following terms:

1. The following decisions are reviewed and set aside:

¹ 2020 (6) SA 69 (SCA).

- 1.1. The respondent's decision, taken on or about 12 October 2021, not to provide the maintenance services to the applicant on any basis until the applicant settles its historic debts in full (**the first decision**);
 - 1.2. The respondent's decision, taken on or about 26 September 2022, to disconnect the optic fibres it leased to the applicant in terms of the lease agreement concluded by the parties on 16 October 2019, and its decision, taken on or about 18 October 2022, to terminate the lease agreement (**the second decision**);
 - 1.3. The respondent's decision to institute the action (**the third decision**).
2. The applicant's delay in applying to review and set aside the first and second decisions referred to in prayers 1.1 and 1.2 above is hereby condoned.
 3. The action is set aside, alternatively, the action is stayed pending the conclusion of the dispute resolution process contemplated in prayer 4 below.
 4. The respondent is directed to participate in the dispute resolution process contemplated in Part 5 of the Intergovernmental Dispute Preventions and Settlement Practice Guide promulgated in terms of section 47(1)(f) of the Intergovernmental Relations Framework Act 13 of 2005, commencing with Step 3.4.
 5. Pending the conclusion of the dispute resolution process contemplated in prayer 4 above of this Part B:
 - 5.1 The respondent is directed within 10 days of this order to:
 - 5.1.1 reconnect all the disconnected optic fibres it leased to the respondent in terms of the lease agreement concluded between the parties on or about 16 October 2019;
 - 5.1.2 provide the lease services in accordance with the terms of the lease agreement.
 - 5.2 The respondent is directed to:
 - 5.2.1 resume providing the services contemplated by the maintenance agreement concluded between the parties on 10 May 2018;

- 5.2.2 provide the maintenance services in accordance with the terms of the maintenance agreement as and when required by the respondent.

[13] The applicant will seek at the hearing of Part B is the relief couched in prayers 4 and 5 of Part B. Prayer 5 is effectively a carbon copy of the relief granted by Du Plessis AJ. Moreover, it follows as a matter of law that after the decisions under consideration are reviewed and set aside (should this occur), such court would be obliged to consider a just and equitable remedy which will include the revisiting of the relief granted by Du Plessis AJ. Conversely, should the decisions not be reviewed and set aside, the relief granted by Acting Judge Du Plessis will fall away and so too the interim relief. Thus, the relief granted by Acting Judge Du Plessis is interim. The issues raised in Acting Judge Du Plessis's order are clearly and squarely going to be raised again in Part B and the order she granted is thus interlocutory or interim, which terminology I use interchangeably. Her order is not the final judgment on the matter. That being so, section 18 (2) has application.

[14] In *TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd and others*² the court held that:

“The scheme of s 18 is simply to allow for different suspension regimes of application to decisions and interlocutory orders. The provision has nothing to say about when an interlocutory order might be appealable. Only that if such an order is sought to be appealed or leave has been given (rightly or wrongly), s 18(2) is the regime of application to the suspension of the order.”

[15] Applying the foregoing dictum, I agree with Mr Cook's submission that appealability, in the context of this application and in the context of the enquiry which

² 2023 (5) SA 163 (SCA)

falls for consideration at this juncture, is a “red herring”. It is totally irrelevant and unhelpful in deciding whether or not the order was suspended by the filing of the application for leave to appeal. I do not understand Mr Notshe to have argued the contrary position.

[16] It follows from the foregoing analysis that the filing of the application for leave to appeal did not suspend the operation of Acting Judge Du Plessis’s order.

Did the failure to comply with the order occur wilfully or mala fide?

[17] On 14 August 2023, the applicant wrote to Eskom reminding it to comply with Acting Judge Du Plessis’s order within 10 days of the judgment. Instead of complying with the order, on 22 August 2023, Eskom delivered an application for leave to appeal. On 6 September 2023, the applicant’s attorneys of record wrote to Eskom again. In the letter, the applicant recorded that the order was obviously interim in nature. Eskom’s delivery of the application for leave to appeal suggested to the applicant that Eskom believed the application suspended the operation of the order. So, to disabuse Eskom of this wrong notion, the applicant alerted Eskom to the provisions of section 18(2) of the Superior Courts Act which stipulate that interlocutory orders not having the effect of final judgments are not suspended pending the decision of an application for leave to appeal.

