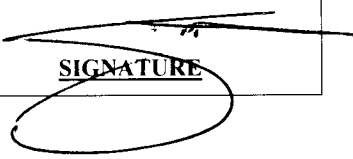




IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED ☒	
DATE 7/2/2017.	SIGNATURE 

CASE NO: 44095/2012

DATE: 9 February 2017

IN THE MATTER BETWEEN

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 MANAGEMNET 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

POTTERILL J

- 1 These parties are habitually in our courts, 18 times at last count, and the applicant had obtained no less than seven High Court orders against the respondents over the period September 2012 to January 2014. All of the orders obtained, enforced an agreement between the parties pending litigation and/or found the respondents, or certain of them, to be in contempt of High Court orders. The agreement was concluded between Tasima (Pty) Ltd (Tasima) and the Department of Transport (DOT) on 3 December 2001 whereby Tasima would provide the National Traffic Information System (eNaTIS). This system nationally maintains and administers a wide variety of information and performs functions pertaining to road traffic in South Africa. This agreement is a turnkey agreement in terms of the National Key Points Act, 1980. This agreement was extended in 2010 until 30 April 2015.

- 2 In early 2015 Tasima launched its eighth contempt application *inter alia* for the handover of the system to be done in terms of the extended agreement and wilful contempt of the respondents of the court orders of Mabuse J, Strijdom AJ, Fabricius J and Rabie J. The DOT in turn brought a counter-application seeking *inter alia* the extension of the agreement in 2010 to be declared invalid on the basis of illegality. Hughes J dismissed the application for contempt and granted the counter-application; setting aside the decision of the Director-General of the DOT to extend the contract and declaring the extended contract to be void *ab origine*.

3 Tasima successfully appealed against these orders of Hughes J in the Supreme Court of Appeal¹. The DOT and others then appealed the Supreme Court of Appeal judgment (SCA judgment) to the Constitutional Court. Pending the appeal to the Constitutional Court the DOT and some of the other respondents, refused to pay Tasima. A ninth contempt application was launched by Tasima. Basson J granted an order [“Basson 1”] finding *inter alia* the DOT in contempt, ordering the approval or processing of purchase requisition orders (PRQ’s), payment and enforcement of the SCA order dealing with payment during the transfer period. Certain of the respondents filed an application for leave to appeal against this order and Tasima filed a counter-application requesting a declaratory order that Basson J’s order is enforceable pending the application for leave to appeal. At the hearing of the applications the parties reached an agreement that was by consent made an order of court (Basson 2). In essence the parties agreed that pending the determination by the Constitutional Court the project/programme manager or lawfully appointed delegee must process the PRQ’s and must deliver to Tasima processed PRQ’s within 5 working days of receipt of such PRQ’s. Payment of payment certificate 107 and further was to take place within 21 days of presentation thereof. The DOT undertook to pay payment certificates 102-106. The payment manner and payment date was also agreed upon.

4 Despite this agreement by consent, Tasima had to again in June, September and October 2016 approach the High Court for orders for *inter alia* contempt, payment and approval of PRQ’s. Tasima was successful in all these applications and the order in October, was again, by agreement between the parties.

5 The Constitutional Court handed down judgment on 9 November 2016. The orders relevant to the dispute before me read as follows²:

“1...

2....

3 The appeal is upheld insofar as the counter application succeeds.

¹ Tasima (Pty) Ltd v Department of Transport (2016) 1 All SA 465 (SCA)

² Department of Transport and Others v Tasima (Pty) Ltd (CCT5/16) 206 ZACC 30 (9 November 2016)

