



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

CASE NO: 60980/18

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED
(4)	 SIGNATURE 22/05/2019 DATE

NATIONAL TECHNOLOGIES IMPLEMENTATION PLATFORM (PTY) LTD

**FIRST APPLICANT/RESPONDENT
on leave to appeal**

INTSIMBI FUTURE PRODUCTION TECHNOLOGIES INITIATIVE NPC

**SECOND APPLICANT/RESPONDENT
on leave to appeal**

and

THE SOUTH AFRICAN NUCLEAR ENERGY CORPORATION (SOC) LTD

**RESPONDENT/APPLICANT
on leave to appeal**

LEAVE TO APPEAL JUDGMENT

KHUMALO J

[1] The Respondents in this leave to appeal, the National Technologies Implementation Platform (Pty) Ltd (NTIP) and Intsimbi Future Productions Technologies Initiative NPC (Intsimbi), as 1st and 2nd Applicants, respectively, sought an urgent interim interdictory relief against the Applicant, the South African Nuclear Energy Corporation ("Necsa"), that was granted on: 14 September 2018, in the following order:

2. *Directing Necsa to forthwith release and return to the Respondents the equipment and machinery more fully reflected on Annexures FA2.1, FA2.2 and FA2.3.*

3. *Authorising the sheriff of this Honourable Court to attach, remove and hand over to the Respondents, the equipment and machinery more fully reflected on Annexures FA2.1, FA2.2 and FA2.3, in the event of Necsa failing and or refusing to comply with 2 above;*

5.1 *Directing that 2 and 3 above operate as Interim Interdicts, with immediate effect, pending the outcome of an Action to be instituted by the Respondents within (thirty) 30 days;*

5.2 *Directing that the costs of this application be costs in such action, save in the event of opposition.*

[2] Necsa ("the Applicant") is applying for leave to appeal the interim interdict order as amplified by the reasons for the Judgment furnished to the parties on 2 December 2018, on the ground that the order has the final effect, in that although clothed in the terms of an interim interdict,

[2.1] Removal of the equipment forming the subject matter of these proceedings will immediately terminate Necsa's accreditation as a testing centre;

[2.2] Such termination of accreditation will affect the students from all over the country apart from students to be enrolled at the Respondents freshly established training centre;

[2.3] By the time the action to be instituted by the Respondents per the order is ripe for hearing, a trial date allocated and the matter heard, the order for the removal of the equipment will have become irreversible and no longer susceptible for an order for the return and re-commissioning of the equipment at 'Necsa's premises as:

[2.3.1] Necsa's training centre is dependent upon continuing operations in order to preserve its capabilities developed through the capacity building process known as the pilot phase;

[2.3.2] a cessation of the training operations performed with the use of such equipment for such a period of time will result in **a permanent and irretrievable loss of such capabilities** including but not limited to **loss of training skills.;**

[2.3.3] The trial court would in the circumstances then prevailing decline an order for specific performance in the form of a reverse decommissioning, removal and re-commissioning at the Applicant's centre of the equipment due to the multiple practical difficulties and consequences associated therewith and further the detrimental effect which it would have on the operations of both parties' training centres and the trainee students served thereby.

[3] The Respondents contends *in limine* that the order granting interim interdict and the judgment makes it clear that the relief granted is interim in nature and therefore not appealable and that the Application must be dismissed on this ground alone, as:

[3.1] It is clear from the order that the interim relief is in place only until the final determination of the action to be instituted by the Respondents and if such action fails, the interdict falls away and the equipment will have to be returned, unless the trial court determines otherwise.

[3.2] The contention that the relief is not interim but final in nature was already raised by Necsa and dealt with in the Judgment upon which it was decided that the order is not final in effect.

[4] The real contention between the parties on the merits was about the consequences of failure by the parties to conclude a new Corporative Agreement or Service Level Agreement, as was envisaged by their lapsed Corporative Agreement (CA). The new CA was supposed to have been concluded prior to the lapse of the then existent CA or when the contractual obligations of the parties have been successfully fulfilled, whichever occurred first. The CA reached its end on 28 April 2018, the period of the agreement having lapsed by effluxion of time. Attempts to negotiate a solution or way out post termination failed, which resulted in Necsa since then, refusing the Respondents' officials access to Necsa premises where the Respondents' machinery and operational equipment are located. Respondents' demand for the Applicant at least to return their machinery and operational equipment was refused, consequently Respondents approached the court for an interim relief for the release thereof arguing that the interim order was important as they have to cater for students already in their programme starting from 1st October 2018 whilst the dispute was still to be adjudicated by the court.

[5] The dispute involved Necsa's insistence to retain the Respondents' machinery and equipment, demanding the commissioning of the Respondents staff to train Necsa's personnel on the programme and the use of the machinery and its refusal to accommodate any innovations to the programme, whilst at the same time increasing the costs paid by the Respondents to Necsa for each student. On the other hand the Respondents were adamant that the CA has lapsed and argued that failing the negotiations they cannot be forced to conclude any agreement. The dispute remains.