[18] Whilst this correspondence was being sent to Eskom and its legal team, the CEO of the Applicant (Mr G Zowa, also the deponent to the applicant’s founding affidavit) was engaging directly with the second respondent (Mr C Cassim, the current Acting Group Chief Executive Officer of Eskom) regarding Eskom’s compliance.

[19] On 23 August 2023, Mr Zowa sent a WhatsApp message to Mr Cassim introducing himself as applicant’s Acting CEO and requesting him to make contact

with him. Mr Cassim replied to the message on 24 August 2023 by advising that he would call him later. On 25 August 2023, they agreed to meet on Tuesday 29 August 2023 in order to discuss the matter. Neither could make that meeting as both had separately been requested to meet the President on Tuesday 29 August 2023 on other matters.

[20] Following the postponement of the aforesaid meeting, Mr Zowa sent a message to Mr Cassim on 1 September 2023, who indicated that he had spoken to Eskom's Group Executive and that they would revert the following week. Having not received a response from Mr Cassim as undertaken by him, Mr Zowa sent a follow up message on 6 September 2023 requesting that Mr Cassim provide him with feedback from his team regarding the reconnections. Mr Cassim replied to this message on 7 September 2023 by advising that they had had a meeting the previous day and that '*...there are actions they are busy with and will get update early next week...*'

[21] Having not received the update that was promised, Mr Zowa sent a further follow up message on 12 September 2023 requesting an update. Mr Zowa also indicated in his message that the issue (i.e. the reconnections) was raised by the applicant's Minister. No update was forthcoming from Mr Cassim. Instead, Mr Zowa received a message from Mr Cassim on 13 September 2023 indicating that he was unavailable to talk to Mr Zowa. From 18 September 2023 to 20 September 2023, Mr Zowa sent Mr Cassim three further messages following up on Eskom's non-compliance with the order. In these messages, Mr Zowa made it clear that the situation was dire and that he was under pressure from the applicant's shareholders and the legal department to provide positive feedback.

[22] Due to Mr Cassim's failure to reply to any of Mr Zowa's messages between 18 September 2023 to 20 September 2023, Mr Zowa made it clear in his last message

dated 20 September 2023, that the applicant would be proceeding with the contempt application.

[23] In Eskom's attorney's response to the 6 September 2023 letter, attention is drawn to the application for leave to appeal which, it is contended, suspends the operation of Acting Judge Du Plessis's order by virtue of the provisions of section 18(1) of the Superior Courts Act. They specifically record that section 18(2) of the Superior Court's Act has no application because *'the interim interdict is not an interlocutory order but a final order...'*

[24] In his opposing affidavit, Mr Cassim states that *'....we have not wilfully and intentionally disobeyed the aforesaid order. We have been advised by our legal representatives that the aforesaid order has been suspended... **The interim interdict is an order with a final effect, thus suspended by the delivery of the notice of an application for leave to appeal.**'*³ (emphasis provided) This affidavit was deposed to on 28 September 2023.

[25] The advice relied upon in the 13th of September 2023 letter is the same as the argument advanced during the hearing of this application by Mr Notshe. The advice emphasised in Mr Cassim's quoted affidavit seems to differ ie it seems couched as relying on section 18(2).

[26] Significantly, none of the attorneys from Adams & Adams (the applicant's attorneys of record) reflected as recipients, received the letter. The person for IT at Adams & Adams confirmed that Eskom's attorneys, zee@tkninc.co.za, did not send the letter of 13 September 2023 to anyone at Adams & Adams. This fact is quite alarming and I trust will be further investigated.

³ The wording of this last sentence echoes the wording of section 18(2) of the Superior Courts Act but this section was disavowed during argument.

[27] For the moment however, I will assume that Mr Cassim thought that such letter was sent.

[28] What is crucial in a defence based on legal advice is that extensive detail is to be provided such as, the extent of the advice, the basis for the advice and the date on which Eskom and Mr Cassim received the advice.