4. The order of the Supreme Court of Appeal is set aside and replaced with the following:
 - i. Within 30 days of this order, Tasima is to hand over the services and the electronic National Traffic Information System to the Road traffic Management Corporation.
 - ii. Unless an alternative transfer management plan is agreed to by the parties within 10 days of this order, the hand over is to be conducted in terms of the Migration Plan set out in in schedule 18 of the Turnkey Agreement.
 5. The finding of contempt in part 1 of the order made by the Supreme Court of Appeal is upheld for the period before the counter application succeeded, but lapses thereafter.”
 6.”(CC order /judgment)
- 6 Tasima has approached the Constitutional Court to clarify or vary the orders in 4(i) and 4(ii). Tasima also requires a further clarification in confirming the payment regime which is to operate during the transfer period.
- 7 Tasima has now on an urgent basis approached this court to order the DOT to pay Payment Certificate 113 in the amount of R30 144 947.63. The underlying payment certificate was approved prior to 8 November 2016 and all work was performed before 8 November 2016; a date before the CC judgment. Tasima is also claiming approval of all PRQ’s and site sign-offs as set out in annexure FA 20 within three days of the order. Tasima is relying on the Basson 1 and 2 orders as basis for payment and approval of the PQR’s, costs for the transfer of the eNaTIS system and contempt orders.
- 8 The crux of this matter is whether the CC order has set aside the Basson 1 and Basson 2 orders; consequently can the DOT refuse payment for work done by Tasima between the SCA judgment and the date of the order the CC? The question is also whether any order given herein pre-judges the pending application before the Constitutional Court.

- 9 The determination of this application depends upon a proper interpretation of the order of the Constitutional Court to ascertain the manifest purpose of the order. The court's intention is to be ascertained from the language of the order, which is to be interpreted on its terms and the court's reasons given as a whole³.
- 10 In para 7 of the Basson 1 order it was *inter alia* ordered that the SCA order operated and was to be executed to the extent necessary until the final determination of the appeal of the SCA judgment in the Constitutional Court. In Basson 2 it was *inter alia* ordered that pending the determination by the Constitutional Court the project/programme manager or his lawfully appointed delegee must deliver to Tasima processed PRQ's within 5 working days of receipt of such PRQ's. The PRQ's must be processed by the project/programme manager or his lawfully appointed delegee. It was further ordered that payment of payment certificates¹⁰⁷ and further will take place within 21 days of presentation thereof to the DOT.
- 11 Tasima is in terms of the Basson 1 and 2 orders requesting that the DOT make payment of payment certificate 113. It is common cause that payment certificate 113 was submitted on 8 November 2016, a day before the CC judgment was handed down. It is never denied by the DOT that all the work relating to certificate 113 was done before 8 November 2016 and that all the underlying PRQ's were approved prior to 8 November 2016. What is denied is Tasima's entitlement to payment because of the order of the Constitutional Court.
- 12 The DOT's counter-application was upheld. The Constitutional Court summarises the effect thereof as: "*To summarise: the Department's counter-application is upheld. From 23 June 2015, the date of Hughes J's order, the extension no longer had legal effect, and the interim interdicts issued by the High Court fell away. Nevertheless, in the period between the granting of the extension and its setting aside, the applicants were constitutionally obliged to comply with the various court orders.*"⁴. The Constitutional Court thus distinguishes between the contract extension and the court

³ Firestone South Africa (Pty) Ltd v Gentiruco AG 1977 (4) SA 298 (A) at 304E; Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal SA Ltd & Others [2012] ZASCA 49; 2013 (2) SA 204 (SCA) para 13; Cross-Border Road Transport Agency v Central African Road Services (Pty) Ltd and Others [2015] ZACC 12; 2015 (5) SA 370 (CC) para 22; Eke v Parsons [2015] ZACC 30; 2016 (3) SA 37 (CC) para 29

⁴ CC judgment para 200

orders; the contract extension no longer having legal effect, but the court orders constitutionally having to be complied with. This distinction is enforced by the reasons in para 199 of the CC judgment that the various findings of contempt made by the Supreme Court of Appeal must stand despite the contract extension no longer having legal effect.