[6] On adjudicating the matter I have come to the conclusion that the Respondents established a clear right to the machinery and to the programmes. The balance of convenience favoured the Respondents who's staff has been conducting the training at the premises for which they paid rent to Necsa. The training centre and the machinery was managed by the Respondent's staff as well. Respondents' staff already have the capacity to proceed with the programme in the meantime, minimising the harm that might be caused to the students. The Respondents were denied access to the premises. Conversely it was going to be difficult for the Applicant to minimise such harm when it has no skilled staff to continue with the teaching or to operate the machines and no agreement in place regarding the fees to be paid for the students as the agreement has lapsed and no structured programme. The interests of justice favoured the granting of the interim interdict to avoid irreparable harm which was a reality.

[7] On the contrary Necsa's major concern in respect of irreparable harm is its accreditation. It argues that it expects not to be able to keep the accreditation if the machinery and the equipment are removed which outcome is irreversible, and concerned of the effect it will have to the students and the training, as it will lead to its training centre's loss of capabilities and training skills, that it argues would result in the interdict having a final effect. A situation it says cannot be altered by the court of first instance and according to it dispositive of the substantial relief claimed, therefore susceptible to appeal. It argues that the situation not only has immediate and final effect but has irreparable harm.

[8] Mr Raath has found an analogy in the matter of *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) which confirmed the finding that the principles expounded in *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 531I-533A were correctly adapted by the SCA to accord with the equitable and the more context-sensitive standard of the interest of justice favoured by our constitution: by acknowledging that they are neither exhaustive nor cast in stone; that what is of paramount importance is the interest of justice; and that they were never without qualification. Also that irreparable harm is an important factor in assessing appealability.

[9] Indeed it is trite that, whether a decision is appealable is not determined by merely the form of the order, but also, and predominantly by its effect. The court in ITAC had in line with that principle affirmed that the effect of the order should be considered from the perspective of the interest of justice whether leave to appeal be granted. The interdict, though interim, was found to be of final effect, because it was likely to cause irreparable harm. However what ITAC has done is to illustrate the broadened application of the principles identified in *Zweni* in line with our Constitutional imperatives. According to *Zweni* an appealable order was held to have the following characteristics:

[9.1] It should be final in effect, therefore the court of first instance must not be able to alter it (correct it or set it aside);

[9.2] It must be definitive of the right of the parties;

[9.3] It must dispose at least a substantial portion of the relief claimed in the main proceedings.

at 531I-533A. Which is in ITAC confirmed were never without qualification. Further that what is in the interest of justice will depend on a careful evaluation of all the relevant considerations in a particular case; at 641 A-B and 642C; see *Pine Villa Country Estate v JR 209 Investments* 2009 (4) SA 302 SCA.

[10] However Necsa's concerns are not authentic. It was established on the merits that it is the Respondents' staff that operate the machinery and the equipment. Necsa had in addition to its demand to retain the Respondents' machinery, required that the Respondents' staff be ordered to impart their skill to Necsa staff by training them to run the programme and the operations of the machinery since it was the Respondents' staff that operated and managed the training, student support and workplace experience. The Respondent provided the machinery, lecturers and controlled the training at the premises that they leased from Necsa. The loss of capabilities and training skills alleged by Necsa is therefore illusory. Nevertheless, Necsa also expected to be supplied with a student

complement from the Respondents for which Necsa is said to have unilaterally escalated the costs, first to 2006% and then to 156%.

[11] Having considered the above factors, I found that under the prevailing circumstances, the balance of convenience and the irreparable harm that might result to the programme and the students if the interim interdict is refused, favoured the granting of the interim interdictory interdict.

[12] The question of the alleged finality of the interdict raised by Necsa especially on the issue of accreditation that, as it is the only accredited assessment centre in the entire South Africa and due to the complexity of the process of decommissioning, the removal of machinery and operational equipment will not only be irreversible but will also terminate its accreditation causing irreparable harm to it and the students, the effect of which would be final, was extensively and substantively dealt with in my judgment taking into account that Necsa had not disputed the allegation of its little involvement with the students, who were seemingly mainly trained by NTIP's lecturers and supported and administered by the Respondents as per clause 4 of the SLA. The Respondents had also established that the said decommissioning and commissioning is not complex and could be managed within a maximum of two (2) weeks. NTIP had previously done that within three days on securing new premises. Furthermore that the Applicant was not the only accredited centre but also Cape Town and there was a third one that was in the process of accreditation at the time. I do not agree that even on the interest of justice perspective such an interim order can be found to be final in effect and therefore appealable.

[13] Under the circumstances, I make the following order:

- 1.. The Application for leave to appeal is dismissed with costs.



N V KHUMALO J

**JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

**On behalf of Applicants:
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