[29] It is strange that Mr Cassim did not tell Mr Zowa that there was nothing to discuss as the filing of the application for leave to appeal, in his view and as advised by his legal representatives, had suspended the operation of the order. He does not explain in his answering affidavit why he created quite the contrary impression when on 1 September 2023, he had told Mr Zowa that he was speaking with the 'Executive' or why when he was asked on 6 September 2023 by Mr Zowa '*Good Evening Sir. Did you get any feedback from your team on the reconnections?*' he had responded: '*Hi Gift, we had a meeting yesterday, there are actions they are busy with and will get update early next week. Thanks.*'

[30] Also problematic is the contradiction between the advice given (reliance on section 18(1)) and the understanding of the advice recorded in the affidavit. That aside, either construction is incorrect. The order is neither final nor final in effect. Part B, when all the relief will be revisited, can be enrolled for hearing as soon as all the papers have been filed.

[31] At the time of the hearing of this application, the application for leave to appeal the order granted by Acting Judge Du Plessis had been heard and dismissed. I was assured from the Bar that although no petition had been filed it would be done shortly. Nothing turns on this window period though.

Conclusion

[32] The defence of acting on legal advice is supported by woefully inadequate evidence. The advice Eskom received is the basis for its contention that its disobedience is bona fide. It is not sufficient for a party who relies on legal advice to resist a finding of contempt to state, without more, that it has acted on the advice of its legal representatives. What is required of a party in Eskom's position is "a proper setting out of the circumstances under which the advice was given", not a bald unsubstantiated allegation of the sort Eskom has provided in its answering affidavit.

[33] The threshold for rejecting legal advice as a defence is high. Under what circumstances can a court conclude that the advice was unreasonable?

[34] Eskom has simply failed properly to explain the circumstances relevant to the giving of the legal advice. There is no confirmatory affidavit from Eskom's attorneys of record confirming that they gave the alleged advice. In any event, Eskom has not explained when the advice was given, who specifically gave the advice, whether the advice was oral or in writing and what the nature and extent of the advice was.

[35] The interim order directs Eskom to perform pending the outcome of the "IRFA process" that the applicant seeks to enforce in the review application that is currently pending before court. It is an order that is quintessentially interim in form and effect. In these circumstances, a clear and comprehensive account is required to sustain Eskom's extraordinary claim that it was entitled to regard the interim order as final in effect.

[36] Such proof, at the minimum, would involve Eskom fully articulating the basis for its view.

[37] In the circumstances, this court must find that Eskom and Mr Cassim have failed to adduce sufficient evidence to discharge its evidentiary burden to show on a

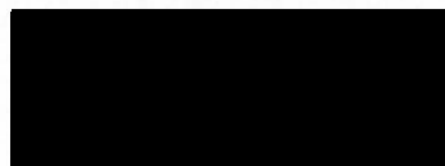
balance of probabilities that Eskom's disobedience was not wilful or mala fide. I find that the advice was wrong but not unreasonable to the point where it fails to raise a reasonable doubt.

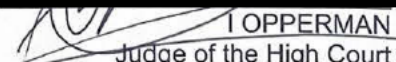
[38] Mr Cook submitted that if I were only to grant the coercive relief that a normal costs order should follow. I am not convinced that under the circumstances of this matter such costs order is appropriate and might have been inclined to grant a punitive costs order. Be that as it may, it was not asked for at the hearing.

Order

[39] I accordingly grant the following order:

- (a) This application is enrolled and heard in terms of the provisions of Rule 6(12)(a).
- (b) The first respondent (Eskom) is declared to be in contempt of paragraphs 2.2 and 2.3 of the order recorded in paragraph 29 of the judgment delivered by the Honourable Acting Justice Du Plessis on 7 August 2023 (as corrected) under case number 2023/062380.
- (c) The first respondent (Eskom) is directed to comply with paragraphs 2.2 and 2.3 of the order within five days of the granting of this order.
- (d) The first respondent (Eskom) is to pay the costs of this application.




T OPPERMAN
Judge of the High Court
Gauteng Division, Johannesburg

Counsel for the applicant: Adv AO Cook and Adv M Seape

Instructed by: Adams & Adams

Counsel for the respondents: Adv VS Notshe SC and Adv T Mlambo

Instructed by: TKN Inc Attorneys

Date of hearing: 12 October 2023

Date of Judgment: 13 November 2023