- 13 The Basson 1 and 2 orders fall in the time period between the granting of the extension and its setting aside and had to be complied with. In the majority judgment the principle is enunciated that until a court is appropriately approached and an allegedly unlawful exercise of public power is adjudicated upon, it has binding effect merely because of its factual existence⁵. The upshot is that the administrative act remains legally effective, despite the fact that it may be objectively invalid. Until the judgment of the Constitutional Court the contract persisted and the High Court orders had to be obeyed.⁶ Basson 1 and 2 came after the SCA judgment and therefor was not part and parcel of the SCA judgment and was therefore not addressed in the CC judgment. Thus the CC orders and the reasons therefore do not refer to the Basson 1 and 2 orders. The silence of the CC on these orders is simply because these orders were not before it. This silence can however not negate the principle in law that all court orders must be complied with prior to the CC order; these court orders cannot be ignored. In interpreting para 200 of the CC judgment one cannot rely on the first sentence therein and ignore the second sentence, as the DOT is doing.
- 14 Basson J made the orders with the necessary authority to make the decision that she did at the moment that she made it.⁷ In fact, the Basson 2 order was made by agreement between the parties. The orders made by Basson only fell away once the counter-application was upheld by the Constitutional Court, but the Court orders are binding and enforceable up to that point.
- 15 In lieu of the court orders of Basson the DOT must make payment of payment certificate 113. The payment is not due because of the extension being found not to

⁵ CC judgment para 147

⁶ CC judgment para 185

⁷ CC judgment para 198

have legal effect i.e. a claim for enrichment, but because of the binding and enforceable court orders prior to the Constitutional Court order.

- 16 Tasima has submitted various PRQ's and site sign-offs to the DOT for the period prior to 9 November 2016 [date of CC order] and a period thereafter. Tasima is praying that it be ordered that the current seventh respondent approve all the PRQ's and site sign-offs as set out in "FA20" within three days of the date of the order given. Tasima avers it did the work before 9 November 2016 in terms of the Basson orders and the work after 9 November 2016 in terms of para 4 of the CC order.
- 17 I am unconvinced that I can make any order pertaining to any approvals of PRQ's and site sign-offs dated after the CC order. Relying on payment in terms of para 4 of the CC order requires an interpretation of para 4 of the order. I most certainly cannot interpret para 4 that is the very subject of an application before the Constitutional Court. Although it was argued on behalf of Tasima that the application before the Constitutional Court does not request clarification or variation pertaining to payment, in its application it is requesting that "as a further clarification, this Honourable Court confirm the payment regime which is to operate during the transfer period." [para 111]. Even if there is no order sought pertaining to payment; Tasima is requesting that payment in terms of the method and time-frame of the transfer period be clarified. The application for variation is pending before the CC and I therefor find it prudent to postpone the relief requested after 9 November 2016 in terms of prayer 2.2 sine die.
- 18 The date of the CC order is the guillotine date for previous court orders; those orders are only operative until 9 November 2016. The Basson orders thus require all the PRQ's and site sign-offs set out in "FA20" for work done, or PRQ's submitted prior to 9 November 2016 to be approved and processed.
- 19 It is common cause that no hand-over of the system has occurred because the parties are at loggerheads as to how and within which time- frame this should occur; hence the application to the CC. The dilemma is that pending and during the handover, the eNaTIS system must, due to its strategic importance, function. The Constitutional Court expressed the view that this handover must in the public interest be done as

expeditiously as possible. [para 206]. The Constitutional Court considered the time-frames for handover that was granted by the High Court and the Supreme Court of Appeal. It found 30 days for the hand over accords with the transfer management plan and that despite the complexities the hand over process entails, 30 days is a sufficient time-frame. The CC further ordered that if no agreement is reached between the parties for an alternative transfer management plan, the handover is to be done in terms of the Migration Plan. It is not denied that absent approval and processing of PRQ's Tasima cannot pay essential service providers to manage and maintain the eNaTIS system pending and during the hand-over. The DOT has tendered to pay service providers directly. All service providers must be paid by Tasima in terms of the Basson orders prior to 9 November 2016. As set out above all work done by service providers and all PRQ's and site sign-offs for the period prior to 9 November 2016 must thus be processed and approved in terms of the Basson orders.

- 20 The question is whether this court can order payment of the service providers by the DOT to Tasima after 9 November 2016. The DOT and RTMC have tendered to pay, as against proper vouching, all bona fide and reasonable costs to Tasima in the handover relating to the variable costs of operation and the reasonable costs in effecting the handover. Tasima has rejected this tender because the Migration Plan sets out payment to Tasima at its current fees on a time and materials basis during migration. In the application before the CC the tender is the very subject of the application before the Constitutional Court (para 109). I could never presume to pre-judge an issue to be decided by the Constitutional Court. One can only hope that to maintain the system common sense will prevail pending the decision of the Constitutional Court. All the parties are urged to act in the interest of the public and to expedite the application before the CC.
- 21 Prayers 3-5.3 all relate and request this court to declare the DOT, second, seventh and tenth respondents to be in wilful contempt of paragraph 7 of the Basson 1 order, paragraphs 3-6 of the Basson 2 order and paragraph 4 of the CC order. None of the respondents can be found to be in contempt of paragraph 4 of the CC order where Tasima itself is asking clarification/variation of para 4 of the CC order. There was non-compliance with the Basson order 2, but the breach must be committed deliberately and *mala fide*. "A deliberate disregard is not enough, since the non-

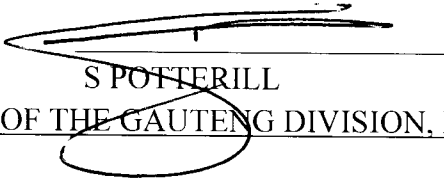
complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case, good faith avoids the infraction.⁸ The respondents interpreted the law pertaining to the Basson orders, albeit mistakenly, as entitling them to not comply with the Basson orders. The history of the matter reflects a pattern of wilful contempt of court orders by the respondents that could cast doubt as to whether there is good faith on the part of the respondents, but I cannot find that where the parties have a different understanding of the CC order and the law, the breach was committed deliberately.

22 The conditional counter-application seeks an order that Tasima is in contempt of the CC order by refusing to perform the hand over as ordered by the CC and directing that the hand over occur within 14 days. This counter application overlaps with the very issue which arises before the CC in Tasima is clarifying application to the CC. This is an insurmountable difficulty which was conceded by counsel for the DOT. The application was also procedurally defective. The counter-application is to be dismissed.

23 I accordingly make the following order:

- 23.1 the first respondent is to pay the applicant the amount of R30 144 947.63 in satisfaction of payment certificate 113 within two days of this order.
- 23.2 the tenth respondent or his lawful delegee is to approve all PRQ's and site sign-offs in annex "FA20" dated before 9 November 2016 within three days from the date of this order. All approvals of PRQs and site sign-off's after 9 November 2016 requested in Prayer 2.2 is postponed sine die.
- 23.3 Prayers 3-5.3 are dismissed.
- 23.4 The respondents are ordered to pay the applicant's costs, jointly and severally, the one paying the others to be absolved, including the costs of 2 counsel
- 23.5 The counter-application is dismissed with costs.

⁸ Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA 326 para [9]


S POTTERILL
JUDGE OF THE GAUTENG DIVISION, PRETORIA

HEARD ON: 24 January 2017

FOR THE APPLICANT: A.E FRANKLIN (SC), J.P MCNALLY (SC) and
AWT ROWAN (SC)

INSTRUCTED BY: WEBER WENTZEL ATTORNEYS

FOR THE RESPONDENTS: J GAUNLETTE (SC), UNTERHALTER (SC)

J.A MOTEPE and F.B PELSER

INSTRUCTED BY: STATE ATTORNEYS 1st to 3rd , 5th 10th and 11th respondent